

I. General

A. Vocabulary

1. **Contract** – legally enforceable agreement (agreement alone isn't enough, then look to see if it is legally enforceable and if there are any defenses)
 - a. **Express K** – communicated by *language* (oral or written)
 - E.g.: X promises to paint Y's car, in return for Y's promise to pay X \$100
 - b. **Implied K** – contract implied based at least in part on *conduct*
 - E.g.: X fills his car at Y's gas station – there is K for purchase & sale of gas
2. **Quasi-K** (restitutionary recovery at law) – equitable remedy to *avoid unjust enrichment* *Quasi-contract is an equitable remedy that applies whenever the application of contract law yields an unfair or inequitable result. Quasi-contract is not limited by contract rules, but is governed by equitable concepts. It protects against unjust enrichment.*
 - a. Not governed by K law – governed by equitable concepts
 - b. Any time the proper application of *K rules produces an unfair result*, we move to Quasi-K
 - (i) **Elements** – P has conferred a benefit & reasonably expected to be paid, AND D realized unjust enrichment if P not be compensated
 - (ii) E.g.: X contracts with Y to build a house for Y – X becomes ill & can't continue after completing 1/3 of work – X can't sue in k, but may recover for benefit conferred on Y
 - c. **Measure of recovery** – K price is *not* the measure of recovery. You get the reasonable value of the benefit conferred, not the contract price.
 - d. NOTE: this is only available as a remedy for *total* breach, NOT for *partial* breach
3. Types of Contracts- **All contracts are bilateral** unless the offer says it can be accepted **only by performance**.
 - a. **Bilateral K** – require an exchange of promises. Offer that can accepted in any reasonable way
 - b. **Unilateral K** – require an exchange of an act for a promise; 2 types (all other K's are bilateral):
 - (i) Offer *expressly requires performance* for acceptance (e.g. **offer ... accepted only by ...**)
 - (ii) *Offer to the public* (e.g., reward, prize, contest)
4. **Void, voidable & unenforceable K's:**
 - a. **Void K** – one without any legal effect from the beginning (e.g., an agreement to commit a crime)
 - b. **Voidable K** – one that a party may *elect to avoid or ratify* (e.g., a K by a minor)
 - c. **Unenforceable K** – one otherwise valid but for which some *defense* exists extraneous to formation (e.g., Statute of Frauds)
5. **Creation of an enforceable K requires:**
 - a. **Mutual assent** – (i) *offer* (i.e., promise) & (ii) *acceptance* before termination
 - b. **Consideration** – (i) *bargained-for-exchange* of something of legal value, or (ii) substitute for consideration (i.e., promissory estoppel, detrimental reliance, or good faith modification under UCC), &
 - c. **No defenses** to formation –including (i) mistake, (ii) lack of capacity (voidable K), (iii) illegality (void K), or (iv) specific performance

B. Applicable Law

1. **Common law** – use this for *service, real estate, employment*, etc. (*NOT* sales or lease of goods)
2. **UCC Article 2** – applies to K's that are primarily **sales of goods** (most rules are same as common law rules)
 - a. **Goods** – tangible, movable personal property (NOT real property)
 - b. NOTE: **mixed deal of goods & services**
 - (i) General rule is that it's *all or nothing, depending on which is more important (primary)*
 - (ii) BUT, *if the parties have divided the payment into 2 parts*, then & only then can you use Article 2 for part of the deal, & common law for the other part
3. **UCC Article 2A** – applies to **leases of goods** (NOT lease of real property)
 - a. *lessor & lessee* controversies: Article 2A is similar to Article 2
 - b. *Default by lessee or priority contests b/w lessor & 3rd parties*: Article 2A is similar to Article 9
4. Differences b/w common law & UCC:

| <i>Common Law</i> | <i>UCC</i> |
|--|---|
| option K requires consideration or promissory estoppel | merchant's firm offer is irrevocable without consideration |
| acceptance must be absolute & unequivocal; otherwise, it will be treated as a rejection & counteroffer ("mirror image rule") | proposal of additional terms does not constitute rejection; terms may become part of K ("battle of the forms" rule) |
| K's cannot be modified without consideration | modifications sought in good faith are binding without consideration |
| rule of substantial performance (performance need not be perfect) | perfect tender rule (with exceptions) |

II. Mutual Assent – Offer & Acceptance

A. Offers

1. Definition – a *manifestation of commitment*
2. Requirements:
 - a. An expression of **promise, undertaking or commitment** to enter into a K – consider:
 - (i) Language used; (ii) surrounding circumstances; (iii) prior relationship of the parties;
 - (iv) Method of communication (broader the communicating media, less likely it is an offer);
 - (v) Custom in the industry; (vi) degree of definiteness & certainty of terms
 - NOTE: *price quotations* are NOT offers UNLESS it is a response to a specific inquiry
 - b. **Definite & certain** in its terms – depends on:
 - (i) *Identification of offeree* – must be sufficiently specific to justify the inference that the offeror intended to create a power of acceptance
 - (ii) *Definiteness of subject matter* – (i) *real estate*, land & price; (ii) *sale of goods*, quantity must be certain or capable of being certain, (iii) *employment k*, duration
 - (a) *Vague terms* – NO offer because may defeat formation; unless acceptance or part performance makes the vague term clear
 - Disqualifying terms – “appropriate”, “fair”, “reasonable”
 - *Highly indicative terms* – “all”, “only”, “solely”
 - (b) *Missing price terms*
 - **UCC (Sale of Goods)** – offer still valid even though K says *nothing* about price, it’s still valid K (reasonable terms *supplied by court* if those terms are consistent with parties’ intent)
 - Common Law K – NO offer
 - (c) **Requirements/output K’s (UCC)**– are valid, even though there’s no quantity term (the buyer can increase requirements so long as the increase is *in line with prior requirements*; RULE OF THUMB: a moderate increase is about 10%)
 - c. **Communicated** to the offeree
 - NOTE: *invitations to deal*
 - (i) Offers followed by additional terms – must consider additional terms
 - (ii) *Advertisements* are NOT offers; unless (i) they are specific as to quantity & (ii) indicate who can accept (e.g., “1 black hat, worth \$140 – 1st come, 1st serve”)

B. Termination of Offers

1. **Termination by Operation of Law:**
 - a. *Death of a party prior to acceptance* – death or incapacity of either party terminates the offer
 - EXCEPT: (i) *options K*, & (ii) part performance of offer to enter into unilateral K
 - b. *Destruction of the proposed K’s subject matter*; or
 - c. *Supervening illegality*
 2. **Termination by Lapse of Time** – time stated OR reasonable time (RULE OF THUMB: 1 month)
 3. **Revocation** – *termination by Offeror (by words or conduct)*
 - a. *Method of revocation*
 - (i) *Statement* by offeror to retract offer; OR
 - (ii) **Conduct by offeror unambiguously** indicating change of mind, AND *offeree’s awareness* (here, need to look at both the offeror & offeree)
 - b. *When revocation is effective*
 - (i) **Time of receipt** (contrast to the mailbox rule for acceptances) BUT *publication of revocation* is effective when published
 - (ii) *Before Acceptance* – once buyer accepts, it’s too late for the seller to revoke
 - c. *Limitations – offeror’s power to revoke:*
 - (i) **Option K** – offeror promised to keep offer open AND *offeree paid* for that promise (consideration):
 - (a) E.g.: S offers to sell B his car, & B pays S \$10 for his promise to keep the offer open for a week – S can’t revoke for a week
 - (b) Rejection of option *before* end of option period – does NOT terminate the power to accept the offer, UNLESS the offeror detrimentally relies on upon the rejection
 - (c) Oral promises not to revoke (*illusory* promise) – offeror still retains the right to revoke offer
- * **NY Distinctions – Option K & Revocation**
 By statute, if offer is in writing, signed by the offeror and states that offer is irrevocable, then the offer is NOT revocable for stated/reasonable time, even without consideration
- (ii) **“Firm offer rule” under UCC (Sales of Goods)** – offer can NOT be revoked (**up to 3 months & NO need for consideration**) if:
 - (a) Offeror is a **merchant** (⇒ one who regularly deals in goods of kind or who has specialized knowledge of the business practices involved), AND
 - (b) **Written & signed** offer that promises to *keep the offer open for some period of time*
 - E.g.: S, a used car dealer, offers to sell B a car for \$400 – S promises by signed writing to keep the offer open for 6 months (Court cuts off to 3 months; even okay if time period not stated)
 - (iii) **Detrimental reliance** – offer cannot be revoked if there has been detrimental reliance by the offeree that is *reasonably*

UCC
difference

foreseeable

(iv) **Unilateral K Part Performance Rule** – offer NOT revocable for a reasonable time in which offeree can complete performance:

(a) *Mere preparation* is NOT part performance – BUT can argue *detrimental reliance*

(b) BUT, part performance is NOT *acceptance*, complete performance required for acceptance

- NOTE: in bilateral K, part performance is acceptance of offer

* *NY Distinctions – Unilateral K*

Part performance does NOT make offer irrevocable (revocable until performance completed)

4. **Rejection** – termination by Offeree (by words or conduct) – 3 methods of indirect rejection:

a. Express rejection

b. **Counteroffer** – (i) terminates the offer & (ii) becomes a new offer

(i) If a counteroffer made, then NO express K, UNLESS that counteroffer itself has been accepted

(ii) Distinguished from bargaining (which does not terminate the offer)

(a) *Bargaining* involves *interrogatories* – “will you take 9K?”

(b) *Counteroffers* are *declaratory* – “I will only pay 9K”

c. **Conditional Acceptance** (same as counteroffers) – (i) terminates the offer & (ii) becomes a new offer

(i) Using words as: “if”, “provided that”, “so long as”, “on condition that”

(ii) Applies under both Common Law & UCC (Sale of Goods)

d. **“Mirror Image Rule”**

(i) **Under Common Law** – acceptance that *adds additional terms* is treated like a counteroffer rather than an acceptance and no K is formed (BUT, if the other party has acted to indicate acceptance, there’s an *implied K*)

(ii) NOTE: **“Battle of the Forms” under UCC (Sale of Goods)** – **does NOT** follow the *mirror image rule*; acceptance or written confirmation that shows an intention to contract forms K

(a) *Conditional Acceptance* – additional terms are NOT part of the K

(b) **K involving Non-Merchant** – K formed but the additional term NOT included (merely a proposal that is to be separately accepted or rejected), UNLESS the offeror agrees

(c) **K between Merchants** – the additional terms is a part of the K, UNLESS

- Additional term *materially changes* the offer (e.g., adding an *arbitration clause*),

- Offer *expressly limits* acceptance to the offer’s terms; OR

- Offeror *objects* to the change

(d) **“Knockout rule”** – some courts knock out conflicting terms in the offer & acceptance, using terms provided by the UCC instead

UCC
difference

C. Acceptance of an Offer

1. **Who may accept** – offer can only be accepted by (i) a person who *knows* about the offer (ii) who is the person to whom it was made (offer can NOT be assigned BUT options *can* be assigned)

– E.g.: X posts a reward for whomever find his lost dog, & Y find it & returns it, not knowing of the reward, Y has no contractual right to the reward

2. **Promises to perform** – most offers can be accepted by a promise to perform

3. **Start (part) of performance as acceptance** – bilateral K (acceptance); unilateral K (NOT acceptance)

a. *Bilateral K* – start of performance is acceptance and is treated as an *implied K*

b. *Unilateral K* – start of performance is NOT acceptance; *completion* of performance is required

4. **Improper performance as acceptance**

a. *Services K* – acceptance & breach

b. **Seller of Goods** (sends ‘wrong’ goods) – acceptance & breach

– EXCEPTION – **Accommodation exception** (counteroffer & no breach)

(a) E.g.: B orders 200 blue widgets, but received 200 red widgets, *along with a note* from S saying that S’s supply of blue widgets is exhausted & cannot be restocked before the delivery date

(b) B may EITHER accept the shipment & pay list price, OR reject it with no other remedy

5. **Offeree’s silence** – silence NOT acceptance, UNLESS offeree by words/conduct agrees silence is acceptance

– If *commercially reasonable* to think silence is acceptable (e.g., for many years, the parties treated silence as acceptance), then the offeree is under a duty to notify the offeror if it does not intend to accept

6. **Mailbox Rule** – acceptance sent by mail is effective *when posted*

a. NOTE: rejection & revocation are effective only when *received*

b. LIMITATIONS:

(i) Offer otherwise provides (e.g., “acceptance will not be effective until received”)

(ii) Option contracts – NO mailbox rule (acceptance is effective upon receipt)

(iii) **Rejection & then acceptance** – NO mailbox rule (whichever arrives first controls)

(a) Offer → Rejection → Acceptance → receives Acceptance → receives Rejection (Contract)

(b) Offer → Rejection → Acceptance → receives Rejection → receives Acceptance (NO K)

(iv) **Acceptance & then rejection** – mailbox rule & K (unless rejection arrives 1st & relied by offeror)

(a) Offer → Acceptance → Rejection → receives Acceptance → receives Rejection (Contract)

(b) Offer → Acceptance → Rejection → receives Rejection → receives Acceptance (Contract)

- (c) Offer → Acceptance → Rejection → receives Rejection & **relies** → receives Acceptance (NO K)
- **Revocation & Acceptance**
 - (a) Offer → Revocation → Acceptance → receives Revocation = Contract (mailbox rule applies)
 - (b) Offer → Revocation → receives Revocation → Acceptance = NO K (terminate power of acceptance)

III. Consideration or Consideration Substitute

A. Consideration – bargained-for legal detriment (or benefit in NY)

* **NY Distinctions – Consideration**
Existence of **written agreement** regularly eliminates the need for consideration

1. **Bargained-for** – asked for by promisor in exchange for his promises
 - a. Forms of exchange
 - (i) *Performance* (or *promise to perform*) – doing something not legally obligated to do
 - (ii) *Forbearance* (or *promise to forbear*) – not doing something legally entitled to do
 - b. Economic benefit NOT required
 - c. NO gifts – no bargain involved
 - d. **Past & Moral Consideration**
 - (i) Generally *not* consideration – E.g.: in consideration of your having done X, I owe you \$\$ (NOT enforceable because promise was given in exchange for past acts)
 - (ii) Exception – *expressly requested AND expectation of payment*

* **NY Distinctions – Past Consideration**
Past consideration is binding if the promisor expressly states the promise in a signed writing that acknowledges the consideration

2. **Legal Detriment** – do something not legally obligated / NOT do something of legal right

* **NY Distinctions – Legal Benefit**
Consideration is **either** a detriment OR a benefit to other party

- a. *Adequacy of consideration* **IRRELEVANT** – BUT token consideration is insufficient
- b. **“Preexisting Legal Duty Rule”**
 - (i) **Under Common Law** – generally, performing or promising to perform an existing legal duty is insufficient consideration (because there is no additional detriment)
 - (a) **EXCEPTIONS** – there is consideration if:
 - *New or different consideration* is promised – consideration is usually found where the obligations of both parties are varied/changed
 - Promise is to *ratify a voidable duty* (e.g., ratify minor’s K after reaching majority)
 - *Unforeseen circumstances* sufficient to discharge a party
 - *Honest dispute* as to the duty
 - **Third Party Exception** – preexisting duty is owed to a 3rd person, rather than to promisor

* **NY Exception – Preexisting Duty Rule**
Written modification satisfies consideration – trumps the preexisting rule

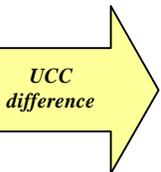
- (ii) **NOTE: UCC (Sales of Goods)** – does NOT follow *preexisting legal duty rule*
 - (a) **Good Faith Requirement** (⇒ with honesty in fact and in observance of reasonable commercial standards of fair dealings) is the test for changes in an existing sale of goods contract
 - (b) **NO** need for new considerations to modify if made under *good faith* – consideration is normally required to modify a K, but not when the parties are merely correcting an error in the original K
- c. **Part payment as consideration for promise to forgive balance of debt:**
 - (i) **Undisputed** – part payment is NOT consideration for release
 - E.g.: D owes C 3K, debt is undisputed, & D pays 2K – C agrees to take the 2K in full satisfaction of the debt – C can still sue for the remaining 1K even if he earlier agreed not to

* **NY Distinction**
Existence in writing satisfies consideration

- (ii) **Disputed** – part payment *is* consideration for release (D can NOT sue for remainder)
- d. **Illusory promises** (only 1 party is bound to perform) NOT enforceable – consideration must exist on *both* sides of a K (requirement of mutuality)
 - Distinguish phrases like
 - (a) “all the widgets I require” or “all that you produce” (valid); from
 - (b) “all the widgets I want” or “all you want to sell me” (NOT valid)

B. Consideration Substitutes

1. **Promissory estoppel** (i.e. detrimental reliance) – is a sufficient substitute



- *Elements* – (i) promise; (ii) reliance that is **reasonable, detrimental, & foreseeable**; & (iii) enforcement necessary to avoid injustice
- 2. **Written promise to pay debt barred by law as consideration substitute** – if a legal obligation not enforceable under law (e.g., a debt barred by the S/L), a new promise to fulfill the legal obligation is enforceable if in *writing*, even without consideration
- 3. Seal is NOT a consideration substitute

IV. Defenses

A. Defenses to Formation

1. Absence of Consideration

2. Mistake of Fact

a. Mutual mistake of material fact

- (i) *Subject Matter* – NO K, if *basic assumption of fact* that **materially affects** the agreed exchange
- (ii) NOTE: K enforceable and no defense if
 - (a) *Value* – not material & agreement is legally enforceable (thus no defense)
 - (b) Assumption of risk – when the parties know that their assumption is doubtful (i.e., conscious ignorance), mutual mistake is not a defense; parties are deemed to have assumed the risk that their assumption was wrong

* **NY Distinction – Mutual Mistake Contract is VOID**

b. Unilateral mistake of material fact:

- (i) Generally *insufficient* to make a K voidable
- (ii) UNLESS:
 - (a) “*palpable*” mistakes (obvious) – if non-mistaken party knows or should’ve known the mistake
 - (b) Mistakes discovered before significant reliance by the other party

3. Ambiguity in words of agreement

- a. Both or Neither party aware – NO K (e.g. 2 ship named “Peerless”)
- b. One party aware – K based on what the ignorant party reasonably believed to be the meaning of the ambiguous words
- c. *Mistake by intermediary* (transmission – telegraph company makes mistake) – the message will be operative *as transmitted* unless the party receiving the message should have been aware of the mistake
- d. NOTE: subjective intent *is* taken into account

4. Misrepresentation

- a. Voidable K if a party **induces** another into K & innocent party **justifiably relied** on the misrepresentation
 - (i) Inducement methods
 - (a) *Fraudulent misrepresentation* (e.g. by asserting information he knows is untrue), OR
 - (b) *Non-fraudulent material misrepresentation* (e.g., by asserting information that he doesn’t know if untrue, but that would induce a reasonable person to enter into a K)
 - (ii) NOT matter if misrepresentation was knowing or wrongful (S honestly believes there aren’t termites)
 - (a) *False assertion of fact* (S tells B house has no termites, but it does), OR
 - (b) *Concealment of facts* (S puts carpet over termite damage)
- b. NOTE: *fraud in the factum* – when a party is tricked into assenting without understanding the significance of his action (rather than *fraudulent misrepresentation*), then K is VOID (e.g., “this is just a lease agreement” when it’s really a purchase)

B. Defenses based on Lack of Capacity

1. Duress

- a. Elements – (i) “bad guy” & (ii) “vulnerable guy”
- b. E.g.: S has K to supply 1,000 purple widgets to B – S refuses to deliver unless B agrees buy white widgets as well – B agrees because has no other source for purple widgets – the white widget agreement is unenforceable by economic duress
- c. Need *more* than taking monetary advantage (e.g. charging more)

2. Lack of capacity

- a. Lacking capacity – (i) *infants* – under 18; (ii) *mental incompetents* – lack ability to understand agreement & (iii) *intoxicated persons* – if the other party has reason to know
- b. Consequences of incapacity:
 - (i) *Defendant’s capacity and right to disaffirm* – only D’s capacity is consider; P’s capacity is irrelevant (thus competent person still has to perform, regardless of knew or not)
 - (ii) *Implied affirmation* – agreement by person without capacity who (i) later gains capacity & (ii) continues to retain benefits (he’s impliedly reaffirming the deal)
 - (iii) *Liability for necessities* – a person lacking capacity is legally obligated to pay the *reasonable value* (not K value) for necessities such as food, clothing, medical care or shelter (quasi-K liability)
 - E.g.: mentally incompetent lessee is charged \$400 per month, while all of L’s other tenants pay \$300 per month – he only has to pay \$300

* *NY Distinction – Lack of Capacity*

1. *Contracts of Infants – by statute infants can NOT void K in the following situations*
 - (a) *14 ½ for life insurance; (b) 16 for educational loans; (c) realty Ks related to marital home; &*
 - (d) *contracts involving artistic or athletic services*
2. *Mental Incapacity*
 - a. *Adjudicated Incompetent – contract Void*
 - b. *Unadjudicated Incompetent – contract not voidable unless incompetent can restore other party to previous position*

C. **Statute of Frauds** (certain agreements must be *in writing* to prove that alleged agreement was made)

1. **Contracts within S/F – MY LEGS: Marriage, not within one Year, Land, Executors (or administrator), Goods for \$500 or more & leases for 1K or more, Surety:**

- a. Promise in consideration of **marriage**
 - (i) Covers pre/post nuptial agreements
 - (ii) NOT include a mere promise to marry
- b. Service K **NOT capable** of being performed **within 1 year from time of K**
 - (i) Specific time period – S/L applicable (look for specific dates, more than a year from date of K)
 - (ii) 1 Year begins to run **from the K date**
 - (iii) Specific performance – NO S/L (because capable within 1 year)
 - (iv) NOTE: **lifetime K's NOT within the S/F** (because they could be performed within a year)

* *NY Distinction – Lifetime K*
Lifetime contracts ARE within S/F

- c. Transfers of interest in **land** (real estate) of a term **more than 1 year**
 - (i) Includes easements, leases, & sales of real estate
 - (ii) NOTE: 1 year does NOT fall within S/F – has to be *more than a year*
- d. Promise by **executor or administrator** to pay obligation of estate from **his own funds**
- e. Sale of **goods** for **\$500 or more** – whether merchant or not is irrelevant
 - (i) Anytime the question mentions sales price, it's probably a S/F issue
 - (ii) EXCEPTIONS – **SAWP** (i) **S**pecially manufactured goods, (ii) **W**ritten confirmation of an oral agreement between merchants, (iii) **A**dmission in a pleadings or court that a K for goods existed, or (iv) **P**artial payment or delivery made & accepted
 - (iii) *Leases of Goods with payments totaling 1K or more* – add all months' lease \$
- f. To act as **Surety** (promise to "answer for" the debt of another)
 - (i) "Answer for" is limited to guarantees – not merely a promise to pay, but rather a *promise to pay if someone else doesn't*
 - (ii) "Main purpose" Exception – if guaranteeing the loan will benefit the promisor, the guarantee is outside the S/F & therefore need not be in writing

* *NY Distinction – Main Purpose Exception*
Requires the promisor have an independent duty of payment irrespective of the liability of the principal

– **NY Statute of Frauds**

- * *NY Distinction – Additional agreements covered under Statute of Frauds*
1. *Assignment of insurance policy or promise to name beneficiary of such policy*
 2. *K to pay commission or finder's fee (unless attorney, auctioneer, licensed broker)*
 3. *"Equal dignities rule" – in agent/principal relationship, if dealing with "interest in land," agent must be authorized in writing or principal must ratify*

2. **Statute of Frauds Defense** – (i) agreement within S/F, AND (ii) S/F not satisfies

– Need more than oral testimony

3. **Satisfying Statute of Frauds WITHOUT writing**

- a. **Services K – full performance**
 - (i) Full performance by either party satisfies the S/F,
 - (ii) BUT part performance doesn't satisfy S/F (e.g. fired after 1 year under 3 year oral agreement)
 - (a) S/F is NOT satisfied (no K) – P can not recover under K law, because D has S/F defense
 - (b) BUT, because this is unfair, she might recover under the law of Quasi-K
- b. **Real estate transfer K – payment & real estate**
 - (i) Part performance by buyer of real estate CAN satisfy the S/F
– Buyer must do 2 of 3 following – (1) part payment; (2) possession; (3) buyer's improvements
 - (ii) Payment alone does NOT satisfy the S/F – even full payment
- c. **Sale of Goods K**
 - (i) Ordinary goods – part performance satisfies S/F but only extent of part performance

- (a) *Delivered Goods* – S/F satisfied
- (b) *Undelivered goods* – S/F NOT satisfied
- (ii) *Specially manufactured goods exception* – S/F is satisfied as soon as seller makes a “substantial beginning” of making or obtaining the goods
- d. *Judicial Admission (sale of goods agreement)* – statement in (i) pleadings, (ii) testimony, or (iii) discovery that there was a deal (“yes, we agreed but we didn’t put it in writing”)

4. **Satisfying Statute of Frauds WITH writing:**

- a. **Common Law K** (*services, real estates, guarantee*) – look at:
 - (i) *Contents of the writing* – “all material terms” (**who & what**), AND
 - (ii) **Signed by person against whom (defendant) the agreement is being enforced**
- b. **UCC (Sale of Goods)**
 - (i) *Contents of the writing* – “all material terms” (**who & what**), AND
 - (ii) **Signed by person against whom (defendant) the agreement is being enforced**
 - (iii) *Quantity* – must be contained in the writing
 - NOTE: *Merchant Confirmatory Memo Rule between merchants* (only time D signature not required)
 - (a) If one party, within reasonable time after oral understanding, sends a signed written confirmation and other party fails to respond – this will satisfy S/F
 - (b) Unless, other party objects within 10 days
- c. **UCC 2A (Leases of personal property)** – this is one place Art. 2A different from Art. 2
 - Writing must – (1) indicate it’s a lease; (2) describe what is leased; (3) **duration**; & (4) **payment**

5. **Related issues:**

- a. **K Modification:**
 - (i) *Law requires a writing to modify* (determined by whether deal with *alleged change* is within S/F)
 - (a) If allegedly modified K is within S/F – must be in writing
 - (b) If not within S/F – no writing requirement
 - (ii) *K requires a writing to modify:*
 - (a) *Common law* – K provisions requiring that all modifications be in writing are *ignored*
 - (b) *UCC* – K provisions requiring written modifications are effective (unless waived)
- b. *Written authority to sign Real Estate agreement for another (Equal Dignity Rule)*
 - (i) Underlying agreement is within S/F – need written authorization
 - (ii) Underlying agreement NOT within S/F – NO need for written authorization

D. **Defenses based on Content**

1. **Illegality**

- a. *Illegal subject matter* – agreement is *Void*
- b. *Illegal Purpose* – *Voidable* only against party with illegal purpose (i.e. *voidable*, but not *void*)
 - E.g.: X contracts with Delta for a non-refundable ticket to fly from Newark to Chicago, where he’ll commit an illegal act – X changes his mind about committing the illegal act, but Delta can still enforce it because this is an illegal *purpose* & Delta wasn’t aware of it

2. **Public Policy**

- a. *Covenants Not to Compete*
 - (i) Depends on reasonableness of time/geographic limitations
 - (ii) Employment K – must have reasonable business need for protection
- b. *Exculpatory Clause*
 - (i) Negligence – in appropriate circumstances allowed
 - (ii) Intentional Tort – NOT allowed

3. **Unconscionability**

- a. *As of the time the agreement was made* (if it was fair when it was made, it’s ok);
- b. Terms are – (i) *unfair surprise* & (ii) *oppressive terms*

V. **Terms of Contract**

A. **Parol Evidence Rule** – (Words of Parties)

1. **Vocabulary**

- a. **Parol Evidence Rule** – **if there is an integrated agreement, the court cannot even consider parol evidence that contradicts the integrated agreement**
- b. *Parol Evidence* – evidence of words of the parties, spoken or written agreement, before the time of the integrated agreement
- c. *Integrated Agreement* – written version of agreement that court finds as final
- d. *Complete Integration* – written & final & complete
- e. *Partial Integration* – written & final, but not complete
- f. *Merger Clause* – K provision that states the contract is complete on its face (strengthens presumption that written agreement is final)
- g. *Reformation* – any litigation to change or add to original agreement

2. **Exceptions**

- a. *Mistake of integration exception* (i.e. clerical mistakes)

UCC 2A
Lease

- *Inconsistencies* are NOT exception (P/E applies)
 - b. *Formation defect exception* (i.e. rescission)
 - c. *Explanation exception* (e.g. ambiguous terms) – does not add or change, but gives meaning)
 - d. *Condition precedent exception* – failure of the condition to occur may be shown despite what would otherwise be deemed a total integration
 - e. *Collateral agreements exception* – if it does not contradict or vary the main contract and if it is not so closely connected as to be part of the main contract
 - f. *Subsequent modifications exception* – NEVER a P/E issue
3. **Consistent Additional Terms Issue** (i.e. something left out of the written K)
- a. P/E prevents a court from considering earlier agreements as a source of additional terms
 - b. UNLESS, the court finds that the written agreement was only a *partial integration* (i.e. depends on whether written agreement is integrated)
4. **Comparison of S/F & P/E**
- a. S/F – question of *formation* (i.e., parties “orally agreed”), thus a defense of formation issue
 - b. P/E – *terms* issue (i.e. “written agreement” is complete integration), thus mistake in integration issue

B. Conduct of Parties

1. Relevant in (i) explaining words in K, & (ii) filling gaps
 - a. *Course of performance* – same parties have done under this K (prior performance)
 - b. *Course of dealing* – same parties have done under earlier, similar K (prior K)
 - c. *Custom & usage* – what others have done under similar K
2. NOTE: (1) > (2) > (3)

C. UCC Terms

1. **Seller’s delivery obligation** (in Sale of Goods)

- a. *Non-carrier K*
 - (i) Seller must place & hold goods at buyer’s disposition for time sufficient for buyer to take possession
 - (ii) Absent an agreement as to place of delivery, the place of delivery is the *seller’s place of business*
- b. *Common Carrier K*
 - (i) **Shipment K** – seller completes his delivery obligation when he (i) gets the goods to a *common carrier*, (ii) make *reasonable arrangement* for delivery, & (iii) *notifies* the buyer
 - (ii) **Destination K** – seller doesn’t complete his delivery obligation until goods *reach* buyer
 - NOTE: *determining whether K is shipment or destination* using FOB (free on board)
 - (a) FOB + seller city – *shipment K*
 - (b) FOB + any other city – *destination K*

2. **Risk of Loss**

a. **Sale of Goods K**

- (i) Risk of Loss – after K, but before Buyer gets goods, goods are damaged & neither party is to blame
 - (a) If risk of loss is on Buyer – Buyer pays the full K price for the damaged or destroyed goods;
 - (b) If risk of loss is on Seller – Seller has to provide new goods at no cost to the Buyer
- (ii) **Basic Rules for Risk of Loss**
 - (a) *Agreement* of the parties controls
 - (b) *Breach* – breaching party is liable for any uninsured loss even though breach is *unrelated*
 - (c) *If Common Carrier* – seller has risk of loss until completion of delivery
 - *Shipment K* – delivered to shipper
 - *Destination K* – delivered to Buyer
 - (d) *If Non-carrier* (NOTE: whether the *buyer* is a merchant is irrelevant):
 - *Non-merchant* – Seller tenders delivery (i.e. makes goods available)
 - *Merchant* – Buyer takes possession (i.e. takes physical possession)

| | <i>Non-carrier K</i> | <i>Carrier K</i> | |
|---|---|---|---|
| | | <i>Shipment K</i> | <i>Destination K</i> |
| Place of Delivery | Seller’s place of business | Seller must deliver to the shipper | Seller must tender delivery of goods to the Buyer at the destination |
| Time of Payment | Upon tender of delivery | when Buyer receives the goods | |
| Shifting of Risk of Loss (S → B) | <i>If seller is non-merchant</i> – when Seller tenders delivery | when goods are delivered to the shipper | when seller tenders delivery of goods to the Buyer at the destination |
| | <i>If seller is merchant</i> – when Buyer takes possession | | |

b. **UCC 2A (Leases of personal property)**

- (i) Risk of loss is on the *lessor*;
- (ii) *Finance Lease Exception* – risk of loss is on the lessee

3. **Warranties**



- a. **Sale of Goods K** – 4 types of warranties
 - (i) **Express Warranty**
 - (a) Words – *fact* or *promise* (NOT opinion)
 - (b) Conduct – *sample* or *model*
 - (ii) **Implied Warranty of Merchantability** (“*goods are fit for the ordinary purpose for which such goods are used*”) – when any person buys any goods from any merchant, this warranty term is automatically added to the K by operation of law
 - (a) Seller **must be a MERCHANT** (deals in goods of that kind)
 - (b) Goods must be *ordinarily purpose* of seller (e.g. no warranty if simply selling company car)
 - NOTE: serving food or drink on premises is sale of goods subject to warranty of merchantability
 - (iii) **Implied Warranty of fitness for particular purpose** – any seller, (i) *knows the particular purpose* for which goods are to be used & (ii) *buyer is relying* on seller’s skill/judgment to select suitable goods
 - (a) E.g.: Buyer asks clerk for advice on what shoes to wear to job interview, & store clerk recommends inappropriate shoes
 - NOTE: difference of warranty of fitness for particular purpose & warranty of merchantability
 - “merchantable” means goods are *generally acceptable*,
 - “fitness for a particular purpose” means goods are *specifically suitable*
 - (iv) **Implied Warranty of title & against infringement:**
 - (a) *Warranty of title* – any seller impliedly warrants good title, no liens/encumbrances
 - (b) *Warranty against infringement* – a **merchant** seller warrants goods are delivered free of any patent, trademark, copyright, or similar claims

b. **UCC 2A (Leases of personal property)**

- (i) Lessor has same warranties as a seller of goods (express, merchantability, & fitness)
- (ii) **Finance Lease Exception** – warranties made by the supplier to lessor are enforceable by lessee, BUT, lessee cannot stop making payments to bank because the car is defective



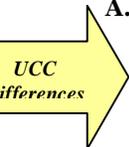
4. **Contractual Limitations on warranty liability:**

- a. **Disclaimer** (both sales & leases)
 - (i) *Express* warranties – can NOT be disclaimed
 - (ii) *Implied* warranties – can be disclaimed
 - (a) Language such as – “*as is*” or “*with all faults*”; OR
 - (b) **Conspicuous** language of disclaimer (e.g. mentioning merchantability)
- b. **Limitation of remedies** (e.g., “warranty liability shall be limited to...”) – does not eliminate warranty, but simply limits or sets recovery for any breach of warranty
 - (i) Damages – possible to limit remedies for both express and/or implied warranties
 - General test is *unconscionability*
 - (ii) Personal Injury – from breach of warranty on *consumer goods*, that’s *prima facie* unconscionability

VI. Performance & Excuse of Performance

A. Performance of Sales of Goods Contract

- 1. **Perfect Tender** – general standard of Art. 2 (seller obligated to deliver perfect goods)
 - NOTE: when seller ships nonconforming goods, it’s *acceptance* AND *breach*
- 2. **Rejection of the Goods** – if the goods are less than perfect
 - a. Buyer’s 3 options:
 - (i) *Accept the whole shipment*;
 - (ii) *Reject the whole shipment*; or
 - (iii) *Accept any commercial units & reject the rest*, paying the K price for those goods accepted
 - b. Buyer always has option to reject unless it’s an installment sales K
 - c. Rejection must occur *before* acceptance of the goods (can not accept AND reject)
 - d. Buyer who rejected goods is entitled to refund of any prepayment, but if Seller does not pay, buyer must:
 - (i) Follow reasonable instructions received from the Seller with respect to the goods, OR
 - (ii) *In the absence of such instructions* – Buyer has a duty to make *reasonable efforts to sell goods* & apply proceeds to what is owed from Seller (entitled to reimbursement of reasonable expenses)
- 3. **Seller’s Right to Cure** – in some instances, Seller who fails to make a perfect tender is given a second opportunity to cure (giving notice & making new tender of conforming goods)
 - a. *Time for performance NOT expired* – Seller still has time to cure
 - b. *Time for performance expired* – in a very limited situation, Seller must have reasonable grounds for believing that improper tender would be acceptable (e.g., in the past, buyer has accepted widgets in colors different from what he ordered)
- 4. **Installment sales K** – K language **must be explicit**
 - a. Requires or authorizes (i) delivery in separate lots (ii) to be separately accepted
 - b. Exception to *perfect tender rule* – Buyer has the right to reject an installment (or declare total breach) **ONLY** where there is a *substantial impairment* to that installment that can not be cured (or to entire K)
- 5. **Acceptance of the goods** – express or implied (retention after opportunity for inspection without rejection)
 - a. Delay in rejection is the same as acceptance (Rule of Thumb 1 month)



advance payment without an opportunity for inspection is NOT the same as acceptance

6. **Revocation of acceptance of the goods** – in limited circumstances, Buyer can effect revocation of K by revoking its acceptance of the goods (proper revocation of acceptance has effect of rejection)
- Requirements for revocation:
 - Defect **substantially impairs the value of the goods**,
 - Difficulty of discovering defect** or reasonable reliance on seller’s assurance, AND
 - Revocation **within a reasonable time** after discovery of defect
 - Comparison – Rejection of goods & Revocation of acceptance of the goods:

| | Rejection | Revocation |
|-----------------|---------------------------|------------------------|
| <i>Timing</i> | Before acceptance | After acceptance |
| <i>Standard</i> | generally, perfect tender | substantial impairment |

7. **Payment Obligation**

- Cash unless otherwise agreed
- Buyer can pay by check, &
- Seller does NOT have to take the check, BUT that gives the Buyer an additional reasonable time

B. Performance of Common Law Contracts

- Substantial performance** (i.e. NOT material breach)
 - If party performs *comparable performance* OR breach in *minor way* – substantial performance
 - Non-breaching party (if breach with substantial performance) can:
 - Sue breach of contract (damages offset by performance); BUT
 - NOT excuse from K (excuse only allowed for material breach)
 - Breaching party
 - Substantial performance – recover under K law for performance
 - Material Breach – NO remedy under K law (may only recover some remedy under Quasi-K law)
- Divisible K & substantial performance rule**
 - Test for divisible K – if met, *substantial performance test is applied to each divisible part of the K*
 - Each party’s performance is divided into 2 or more parts under the K;
 - Number of parts due from each party is the same, &
 - Performance of each part by a party is agreed-upon equivalent of corresponding part from other party

C. Conditions of Performance

- Condition – event the occurrence or nonoccurrence of which will create/limit/extinguish duty to perform
- Basic questions must be asked, *if there is condition to a party’s performance of K*:
 - Whether present duty to performance has arisen (i.e. absolute promise *or* all conditions met/excused); &
 - Whether the duty to performance has been discharged

| Conditions – Time of occurrence | | | |
|--|---|--|---|
| <i>Condition Type</i> | <i>Definition</i> | <i>Effect of Occurrence of Condition</i> | <i>Example</i> |
| <i>Precedent</i> | Condition must occur <i>before</i> performance is due | Performance due | Agreement to pay 10K “if my house is sold by 4/1” – no payment unless house sold by 4/1 |
| <i>Concurrent</i> | Conditions to occur at the <i>same time</i> | If 1 condition occurred, performance of other is due | Agreement to pay 1M for Blackacre – Money & deed exchanged in same transaction |
| <i>Subsequent</i> | Condition cuts off already existing duty | Duty to perform is excused | Agreement to buy Blackacre for 1M unless zoning is changed – if zoning is changed, no duty to pay 1M or transfer deed |

- Express performance condition**
 - Mutually agreed upon promise modifier expressed in K
 - Identifying an *express condition* – watch for words such as:
 - “if,” “provided,” “so long as,” “subject to,” “in the event that,” “until,” & “on condition that”
- Satisfying an express condition** – ONLY by **strict compliance** with the express conditions
 - EXCEPTION: condition based on approval of 1 of the contracting parties is treated as satisfied if a *reasonable person would approve*, UNLESS the subject is discretionary matters
- Excusing an express condition by (later action or inaction of person “protected” by condition):**
 - Estoppel & waiver** – when party protected by condition gives up that protection
 - Estoppel* (party doesn’t insist on a condition) – based on statement BEFORE conditioning event was to occur & requires a change of position (e.g. A tells B that certificate no longer needed for payment)
 - Waiver* (party “waives” a condition) – based on a statement AFTER conditioning event was to occur & not require a change of position (e.g. B neglects certificate, A tells B that will pay nonetheless)
 - Failure to cooperate** – when person protected by condition fails to cooperate
 - E.g. B contracts to buy S’s house on condition that B obtains 100K mortgage; B does not make any effort to obtain mortgage & B refuses to buy the house – S can recover cause condition excused
 - Actual breach* – 1 party’s breach excuses the other’s performance
 - Anticipatory repudiation* (must be unequivocal) – applies only if they are *executory* (unperformed) duties on both sides, NOT in (i) *unilateral K* or (ii) *bilateral K fully performed on one side*

- e. *Prospective inability or unwillingness to perform* – a party might have reasonable grounds to believe the other party will be unable or unwilling to perform when performance is due
 - (i) Innocent party may suspend his own performance until he receives *adequate assurances of performance* – if these aren't forthcoming, he can treat the failure as a repudiation
 - (ii) NOTE: this is different from *anticipatory repudiation*, because prospective inability to perform merely *raises doubts* about performance

D. Excuse of Performance (something that happens after K)

1. Excuse by nonoccurrence of express condition

- If a party's duty to perform is conditional, failure of the condition excuses the duty to perform

2. Excuse because of other party's Breach

- a. *Sale of Goods* – Seller is generally obligated to make a *perfect tender*
- b. *Common Law K* – requires only "*substantial performance*"
 - (i) If one party substantially performs, the other party is required to perform as well
 - (ii) Minor breach by one party will NOT excuse performance by the other
 - (iii) "*Material breach*" by one party excuses the other party's perform

3. Excuse because of other party's Anticipatory Repudiation (*through words or conduct*)

- a. Applicable only where there are executory duties on both sides
 - (i) An unambiguous statement that (i) repudiating party won't perform, & (ii) made prior to the time that performance was due by other party
 - (ii) *Excuses other party's duty to performance* (generally gives rise to *immediate claim for damages for breach*)
 - E.g.: P contracts to paint O's house for 1K, payable 30 days after P completes work – after P begins painting, O tells P that he is not going to pay for P's work – O can't sue P for breach of K, because P's performance is excused by O's repudiation
- b. Anticipatory repudiation can be *reversed* or *retracted* so long as there is NO been a *material change* in position by the other party – if the repudiation is timely retracted, the duty to performance is re-imposed but performance can be delayed until *adequate assurance* is provided

4. Excuse because of Later Contract

a. Accord & satisfaction (substituted performance):

- (i) *Accord* – new agreement by the *parties to an already existing obligation to accept a different performance instead*
 - (a) Accord does NOT discharge contractual duty, but merely suspends other party's right to enforce
 - (b) Consideration less than that of existing obligation is sufficient IF different type
- (ii) *Satisfaction* – performance of the *accord*, which discharges both the accord & existing obligation
 - (a) *Effect of no satisfaction* – if the accord is not performed, other party can sue EITHER on the original obligation OR the accord (one or the other)
 - (b) *Effect of consideration requirement* – part payment of a debt that's due & undisputed is NOT consideration for a promise to release the remainder of the debt (NOT accord & satisfaction), BUT, *forbearance from suing* IS consideration
 - NOTE: cashing a check offered as *payment in full*, where there is a *bona fide dispute* as to amount owed, will establish accord & satisfaction

b. Modification (i.e., substituted agreement) – new agreement by parties to existing obligation to accept a different agreement in satisfaction of the existing obligation

- (i) K modification under **UCC** is enforceable if made in *good faith even without consideration*, whereas K modification under **Common Law** *must be supported by consideration*
- (ii) NOTE: in *modification* old K stays in place until the new one is completed, whereas in *accord/satisfaction* the old K disappears immediately

* **NY Distinction – Modification**
NO consideration needed if modification is in writing and signed by the party to be charged

c. Novation (i.e., substituted person) – new agreement between *ALL parties (including BOTH parties to existing K)* to the substitution of a new party (thus, same performance by different party)

- (i) *Liability after novation* – new party (excuses liability of replaced party)
- (ii) *Novation v. delegation* – delegation does NOT require the agreement of both parties, & does NOT excuse liability of original (replaced) party for performance

d. Rescission (i.e., cancellation)

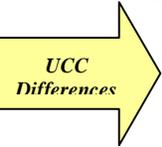
- (i) **Mutual Rescission** – *executory K* where there are *unperformed duties on both sides*
 - If either party has completed performance – NO rescission because too late
- (ii) **Unilateral Rescission** – must have adequate legal ground (e.g. mistake, misrepresentation, duress)

e. Release

- (i) Duties may be discharged by a release and/or covenant not to sue
- (ii) Must be in *writing* and supported by *new consideration* or *promissory estoppel* elements

* **NY Distinction – Release** *must be in writing but can be without consideration*

5. Excuse because of a Later, Unforeseen Event



performance of contractual duties (other than duty to pay money) can be excused by something that (i) happens after K formation but before the completion of K performance, (ii) was unforeseen, & (ii) makes performance *impossible*, commercially *impracticable* or *frustrates the purpose* of performance

- (i) **Impossibility** – measured by **objective standard** (i.e., no one would be capable of performing)
- (a) **Destruction of subject matter** (thing necessary)
 - **K to repair v. K to build**
 - K to repair – performance is excused (house for repair is destroyed)
 - BUT, K to build – performance is NOT excused (*still possible to build*)
 - **Risk of Loss** (in **Sale of Goods**)
 - Destruction before delivery (Seller's risk of loss) – Seller is excused
 - Destruction after delivery (Buyer's risk of loss) – Buyer NOT excused (Buyer must still pay)
 - If subject matter is **fungible or commodity goods** – destruction does NOT make performance impossible (the seller can always get more of the goods)
 - (b) **Death** – excuses nonperformance & thus can NOT sue the estate
 - Personal services of *unique* kind – performance is excused
 - BUT, personal services not unique (i.e. *delegable*) – performance NOT excused
 - (c) NOTE: if either party has partially performed prior to the existence of facts resulting in impossibility, that partially performed party has a right to recover in Quasi-K (e.g., X is working on plumbing for O's house before it's swept away in a flood – X can recover value of his work he performed)
- (ii) **Impracticability** – measured by **subjective standard** (i.e., only one party can not perform)
- (a) Circumstances sufficient for discharge – means can only be done with **extreme & unreasonable difficulty and expense**
 - NOTE: *delay in delivery*, or *non-delivery* – Seller is excused performance if performance has been made *impracticable* by the occurrence of a contingency (e.g. winter storm delays delivery of goods)
 - (b) Circumstances must be unforeseen **at the time the contract is made**
 - NOTE: *Seller's partial inability to perform* – NOT excuse performance; seller must allocate available supply among customers (e.g. shortage of goods)
- (iii) **Frustration of Purpose** (*NOT applicable in Sale of Goods*)
- (a) At the time of K, *both* parties understand the purpose of the K; &
 - (b) There is later *reasonably unforeseen, supervening event* that *destroys/affects* that purpose
 - Subsequent law or regulation
 - (c) *Impossibility* – if subject of the K is outlawed
 - (d) *Frustration of Purpose* – if the subsequent law affects a *mutually understood purpose of the deal*, NOT *performance of the deal itself*
- b. Other Excuses
- (i) *Discharge by operation of the law* – contractual duty of performance is merged in a court judgment for breach of duty (e.g., discharge in bankruptcy bars any right of action on the K)
 - (ii) *Discharge by lapse* – parties' duties are *discharged* if each party's duty is a condition to the other's duty, & neither party performs his duty
 - (iii) *Running of S/L* – makes a K *unenforceable* because an action for breach of K is barred

VII. Breach Remedies

A. Breach

1. *Breach occurs if* – (i) promisor is under an absolute duty of performance & (ii) duty has not been discharged, then failure to perform in accordance with the K terms may be held to be a breach of K
2. **Material Breach** – as a result of breach, non-breaching party does not receive substantial benefit of his bargain
 - a. **Material Breach**
 - (i) Non-breaching party has *immediate right* to all remedies for breach of the entire K, including total damages; &
 - (ii) Non-breaching party's duty of performance is *discharged*
 - b. **Minor Breach**
 - (i) May allow the non-breaching party to recover damages,
 - (ii) BUT non-breaching party's duty of performance NOT discharged
 - NOTE: a minor breach, if coupled with anticipatory repudiation, is treated as a material breach

B. Damages (monetary remedy)

1. **Punitive and Nominal Damages**
 - a. *Punitive damages* – NOT generally recoverable for breach of K
 - b. *Nominal damages* – may be awarded where the breach is shown but *no actual loss* is proven
2. **Liquidated Damages**
 - a. Definition – K provision regarding amount of fixed damages
 - b. Test for validity
 - (i) Damages are difficult to forecast (at time of K)
 - (ii) K provision is reasonable forecast (at time of K)
 - c. If liquidated damages is unreasonable, the provision will be unenforceable as an *invalid penalty provision*



d. UCC – court can consider the *actual damages* incurred in determining whether a liquidated damages clause is valid

3. Compensatory Damages

- a. Definition ⇒ to put the non-breaching party into *as good a position* as if the contract had been performed without breach (i.e., protection of the plaintiff's expectation interest)
 - (i) Damages must be reasonably certain – NOT allow *speculative* damages
- b. Standard measure of damages
 - (i) *Expectation damages* – that would permit P to buy a substitute; OR
 - (ii) *Reliance damages* – the cost incurred by performing (when expectation damages are speculative)
- c. Formula
 - (i) What would P had if there was no breach
 - (ii) In \$ terms, what is P's position after breach
 - (iii) Calculate damages = (i) – (ii)

4. Consequential or Special Damages – awarded *in addition* to compensatory damages ⇒ if such damages were in *reasonable contemplation of both parties* at the time of K (e.g. *loss of profits*)

- a. *Both parties were aware*; OR
- b. *Reasonably foreseeable* – if damages are *special* to P (P has the burden of proving special circumstances were made clear to other party)

5. Incidental Damages – non-breaching party can also recover costs he incurs in dealing with the breach

- a. Incidental damages are always recoverable
- b. Calculated based on cost (expenses) of finding & entering into new K

* *Avoidable Damages (Duty to Mitigate Damages* by non-breaching party) – damages will be reduced by avoidable damages that might have been avoided by mitigation

- a. *Sale of Goods K* – cover must be reasonable, in good faith, & without unreasonable delay
- b. *Employment K* – employee is under a duty to use reasonable diligence to find a like position
 - E.g.: D school hires P for 100K but breaches – P rejects another teaching job in the same city for 80K
 - (a) P can only recover 20K – there was comparable job (not saying P is obligated to take new job, only that damages are reduced if P rejects a comparable job)
 - (b) D has burden of pleading & proving avoidable damages
- c. *Construction & manufacturing K* – mitigation requires the builder or manufacturer to cease work unless completion would decrease damages (e.g., finishing partly manufactured goods)
 - NOTE: duty to mitigate only *reduces* recovery, but does not *prohibit* recovery

C. Compensatory Damages Calculations

1. Damages Rules for UCC Sales of Goods



| | <i>Buyer keeps goods</i> (<i>acceptance</i>) | <i>Seller keeps goods</i> (<i>rejection or not delivery</i>) |
|------------------------|---|---|
| <i>Seller breaches</i> | FMV (perfect) – FMV (as delivered) | Replacement Price – K Price; OR Market Price <i>at time of discovery</i> – K Price |
| <i>Buyer breaches</i> | K Price (market price is irrelevant) | K Price – Market Price <i>at time/place of delivery</i> ; OR K Price – Resell Price; OR <i>Provable Loss Profits (K Price – costs)</i> |

- *Lost Volume Seller* – consider in Buyer breach & Seller keeps
 - (i) Seller's supply of goods is ***UNLIMITED*** – ***provable loss profits*** apply (because Seller could have made an additional sale had the buyer not breached – used when other measures are inadequate)
 - (ii) Seller's supply is *limited* – (K Price – Market Price) OR (K Price – Resell Price)

2. Damages Rules for Common Law Contracts

- a. *Sale of Land K* – difference between K price & Fair Market Value

NY Distinction – if Seller breach because of unaware defect, down payment & reasonable expenses

- b. *Employment K*:
 - (i) Breach by *employer* – full K price (less wages actually earned elsewhere after the breach)
 - (ii) Breach by *employee* – whatever it costs to replace the employee (modern view allows employee to offset any monies due from work done to date)
- c. *Construction K*:
 - (i) Breach by *owner* – builder entitled to ***profits*** from K, AND any ***costs*** expended
 - If construction is completed, the measure is the full K price plus interest
 - (ii) Breach by *builder* – owner entitled to ***cost of completion***, AND ***reasonable compensation*** for delay
 - (a) Allow builder to offset/recover for work performed to date to avoid unjust enrichment of owner
 - (b) If breach is only late performance, owner entitled to damages incurred from late performance
- d. *Installment Payments K* – there is only partial breach, & the non-breaching party is limited to recovering only the missed payment, not the entire K price (but, K may include an *acceleration clause* making entire amount due on any late payment,

in which case non-breaching party may recover entire amount)

D. Non-Monetary Remedies

1. Specific Performance / Injunction

- a. ONLY apply equity remedies *if money damages are inadequate*
 - Court may, *in addition to or in lieu of an injunction*, give (i) a judgment for damages, (ii) a judgment for the recovery of possession of land or chattels, or (iii) declaratory judgment
- b. **Sale of Land K** – court can compel seller to sell land because there is no substitute
- c. **Sale of Goods K** – **unique** goods (e.g. *antiques, art, custom-made*)
- d. **Services K** – NO specific performance, only money damages (but possible injunctive relief)
 - Courts will not force someone to work, but can grant *negative specific performance* (barring D from working for P's competitor)

2. Reclamation (ONLY for Sale of Goods) – right of an unpaid Seller to recover goods from an *insolvent* Buyer

- a. Sale of goods on credit – Seller not paid yet;
- b. Buyer must have been **insolvent at time of delivery of goods**;
- c. Seller *demands* for return of goods *within 10 days of Buyer's receipt*; AND
- d. Buyer still has goods

3. Entrustment – rights of good faith purchaser in entrustment

- a. Entrusting goods to a *merchant who deals in goods of that kind* gives him power to transfer all rights of the entruster to a *Buyer in the ordinary course of business*
- b. Entrusting owner has NO right to recover its goods from a *bona fide purchaser* (can only sue trustee)

E. Rescission & Restitution

1. *Rescission* – Non-breaching party may *rescind* (i.e. cancel) K and sue for damages at law or in equity
2. *Restitution* – simultaneously seek *restitution* to restore parties to positions they were in before K was formed

F. Quasi-Contract Relief – if results in *unjust enrichment*

VIII. Third Party Problems

A. Delegation of Duties

1. *Delegation* – transfer of K duties to a 3rd party (often delegation & assignment)
 - a. *Delegation* – transfers duties / burdens
 - b. NOTE: *Assignments* – transfers rights / benefits
2. **Limitations on Delegation** – generally, all contractual duties are delegable EXCEPT:
 - a. *K Prohibits delegations or assignments* (“no delegations” or “no assignments” – either one)
 - b. *Duties involve personal judgment & skill or special reputation* (e.g. cannot delegate Jeter for A-Rod)
 - c. *Delegation would change obligee's expectancy* (e.g., requirements & output K)
3. *Consequences of delegation*:
 - a. Delegator (delegating party) – always remains liable (to obligee)
 - b. Delegatee (3rd party) – liable ONLY IF *consideration* (to BOTH delegator & obligee)
 - (i) Delegatee is the *principal* & the delegator is the *surety* – can sue either one & the surety can then seek reimbursement from the principal, based on the assumption agreement
 - (ii) NOTE: If delegation without consideration – delegatee NOT liable to both delegator or obligee
4. *Novation* is different from *delegation* because it substitutes a new party for an original party to the K

B. Assignment of Rights

1. *Assignment* – transfer of K rights to 3rd Party
 - a. *Assignment* – original K & assignment (2 steps)
 - b. NOTE: *3rd Party Beneficiary* – parties making K that benefits 3rd party (1 step)
2. *Requirements for assignments*:
 - a. Watch for language of *present assignment* – “**I assign**” (NOT “I will assign” or “I promise to assign”)
 - b. Consideration NOT required
 - c. Writing required if K amount more than \$5K
3. **Limitations on Assignment** – generally, all contractual rights are assignable EXCEPT:
 - a. **K Provisions**
 - (i) Language of **prohibition** – takes away the *right to assignment* but NOT the *power to assign*
 - (a) Assignor is liable for breach of K, BUT
 - (b) *Assignee who does not know* of the prohibition can still enforce the assignment
 - (ii) Language of **invalidation** (e.g. *void*)– takes away both the right AND power to assign
 - Thus – *breach by the assignor & NO rights in assignee*
 - b. **Common Law** – even if K does not in any way limit the right to assign, an assignment that *substantially changes the duties of the obligor* is barred (e.g. **unique service K or requirement/output K**)
 - (i) *Assignment of other K performance rights* – NOT valid assignment
 - (ii) *Assignment of the right to payment* – always valid assign
4. *Rights of Assignee*:
 - a. *Assignee can always sue the obligor*

- NOTE: *obligor* has same *defense* against assignee as it would have against assignor
 - b. *Assignee can sue assignor* – for wrongful exercise of power to revoke in irrevocable assignment situation
 - NOTE: *assignor* won't be liable to the assignee if the obligor is incapable of performing
5. *Notice to obligor of assignment*
- a. Payment by obligor to assignor is effective until obligor knows of assignment
 - b. Modification agreements between obligor & assignor are effective if obligor not know of assignment

6. **Multiple Assignments**

- a. **Gratuitous Assignments** (NO consideration gift assignment – look for words like “present,” “gift”)
 - (i) General Rule – **last in time rule** (later gift assignment revokes an earlier gift assignment)
 - (ii) UNLESS obligor has already performed or assignee has relief on the promise to his detriment

* **NY Distinction – Gratuitous Assignments**
Irrevocable if in writing and signed by the assignor

- b. **Assignments for Consideration**

- (i) General rule – **first in time rule**
- (ii) (limited) EXCEPTION – subsequent assignee takes priority over an earlier assignee for value only if he both: (i) doesn't know of the earlier assignment & (ii) is the 1st to obtain payments, a judgment, a novation, indicia of ownership
- (iii) *Multiple Assignments for Consideration as Breach of Warranty* – in an assignment for consideration, the assignor makes a warranty that the rights assigned are assignable & enforceable; then a later assignee can sue assignor for breach of warranty

C. **Third-Party Beneficiaries** – parties contracting with intent of benefiting a 3rd party:

1. *Vocabulary*

- a. *3rd Party Beneficiary* – not a party to K but able to enforce K other made intended for his benefit
- b. *Promisor* – party *making the promise* that benefits the 3rd party (e.g. insurance company)
- c. *Promisee* – party who *obtains the promise* that benefits the 3rd party (e.g. person pay insurance)
- d. *Intended v. Incidental beneficiaries:*
 - (i) *Intended beneficiary* – named beneficiary in K (have contractual rights)
 - (ii) *Incidental beneficiary* – NOT named in K (NO contractual rights)
- e. *Creditor v. Donee beneficiaries:*
 - (i) *Creditor Beneficiaries* – a person whom a debt is owed by the promise (must be explicit); OR
 - (ii) *Donee Beneficiaries* (default) – a person the promisee intends to benefit gratuitously

2. **Vesting** – when a 3rd Party Beneficiary acquires contractual rights; occurs when he:

- a. **Knowledge AND**

- (i) **Manifests assent** to a promise in the manner requested by the parties; **OR**
- (ii) **Detrimental reliance** on the promise

- b. NOTE: *prior to vesting*, promisee & promisor are free to *modify* or *rescind* beneficiary's rights under K

3. **Rights of 3rd Party Beneficiary**

- a. **Beneficiary v. Promisor**

- (i) 3rd Party Beneficiary may sue promisor (even though no privity of K)
- (ii) NOTE: **promisor can assert any defense that he would've had if sued by the promisee**
 - E.g. 3rd Party Beneficiary cannot recover for Promisor's non-performance when Promisee's check bounced (because Promisor has a valid defense against Promisee)

- b. **Beneficiary v. Promisee**

- (i) Generally – 3rd Party Beneficiary can NOT sue the promisee unless detrimental reliance
- (ii) EXCEPTION: *creditor beneficiary can sue on the original debt* (existing obligation)

- c. *Promisee v. Promisor* – promisee may sue promisor both at law & in equity for specific performance if the promisor is not performing for the 3rd person