

Contracts
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3 Bases of adjudication:

1. Enforceable Agreement?

Requirements:

1. Offer

2. Acceptance

3. Rule of Recognition: (Is the agreement legally enforceable?)

Consideration*

or Promisory Estoppel

[Defense]*

2. Breach? (Did at least one party fail to perform?)

When & degree of breach?

anticipatory breach

material breach

perfect tender

3. What is the Remedy?

*Public policy considerations (enforce contracts for moral reasons or economic efficiency)

I. Enforceable Agreement

A. Agreements are enforceable only when they contemplate an exchange between the parties.

1. Promise to Make a Gift → not enforceable

2. Promises for contracts/exchange → legally enforceable

a. Purely executory contract

When neither party has performed & has only exchanged promises.

b. Detrimental reliance

When a party has changed his behavior in response to a promise & suffered harm in reliance on promise.

Contract Formation & Interpretation

?Did Defendant make an offer?

?What is an offerer's right of revocation prior to acceptance?

?What constitutes a revocation?

1. An offerer may revoke his offer at any time prior to offeree's acceptance

2. option contract

A. Mutual Assent

1. subjective: meeting of the minds - emphasis on what parties know

P could have protected self w/ *option contract* (or show that was an option contract)

-purchase option, give \$ in bilateral exchange to keep option open.

→limits D's power to revoke offer

2. Objective Assent

→*Perceived intent* by a reasonable person (offeree)

what a reasonable man would have thought or should have known.

3. Defining Offer & Acceptance:

→*Terms of acceptance has to mirror terms of offer*

a. Offer

1) Preliminary Negotiations

→All terms have to be made w/some specificity to be considered an offer (price & quantity)

-common law vs. UCC

UCC = markets

pro-contract

pro-transactions

→but, commercial sale of goods among commercial entities vs. individuals - imbalance of power; makes it harder to enter into contracts & impose liability on others.

→*Objective vs. Subjective Standard*

Reasonable Offeree: reasonable person as ordinary person (vs. contracts professor):

1. Offeree in context (as contracts professor) →protects offeree

2. Abstract Offeree (reasonable person as represented by jury)

→protects offerer from being held liable/bound, when offeree is of below average perceptiveness

3. Perceived Offeree (how offeree appeared to offerer)

- different standards of care depending on perceptions of offeree

→protects offerer from being held liable/bound, when offeree is of below average perceptiveness

→*evidence*: include or exclude, depending on 1,2,3.

- if no difference between offeree in fact, appearance, abstract reasonable person →1,2,3 does not make a difference

- if offeree is, appears to be more/less shrewd than abstract person →1 vs. 2 argument

-if offeree appears to offerer to be more/less shrewd than abstract person & doesn't appear that way in trial as fact finder →1 vs. 3 argument

→Contingent on *communication* - signals perceived may depend on "culture"

- "cultural defense" - response would have been normal in other cultures (ie, urban violence defense)

-burden on offerer

2) Writing

→Once the parties' minds have met and a contract is formed through exchange of correspondence, the contract is enforceable/binding, even in the absence of writing.

b. Acceptance

1) *Acceptance by Correspondence - the "Mailbox Rule"*

- At the point of contract formation, when contract negotiations are not simultaneous, there is a single decisive moment when the offerer can no longer revoke and the offeree can no longer reject the offer.

→Deposited Acceptance Rule, b/c

1. Offeror controls medium /Default - can unilaterally control terms of acceptance by specifying time or means of delivery.
 2. "Loss of control" not clearly primary rule
 3. Offeror has already manifested assent.
 4. Preference for contract formation (early vs. later)
 5. Offeree can begin to perform/rely
 6. No option contracts w/o consideration.
 - Once an offeree accepts, offeror is held to perform & Offeree is not held to be bound until offeror receives his acceptance.
- Option contract - offeree wants option to perform/not
 offeree pays to hold offeror's performance by holding goods.
 offeree is not bound to perform - pays for option to perform.
 offeree can withdraw acceptance
 (like putting clothes on hold, but paying for that option)
- Norm: Most legal negotiations are accepted upon receipt (ie, bills)
 →instantaneous (email) vs. non-instantaneous (mail)

2) *Acceptance by Silence*

- Generally, acceptance cannot be construed from silence, unless there is a *previous relationship*.
- Where relationship/context exists, law will infer acceptance by silence.

4. *Acceptance by Performance or "Unilateral" Contracts*

bilateral contract - promise for a promise
 unilateral contract - contract accepted by performance
 ¶45 *unilateral contracts* (p.405)

"classic" →Once offerer makes an offer, & the offeree begins to perform →option contract is formed →accept only until offeree fully performs.
 - offeree cannot sue offerer
 -offeree cannot hold offerer to pay (not bound to perform)
 →*until complete performance by offeree*

hybrid →like bilateral contracts, once offeree begins to perform, offerer can no longer revoke.
 & like unilateral contracts, offerer does not have to perform until offeree fully performs.
 →application: enter into unilateral contracts where the *only value to the promisor is in performance*, not the promise. (ie, whoever finds cat gets reward - the only value is in finding the cat)

B. Interpreting Assent

1. Interpretation problems
 - a. failed to supply terms →Court will supply/fill in gaps
 - b. Terms there but ambiguous →Court will interpret ambiguity
- vague - things distributed around norm, but not specific (ie, chicken case - range)
 ambiguous - entirely differently meanings (ie, Peerless)

2. Filling Gaps in Assent

- a. Agreements to Agree
 - Reasonable degree of certainty to be considered a binding contract
 establish length of time (such as, when price will govern)

price

→UCC will supply terms left upon

- 1) facilitating contracts & transactions
- 2) assumption of homogeneity & common customs (industry norms)

3. Interpreting Assent Subjectively or Objectively

a. 4 Communities courts can go to construe meaning:

1. Popular (community at large)
2. Local (industry, region) (Weinberg)
3. Mutual parties
4. Individual party

b. If there is no common meaning:

1. No contract (Raffles, Oswald)

→When minds do not meet on key terms, then there is no contract. (Peerless/Raffles case)

2. Actual Knowledge of Different Understandings (subjective)

→Contract enforced against that party

-make party bargain in good faith.

3. Has reason to know of a misunderstanding (objective - look at surrounding circumstances)

→Contract enforced against that party

-pressure to cure/identify ambiguities in advance to conserve judicial resources.

c. Share a common meaning: (direct conflict between)

1. Implement shared meaning (subjective)

2. Apply the common meaning (objective) (range chicken case)

C. Writing Requirements

Important in enforcement of contract:

1. Parol Evidence
2. Mistakes in Integration
3. Battle of Forms
4. Statute of Limitations

1. Parol Evidence

a. used to contest assent itself or particular term in interpreting negotiations & communications *prior* to written agreements, but not to amendments after written agreements. (?formation/breach/potential breach)

b. General Rule: Writing is purely conclusive of intent, if parties intended the writing to be conclusive.

First Tier: Look only at written document itself to decide if parties intended it to be the final rule.

Second Tier: As part of one written agreement, parties may reference another written agreement. - external evidence ie, one page contract, but w/in contract may reference another general contract (ie, employment manual)

Third Tier: If external evidence is not covered w/in written document, prior agreement is a separate freestanding agreement (broadest interpretation)

ie, contract to teach. + oral agreement to pay for moving expenses, not written w/in contract. Show that did negotiate moving expenses and had a separate agreement for moving expenses.

→Existence of writing may be considered privilege (greater weight) and has priority over prior communications (written - oral hierarchy).

→Preference is to reject earlier, tentative agreements for later, final agreement.

2. Mistakes in Integration.

Where final writing fails to reflect understanding of one or both parties, Court may reform actual written document to reflect intent.

3. Battle of Forms

When form contracts issued for repeat players, whose form will govern transaction?

1. Mirror Image Rule: common law state that a statement of acceptance is effective only if it is a mirror image of the offer and expresses unconditional assent to all of the terms and conditions imposed by the offerer. (*meeting of the minds*)

a. If an offeree responds to an offer by making a *counteroffer* in effect, proposes terms other than those contained in the original offer, common law treats that response as the legal equivalent of an outright rejection.

b. Unless, the offeree manifests a contrary intent if offeree's aim was merely to inquire about the possibility of different terms, counteroffer shall not be treated as a rejection.

2. Last Shot Rule

a. The last person to send the document, their document rules.

b. Problems - can't actually perform, b/c sending forms back & forth.

3. Court favor flexible approach under UCC §2-207 (pp.510-11)

Supply terms now & fill in later: even when terms don't meet, binding.

-Additional proposals are accepted, unless

1. expressly limit acceptance to terms of offer

2. materially alter terms of contract

3. notification of objection to terms

→then, not legally binding

4. Statute of Frauds

Rule: Specify classes of contracts forbidding enforcement, unless there was an written document.

→Led to underenforcement

→Common law exceptions:

1. *Part performance*: one person begins to perform

2. *Estoppel*: where one person relies on agreement to their detriment and the other knows this.

II. Enforceability

A. 2 principles trying to preserve:

1. In cases of discrete transactions, distinguish enforceable from unenforceable

2. Social relations *ungoverned* by legal obligations &

Social relations *governed* by legal obligations.

B. Conclusions of law:

1. Gift vs. contracts

2. Private vs. public

→shifting principles to preserve boundaries

-example: promises between unmarried persons living together in an intimate relationship (Marvin v. Marvin →agreement had legal force; concerns about collapsing boundaries of public & private spheres, where commercial principles are brought w/in private life.)

C. *Rules of Recognition*: why the law should enforce mutual assent of contracting parties: (notes)

1. Will of promisor
2. Reliance by promisee* (promissory estoppel)
3. To prevent unjust enrichment of the promisor
4. Efficiency (maximize wealth & utility)
5. Fairness (just-price rule)
6. Bargain*(the most dominant rule of recognition)

D. Consideration Models:

1. Benefit/Detriment Model
Benefit to promisee and detriment to promisor
2. Bargain Theory

E. *Bargain Theory of Consideration*

1. Section 17 of Restatement - formation of a contract requires a bargain, to which the contracting parties give assent, and a consideration which can take the form of either a *return promise* or an *actual performance*.

- consideration is the *inducement* of the promise and the promise induces the furnishing of consideration.

2. Distinguishing Bargains from Gratuitous Promises

→General rule: promise to make a gift in the future is unenforceable.

3. *Past Consideration*

→*Rule*: Past consideration is not Legal Consideration

→Past consideration for something already rendered does not constitute legal consideration. (Moore v. Elmer - fortune teller case)

-timing problem - bargain has to precede performance/return promise.

4. *Moral Consideration*

→*Rule*: Moral obligation does not equal legal consideration, unless a material benefit is received by the promisor.

-If there had been a pre-existing duty (ie, under status law, head of household has a legal duty to support all those w/in household), pre-existing debt is sufficient consideration. (Mills v. Wyman - adult son not living w/in household)

5. *Action Not Induced*

→If a promise is not induced by the other's actions, then promise is not bargained for and not enforceable. (Glover v. Jewish War Veterans) (Glover v D.C.)

6. *Contract Modification and the Preexisting Duty Rule*

General Rule: Contract cannot be modified without consideration.

→*Pre-existing duty rule*: The performance of an act which the promisee is already bound by contract to perform is not valid consideration for the change that the promisor has apparently agreed to.

Example: Alaska Packers - workers renegotiate contract for higher wages. Superintendent does not have authority to change contract, but agrees to change. →no consideration, b/c workers are not promising to do

more than what they had promised to do w/in original contract. (pre-existing duty).

→ *Unforeseen circumstances exception*: Preexisting Duty does not equal valid consideration, unless there are unforeseen circumstances. (see p.713-14)

Example: Brian Construction - P contracted to remove rubble from excavation. Discovered remains of another building, unanticipated at time of contract, which would require considerably more excavation work than originally though. P asked for additional compensation. D contends that "new" contract not supported by consideration. → unanticipated & functioning market.

→ Fear of economic distortion: (J. Posner)

-once a promisee enters into a contract, promisee is more vulnerable than before the contract existed, which gives the promisor more bargaining power.

-absence/presence of the Market: where there is a market, there is an expectation that people will go to the market to get a remedy; and where there is not a market, promisee cannot seek a remedy.

→ UCC 2-209 (p.714)

→ *Modification of contracts does not need consideration to be binding.*

-Require: 1) good faith
2) protects parties from taking ec. advantage of each other.

-Logic:

1) pro-market → facilitating agreements

2) homogeneous groups bound by agreement

3) Provide long-term relationship between the parties

- If continue in on-going relationship, circumstances will change & necessitate change in contract. UCC permits renegotiation & keep parties together.

7. Adequacy of Consideration

Is the act/promise of sufficient value to constitute consideration?

-Depends upon subjective vs. objective theory of value:

- objective value - prevents from having to look into minds of people.

- subjective value-adequacy of consideration vs. failure of consideration:

- subjective value in consideration at pt. of formation w/o being victim of misrepresentation → adequacy of consideration.

- where active misrepresentation → failure of consideration b/c person is not getting what they think they are getting (defense).

→ Inequality of exchange: depends on who the plaintiff is.

Example: Newman & Snell's State Bank v. Hunter - Deceased owed bank money, but there is no money in his estate. Widow agrees to put in own note that she repay debt, if bank will cancel husband's note. → no consideration. Bank's promise to cancel husband's note is not of sufficient value to constitute consideration, b/c bank's note had become economically valueless & bank did not have legal ability to collect the debt. Widow is the only one who values the note (sentimental value).

F. Promissory Estoppel (detrimental reliance)

Promissory estoppel treats the promisee's reliance as an independent and sufficient basis for enforcement of a contract (alternative to consideration rule of recognition (bargain theory)).

1. equitable vs. promissory estoppel

equitable estoppel (used as a defense) - misrepresentation - when A suffers from B from a misrepresentation, B is equitably estopped from suing you, b/c B had given you misrepresented facts from which A relied upon. A cannot sue B, b/c equitable estoppel is a defense to an action.

example: bank - use equitable estoppel as a defense b/c bank had misrepresented facts & told you that check had cleared and you made checks in reliance of cleared check.

promisory estoppel - (affirmative cause of action) - a promise where A changes her position in reliance on B's promise to A's detriment.

2. Requirements for *promisory estoppel*:

- a. There was a promise
- b. Intent to induce reliance on the promise.
- c. Reliance by the promisee was reasonably foreseeable.
- d. Promisee actually relied to his detriment.

→Restatement § 90 - enforces a promise w/o bargain or consideration.

3. Remedy: Detrimental reliance is a reason for enforcing a contract, and become a cause of action, where the remedy is full expectation damages/economic value of the promise or actual performance when available. (same as remedy under consideration)

4. Advantages of using *promisory estoppel*

- a. explicitly about equity
- b. as safety valve for consideration, where there is no consideration.

example: construction bids
gratuitous promises
promises to convey land
promises of a pension

4. Example: construction bids (Drennan v. Star Paving)

→Consideration Doctrine: No consideration b/c no bargained for exchange - subcontractor had not entered into an agreement w/contractor & had not promised anything in return for entering a bid.

→Promisory estoppel: bid was a binding promise under *promisory estoppel*.

-Intention to induce reliance on promise/bid.

-Reasonably foreseeable - custom of industry, that when subcontractor submits a bid by a certain time, the contractor will include the bid in their whole bid. →custom of community of subcontractor & contractors.

-Contractor relief on bid to his detriment.

→Subcontractor had to pay.

G. Meaning of Performance

1. Implied Duty of Good Faith Performance

a. *Rule:* Implied duty to use reasonable efforts to operate in good faith.

- *J. Posner:* - duty not to operate in bad faith, not necessarily a duty to operate in good faith. As part of the bargaining process, can't take advantage of duress or the bargaining power relationship.

→use *intent analysis* at time of *contract formation*

objective vs. subjective standards:

- the court's defer to business judgment of tenants, absent a showing of bad faith. (commercial leases)

vs. scrutinizing facts in determining whether someone is dealing in good faith.

b. Employment contracts

Rule: Can be fired/quit for any reason or no reason.

1. *Express at-will contract* - specifically says that can be fired/quit for any reason or no reason. → courts may not enforce duty of good faith b/c can negotiate terms of contract for more money.

2. *Implied at-will contract* - does not specifically state.

→ courts will imply duty of good faith

→ Contracts promoting/stabilizing market:

-Defer to business judgment of employers vs. conform to certain social practices.

-Can fire for good reason or no reason.

-Can't be fired for bad reason (don't want to marginalize employees from mkt).

2. Implied Warranties

Rule: Even if parties do not negotiate terms, products still have implied warranties.

a. implied warranties of merchantability - warranty for general use ordinary purposes for which it is supposed to be used.

b. implied warranty of fitness for a particular purpose - warranty for a specific purpose.

c. Standards for Implied Warranty of Fitness for a Particular Purpose

1) Seller must have reason to know buyer's particular purpose

(*foreseeability* - Hadley - protects the seller)

2) Seller must have reason to know that buyer is relying on seller's skill or judgment to furnish appropriate goods.

3) Buyer must in fact rely on seller's skill or judgment (*reliance*)

d. Since implied warranties are default rules, they can be *contracted around*, by:

1) *express warranty* - greater or less protection than implied warranties.

or 2) *disclaimers* - that implied warranties are not applicable.

- but, Consumer Protection Laws cannot be disclaimed.

e. Justifications for imposing implied duties:

1) Intent - Represent duties at time of contract formation

Understood good faith performance at time of agreement

2) Public Policy - to promote certain kinds of behavior

a) *cowboy vision* - encourage efficient breach

-Purpose of the market is to maximize own utilities, and therefore maximize social utility.

-If want good faith can negotiate for it.

- No implied duties of good faith performance

vs. b) *stability vision* -

- For predictability, discourage efficient breach and assume good faith performance.

-Encourage people to enter into contract and rely on assumption that contract will be performed.

H. Breach of Contract

Whether a breach has occurred?

What kind of breach has occurred

Is the breach material or not? → What kinds of remedies are available?

1. Prospective Nonperformance

When can you sue?

1. Breach by Nonperformance - at pt. performance is due

2. Breach by Repudiation - anticipatory breach (before nonperformance)

a. Anticipatory Repudiation

→Renunciation may be treated as a breach of contract & P can elect immediate suit of repudiation or wait until time of performance.

→Repudiation may be retracted before an injured party accepts it or relies on it (where the injured party changes his position on reliance on it, ie. look for substitute contract)

→Repudiation - manifestation by one party that will not/cannot perform some part of obligations.

considerations:

1. role of *willingness*

2. clear expression *by words/conduct*

→There must be a definite and unequivocal manifestation of intent to repudiate. (- ie, request for cancellation is not sufficient to constitute repudiation.)

3. Good faith is no defense/exception

4. Repudiation does not operate as breach, if repudiation occurs after repudiating party has received all of performance due.

-options:

a) suspend own performance

b) sue for damages

-wait to sue when performance is due → for expectation damages.

-at pt of repudiation → sue for restitution

5. *avoidability doctrine*:

-If could have found substitute contract, value of contract is subtracted from expectation damages, calculated back from pt. of repudiation (not at pt. of breach)

- if don't suspend performance, may lead to double liability - won't be able to cover & won't be able to sue for anticipatory breach.

6. public policy interest: stable vision vs. cowboy vision

-stable vision - recognizes anticipatory breach (security interest in future performance)

-cowboy vision - cannot have a breach until performance is due.

→Recognizes *vulnerability* of parties after they enter into contracts, where there are contractual obligations and pre-existing duties that arise at formation until the point of performance. (like pre-existing duty rule, distinguishes between real modifications (unforeseen circumstances) & those forced by market circumstances)

b. Adequate Assurances of Performance

1. 2 prong standard

- 1) *Reasonable* grounds for insecurity (ie, seller is not sure of buyer's performance to pay)
 - 2) *written* demand for adequate assurances
2. Adequate assurances meant to disable efficient breach when a better deal comes along (Tongish - market price increases)

2. *Material Breach*

When rescission is appropriate for a particular breach?

a. Doctrine of Materiality - When is nonperformance material?

→ At what point does the injured party no longer have to perform and can sue for expectation damages? (question of fact for the jury)

→ Nonperformance is material when... (Restatement 241 ¶ p. 1008-09)

1. injured party will be deprived of benefit which he reasonably expected
2. injured party can be adequately compensated for the part of benefit he conferred.
3. party failing to perform/offer to perform will suffer forfeiture/penalty
4. likelihood that party failing to perform will cure his failure
5. extent of behavior of party failing to perform comports w/ standards of good faith

b. *The Perfect Tender Rule:* Cure and Rescission

→ Traditionally, the "perfect tender rule" required a seller to tender goods that conformed exactly pursuant to the contract provisions.

→ But, both common law & UCC began to recognize buyer's right to rescind a contract for sale of goods only where the nonconformity amounted to a material breach of the agreement.

common law: Rescission & Restitution

UCC: Cancellation & Recovery

→ Rights of parties vary depending on where rescission occurs prior or after acceptance of goods:

Prior to acceptance:

1. Buyer may reject for any nonconformity (for sale of goods)
2. Seller can cure; unconditional during the time set for performance.
3. After point of performance, seller has further reasonable time to cure if it believed reasonably that the goods would be acceptable (good faith exception)

After acceptance:

1. Buyer may revoke acceptance only if goods are substantially impaired
2. Buyer has burden of proof.

purpose: police buyers from buying goods & returning
prevent buyer from returning depreciated goods
prevent economic vulnerability of seller

3. Seller has right to cure
-gives buyers incentives to inspect goods before purchase/acceptance

→ public policy consideration:

pro-contract & transaction

vs. on-going relationship between seller & buyer

3. *Substantial Performance Doctrine*

→Proper measure of damages for those breaches of contract that do not justify rescission or where the promisee does not seek rescission (limitation on award of money damages for incomplete performance.)

1. Cost of performance -cost of remedying defect/error(dominant rule)

2. Diminution of Value (*equitable exception*)

Value of property as promised

- Value of Property received

difference in market value

-*Proportionality test*: cost of performance vs. diminution of value

→*Good vs. bad faith* - threshold elements before can get substantial performance.

Rule: Where D willfully and fraudulently vary from terms of construction contract, he cannot sue and have benefit of equitable doctrine of substantial performance.

→Substantial performance encroaches on ability to contract for idiosyncracies

-encourages practicality & prevention of economic waste

vs. sanctity of contract & *subjectivity of value*

III. Defenses to Enforcement

Even though all elements are satisfied (offer, acceptance, promisory estoppel/consideration), defenses can still be brought to destroy enforceability.

A. Kinds of defenses:

1. Incapacity (minority, mental incompetence, intoxicated)

2. Failure of a Basic Assumption

(at pt. of formation, did not have same assumption or meeting of the minds)

3. Improper Means*

B. Obtaining Assent by Improper Means

1. Misrepresentation

effects-based test (not motive-based, where knowledge is required)

→A contract can be rescinded where material misrepresentations of facts that induces another to enter into a contract.

-A misrepresentation becomes material when it becomes likely to affect the conduct of a reasonable man with reference to a transaction w/ another person.

-includes even innocent misrepresentations; does not include *opinions*

→Justifications for Misrepresentation Defense:

1. Cheapest cost avoider (Posner)

2. Reliance (promisory estoppel)

3. No meeting of the minds (will theory)

→vs. Fraud - tort & affirmative cause of action (motive-based test), where knowledge is a requirement.

Legal Fraud:

1. misrepresentation of material fact

2. known to be false (knowledge is not required in equitable fraud)

3. upon which party relied.

4. to his damage

2. Duress

→Complete absence of real consent

a. Improper Threats

→If contract obtained by duress, there is no real consent.

→Depends on Interpretations of definition of duress

a broad: objective standard- external measure of duress

1) Threats →Illegal acts

2) Threats of Imprisonment

b. narrow interpretation:"it must be shown that the will is overcome by an improper and wrongful influence, producing fear which he has not sufficient strength to withstand."

- burden of proof is on P to show that D obtained the contract by threatening to inflict injury. (subjective standard)

b. Economic Duress

→*Rule*: Duress exists when by the *unlawful act* of another is induced to make a contract or perform some act under circumstances which *deprive him of the exercise of free will*.

example: take it or leave it situations

- Hackley v. Headley (1881)- P performed work for D. B/c of economic necessity to avoid financial ruination, P accepted a lesser compensation than agreed to amount & to that which he felt he was entitled to. →Ct did not accept defense of economic duress b/c P accepted amt willingly, albeit reluctantly; ct later voided transaction on grounds of lack of consideration.

→economic duress accepted more in present than in 1881.

example: just-in-time: keep enough to meet daily demands.

→Posner- don't want parties to take advantage of each other.

Yet, all contracts made under some sort of economic duress.

→pre-existing duty rule.

3. Undue Influence

→Lack of capacity to make a meaningful decision

→Persuasion vs. Undue Influence

1. undue weakness of one party and

2. undue strength of another party

→overpersuasion/undue influence

→Factors: (p. 1152)

1) discussion of the transaction at an unusual or inappropriate time

2) consummation of the transaction in an unusual place

3) insistent demand that the business be finished at once

4) extreme emphasis on untoward consequences of delay

5) use of multiple persuaders by the dominant side against a single servient party

6) absence of third-party advisers to the servient party

7) statements that there is no time to consult financial advisers or attorneys.

→if enough factors are present, agreement was made by undue influence.

4. Unconscionability

→at time of *contract formation*, absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. (*gross inequality of bargaining power*) (*effects-based*)

-Cost Avoided - promisee's savings from not performing
volume seller exception **-Loss Avoided** - portion of loss that promisee avoided by other opp.
Net expectation/Profit

1. Loss in Value: (Tongish v Thomas)
 - a. contract price at time of contract formation
 - b. market price at time the buyer learns of the breach
 - c. uncertainty - Damages for a breach are recoverable only to the extent that the injured party's loss (lost profits) can be established with absolute certainty. (reliance interest - expenditures made in preparation for performance or in performance)
2. Consequential Damages:
 - a. Losses caused by D's breach of contract.
 - b. *Foreseeability Test*:
 1. Actual Notice - clear statement
 2. Reasonably foreseeable at time of contract formation.
 - a. foreseeability of loss (typically flows from breach)
 - b. foreseeability by party in breach

(*objective standard* - whether a reasonable person in D's position at time of contract formation, aware of the *special circumstances surrounding* the contract, would have foreseen the particular harm that resulted as a consequence of his breach; less factually intensive)
 - c. *Tacit Agreement* -
3. Incidental Damages

Cover - pay to cover losses (ie, find another buyer)
Costs incurred in trying to avoid loss/future harm by finding substitute for breached contract.
Examples: storage, maintenance, finance charges, insurance
4. Cost Avoided
 - a. Cost saved from not having to perform
 - a. Avoidability of Harm (Maclaine case)
 - b. Burden is on D to show that other options were available
5. Loss Avoided
 - a. Lost Volume seller exception: where a seller has an unlimited supply of goods at his disposal, the subsequent sales of the item is not sufficient to restore the seller to his expected position, since had the buyer performed, the seller theoretically would have profited from both sales.
(Neri)

Avoidability and Mitigation Limitation

 - a. an injured promisee cannot recover damages for losses that, with reasonable effort, he could have avoided after the promisor's breach became known.
 - b. the injured party is under a legal obligation to take reasonable steps to avoid waste & minimize the cost of breach.
6. Contingent on satisfying:
 - a. Foreseeability

- b. No opportunity for substitute on market (volume dealer exception)
- c. Loss in value w/ certainty
→absent, might get lower award.

7. Burden

Chicago - burden on promisee that entered positive contract.

→expenses limited to expenses after K formation.

Anglia - if rational, promisee would have at least broken even.

→award investment expenditure (all \$ spent in preparation, including pre-formation)

d. Contracting Around the Default Rules of Damages

1. Default is incidental & consequential damages & can be contracted around:

a. *disclaimer clause* - promisor is not liable for consequential or incidental damages, even though damages may be foreseeable.

b. *liquidated damages* - default rule to expectation damages.

-amount specified or calculation instructions in event of breach.

c. *arbitration* - default rule to litigation - nonlegal/extra-legal remedy.

2. unequal bargaining positions

default rules set the initial negotiation position of parties.

3. Liquidated Damages

requirements:

1. amount is a reasonable forecast of just compensation at point of formation. (estimation of amt suffered, not actual harm)

2. Harm is difficult to estimate at time of formation.

Examples: video returns, doctor visits

J. Posner - use economic to explain/predict behavior

if the goal is to expedite market, more efficient if the law expedites efficient breach or if rule is in favor of the parties' best interests → favor liquidated damages or penalty clauses.

- penalty clauses also inhibit efficient breach

→Sophisticated parties put in liquidated damages in contract to protect self. (ie, companies)

4. Punitive Damages and Arbitration Clauses

→Where punitive damages are not allowed through legal contract, complainant can seek another system to seek punitive damages, ie, arbitration.

a. Def - Punitive damages are damages awarded beyond the amount to compensate for a harm, intended to punish & deter.

req.: 1) tort committed

2) breach of a fiduciary duty

3) fraudulent, grossly malignant, oppressive/malicious behavior

b. Emphasis on person committing injury & bad effect on society vs. compensatory damages to make one whole

c. Punitive damages are never allow punitive damages for mere breach of contract where private wrong (torts) involved. (Garrity - criminal - left to state to punish)

d. *Federal Arbitration Act* - Federal law preempts state law. If federal policy allows enforcement of an arbitration provision giving arbitrators

- the authority to award punitive damages, then the provision remains enforceable even though it's against state law or policy.
- default rule: arbitrators do have power to award punitive damages, unless specified in contract.
- advantages & disadvantages of arbitration (see notes re: diamond industry)

4. Specific Performance and Injunctions - equitable remedies

- equitable case b/c:

- 1) fairness (no remedy at law)
- 2) seeking equitable remedy specifically
- 3) seek discretion of judge to determine remedy

a. Contracts for Land

- Default rule: specific performance (in court of equity)
 - where the buyer has improved the state of the land to be worth more than the contract price, to deny specific performance and award damages far below the buyer's expenditures in improving the property, the seller would be unjustly enriched.
 - Burden is on D to show uniqueness of land.
- Land as a commodity, affecting market value:
 - if default for monetary damages, where buyer knows that he will not get the land, when a breach does occur, buyer is willing to pay less money.
 - if default for specific performance, where buyer knows he is more likely to get the land, buyer is more willing to pay more to get it.

b. Contracts for Goods

- Default rule: *monetary damages*
- Specific performance, where there is no adequate remedy at law b/c of
 1. *uniqueness* (peculiar, unique or sentimental value)
 2. unavailability of the product (not readily obtainable, due to *scarcity* of good)
 - shows that the good is not just a commodity, & is not purely fungible.
- UCC remedy → market price - assumption of fungible goods
 - assumption that if can't get good, can replace
 - sometimes there is no remedy where no difference btwn mkt & contract prices.
- Note: action for *replevin* - legal remedy - seeking return of goods wrongfully held by someone else. → courts will not award specific performance.

c. Contracts for Personal Services

- Default rule: *monetary damages with a strong presumption against specific performance.*
- Injunction (specific performance):
 - will enforce negative side where injunctions prevent someone from performing somewhere else.
 - Lumley v. Wagner - seek indirect methods of granting specific performance b/c felt responsibility of maintaining good faith of contract.
 - Ford v. Jermon - no injunction b/c question sincerity of performance.

→ Requirements: (like contracts for goods)

1. uniqueness

2. replaceability

→decided by jury on "sufficient" evidence standard

→No labor contracts b/c:

1. monitoring costs of awarding specific performance →?of efficiency
2. indentured servitude (? of morality)
3. judicial hypocrisy - presumption against specific performance if allow court to do indirectly what cannot do directly.

→Duff v. Russell →although *no negative covenant* in contract, court granted injunction b/c breached in *bad faith*.

→13th Amendment and Contractual Freedom (14th Amendment - liberty to contract clause) -Conflicts: (need both for a smoothly functioning economy)

freedom of contract vs. freedom of labor

freedom of contract vs. political freedom (ideologies)

freedom of contract vs. freedom of trade

5. Restitution: - Damage Interest and Cause of Action

Based on *Fairness*

a. Restitution for Breach in Contract

where: 1) losing expectation contract

2) part performance & rescission of contract (Bush v. Canfield)

3) want return of actual goods, rather than monetary damages.

4) repudiation/breach

exception: anticipated repudiation →damages from pt. of breach to pt of K completion.

5) no contract to support agreement

implied or quasi-contract - no agreement is made, but where the court makes one to afford a remedy.

b. Restitution to the Party in Breach

→Even the part in breach is allowed benefits he conferred to employer.

c. Restitution and "Quasi-Contract"

"Quasi-contract" - no formal agreement, but can use *relationship* btwn parties to get restitution.

(functions as a cause of action)

1. implied at law - quasi-contract - no agreement, but bound in a *relationship* such that another has to return benefits conferred.

2. implied in fact - conduct of parties sufficient to confer intent to create an agreement.

d. Limitations

1. cannot seek restitution where efficiously granted/conferred.
cannot force things on will & have it enforced.

example: squeegee guys can't demand \$

2. gratuitous - if benefit conferred w/o expectation of compensation, no restitution order.

example: CPR -gratuitously conferred vs. doctor (quasi-contract)
benefit to family vs. work (private vs. public sphere)

3. Restitution has to be quantified.

net enrichment has to be measurable.

or cost avoided - what have to pay to someone else.

6. *Tortious Interference*

→One who induces a party to breach a contract may be liable to the other contracting party for his damages resulting therefrom, even if a final contract does not exist.

→Liability for knowingly interfering w/an existing contract, where:

1. *Knowledge* of the contract with which he is interfering

- mere knowledge of facts is sufficient

(not nec. full knowledge or appreciate the legal consequences of operative facts.)

2. *Interference*

-act of persuasion or inducement

-just the act of making a better offer is interference (Texaco)

→Arguments:

pro-tortious interference rule: link to efficient breach

against tortious interference rule: stability, predictability, certainty

Themes:

Theories of obligation:

1. welfare - focus on making community better off; all are better off w/ a smoothly based economy.

-efficiency

-more willing to enter into agreements in a stable & predictable market.

2. morality - focus on making better community

-breach in bad faith/no good reason

→vision of professionalism (lawyering)

1. morally neutral

2. moral outrage (exit strategy)

3. moral engagement w/client

w/colleague

w/own conscience

3. Justice - focus on individual rights

Legal Decision-Making

1. Courts vs. Legislature

2. Judge vs. Jury

- a. Allocation of decision-making between judge and jury.
 - jury - expectation model puts restraints on juries (certainty, predictability, stability)
 - judge- responsibility of limiting/instructing juries
- b. Jury - decisions on fact
Judge - decisions on law
- c. fairness vs. morality

3. Judiciary vs. extra-legal sources

- common law - rely on judge/jury
- equity - rely on discretion

family vs. individual

individuals are now given an economic personality w/ interaction w/ market affect different relationship w/ market than others (ie, female actresses)

subjective vs. objective standard

subjectivity in expectation model
objectivity in contract formation

Objectivity

reasonable offerer's interpretation
apparencies
manifestations
expression

Subjectivity

D/Offerer's intent
will
desire
intent

Public policy →focus on promisee & his behavior (what did/fail to do)

- 1. Sources of public policy:
 - a) Legitimacy of courts
 - b) Judicial Resource (expend resources to enforce public interests)
- 2. Enforcement of public policy:
 - a) safety valve - turn to public policy to protect individual interests
 - b) Nothing in existing legal theory to justify rulings
- 3. public vs. private spheres
- 4. To promote certain kinds of behavior
 - a) *cowboy vision* - encourage efficient breach
 - Purpose of the market is to maximize own utilities, and therefore maximize social utility.
 - If want good faith can negotiate for it.
 - No implied duties of good faith performance
 - vs. b) *stability vision* -
 - For predictability, discourage efficient breach and assume good faith performance.

-Encourage people to enter into contract and rely on assumption that contract will be performed.

5. Enforce contracts for moral reasons or economic efficiency:
 - offer & acceptance (rules)
 - consideration (use moral/economic reasons to enforce/not enforce)
 - defenses (2nd way to/not enforce)

Justice's Perspectives:

J. Cardoso

1. Moral vision
2. Promises are binding
 - If you say you are going to perform, should perform & other party expect you will.
 - The right thing to do is to uphold our promises.
3. Law carves out exceptions

J. Holmes

1. Promises are assumed to be unenforceable
2. "pay-or-play" model, regardless of expectations
 - When enter into binding contract, promise to perform or pay for contract (efficient contract)
 - takes morality out of damage calculation.

J. Posner

1. Economics to explain or predict human behavior
2. encourage efficient breach
3. In determining the enforceability of contract modifications, the court should look at duress and economic circumstances, rather than consideration. (fear of economic distortions)
 - Defense/counterargument: *Judicial discretion* as to whether someone is being taken advantage of - prevent parties from taking advantage of each other.
4. Duty not to operate in bad faith, not necessarily a duty to operate in good faith.
 - As part of the bargaining process, can't take advantage of duress or the bargaining power relationship.