

- 1 **CHAPTER 10**  
2 objective v. subjective  
3 Objective Theory of Contracts: Rosco Pound  
4 presume preference for no contract since assume prefer liberty  
5 **elements:**  
6 agreement, consideration, capacity, reality of assent, form, & legal subject matter  
7 unilateral (acceptance by performance)  
8 v. bilateral contract (two promises to perform)  
9 express v. implied-in-fact contract  
10 formal v. informal  
11 executory (recall, *Art. I, sec. 10 not impair contracts*)  
12 v. executed contracts  
13 valid v. unenforceable v. voidable v. void  
14 **quasi contract** is not a contract even though its name is **implied-in-law**  
15 *quasi* contract is an equitable remedy (e.g., *quantum meruit*)  
16 rules of interpretation:  
17 #1 plain meaning  
18 #8a course of performance, #8b prior dealings, #8c trade usage  
19 *agreements that can be, but need not be, contracts: need not resort to equity*  
20 employment, warranty, bailment  
21 often lack capacity and/or capacity  
22 license  
23  
24  
25  
26 **CHAPTER 11**  
27 agreement: offer plus acceptance  
28 offer must be sufficiently definite that all offeree need say is a "yes"  
29 reasonably certain for court to enforce the parties' agreement  
30 offer requires intent to be bound (consideration is the objective proof of the intent)  
31 agreement to agree v. option contract (e.g., irrevocable offer)  
32 advertisement  
33 auction  
34 **material terms:** parties, time, consideration, subject matter  
35 **Mirror Image Rule**  
36 **promissory estoppel:**  
37 a promise made with a reasonably foreseen justifiable detrimental reliance  
38 partial performance  
39 termination of offer by operation of law:  
40 time v. destruction of subject matter v. supervening illegality  
41 acceptance: must be unequivocal or it is a rejection of the offer  
42 counter offer is a rejection of the original offer and a new offer  
43 **silence is not acceptance unless ...**  
44 revocation of offer: but, **Mail Box Rule**  
45

1 **CHAPTER 12**

2 consideration provides the objective proof of the requisite intent to be bound

3 **consideration**: legally sufficient value **and** bargained for exchange4 BUT: **value** is a term of art (i.e., jargon) materially different from consideration5 life, *liberty*, property: a promise almost always is legally sufficient value6 *promise to do* that which have the right not to do

7 or

8 *promise not to* that which have the right to do9 freedom **of** contract versus freedom **from** contract

10 preexisting duty

11 past consideration

12 *value* ≠ *consideration*13 mutual **rescission** (i.e., new contract) versus unilateral rescission (i.e., equity)

14 illusory promise

15 **requirements contract**16 **output contract**

17 accord and satisfaction

18 liquidated debt versus **liquidated damages** (see p. 345)19 **promissory estoppel**:

20 a clear and definite promise inducing a

21 reasonably foreseen justifiable and detrimental reliance when

22 justice served by enforcement

23

24

25

26 **CHAPTER 13**

27 all USA law turns on knowing and voluntary: capacity is the knowing part of contracts

28 **capacity**: the *ability* to grasp the natural consequences of one's actions29 *note: this is not knowing, it is the mere ability to know*

30 capacity: crime &gt; contract &gt; tort &gt; wills

31 objectively have capacity upon reaching the **age of majority**: in NEB at age 19

32 rebuttable presumption of capacity

33 **minors**:

34 emancipation

35 necessities

36 disaffirmance (i.e., voidable)

37 **restitution**,

38 but magnitude

39 (as is [*majority rule*] at time return v. value at time of transaction)

40 tort (e.g., fraud) versus contract

41 ratification

42 **intoxication**:

43 objective loss of a capacity

44 involuntary versus voluntary

45 incompetence:

46 objective loss of capacity

47 adjudicated versus mere objective condition

- 1 illegal subject matter  
2 usury  
3 **gambling**: creates and allocates risk on chance  
4 **insurance**: allocates existing risk on chance  
5 contrary to public policy  
6 contracts in restraint of trade  
7 covenant not to compete  
8 reasonable time and area (in NEB: one year and one county)  
9 **unconscionable** contract (equity) versus unconscionable contract (statute)  
10 NEB (i.e., express separation of powers) versus majority of States  
11 procedural versus substantive unconscionable  
12 adhesion contract  
13 exculpatory clause (e.g., liquidated damages clause)  
14 two merchants versus merchant v. consumer  
15 *in pari delicto* *in flagrante delicto*  
16 ignorance of the law (recall, an expert's opinion is a fact)  
17 protected class  
18 **reform** versus **sever** versus **void**  
19  
20  
21  
22 **CHAPTER 14**  
23 all USA law turns on knowing and voluntary: reality of assent is the voluntary  
24 rebuttable presumption of voluntary transaction  
25 **mistake**:  
26 mutual mistake of *material* fact  
27 unilateral mistake:  
28 non-mistaking party objectively knows of *material* mistake of fact  
29 common law **fraud**:  
30 knowing (*i.e., scienter*) and intentional misrepresentation of *material* fact  
31 inducing justifiable reliance and proximately causing damages  
32 security law fraud:  
33 misrepresentation or omission of a *material* fact causing injury  
34 **material**:  
35 big enough to change mind (mutual > unilateral > fraud)  
36 what a reasonable prudent investor would want to know (sec. law. fraud)  
37 **undue influence**:  
38 opportunity, inclination, and result  
39 presumption if fiduciary  
40 **duress**:  
41 physical > emotional > economic, predatory > economic, privileged  
42 **unconscionable** contract (equity) versus unconscionable contract (statute)  
43 adhesion contract  
44 public policy (e.g., Amd. 14) versus necessity (e.g., insurance)  
45

1 **CHAPTER 15**

2 parole evidence rule

3 Parliament in 1677

4 **Statute of Frauds:**

5 five types of contracts whose material terms

6 must be in a written memorandum of sufficient definiteness

7 that the court can enforce the parties' agreement and

8 signed by the party to be sued

9 [1] sale of interest in land

10 [2] sale of "goods" at \$5,000 or more

11 [3] must take more than one year to complete

12 [4] guarantee the debts of another

13 [5] in consideration of marriage

14 **signature:**

15 any mark with the current intent to authenticate the document

16 **material terms:** parties, time, consideration, and subject matter

17 "goods" are tangible and moveable

18 guarantee versus surety

19 marriage is a mutual, exclusive, unlimited, perpetual, requirements and output contract

20 prenuptial agreements void in NEB prior to 1996

21 promissory estoppel

22 **incorporation by reference** versus **merger clause** or integrated contract clause

23 international contract law does *not* use the Statute of Frauds

24

25

26

27 **CHAPTER 16**

28 both the old and the new common law seek to satisfy

29 the parties' reasonable expectations

30 old common law: all changes in parties are material

31 thus, no assignments and no delegations of contracts

32 new common law: assignment of rights usually permitted

33 but most delegations of duties are prohibited

34 material alteration of the parties' reasonable expectations

35 if [1] express prohibition, [2] **personal services**, [3] statute

36 notice of the assignment of rights or of the delegation of duties

37 delegation creates additional obligor rather than eliminates an obligor

38 assignment of "all rights"

39 third party beneficiary:

40 intended versus incidental

41 creditor versus donee

42 **vesting** of rights creates privity and standing to sue

43

- 1 **CHAPTER 17**  
2 **conditions:**  
3 precedent versus concurrent versus subsequent  
4 express versus implied conditions  
5 **performance:**  
6 complete versus substantial versus material breach  
7 personal services contracts: honesty in fact  
8 **anticipatory repudiation**  
9 time for performance  
10 election of remedies  
11 mutual rescission versus unilateral rescission  
12 novation  
13 substituted agreement  
14 accord and satisfaction  
15 **statute of limitations** (can be tolled) versus **statute of repose**  
16 **Force Majeure Clause** (see, p. 402)  
17 commercial **impossibility** (x10) versus commercial **impracticability** (x3)  
18  
19  
20  
21 **CHAPTER 18**  
22 damages: legally recognized pecuniary loss  
23 **compensatory damages:**  
24 loss of the bargain  
25 difference between the contract price and the market price  
26 includes **incidental damages** (e.g., cost of entering the market)  
27 **consequential damages** (or, special damages):  
28 *Hadley v. Baxendale* subjectively or objectively reasonably foreseen losses  
29 e.g., **lost profits**  
30 *punitive damages:*  
31 [1] degree of reprehensibility; [2] reasonable ratio (max 10:1); [3] legislative fines  
32 typically, only tort; but also *employment and insurance contracts*  
33 nominal damages (e.g., \$1)  
34 **economic loss:**  
35 tort losses within a contract are not contract damages (and not tort damages)  
36 **mitigation** of damages:  
37 non-breaching party's *duty*  
38 **liquidated damages:**  
39 requires [1] at the time of contract it must be reasonable to believe that at the  
40 time of breach it will *difficult to estimate* damages; and [2] at the time of  
41 contract the contract contains a *reasonable estimate* of damages anticipated at  
42 the time of breach  
43 but, **penalties** are unenforceable  
44 equitable remedies:  
45 rescission; restitution; **specific performance**; reformation; *quasi* contract  
46 **election of remedies** versus pleading in the alternative  
47 **waiver** of breach: silence is not acceptance versus course of performance

- 1 **CHAPTER 19**
- 2 USA law seeks to satisfy the Reasonable Person's reasonable expectations
- 3 the law can not anticipate
- 4 technology often changes reasonable expectations
- 5 adhesion contracts: necessity
- 6       choice of law, forum, venue, and language
- 7       expressly disclaim all consequential damages
- 8       liquidated damages and exculpatory clause
- 9       alternative dispute resolution
- 10 signature: starting March 2003 federal preemption a click is a signature in commerce
- 11       consumers often not in commerce
- 12       Acts of State (e.g., deed; will) often are not in commerce
- 13 UETA (favors merchants) versus UCITA (favors consumers)
- 14       no federal preemption if State adopts UETA
- 15
- 16 **CHAPTER FIVE**
- 17 **ethics**
- 18 **(see also, Focus on Ethics**
- 19 **pages 115 - 117; 206 - 208; 376 - 378; 472 - 475; 984 - 986; and 1061 - 1063**
- 20 **which, typically, will be covered after the last chapter of each such Unit)**