

Determining What Type of Contract

What Law Governs

Common Law - applies to **real estate** and **services** contracts. Insurance, intangible assets, and employment as well. If the contract is for both the sale of goods and for services, the dominant element in the contract is controls.

UCC applies to the sale of **goods and securities**, even if it is only one good sold by individuals.

Goods are **moveable tangible** items that are **identifiable** at the time of contracting.

Mixed Deal (service and goods): **Whichever** contract is **predominant**.

All or Nothing Rule unless K divides payment between goods and services --- then apply common law to the services and UCC to goods.

Merchant

A merchant is a person who **regularly deals** in goods of this kind or who, **by his occupation** has some **special skill or knowledge** as to these goods. A merchant must act in good faith in every transaction concerned and may be cause to avoid a sale in which it is absent.

Elements:

- 1) **Regularly deals**
- 2) **by his occupation**
- 3) **special skill or knowledge**

Formation

Offer

Outward manifestation of present contractual intent communicated to an identified offeree containing definite and certain terms. Definite and certain terms break down by: (Quantity; Time; Identity of Parties; Price; Subject Matter)

Missing price term: required under common law; not required under UCC

Vague/Ambiguous term: no contract

Requirement Contracts: quantity term not required; increases must not be unreasonably disproportionate to previous requirements

Price Quotations/Advertisements: generally, not offers UNLESS in response to a specific inquiry, a reward, or specifies quantity and who can accept
Preliminary negotiations is not an offer.

Elements: 1) Outward manifestation, 2) present contractual intent, 3) communicated, 4) identified offeree, 5) containing definite and certain terms.

Irrevocable Offers

Option Contract w/ Consideration

Promise to keep offer open for a **certain amount of time** if no time stated then **reasonable amount of time**. It must be supported by **consideration**. If there is no consideration, then not a valid option contract.

Elements: 1) Promise, 2) Certain amount of time, 3) No time stated then reasonable time, 4) **Needs consideration**

Example: Land Contract/Rent to Own where somebody has been paying rent on time, the offer to purchase at the initial agreed upon price is never revocable as long as the rest of the bargain is fulfilled.

Merchants Firm Offer (option contract type)

Writing signed by a merchant who gives **assurance** that the offer **will remain open** for the **time stated if no time is stated then reasonable amount of time**. Cannot be revoked for a reasonable time up to 3 months. If time stated then cannot be revoked for that time. If they don't revoke it after 3 months the offer can still be accepted. Don't need consideration.

Elements: 1) **Writing signed by a merchant, 2) assurance will remain open 3) For time stated /no time then reasonable**

Merchants are bound by the law of merchants because they are professionals who regularly deal in the trade of their type of goods and the exigencies of business require the differences.

Detrimental Reliance (option contract type)

Must be **reasonable** reliance and **foreseeable**.

Elements: 1) **reasonable 2) foreseeable**

Example: If a P is in an Option Contract with a D and foregoes other opportunities of a similar kind to the option in the option contract, this is an example of detrimental reliance on the option and it therefore makes the option contract offer an irrevocable offer.

Unilateral Contracts - start of performance

Start of Performance on Unilateral Contract (irrevocable for reasonable time to complete performance; preparation for performance is not sufficient).

Example: D promises to pay \$500 if P paints fence white. P goes to truck, grabs paint bucket and brush and begins painting fence white. D comes out to say “wait, no, nevermind”. offer is irrevocable because of start of performance.

Termination of Offer

Lapse

Offer remains open for time stated or for a reasonable time. In face-to-face negotiations, offer will terminate when they walk away from it.

Lapse of time operates to terminate an offer in which the intended recipient does not respond to it within the time stipulated therein or within a reasonable time.

Revocation

Offeror communicates to the offeree that it is no longer willing to be bound to the offer. It must be done before the offeree accepts the offer. The revocation is also only valid if the offer was not an irrevocable offer in the first place, those types of offers must be changed by new benefit or detriment on the other side of the equation of the bargain - counteroffer.

Indirect Revocation

Offeree receives true and correct info from a reliable source that the offeror no longer wishes to be bound to the offer. The offeree must obtain reliable information that the offeror has taken action showing the change of mind.

Rejection

Offeree communicates to the Offeror that it is rejecting the offer. Counteroffer is a rejection and new offer. Conditional acceptance is a counter offer.

Additional Terms

Common Law Mirror Image Rule: Counteroffer is treated as rejection.

UCC: generally treated as an acceptance (additional term becomes part of contract If both parties are merchants, UNLESS it **materially changes** the offer or the offeror objects to the change; if one or both of the parties are not merchants, the additional term must be separately accepted/rejected).

Gilbert Summary of UCC Mirror Image Rule: “a definite and seasonable expression of acceptance or a written confirmation that is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.”

Death/Incapacity/Destruction/Supervening Illegality

Terminates (UNLESS there is an Option or start of performance on unilateral contract). This does not apply to options, at least when the performance of the decedent themselves as an individual was not an essential part of the contract. The option is still part of the estate.

Acceptance

Requirements: Must know of offer; must be person to whom offer was made (BUT, Options can be assigned). Unequivocal assent to the terms. UCC any reasonable means.

Additional Terms – UCC – Allowed, CL – Mirror Image Rule.

Acceptance Methods

Bilateral Offer - accepted by promise to perform.

Unilateral Offer - acceptance by complete performance.

-(offer irrevocable by start of performance)

Be aware of grumbling acceptance: Accept terms of contract while complaining about them.

Inquiry as to terms- merely asking about terms of offer no rejection.

Shipment of wrong goods: operates as an acceptance and breach, UNLESS there is an accommodation letter (i.e., explanation, which operates as a counteroffer with no breach).

Offeree is silent: not acceptance UNLESS offeree indicates otherwise.

Example: If the relationship between the parties is such that it is not expected that the offeree reply, silence by the offeree may constitute acceptance. Another exception would be where the offeree readily understands that silence or a failure to respond means acceptance of the offer.

Rewards: Requires knowledge of offer before performing act.

Exception: Police performing already bound to perform duties under color of law.

UCC - Battle of the forms - Dealings between merchant becomes part of agreement. Different Terms never become part of the contract, unless offeror expressly assents to the terms in writing. Offeror Master of the offer. Typically, these so-called battles of the forms occur when a buyer and seller of goods exchange pre-printed order forms with their own different terms on the back and then proceed with the transaction without ever signing any final contract or reaching agreement on the terms of the deal. If a dispute later arises, how it gets resolved will depend in part on whether the parties involved are considered merchants under the UCC.

Knock Out Rule - Knock out different terms that alter the agreement. A rule courts apply in cases of conflicting contract terms, under which, if an expression of acceptance contains terms that are additional to or different from those in the offer, the conflicting terms in both the offer and acceptance are knocked out of the contract and replaced by UCC gap-filler provisions.

Mailbox

Acceptance effective upon dispatch, contract formed whether reaches offeror or not.

Acceptance/Rejection: Acceptance sent first then rejection. Rejection is received first. Mailbox rule applies and a contract is formed. Exception offeror relies on the rejection.

Rejection/Acceptance: Rejection sent first then acceptance, whichever one gets there first.

Revocation is upon receipt.

Stamp.com Cases:

Thomas: the court concluded that the USPS postmark controls and declined to reconsider the deficiency determination rather than the one day earlier stamp.com dated private postage metered postage printed below it. Thomas v. Comm'r., T.C. Memo. 2020-33 (2020).

Pearson: The above Thomas case overturned Pearson from 2017: The Tax Court agreed with the taxpayer and determined that the **Stamps.com** postage label qualified as a postmark not made by the USPS, concluding that the IRS's construction of its own regulations is entitled to deference. While the court agreed that "a **Stamps.com** postage label does not literally 'mark' the

entry of mail ‘post, ’” it said that the date generated on the label does serve as an indication of the date the taxpayer purchased the postage and generated said label, and that “the envelope containing the petition received by this Court on April 29, 2015, was thus received ‘not later than a time when a document would ordinarily be received if [it] were postmarked.’”

Perfect Tender Rule

If the goods do not conform in any respect the buyer may reject the whole, accept the whole or accept any commercial units and reject the rest.

The buyer must notify the seller of any non conformity and the thought the buyer has the right to reject for any nonconforming defect in general, if contract time remains, the seller has the right to cure.

Buyer may cover and recover the difference between the cost of the cover and the contract price.

Buyer may recover the difference between the market price at the time the buyer learned of the breach and the contract price.

Buyer may recover any incidental or consequential damages.

Buyer may recover identified goods in the sellers’ possession or obtain specific performance.

Provides that in a contract for the sale of goods, the goods and their delivery must conform to the contract in every respect, including the time of delivery. If the goods deviate even slightly from the terms of the contract, then the seller has breached the contract. The buyer may elect to reject or accept the goods in their entirety, or the buyer may accept some goods and reject the rest. The perfect-tender rule is a substantial deviation from the common law.

Consideration

Legally sufficient, bargained for exchange which induces current performance, and is a binding obligation on both parties.

Benefit or detriment of value to either party.

Illusory promises (only one party bound to perform): not valid consideration (look for promissory estoppel).

Past consideration: not valid consideration

Pre existing Duty: not valid consideration, unless need additional consideration, exception is unforeseen difficulty.

Part Payment as consideration for release. - Not valid can go after full debt. Example the payment is dues and you tell them pay me less amount and will release them for the other amount. Once you get payment you can go after the remainder of the balance.

Payment not due is consideration for release if partial payment,

Modification - Common Law need additional consideration. UCC - just good faith. Both need mutual assent and must be in writing if the contract falls under SOF.

Promissory Estoppel

Promissory Estoppel (Detrimental Reliance): need a promise; reliance that is reasonable, foreseeable, and detrimental; AND enforcement necessary to prevent injustice. Use it when there is no consideration. Gets Reliance damages.

Written promise to pay debt barred by legal defense

Written release for breach of sale of goods

Defense to Formation

Statue of Frauds

Contracts must be in writing. **M.Y. L.E.G.S.**

Marriage - Promise in consideration for marriage.

Year - Contracts that cannot be completed in less than one year must be evidenced by a writing to be enforceable.

Land - Contracts for sale of real property or interest therein

Executors Promise - An executors promise to be personally liable for the debts of the estate must be in writing to be enforceable.

Goods - Sale of Goods for \$500 or more.

Surety - Contracts for a surety or to answer for the debt of another must be in writing to be enforceable.

Satisfy Statue of Frauds

Service contract: must have full performance by either party

Sale of goods - ordinary goods: part performance satisfies SOF but only to extent of the part performance Specially manufactured goods: SOF satisfied when seller makes a substantial beginning of making/obtaining the goods

Real estate purchase, sale, lease: full payment of cash does not satisfy SOF (not substantially connected to the land); **part performance by any two:** of payment, possession, and/or improvements will satisfy SOF

Sufficient Memorandum - containing essential terms, signed by the party to be charged (one that you are suing). Applies to all part of SOF.

Written Confirmation - Quantity and Terms will become part of the agreement if merchant fails to respond in 10 days.

Main Purpose Rule: If the main purpose of the promise was to benefit the promisor, rather than the debtor, an oral promise is enforceable against the promisor and the contract is taken out of the Statue of Frauds.

Contract modification: if contract as modified is within SOF, then the modification must satisfy the SOF. Applies to both UCC and Common Law.

Illegality

Illegal subject matter: agreement is void

Illegal purpose: enforceable only by person who did not know of the illegality

Misrepresentation

Misrepresentation: false assertion of fact

As to terms of contract: contract is voidable if the misrepresentation is fraudulent or material AND induced formation of the contract.

As to nature of the contract: void

No duty to disclose, unless half truth or know it to be false.

Duress

Physical or economic compulsion to gain the assent of another.

Unconscionability

Contract is unconscionable if the conditions at the time of contracting are either procedurally or substantively unconscionable.

Procedurally - unequal bargaining power and or absence of meaningful choice.

Substantively - the terms favor one party.

A determination that a contractual term was so procedurally or substantively unfair and offensive that the harmed party should be relieved from its consequences.

Mistake of Fact

Mutual mistake: no contract if both parties mistaken, mistake is to a basic assumption of fact (e.g., subject matter), and mistake materially affects the agreement (not just its value)

Unilateral mistake: not a valid defense when one party is mistaken to the terms. It is a valid defense if other party knows or should have known of the mistake, courts grant relief to mistaken party.

Transcription Error - Scriveners Error

Modification

CL - Need mutual assent and new consideration, must be in writing if within the SOF

UCC - No consideration required as long done in good faith and mutual assent. Need to be in writing if contract falls within SOF.

Parole Evidence

Prior written, oral or contemporaneous oral agreements that contradict, vary or modify the terms are inadmissible if the written contract is intended as a complete and final expressions of the parties.

Integration

Partial Integration – written and final but does not include everything.

Complete Integration – written and final and complete, length of the contract and the more it looks complete the more it will be viewed complete.

Merger Clause – Clause says this is the complete and final agreement and is highly persuasive

Exceptions to PE

Allowed to show Defenses to formation, Explaining earlier agreements (Partial integration), Establishing subsequent agreements, Separate considerations, Existence of condition precedent,

Naturally omitted terms, course of dealing, performance, dealings and explain ambiguity in the term or meaning of the term.

Delivery Obligations

No Agreed Delivery Place

Then it is the seller's place of business, unless both parties agree to a different place.

Agreed upon by Common Carriers

Shipment Contracts - Seller completes delivery when: 1) Delivers to common carrier, 2) Makes reasonable arrangement for delivery, 3) Notifies buyer

Destination Contracts - Seller completes obligation when he delivers goods to buyer.

Risk of Loss

Contract is formed and before the buyer receives the goods (meaning while obtaining or making them) and goods are damaged or destroyed at no party's fault then the contract is avoided and discharged.

If loss is partial buyer can inspect and accept: whole, partial, reject all.

Shipment Contracts - If seller delivers to common carriers then buyer assumes risk.

Destination Contract - Seller assumes until buyer receives the goods.

No Agreement - Seller is a Merchant - seller assumes ROL until buyer takes receipt. **Seller not Merchant** - Seller assumes risk until tenders delivery (pick up or notifies)

Warranties

Express Warranties

By words (but puffing/sales pitches are OK) OR by use of model/sample

Implied Warranty of Merchantability

fit for ordinary purposes; seller must be a merchant of goods of that kind

Implied Warranty of Fitness for a Particular Purpose

buyer must rely on seller to select suitable goods; seller must have reason to know of the purpose

Limitations on Warranty Liability

Disclaimer: effective to waive implied warranties only

Limitation of Remedies: effective for express and implied warranties UNLESS unconscionable at time of contract

Covenants and Conditions

Covenant

Absolute duty to perform - failure to perform is a breach.

A contract term that a party to the contract has a right to enforce against the other party.

Condition

An event that determines if and when a duty either arises or is extinguished.

Expressed

Either orally or written. (Time of the essence, Architect cert.)

Implied

(Called implied in fact conditions)

Are those to be enforced from evidence of the parties intention.

Constructive Conditions

Conditions that are read into the contract by the court without regard to the parties' intention in order to ensure that the parties receive what they bargain for. Constructive conditions may relate to the time of performance, i.e. which party performs first.

Condition Precedent

- A condition precedent is an event that must occur before a duty arises.

Condition Concurrent

- A condition concurrent occurs when both parties' duties arise at the same time

Condition Subsequent

- A condition subsequent occurs after a duty has arisen and refers to a future event

Condition Satisfied or Excused

(Swap Dipe)

When all conditions have either been excused or satisfied, then all parties will be under an absolute duty to perform.

Substantial Performance

Purpose of the contract is accomplished. Substantial Satisfaction - Performance meets the essential purpose of the contract.

Waiver

Party's voluntary relinquishment of a right, can be by conduct, can retract unless detrimental reliance.

Anticipatory Repudiation

A contract-law principle that consists of a breach of a contract prior to its completion. "An anticipatory breach of a contract—also known as an anticipatory repudiation—'can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.'"

Must be unequivocal, not just an expression of doubt.

It applies only if there are executory (unperformed) duties on both sides of a bilateral contract. Anticipatory repudiation gives the non-repudiating party four alternatives:
treat the contract as totally repudiated and sue immediately;
suspend his own performance and wait until the performance due date to sue;

treat the repudiation as an offer to rescind and treat the contract as discharged; or ignore the repudiation and urge performance.

Repudiation may be retracted until the non-repudiating party has accepted the repudiation or detrimentally relied on it (UCC 2-611).

Prevention Doctrine

- Where a party wrongfully prevents or hinders the occurrence or happening of the condition.
- **Definition:** A principle by which a party who materially contributes to the non-occurrence of a condition precedent is deemed to have waived the condition.

Divisibility

The performance by each party is divided into two or more parts;

The number of parts due from each party is the same; and

The performance of each part by one party is agreed to be the equivalent of the Corresponding part from the other party.

When all conditions have either been excused or satisfied, then all parties will be under an absolute duty to perform.

Impossibility

Impossibility of Performance - When it becomes objectively impossible to perform. Must go through FUC. Foreseeability, Unavoidable, Clear and Certain.

Prospective Inability to Perform

A party has reasonable grounds to believe the other party will be unable or unwilling to perform when performance is due.

innocent party may demand adequate assurances of performance.

innocent part may suspend her own performance until she receives these assurances.

if these are not forthcoming, she may treat the failure as a repudiation.

Retraction is possible, but may be ineffective if the other party has changed her position in reliance on the prospective failure.

Estoppel

Based on Detrimental reliance. Detrimental reliance is a change of position in reliance upon reliance upon words or acts which a reasonable person would so understand.

Discharging the Contract (Im Fr Sandi)

Impossibility of Performance

After the contract is entered into, due to an event, performance is objectively impossible to accomplish. Must ask is it foreseeable, Unavoidable, Clear and Certain (FUC)

Modification

Change in terms. CL - requires mutual assent and consideration. UCC - If in good faith and mutual assent. SOF contract must be in writing.

Frustration of Purpose

Supervening act that was not reasonably foreseeable at the time of formation which almost completely destroys the purpose of the contract. Must ask is it foreseeable, Unavoidable, Clear and Certain (FUC)

Recession

Mutual agreement by parties to terminate the contract.

Substituted Contract

Second Contract that alters the first Contract

Accord and Satisfaction

Requires additional consideration. Accord is the agreement and satisfaction is the performance.

Novation

An agreement by all parties to extinguish contractual duties between the original parties and replace them with a new contract.

Defenses to Formation

Siim Dum (Statute of Frauds, Illegality, Incapacity, Misrepresentation, Duress, Unconscionable, Mistake).

Implacability

Extreme and unreasonable difficulty that was unanticipated. Only under UCC and a minority of jurisdictions.

Breach

Major

Non breaching party does not receive the substantial benefit of his bargain.
Excuses injured party's counter-performance and allows right to damages

Minor

Must continue performance, but can sue for damages -- P gets substantial basis of his bargain.

Determining minor or major breach.

The amount of benefit received by the non breaching party.

The adequacy of compensation for damages to the injured party.

The extent of part performance by the breaching party.

Hardship to the breaching party.

Negligent or willful behavior of the breaching party.

The likelihood that the breaching party will perform the remainder of the contract.

Third Party Rights

Third Party Beneficiary

Intended third party beneficiaries are usually named in the contract, the performance runs directly to them or the performance by the promisor benefits a third party, and there is a relationship between the third party beneficiary and the Promisee.

Incidental third parties have no rights.

Creditor Beneficiary – the person becomes a third party beneficiary to satisfy an underlying obligation by the promisee to the third party beneficiary.

Donee Beneficiary – the person becomes a third party beneficiary because of a gift from the Promisee to the third party beneficiary.

Third party's rights will vest if the third party is asked to assent to the contract terms, the third party changes their legal position in reliance on the promise, or the third party sues to enforce the promise.

Third party beneficiaries can sue promisor for enforcement of the third party contract, but only a creditor third party beneficiary can sue the Promisee on the underlying obligation.

A promisor can use any defense against the third party beneficiary that the promisor could have raised against the Promisee.

Assignment

Assignments are generally valid unless they materially alter the obligors duty or risk or unless they are prohibited by law.

Assignee becomes the real party in interest. Obligor must directly deal with assignee once notice is given.

Obligor can use any defenses against assignee that could have been used against assignor.

More than one assignment of the same right.

- Revocable assignments are revoked by subsequent assignments

- Irrevocable assignments compete first in time, first in right.

- Unless subsequent assignee takes without notice of prior assignments and gets judgment, payment, token chose, obtains a novation or estoppel.

Delegation

Delegation of duties is permitted except where the duties involve personal judgment and/or skill or where the delegation would substantially change the obligee's expectations.

Obligee must accept performance from delegatee.

Delegator remains a surety for delegatee.

The obligee may sue the delegator and may sue the delegatee if the delegation was for consideration under a third party promise with the delegatee being the promisor and the obligee being the third party beneficiary.

Remedies

General

Expectation damages (“benefit of the bargain”) They include:
market price minus K price;
cover price minus K price;
K price minus party’s savings by not performing (profit)

Consequential

Damages given if at the time of Contracting Defendant could have foreseen and must be reasonable, certain and unavoidable.

Liquated

Set at the time of contracting, Reasonable damages not a penalty, the number would be difficult to ascertain at the time of contracting.

Reliance

Damages awarded for losses incurred by the plaintiff in reliance on the contract.

Rescission

Purpose: To cancel a contract for lack of true consent.

Grounds: It is done if there is a mutual mistake, Unilateral Mistake, Misrepresentation.

Effect: Releases parties from contract.

Restitution

Purpose: Obtain the value of the benefit and Used to prevent unjust enrichment

Grounds: It is done if there is a mutual mistake, Unilateral Mistake, Misrepresentation.

Effect: Parties bound to the contract, but terms are the ones parties intended.

Reformation

To conform a writing to the parties true agreement.

Specific Performance (must go through all of the items)

Clear and Definite Terms (Valid Contract)

Conditions are excused or satisfied or prepare to satisfy.

Inadequate Remedies - Money damages are not sufficient. Property is unique. Irreparable harm or injury. Multiple lawsuits.

Mutuality of Performance - Both parties can perform.

Feasibility of Enforcement - The courts can enforce the order and force the parties to comply. Its not outside the jurisdiction or difficult for them to enforce. If it is sold to someone else then courts cannot accept.

Defenses

Unclean Hands - where the party seeking specific performance is guilty of wrongdoing in the transaction.

Laches - The claim was brought to late and the delay would prejudice the defendant.

Bona fide purchaser - sold to a third party who purchased for value in good faith.

SOF - Any SOF defenses.

Waiver - Plaintiff waived or relinquished the right.

Formation issues - Contract was not formed properly.

Misrepresentation - Contract was induced by misrepresentation.

Injunction

I Put Five Bucks down

Inadequate Remedies

Money damages are not sufficient. Property is unique. Irreparable harm or injury. Multiple lawsuits.

Property Right

Plaintiff must have a property right that he is seeking to enforce. Real Property or even a contract.

Feasibility of Enforcement

Court must be able to enforce. It is not too difficult for them to ensure that the parties perform. Look to see if it is out of the courts control.

Balancing the Hardship

Balance the hardship to the Plaintiff. Must be greater hardship than the Defendant.
Balance the hardship to the defendant. Don't need to do if the conduct is willful or intentional.
Court will consider hardship to public.

Defenses

Unclean Hands - where the party seeking specific performance is guilty of wrongdoing in the transaction.

Laches - The claim was brought to late and the delay would prejudice the defendant.

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SOF - Any SOF defenses.

Waiver - Plaintiff waived or relinquished the right.

Formation issues - Contract was not formed properly.

Misrepresentation - Contract was induced by misrepresentation.

Duty to Mitigate

Avoidable Damages (Rule of Mitigation): can't recover damages party could have reasonably avoided
Punitive damages: not generally recoverable.

Is a natural way of some people to keep fighting to avoid loss and of some people to be offended and let damage occur, but it is only right to avoid more damage.

UCC Article 2

UCC Monetary Damages Under Article 2: awards expectation damages for breach.

Buyer's Damages: buyer can get [Cost to Cover – Contract Price] or [FMV – Contract].

Seller's Damages: seller can get [Contract – Market Value] (at time seller learned of breach).

Lost Volume Seller: gets lost profits from the sale.