

- 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,**
7 **reality of assent, form, and legal subject matter**
8 unilateral (acceptance by performance)
9 v. bilateral contract (two promises to perform)
10 express v. **implied-in-fact** contract
11 formal v. informal
12 executory (recall, *Art. I, sec. 10 not impair contracts*)
13 v. executed contracts
14 **valid v. unenforceable v. voidable v. void**
15 **quasi contract** is not a contract even though its name is **implied-in-law**
16 *quasi* contract is an equitable remedy (e.g., *quantum meruit*)
17 rules of interpretation:
18 #1 plain meaning
19 #8a course of performance, #8b prior dealings, #8c trade usage
20 *agreements that can be, but need not be, contracts: need not resort to equity*
21 employment, warranty, bailment
22 often lack capacity and/or capacity
23 license
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27 **CHAPTER 11**
28 agreement: offer plus acceptance
29 offer must be sufficiently definite that all offeree need say is a "yes"
30 reasonably certain for court to enforce the parties' agreement
31 offer requires intent to be bound (consideration is the objective proof of the intent)
32 agreement to agree v. option contract (e.g., irrevocable offer)
33 advertisement
34 auction
35 **material terms:** parties, time, consideration, subject matter
36 **Mirror Image Rule**
37 **promissory estoppel:**
38 a promise made with a reasonably foreseen justifiable detrimental reliance
39 partial performance
40 termination of offer by operation of law:
41 time v. destruction of subject matter v. supervening illegality
42 acceptance: must be unequivocal or it is a rejection of the offer
43 counter offer is a rejection of the original offer and a new offer
44 **silence is not acceptance unless ...**
45 revocation of offer: but, **Mail Box Rule**

- 1 **CHAPTER 12**
2 consideration provides the objective proof of the requisite intent to be bound
3 **consideration:**
4 legally sufficient value
5 and
6 bargained for exchange
7 BUT: **value** is a term of art (i.e., jargon) materially different from consideration
8 life, *liberty*, property: a promise almost always is legally sufficient value
9 *promise to do* that which have the right not to do
10 or
11 *promise not to* that which have the right to do
12 freedom of contract versus freedom from contract
13 preexisting duty
14 past consideration
15 *value ≠ consideration*
16 mutual **rescission** (i.e., new contract) versus unilateral **rescission** (i.e., equity)
17 illusory promise
18 **requirements contract**
19 **output contract**
20 accord and satisfaction
21 liquidated debt versus **liquidated damages** (see p. 345)
22 **promissory estoppel:**
23 a clear and definite promise inducing a
24 reasonably foreseen justifiable and detrimental reliance when
25 justice served by enforcement
26
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29 **CHAPTER 13**
30 all USA law turns on knowing and voluntary: capacity is the knowing part of contracts
31 **capacity:** the *ability* to grasp the natural consequences of one's actions
32 *note: this is not knowing, it is the mere ability to know*
33 capacity: crime > contract > tort > wills
34 objectively have capacity upon reaching the **age of majority:** in NEB at age 19
35 rebuttable presumption of capacity
36 **minors:**
37 emancipation
38 necessaries
39 disaffirmance (i.e., voidable)
40 **restitution,**
41 but magnitude
42 (as is [*majority rule*] at time return v. value at time of transaction)
43 tort (e.g., fraud) versus contract
44 ratification
45 **intoxication:** objective loss of a capacity: involuntary versus voluntary
46 **incompetence:** objective loss of capacity: 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
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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)

- 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
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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

- 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)
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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
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18 **CHAPTER 20**
19 common law versus civil law
20 precedence and the separation of powers
21 Uniform Commercial Code:
22 Art. 1 definitions; Art. 2 sale of goods (2A leases);
23 Art. 3 negotiable instruments; Art. 4 banking system; Art. 5 letters of credit;
24 Art. 6 bulk transfers; Art. 7; documents of title (e.g., warehouse receipts);
25 Art. 8 investment securities; Art. 9 secured transactions
26 amendments updating UCC effective in Nebraska January 1, 2006
27 (e.g., electronic commerce per UETA *record* replaces *writing*)
28 **goods** = tangible and movable
29 versus sale of service: **predominant nature of the transaction**
30 sale = pass title from seller to buyer for a price; lease = sells right to possess
31 **consumer** = natural person purchasing goods primarily for personal or household use
32 **merchant** =
33 [1] deal in goods of that kind (i.e. reason to know; or
34 [2] hire an agent who is a merchant; (i.e., vicarious knowledge) or
35 [3] hold self out as a merchant (i.e., estopped to deny knowledge)
36 UCC is your default contract.
37 you may disclaim all but 1-202 (19) and part of 2-318
38 **may not disclaim good faith.**
39 **may not disclaim personal injury from consumer goods.**
40 good faith: *recall*: C.L. consumer; UCC consumer; merchant; fiduciary
41 **open terms**: UCC focuses upon objective intent and reasonably certain terms of
42 contract;
43 supply all missing terms with *good faith measured commercially reasonable*
44 *terms*
45 **but, must have quantity specified**
46 merchant's firm offer: signed writing creates option contract

- 1 acceptance via shipment of **conforming goods** or
2 via shipment of nonconforming goods,
3 **but**, counter offer via shipment of nonconforming goods with reasonable notice
4 that shipped as an **accommodation** (see, **cure**, p. 427)
5 *UCC rejects the Mirror Image Rule*
6 non-merchants do not make a counter offer if make an definite acceptance;
7 merchants add **additional terms**
8 that do not material alter (e.g., expressly limited; timely objection) the
9 offer
10 are included in the contract
11 contract **modifications** made in good faith do not require new consideration;
12 but: may expressly require a writing,
13 but: writing required if consumer's contract with a merchant is being modified
14 Statute of Frauds
15 \$5,000 sale of goods (if leased goods, then \$1,000);
16 *merchant's 10 days silence* following receipt of signed written contract *equals a*
17 *signature*
18 no writing needed for
19 specially manufactured goods; admits in pleadings; or partial performance
20 interpret the contract per
21 express terms, course of performance, course of dealings, usage of trade
22 unconscionable contracts: **reform** versus **sever** versus **void**
23 **CISG**: no Statute of Frauds; keeps (heart of) Mirror Image Rule; must have price;
24 silent on choice of law, forum, venue, and language; use a *Force Majeure* Clause
25
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28 **CHAPTER 21**
29 **insurable interest**, see p.420 and p. 990
30 **title** is easy to define and very difficult to locate:
31 seller's physical delivery to buyer
32 **identification** is both easy to define and difficult to locate:
33 goods are in **existence and** are **designated** by the seller
34 fungible (i.e., homogenous) goods: tenants in common to the undivided entire mass
35 shipment contracts (i.e., hands of
36 carrier); destination contract (i.e., location)
37 delivery without movement of goods:
38 documents of title
39 sales by non-owners
40 void title creates void title:
41 e.g., fraud in the execution (or inception)
42 voidable title creates a voidable title:
43 e.g., fraud in the inducement
44 plus good faith purchaser for value w/o knowledge
45 **entrustment rule** true owner entrusts goods
46 to a merchant who deals in goods of that kind

- 1 and buyer in the ordinary course of business
2 buys in good faith, w/o knowledge, & for value **obtains good title**
3 **risk of loss** passes not upon title;
4 rather risk of loss passes upon identification plus delivery
5 consumer buyer: seller's front door, unless ...
6 merchant buyer: merchant seller's back door, unless ...
7 note the difference between a risk of loss and the risk of loss
8 **bailment**: transfer of possess (and possibly use) see, p. 951
9 conditional sales:
10 sale or return (e.g., consignment);
11 sale (really an offer) on approval
12 bulk transfer: not made in the ordinary course of business
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16 **CHAPTER 22**
17 **good faith**: *recall*: C.L. consumer < UCC consumer < merchant < fiduciary
18 both performance and enforcement of UCC contracts implemented in good faith
19 lack power to disclaim UCC good faith
20 perfect tender and conforming goods
21 UCC, as does the common law (C.L.), requires **perfect tender** but
22 **cure** = right of seller prior to performance due date
23 to remedy non-conforming goods
24 for example,
25 substitution of carriers
26 installment contract: value of whole is substantially impaired
27 foreseeable versus unforeseen contingencies
28 *Force Majeure* Clause v. impractical (x3) v. impossible (x10)
29 partial performance
30 destruction of identified goods
31 good faith:
32 **Right of Assurance**:
33 if reasonable grounds, then may make written demand
34 **Duty of Cooperation**
35 **right of inspection**:
36 buyer has an absolute right;
37 *opportunity* is a condition precedent to duty to pay
38 partial acceptance: non-conforming goods or failure to cure
39 **anticipatory repudiation** may be retracted prior to detrimental reliance: *recall* **cure**
40 **compensatory damages** (see also, p. 343 and 443)
41 difference between benefit of the contract and market price, plus overhead
42 include UCC incidental damages
43 which *include as a matter of law reasonably foreseen lost profits*
44 **right to cover** is a means of discharging duty to mitigate damages
45 enter market for substitute performance
46 parties can agree to exclusive remedies,
47 otherwise no **election of remedies**

- 1 **CHAPTER 23**
2 employment, bailment, warranty, license: each can be, but need not be, a contract
3 generic implied warranties:
4 good title; no liens; *no infringements*:
5 may expressly disclaim (e.g., quit claim deed)
6 **UCC2 express warranties:**
7 affirmation of fact (e.g., sample or model) that is the basis of the bargain
8 but, opinion: puffery; value; and expert's opinion
9 **UCC2 implied warranties**
10 **merchantability:**
11 reasonably fit for ordinary purposes
12 (i.e., pass without objection in the market)
13 if food,
14 then predominate nature of the transaction is goods
15 **fitness for a particular purpose:**
16 seller **knows** of buyer's reliance
17 federal Magnuson-Moss Warranty Act:
18 IF: [1] commerce, [2] consumer product, [3] written;
19 THEN **full** or limited
20 warranties may overlap,
21 if conflict, then express > implied; technical > sample > description
22 **disclaimer** of warranties:
23 if express warranty, then express disclaimer
24 if merchantability, then conspicuous (e.g., say "not merchantable" or say "as
25 is")
26 but, disclaimer can be unconscionable
27 e.g., can not disclaim personal injury from consumer product
28 **product liability** (see also, p. 150 and p. 957)
29 tort liability based on negligence,
30 but **privity** not required under UCC
31 tort liability based on C.L. fraud or innocent material misrepresentation
32 tort strict liability,
33 Restatement section 402 A
34 defective condition; business of selling; unreasonably dangerous;
35 physical harm; proximate cause; not substantially changed
36 UCC strict liability for products 2-318 *options A, B, or C*
37 who and what is reasonably expected?
38 **defects:**
39 manufacturing;
40 design;
41 labeling (e.g., of latent defect)
42 assumption of the risk versus foreseeable misuses
43 market share liability
44 statute of limitations versus statute of repose