**Contracts Outline**

1. **Applicable Law**
   1. Common Law: e.g., services, real property
   2. UCC Art. 2: contracts for the sale of goods
   3. Mixed Contracts: apply either common law or UCC, *but not both*, depending on which is the more important part of the contract. Exception: if contract divides payment, apply separately.
2. **Formation of Contracts** (legally enforceable agreements)
   1. Types of Offers
      1. Unilateral: requires complete performance as sole method of *acceptance*.
      2. Bilateral: all others; usually, offer is silent as to method of acceptance.
   2. **Stage 1: Was There an Offer?**
      1. **Rule**: a *manifestation* of intention of one person to contract, measured objectively (subjective intent irrelevant), containing definite terms, and communicated to the other party.
      2. **Contents of Offer**: who and what; UCC-quantity
         1. **Price**
            1. Common Law: need not contain price *unless real estate contract*
            2. UCC: need not contain price, which will then be reasonable price at time of delivery.
         2. **Vague/Ambiguous Material Terms**: no offer. Silence is better than ambiguity, as can often fill gap but not supplant term.
         3. **Requirements/Outputs Contracts** (either exclusive supply or exclusive demand): offer even if no quantity term. Sudden increases in requirements does not render indefinite if in line with prior demands or not unreasonably disproportionate.
      3. **Advertisement**: not an offer, unless: (1) in the nature of a reward; (2) specifies quantity and expressly indicates who can accept; or (3) price quotation sent in response to an inquiry.
   3. **Stage 2: Was The Offer Terminated?** can be, if
      1. **Lapse of Time**: time stated in offer or a reasonable time.
      2. **Death**: of either party prior to acceptance, unless irrevocable
      3. **Revocation** (by offeror)
         1. **General Rule**: may revoke at any time before acceptance, either by (1) unambiguous statement to offeree or (2) unambiguous conduct by offeror indicating unwillingness or inability to contract, which offeree is aware of.
            1. Multiple Offers: not revocation.
         2. **Exceptions**: offers that cannot be revoked.
            1. **Option Contract**: a *paid* promise to keep offer open.
            2. **UCC Firm Offer**: (1) offer to buy or sell goods, (2) signed *written* promise to keep offer open, (3) by merchant. *Need not be paid*. Stays irrevocable for term provided in offer or reasonable time, *not to exceed 3 months*. After firmness (irrevocability) expires, offer becomes revocable—it does not disappear.
            3. **Reliance**: detrimental, reasonably foreseeable reliance.
            4. **Start of Performance in Unilateral Contract**. However, mere preparation insufficient.
         3. **Rejection** (of offeree): direct, or any of the following indirects:
            1. **Counteroffer**: terminates original offer and becomes new offer. Counteroffer *does not* terminate an option.

**Bargaining**: does not terminate offer (e.g., “will you take lower?”). Typically in form of question.

* + - * 1. **Conditional Acceptance**: “I accept *if*…”

Common Law: terminates offer and becomes counteroffer

UCC: simply terminates offer. No counteroffer, and no possible acceptance of counteroffer.

* + - * 1. **Acceptance Containing Additional Terms**: here, unlike Conditional Acceptance, the response includes, *but does not insist*, on new terms.

Common Law: terminates offer and becomes counteroffer.

UCC: does *not* operate as a rejection. There is a contract for at least the original terms. However, the additional terms don’t automatically become part of the contract unless (1) both parties are merchants, (2) the term is not a material change; and (3) offeror does not object within reasonable time.

* 1. **Stage 3: Was The Offer Accepted?**
     1. Method of Acceptance: if offer is silent, acceptable methods typically include promise to perform or starting performance.
        1. **Start of Performance**: acceptance (implied promise to finish), unless a unilateral contract, which requires complete performance.
        2. **Improper Performance**: *is* acceptance but breach, unless accompanied by words of explanation, which is rejection and counteroffer.
     2. **Timing of Acceptance**: unlike all other communications (e.g., revocation), which are effective only when received, an acceptance is effective when sent, even if lost, never arrives, nor even put in real mail.
        1. Default Rule Only: doesn’t apply if offer provides otherwise.
        2. Exception: Option Deadline Only Satisfied When Received
        3. **Changes of Mind**
           1. Acceptance Arrives First: effective.
           2. Rejection Arrives First:

Was Sent First: effective.

Was Sent Last: effective only if offeror relied.

* + 1. Who Can Accept: must (1) know of offer at time of acceptance, and (2) be person to whom offer was made. No assignment of offers, *unless options*.

1. **Defenses Against Formation**
   1. **Consideration**: a *bargained for* legal detriment.
      1. **Promise to Pay for Past Performance** (X saves B, then B promises to reward X): unenforceable for lack of consideration, unless performance was requested and requestor knew payment would be expected.
      2. **Pre-Existing Duty & Contract Modification**
         1. Common Law: promise to pay more for already-agreed performance is unenforceable. Exception: addition or change in performance; *unforeseen difficulty*; third-party promises to pay additional amounts.
            1. Partial payment of due and undisputed debt is not consideration for promise to release remaining debt.
         2. UCC: new consideration *not required* for *good-faith* modification. Thus, promise to pay more for already-agreed is enforceable if good faith request.
      3. Consideration Substitutes/Exceptions
         1. *Written* promise to enforce obligation for which there is a legal defense is enforceable without consideration.
         2. **Promissory Estoppel**: no consideration necessary where (1) promise, (2) reasonable and detrimental reliance, and (3) enforcement necessary to avoid injustice.
   2. **Capacity**: minors, mental incompetents, intoxicated (if other party has reason to know) lack capacity to contract. Consequence: incapacitees have *right to disaffirm*. However, contract can be enforced if incapacitee impliedly affirms after gaining capacity. Finally, there is quasi-contractual liability for necessities (e.g., food) for fair value.
   3. **Statute of Frauds** (grounds for dismissal)
      1. **Applicability**
         1. **Guarantees Of Another’s Debt**: only a promise to pay if other does not triggers SOF, not a general promise to pay regardless of other. Exception: if main purpose of guaranteed obligation was to benefit guarantor, SOF inapplicable.
         2. **Service Contract Not Capable of Performance In < 1 Year of K**: analyzed on contractual terms, not actual time ultimately takes, and measured from date of contract. Exception: SOF inapplicable to contract to employ “for life,” as death could be a day later, and thus full performance within year.
         3. ***Transfer* of Any Interest in Real Estate**
            1. **Exception**: SOF inapplicable to leases ≤ 1 year.
         4. **Sale of Goods ≥ $500**
      2. **How Satisfied**
         1. **Writing**
            1. Common Law: all material terms (who & what) and signed by *defendant*.
            2. Sale of Goods: quantity and signed by defendant.

Merchant’s Confirmatory Memo: plaintiff may use its *own* signed writing against defendant if both are merchants, the writing notes a prior oral agreement, and recipient doesn’t object in writing within 10 days of receipt.

* + - 1. **Exceptions**: need not be in writing, chance of fraud minimal
         1. **Part Performance in Transfer of Real Estate**: must have two of: (1) improvement, (2) payment, and (3) possession.
         2. **Full Performance of Service Contract**. No part performance.
         3. **Sale of Goods**

Goods Accepted/Paid For

Custom-Made Goods not suitable for sale to others

Judicial Admission that contract existed, made by party trying to get out of contract in a pleading, testimony, or in response to discovery.

* + - 1. **Equal Dignity Rule**: authorization for an agent to enter into contract must be in writing only if underlying contract requires a writing due to the SOF.
      2. **Contract Modification**: within statute of frauds only if the contract *as modified* falls within a SOF category, regardless of whether the original contract did. Note: provisions requiring modifications be in writing are invalid at common law, but valid under UCC.
  1. **Misrepresentation of Existing Fact** which induces contract, even if honest or unintentional, renders contract unenforceable.
  2. **Mistake of Material Existing Fact At Time of Agreement** 
     1. Mutual: voidable by adversely affected party if he did not assume the risk.
     2. Unilateral: no excuse, unless other party had reason to know of mistake.
  3. **Ambiguity**: contract unenforceable where (1) material term open to at least two reasonable interpretations, (2) each party attaches different meaning, and (3) *neither* party knows or has reason to know of ambiguity. If one party knows, there is contract under terms understood by other party.
  4. Illegality: illegal subject matter; illegal purpose (but legal subject matter) if plaintiff had reason to know of illegal purpose.
  5. Public Policy
  6. Duress: physical duress; economic duress: improper threat (e.g., breach) and vulnerable counterparty with no reasonable alternative.
  7. Undue Influence: special relationship and improper persuasion
  8. Unconscionability: at time of contract, both unfair surprise (procedural) and oppressive terms (substantive).
  9. **Nondisclosure Irrelevant**: no duty to disclose information; contract enforceable. However, if concealment, may be unenforceable if material.

1. **Terms of Contract**
   1. **Parol Evidence Rule**: evidence of a *prior agreement* (either oral or written) or contemporaneous oral statement that changes/contradicts a later *writing* is inadmissible. Exceptions:
      1. To correct a clerical error.
      2. To establish a defense against formation of an agreement.
      3. To explain facially vague or ambiguous term.
      4. To supplement *partially integrated* writing (a final statement of the terms included, but not a complete statement of all terms agreed to). This is where a party attempts to add to (but not change or contradict) a writing. If there is a merger clause (“this contract is limited to the terms herein), this is persuasive (but not conclusive) evidence that the contract is complete on its face and cannot be supplemented.
   2. **Conduct**: can be used to explain what terms mean or to fill gaps in contracts: listed from most to least important:
      1. Course of Performance: what parties have done under this contract in past
      2. Course of Dealing: what the parties did under their earlier contracts with one another
      3. Usage of Trade: what others in the trade do under similar contracts
   3. **UCC Sale of Goods Default Terms**
      1. **Delivery Obligations if by Common Carrier**
         1. Shipment Contract: (1) get goods to common carrier, (2) make reasonable arrangements for delivery, and (3) notify buyer.
         2. Destination Contract: delivery complete only when goods arrive

Note: if FOB is followed by city where seller or goods are, it is shipment contract; any other city is destination contract.

* + 1. **Risk of Loss**: where goods damaged before receipt:
       1. Step 1: Agreement: agreement of parties controls.
       2. Step 2: Breach: if any party has breached, he is liable for any uninsured loss, even if breach unrelated to problem. If no breach:
       3. Step 3: Delivery
          1. By Common Carrier: risk shifts to buyer when seller completes delivery obligations.
          2. All Other Modes of Delivery

Seller Is Merchant: bears risk until buyer takes possession.

Seller Isn’t Merchant: bears risk until goods are tendered (made available to buyer)

* + 1. **Warranties of Quality of Goods**
       1. Express Warranties: as provided in agreement. A model/sample is express warranty that product is like sample.
       2. Implied
          1. **Warranty of Merchantability**: goods are fit for their ordinary purpose. Arises whenever the seller is a merchant *who regularly deals in goods of the kind at issue*.
          2. **Warranty of Fitness for Particular Purpose**: Arises when (i) buyer has a special purpose in mind, (ii) buyer is relying on the seller to select suitable goods, and (iii) seller knows both of these facts. Seller need not be merchant.
       3. **Limitations on Warranty Liability**
          1. SOL: 4 years from tender of delivery.
          2. **Buyer’s Examination of Goods**: if so, no implied warranties as to obvious defects. No effect on express warranty.
          3. **Disclaimer**: express warranties cannot be disclaimed. Implied warranties can be disclaimed if either (1) conspicuous language specifically mentioning warranty or (2) sold as it/with faults.
          4. **Limitations**: simply limits remedies available, and may be done for both express and implied, unless unconscionable, which is presumed if breach in consumer good causes personal injury.

1. **Performance of UCC Sale of Goods Contracts**
   1. **Perfect Tender Rule**: a seller must deliver perfect goods in the right place at the right time. If tender is not perfect, buyer has right to reject the goods (not rejection of offer, as already a contract). Buyer must take reasonable care of rejected goods. However, seller can cure if deadline for performance has not expired. If it has, seller can only still cure if there were reasonable grounds to believe goods delivered would be acceptable with price adjustments (e.g., course of dealing).
      1. **Exception: Installment Contracts** (contract for delivery of goods in separate installments): Perfect Tender Rule doesn’t apply. Instead, buyer may reject installment *only* if there is *substantial impairment* in the installment that cannot be cured. A buyer can reject the entire contract only if a defect in an installment substantially impairs the value of the whole contract.
   2. **Acceptance of Goods** **Precludes Rejection** (not acceptance of the offer, which is pre-contract formation): once buyer accepts goods, cannot reject. However, buyer who accepts non-conforming goods *can still get damages*. Mere payment for goods not acceptance unless there was an opportunity to inspect (even if no inspection).
   3. **Revocation of Acceptance of Goods**: a buyer can revoke acceptance of goods only if (1) nonconformity substantially impairs value, (2) nonconformity difficult to discover, and (3) revocation occurs within reasonable time of discovery.
2. **Common Law**: performance doesn’t have to be perfect; substantial performance (not committing a material breach) is all that is required.
3. **Remedies for Unexcused Performance**
   1. **Non-Monetary** (equitable)
      1. **Specific Performance**:only where money damages inadequate, and *never* for services contracts. Breach of land sale contract gets specific performance, unless land has been sold to BFP. For sale of goods, must be unique.
      2. **Seller’s Right of Reclamation from Insolvent Buyer**: right to return of item where (1) buyer insolvent when goods received, (2) seller requests return within 10 days of receipt, and (3) buyer still has goods.
      3. **Buyer’s Recovery of Sold Goods from Insolvent Seller**: can recover only identified, paid-for goods from a seller who becomes insolvent within 10 days of payment.
   2. **Money Damages**
      1. Policy: to compensate, not punish. No punitive damages.
      2. **Expectation Damages**: a sum that leaves party in as good a position as full performance of contract would have. Usual measure of damage.
         1. **Common Law**: common sense. However, where way too uncertain, recovery for expenses(reliance).
         2. **UCC Damages for Sale of Goods**
            1. **Buyer’s Damages for Seller’s Breach**

Seller Has Goods: difference between reasonable cover price or market price and contract price—whichever is greater, even if doesn’t cover.

Buyer Keeps Goods: difference between fair market value of goods delivered and fair market value of goods promises (not K price).

* + - * 1. **Seller’s Damages for Buyer’s Breach**:

Seller Has Goods: difference between contract price and resale unless cannot resell, in which contract price. Exception: lost-volume seller’s damages are lost profits on sale, as would have sold twice were it not for breach.

Buyer Keeps Goods: contract price.

* + 1. **Incidental Damages**: *always recoverable* (no forseeability requirement): cost of caring for/transporting goods after breach and cost of arranging substitute transaction. Available for both buyer and seller.
    2. **Consequential Damages**: recoverable damages that are (1) special to this particular plaintiff and (2) reasonably *foreseeable* by the breaching party *at the time of the contract* (not at the time of the breach).
    3. **Avoidable Damages**: Mitigation Rule: cannot recover damages avoidable with reasonable effort. For jobs, must be *comparable* – same kind of job in same city. This is a *defense*.
    4. **Liquidated Damages**: permissible if damages are difficult to estimate and provision is reasonable forecast of probable damages. Cannot operate as a penalty. If clause struck, aggrieved party gets actual damages.

1. **Excuse for Nonperformance of Contract**: events after contract formation
   1. **Anticipatory Repudiation**: *unambiguous* statement or conduct that repudiating party will not perform: generally gives rise to immediate claim for damages for breach, but party can retract so long as other party has not relied on anticipatory breach (may request adequate assurance).
      1. **Adequate Assurance for Sale of Goods**: if statement or conduct creates reasonable uncertainty regarding performance, UCC permits written demand for adequate assurance and, if commercially reasonable, permits suspension of performance until assurance given.
   2. **Material Breach**
      1. Sale of Goods: Perfect Tender Rule (see above): if tender is imperfect, buyer can accept all the goods, reject all the goods, or accept any commercial units and reject the rest. Whichever option the buyer chooses, she can still get damages from the seller.
      2. Common Law: damages are available for *any* breach of contract, but only a material breach excuses performance.
         1. Beware Quasi-Contract: where performance confers benefit but not substantial performance, breaching party does not recover in contract, but may recover under quasi-contract.
         2. Divisible Contract: where payment is on a per-unit basis, substantial performance analysis conducted on per-unit basis. E.g., X contracts to decorate 10 cabanas for $9000 per cabana, decorates 3, and then quits. X recovers $27,000, the *contract price*, for the 3 she decorated.
   3. **Non-Occurrence of Express Condition**:failure to *strictly* comply excuses performance, but *does not* constitute a breach of contract.
      1. Satisfaction Clause: where duty to perform (pay) only arises where party is satisfied with other party’s performance. Apply a reasonable person standard unless contract deals with art or matters of personal taste, in which case we apply subjective standard and ask only if party is satisfied.
      2. Waiver: condition may be excused by later action/inaction of the person protected by the condition.
      3. Prevention: failure of condition does not excuse protected party’s performance where protected party prevented satisfaction of condition.
   4. **Later Agreement**: between parties may excuse non-performance
      1. **Rescission**: agreement to cancel contract, effective only if *both* *parties* have some performance remaining (otherwise no consideration).
      2. **Modification**: substituted agreement. Takes effect immediately. Aggrieved party can only sue for non-performance of new contract.
      3. **Accord & Satisfaction**: agreement to accept different performance in satisfaction of existing duty (accord) *and* performance (satisfaction). Wipes out original obligation only if and when stated performance is satisfied. If not performed, may recover on *either* original agreement or accord and satisfaction, but not both.Unlike modification, where old agreement disappears. For A & C, look for language like “if…then.”
      4. **Novation**: consensual agreement substituting a new party for existing party. Releases the originally bound party from liability. Absent consent, it is only delegation, and original party remains liable.
   5. **Unanticipated Occurrence**: impairing *ability* to perform may be excuse, but never excuse for unanticipated rise in cost.
      1. **Destruction of Something Necessary for Performance**
         1. Common Law: valid excuse
         2. UCC Sale of Goods: if buyer has risk of loss and delivery made, no excuse for buyer’s non-payment (as there has been performance). If seller has risk of loss, no excuse unless damaged goods were identified to this particular contract.
      2. **Death or Incapacity**: does not excuse contract performance, unless person is hired for special skills unique to him.
      3. **Supervening Government Regulation or Order**
      4. **Frustration of Purpose (Buyer’s Excuse)**: where unforeseen supervening event frustrates buyer’s primary purpose for entering into contract, valid excuse where, at time of contract, seller knew of primary purpose. Mere lack of profitability, though, insufficient frustration.
2. **Third-Party Problems**
   1. **Third-Party Beneficiary**: two people contract with intent to benefit 3rd
      1. Intended vs. Incidental: a third party named in the contract is intended beneficiary with legal rights; otherwise, is incidental beneficiary with no legal rights. Intended TBP can sue breaching promisor. Promisor can raise same defenses it could have against promisee.
      2. Creditor/Donee: if the promisee’s main reason for entering the contract is to discharge a debt owed to the third party, the third party is a creditor beneficiary; otherwise, he is a donee beneficiary. Only creditor beneficiary can sue promisee (as promisee owes the original debt).
      3. Modifying Contract: the promisor and promisee can rescind or modify contract until third party beneficiary’s rights have vested—meaning TPB learned of and relied on the contract (even if donee). However, if the contract allows modification even after reliance, modification not actionable.
   2. **Assignment of Right**: a transfer of rights under a contract. *No consideration required*, but if none, assignment is freely revocable.
      1. Limitations
         1. Contract Language Controls; but distinguish between prohibition and invalidation. If merely prohibits (“rights are not assignable”), assignment makes assignor liable for breach of contract, but the assignment is still *valid*. If invalidates (“assignments void”), assignment invalid.
         2. No Substantial Change: assignment cannot substantially change duties of obligor. Assigning right to payment is OK.
      2. Rights
         1. Assignee can sue obligor.
         2. Assignor for consideration cannot sue obligor (because cannot revoke).
         3. Payment by obligor to assignor is effective until obligor knows of assignment.
         4. Implied Warranties: arise only in assignment for consideration: (1) right assigned exists; (2) obligor has no existing defenses; & (3) assignor will not do anything to impair value of assignment.
      3. Multiple Assignments Problem: where same right assigned to multiple parties:
         1. Gratuitous Assignments: *last* assignee wins (each prior was revocable).
         2. Consideration Assignments: first assignee for consideration wins. However, later assignee for consideration wins where (1) no notice of prior and (2) is first to obtain payment or judgment against obligor.
   3. **Delegation of Duties**: contractual obligations can be delegated without consent
      1. Limitations
         1. Contract Language Controls: if it prohibits delegation, then duty may not be delegated. If the contract prohibits “assignment,” no delegation either.
         2. Duties Involving Special Skill or Reputation cannot be delegated.
      2. Liabilities
         1. The delegating party is *always* liable to the obligee.
         2. The delegatee is also liable to the obligee if the delegatee received consideration.

Contracts Checklist

1. Formation
   1. Offer (price, quantity)
   2. Termination Prior to Acceptance
      1. Lapse
      2. Death
      3. Revocation
         1. Paid Option Contract
         2. Merchant’s Firm Offer
         3. Reliance
         4. Start of Performance in Unilateral Contract
      4. Rejection
         1. Counteroffer v. Bargain
         2. Conditional Acceptance
         3. Acceptance Containing Additional Terms
   3. Acceptance
      1. Method
         1. Starting Performance
         2. Improper Performance
      2. Timing
2. Defenses to Enforceability
   1. Consideration
      1. Retroactive Consideration
      2. Pre-Existing Duty & Contract Modification
      3. Promissory Estoppel
   2. Incapacity
   3. Statute of Frauds
      1. Applicability
         1. Transfer of Interest in Real Estate
         2. Guaranty of Another’s Debt
         3. Services Incapable of Performance Within Year
         4. Sale of Goods $500 or More
      2. Signed Writing Required
         1. Merchant’s Confirmatory Memo
         2. Part Performance of Real Estate Transfer
         3. Full Performance of Services Contract
         4. Acceptance of Goods
         5. Custom Goods
         6. Authorization to Contract
         7. Modification
   4. Misrepresentation of Existing Fact
   5. Mistake of Material Existing Fact
      1. Unilateral
      2. Mutual
   6. Ambiguity
   7. Nondisclosure Irrelevant
3. Terms of the Contract
   1. Parol Evidence Rule
      1. Ambiguity
      2. Partial Integration
   2. Conduct Evidence
   3. UCC Default Terms
      1. Delivery Obligations if by Common Carrier
      2. Risk of Loss
         1. Agreement
         2. Breach
         3. Delivery Mode
      3. Warranties
         1. Express
         2. Implied Warranty of Merchantability
         3. Implied Warranty of Fitness for Particular Purpose
4. Performance
   1. Common Law: Substantial Performance
   2. UCC
      1. Perfect Tender Rule
         1. Installment Contract Exception
      2. Acceptance of Goods Precludes Rejection
         1. Post-Acceptance Rejection Exception
5. Remedies for Breach
   1. Equitable
      1. Specific Performance
      2. Seller’s Reclamation From Insolvent Buyer
      3. Buyer’s Recovery From Insolvent Seller
   2. Monetary
      1. Expectation
      2. Incidental
      3. Consequential
      4. Liquidated
      5. No Avoidable Damages
6. Excuses for Non-Performance
   1. Anticipatory Repudiation
   2. Adequate Assurance for Sale of Goods
   3. Material Breach
   4. Non-Occurrence of Express Condition
   5. Later Agreement
      1. Rescission
      2. Modification
      3. Accord & Satisfaction
      4. Novation
   6. Unanticipated Occurrence
      1. Destruction of Something Necessary for Performance
      2. Death/Incapacity
      3. Supervening Government Regulation
      4. Frustration of Purpose
7. Third-Parties
   1. Third-Party Beneficiary
      1. Intended vs. Incidental
      2. Creditor vs. Donee
      3. Modification
   2. Assignment of Rights
   3. Delegation of Duties