

Subject: contracts 2 final outline (with slide...

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(By leslie & prof frykberg in part) contracts 2 final outline (with slide pictures inserted within, credited to prof. frykberg):

CONTRACTS II FINAL OUTLINE (CRUNCHTIME SERIES EMANUELS + REVIEW/SLIDES)

Which Law Governs? UCC or COMMON LAW?

- a. Predominant Purpose?
- b. Hybrid? Is it severable?

FORMATION

Is there a VALID contract?

a. Offer/Acceptance/Consideration/Defenses?

i. Consideration Issue(s):

- 1. See Changes #4: (c) *Modification* (§2-209) Definition: A modification is a contractual agreement by the parties to change the existing K, requiring a second formation discussion. UCC – §2-209 – *new consideration* because good faith requirement / has to be in writing unless there is a waiver in writing, CL – pre-existing duty problem / oral modification is okay
- 2. Assignments → is a present transfer, no consideration is required.

b. Exception to *Privity* Requirement:

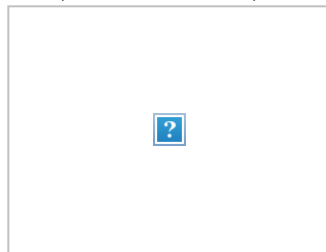
i. **Third Party Contracts:**

- 1. A (promisee) asks B (promisor) to promise C (third party)
- 2. Were they named parties? (*Intended or Incidental?*)



ii. **Assignment:** When a party to an existing K transfers to a 3rd person “her rights” under the K.

- 1. A (assignor) assigns his rights to C (assignee) from original B-A contract, B (obligor) is now obligated to perform duties to C now. C gets rights of A and receives performance from B.
- 2. No new consideration required, b/c present transfer of rights
- 3. Once obligor receives notice **MUST** perform to assignee (if she performs to assignor matters she was given notice, before/defense, after no defense of payment against assignee) (p.113)



iii. **Delegation:** When an existing party appoints a 3rd person to “perform her duties” under the K.

- 1. C (Delegatee) UP-TOP, promises to perform A’s (Delegator) original promise to B (obligee) Meanwhile, bottomleft, A, delegates his duty (of performance to B) to C.



c. ASSIGNMENTS (Enforceability)

i. C/L *does not* have to be in writing (SOF not applicable!!)

a. *Exception*, UCC 9-203 3rd party right to receive payment, not enforceable unless assignor has signed a “security interest.”

2. *Gratuitous assignment*: enforceable, unless:

a. *Revocable*: If assignor (1) dies, (2) makes a subsequent assignment to a different person, or (3) gives notice to either assignee to obligor that assignment has been revoked.

b. *Irrevocable*: If symbolic document (“I am assigning you this policy”), assignor puts it in writing and assignee relies to his detriment and reliance was reasonably foreseeable by assignor, or if obligor prevents assignee payment or performance.

3. *NO ASSIGNMENT if*: (1) materially alter/change obligor’s duty (2) personal service Ks, (3) increase obligor’s risk (insurance policies), (4) impair obligor’s chance of return performance, (5) clause prohibits assignment

4. “*No Assignment Clause*” enforceable unless (aka Ex. Assignments that ARE):

a. Assignor has fully performed, right to payment, for contracted-for work

b. Right to sue for damages from breach may ALWAYS be assigned

c. If says “can’t assign K” (no mention of rights) interpret it as barring “delegation” not assignments.

d. If someone violated “no assignment clause” assignment STILL effective, just obligor liable for right to damages against assignor for breach.

e. UCC right to payment, when assignor signed a “security interest” –anti-assignment clause is automatically invalid.

ii. *Assignee v. Obligor*

1. “Assignee stands in the shoes of his assignor”

2. *NOTICE & Modifications of Assignments

a. assignee and assignor FREE to MODIFY *anytime* BEFORE obligor has received notice

b. AFTER NOTICE (of assignment) given to obligor, can MODIFY *only if* assignor has fully performed.

iii. *Rights of Assignee v. Assignor*

1. If the obligor is unable to perform, or in some other way the assignee doesn’t obtain the value expected from the K, the assignee may be able to recover against the assignor.

2. Gratuitous promises: assignee usually NOT able to recover against assignor

a. Exception: if assignor interferes w/ assignee’s ability to collect performance or assignor makes a subsequent assignment, or obligor fails to perform, assignee may sue for damages.

d. DELEGATIONS (Enforceability)

i. When performance of a duty is delegated, the delegator (A) remains liable (even though C promises to perform A’s promise to B).

1. *Exception*: “NOVATION” occurs when obligee (B) expressly agrees to accept delegatee (C)’s performance in place of the delegator (A’s original promise to perform).

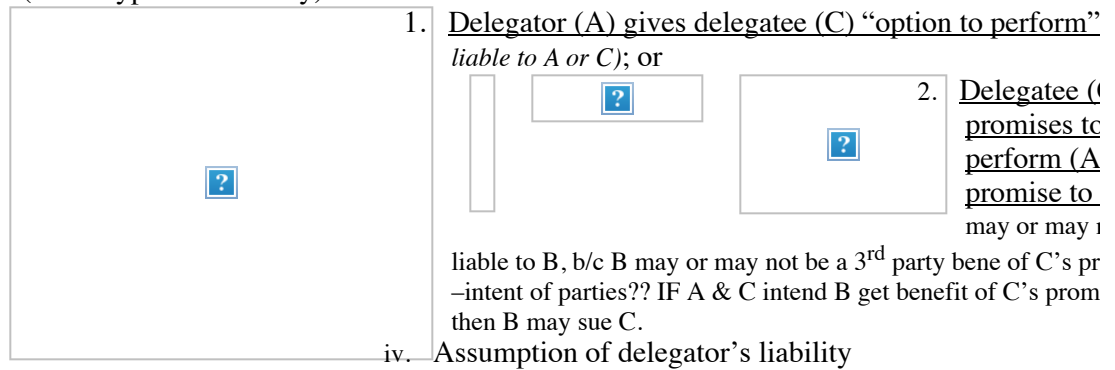
ii. *NON-Delegable Duties:

1. Special skills (i.e. artistic performance, professional service lawyer/doctor, duties of close personal supervision)

2. Construction & Repair Contracts

3. agreement of parties

iii. Delegation (TWO types of Liability):

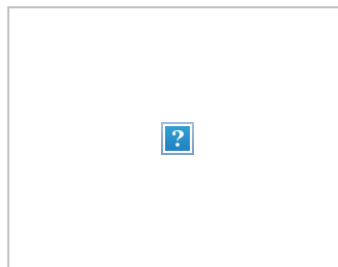


v. Assignment of a K, considered promise by assignee to perform, making B the intended beneficiary.

1. Exception: assignment made by a "vendee" in a land contract, rule does not apply. (not deemed to incur liability original seller, UCC 2-210(4) follows C/L, when says "I assign all my rights" is assignment of "rights" UNLESS it's a delegation of "performance" of assignor's duties and acceptance is the assignee promising to perform. Promise is enforceable by either assignor or other party to the original contract (B). (i.e. collateral interest in loan, lender not deemed to have undertaken to perform assignor's duties, ex. contractor assigns "the contract" for a loan, bank has not promised to paint the house and may not be sued if not painted.)

e. THIRD PARTY BENEFICIARIES

- i. Intended Beneficiaries may sue, but "incidental beneficiaries" may NOT sue.
- ii. Intended Beneficiaries (*can sue)
 1. "Creditor Beneficiary" ---Payment of money
 - a. if performance satisfies obligation of promisee to pay money to beneficiary
 2. "Donee Beneficiary"
 - a. Intent to give benefit: if indicated promisee intends to give the beneficiary the benefit of the promised performance. (promise to give a gift to the beneficiary)
- iii. Who Can't Sue:
 1. Incidental Beneficiaries (*cannot sue promisor)
 2. Government contracts, member of public injured cannot sue contractor's non-performance
 - a. Exception: explicitly promised, or gov't has duty to provide service
 3. Party taking over "mortgage payments"
 - a. Purchaser assumes the mortgage, and personally liable
 - b. Mortgagee is the (*i.e. lender*) "creditor beneficiary" of the assumption agreement btw seller and buyer
 - c. Mortgagee can sue purchaser to compel him to pay
 - d. What is a sub-purchaser is added to the mix, lender may sue either purchaser or sub-purchaser.
- iv. Discharge or Modification by the original parties?
 1. Original parties power to modify the contract terminates if the beneficiary, before he receive notification of discharge or modification, does any of the following: (1) materially changes his position in justifiable reliance on the promise, (2) brings suit on it, (3) manifests assent to it at the request of either party.
- v. Beneficiary Defenses: promisor/defendant can assert against the beneficiary any defenses which he could have asserted if he been sued by the promisee. (may not assert defense from unrelated transactions).
- vi. Beneficiary v. Promisee (When C sues B, C does not waive his right to later sue A –can sue for remaining due)
- vii. Promisee v. Promisor (A can bring separate suit against B (promisor) for benefit of 3rd Party, if B breaches).
- viii. Creditor beneficiary **promisee-debtor recovers from promisor (B) the amount which promisor promised he would pay to creditor (lender) (at least when promisee has already paid the debt to the creditor).



the valid contract ENFORCEABLE?

- 1) STATUTE OF FRAUDS (SOF)

- i. Did the K fall within the **Statute of Frauds**?
- ii. Although a K may be valid, it must be enforceable before it can be performed.
- iii. Does this K fall within the Statute of Frauds (SOF)? If so, which provision?
- iv. The SOF requires the K to be in writing so long as it falls within an applicable provision unless there is an exception that may be used to take the K out of the SOF requirement or a memo that can be used to satisfy the writing requirement. (note: memos are not provisions)
- v. Note: In the absence of a principal's signature, an authorized agent's signature on behalf of the principal is sufficient to bind the principal.

2) Ways to satisfy the writing requirement:

- a. Writing → (*Established expressly in the facts*)
- b. Memo → Rule: Even if there is no signed "K", a signed "memorandum summarizing the agreement" may be enough to meet the SOF.
- c. Multiple writings may be used to establish the memorandum so long as they reference the transaction (*Crabtree v. Elizabeth Arden Sale Corp.*)
- d. So long as a memo was sufficient, it does not matter whether it is presently in existence

a. Common Law:

- a. A memorandum satisfies the SOF if it (1) reasonably identifies the subject matter, (2) indicates that a K has been made between the parties, (3) states with reasonable certainty the essential terms of the K, and (4) is signed by or on behalf of the party to be charged.

b. UCC:

- a. Under the UCC, a writing satisfies the Statute if it is sufficient to indicate that a K for sale has been made between the parties and is signed by the party against whom enforcement is sought. The quantity term is all that the UCC requires, so whatever quantity term is stated will govern as the quantity term.

c. Exceptions TO WRITING REQUIREMENT:

- a. Estoppel: **PROMISSORY ESTOPPEL** is foreseeable detrimental reliance
 - i. Reasoning: applied by courts to prevent fraud that would result from refusal to enforce a K in certain circumstances
 - ii. Examples: (1) One party promises not to enforce the SOF (2) If one party gives ASSURANCE they will prepare a memo but they never do
 1. §2-609 Right to Adequate Assurance of Performance. (1-4) Sub (3) tested on choice questions. Adequacy, if you ask for further assurances don't give 'em an automatic breach, different than C/L --p.1010***
- b. **PART PERFORMANCE**: acts done in furtherance of the promise
 - i. In terms of land: Even if an oral K for the transfer of an interest in land is not enforceable at the time it is made, subsequent acts by either party (such as taking possession and making improvements) may make it enforceable
 - a. In terms of UCC goods: Goods that have been delivered or paid for require writing ***Some exceptions apply only to specific provisions (see below)*

(2) SOF Provisions:

(a) One Year provision: Only K's that by their own terms cannot be performed within one year from the forming of the K's must be in writing.

- a. **Exceptions:** (1) if by K's own terms, it does not fall within the SOF (2) Part performance (i.e. full performance on one side even if performance takes longer than a year)
- b. **RULE:** Under minority view and California law, K's with termination at-will clauses do not fall within the one year provision

(c) Sale of Land (real property): A (1) land sales K of real property or (2) option to purchase land falls within real property provision and must be in writing to be enforceable.

- a. **Exception:** Part Performance – even if an oral K for the transfer of an interest in land is not enforceable the time it is made, subsequent acts by either party (such as taking possession and making improvements) may make it enforceable.
- b. **RULE:** A lease does not fall within the SOF real property provisions; however, a lease may fall within the one year provision if it is greater than a year for completion upon formation

(d) UCC Sale of Goods: Under the UCC §2-201, a K for the sale of goods for a price of \$500 or more must be in writing

UCC §2-201 states:

- (1) There has to be a quantity stated – even if the quantity stated is incorrect, that quantity will control
- (2) Merchant's confirmatory memo – if the signature by the party being charged is lacking, full apply, both parties have to be merchants, and after receiving goods, recipient merchant with reason to know of the confirmation does not object the confirmation within 10 days
- (3) Exceptions to the merchant's confirmatory memo include:
 - a. Specifically manufactured goods for the buyer, not suitable for sale to others require writing (it must be shown that seller substantially began or committed to the procure the goods)
 - b. Goods that have been delivered or paid for (part performance) require no writing
 - c. Estoppel: admission (pleadings or writings that admit to a K of sale) requires no writing is not enforceable under this provision beyond the quantity of goods admitted)

(e) Suretyship (guarantee provision): A K promising to be secondarily liable to pay the debt/duty of another written to be enforceable

- a. **Exception:** Main purpose doctrine = If the promisor's chief purpose in making his promise of surety to benefit himself, his promise does not fall within the SOF.
- b. **RULES:** It is rare to find a suretyship; will say either "I promise to pay if he does not" OR "I will be surety" (otherwise, it is a 3rd party K, delegation, novation, or indemnity) ***If there is a pre-existing debt, it is a delegation, not a suretyship*

Are there any CHANGES to that valid enforceable contract?

- a. *think MODIFICATIONS!?!?!(2nd Formation Discussion)* (aka "a contract on a contract") --Change in contract either by alteration or by mutual rescission of first contract followed immediately by formation of second contract on the same subject matter.

(A) ORAL RESCISSION

Where a K is in writing, it can be orally rescinded even though the original was required to be in writing because of the Statute.

(B) PAROL EVIDENCE RULE (§2-202)

Definition: The parol evidence rule states that evidence will be excluded

so long as there is a K, a prior or contemporaneous statement, an integrated writing, and the evidence was coming in to contradict

(C) MODIFICATION (§2-209)

Definition: A modification is a contractual agreement by the parties to change the existing K, requiring a second formation discussion.

UCC – §2-209 no new consideration because good faith requirement / has

to be in writing unless there is a waiver of writing

CL – pre-existing duty problem / oral modification is okay

(D) ACCORD AND SATISFACTION

Definition: An accord and satisfaction is a specialized form of modification to resolve a good faith dispute over an unliquidated debt.

(E) MUTUAL RESCISSION

Definition: A mutual rescission is a specialized form of modification that rescinds the K, bringing the parties back to the position they were in before entering the K in order to modify it into existence again.

UCC – no consideration needed because of the good faith requirement

§1-107 Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party

CL – Giving up performance is the consideration

Partial performance – look to party's intentions: In a rescission of a

K that has been partially performed, it is a question of intent that determines whether the rescission is for prospective promises or applies to all promises, even those already completed (Copeland Process Corp. v. Nalews, Inc.)

Full performance on one side – pre-existing duty problem:

Consideration to support the rescission is only a problem if one party has fully performed. So long as neither side has fully performed, there is consideration to support the rescission.

(F) RELEASE, SUBSTITUTE AGREEMENT, OR EXECUTORY ACCORD (AGREEMENT TO SETTLE)

Release: K to release liability for an obligation

ii. Never sign a general release

iii. Only sign a specific release to release your known rights

Substituted agreement: the consideration of K #2 is the discharge of K #1 and is enforceable

c. To determine between substitute agreement and executory accord, look to the question: when was the intent to discharge? When did you intend to release them?

- i. Immediately (substituted agreement) v. only upon cashing of the check (executory accord)

EXECUTORY ACCORD: (agreement to settle / accord without satisfaction / offer without acceptance) – an incomplete accord and satisfaction that gives no rights until it is accepted, at which point, it becomes an accord and satisfaction.

- a. It is discharged once accepted and is not enforceable until it ripens in accord and satisfaction
- b. Generally it is assumed that one does not surrender an existing obligation for a promise to perform in the future
- c. If an executory accord then:
 - (1) CL – no effect not even a defense
 - (2) Modernly – enforceable if in writing and signed by the party to be charged

(G) NOVATION

Definition: a 3rd party K that grows from a delegation where the obligee under an original K agrees to relieve the obligor (delegator) of all liability after the duty is delegated to a 3rd party (called the delegatee), substituting the original obligor with the delegatee. Agreement by all 3 parties is required and is the only way out for a delegator.

This may occur through:

- (1) Express novation
 - i. Obligee expressly promises to release the delegator and accept the performance of the delegate
 - ii. Delegatee promises to perform to the obligor
- (2) Implied novation
 - i. delegable duty for an effective delegation
 - ii. delegator repudiates obligations or liability to obligee
 - iii. obligee does not object and accepts performance from delegatee without reserving rights against delegator

Rules:

- a. “Releases” evidences a novation
- b. There must be intent to release for a novation
- c. “Account stated” = short hand way of suing under the amount you agreed is owed

here is a valid change to our existing contract, is that valid contract now enforceable as changes? (MUST do NE FORCEABILITY discussion to see if contract modified is enforceable)**

PERFORMANCE

What PROMISE are you suing under?

- a. I.D. Promise, discuss one at a time!!! (can say “see supra 1-5” unless there’s a modification, repeat #3)

Are there any CONDITIONS relative to that promise?

- a. Definition: a condition is an act or event, other than a lapse of time, which unless the condition is excused or occurs before a duty to perform a promise arises.
- b. How was the condition created? (Express/Implied-in-Fact/Implied-in-Law/precedent/concurrent/subsequent)
 - i. **Express:** manifestly expressed in K that one party has no obligation to perform “unless and until” a specific event occurs.
 1. Conditions of Satisfaction: conditional upon someone’s satisfaction, needs to be expressed

- a. Party to the contracts
 - i. Non-personal K-Objective standard
 - 1. If the condition of satisfaction is of a party to the K, the objective person standard applies, as in a commercial setting
 - ii. Personal K OR Third Party–Subjective standard
 - 1. If the condition of satisfaction is of a 3rd party, the subjective standard applies because parties contracted to pick that specific person, with exception being bad faith
- ii. **Implied in Fact:** conditions necessary for performance of K but not expressly stated as a condition of cooperation.
- iii. **Constructive conditions:** General Rule: Where each party make one or more promises to the other, each party's substantial performance of his promise is generally a constructive condition to the performance of subsequent duties by the other party. (ex. Sale of Goods and Land)
 - a. Constructive conditions do not apply to "independent promises" (i.e. promises in relation are independent of each other.)
 - b. If the order of performance is not specified, whichever condition takes longer to perform must occur first.
- iv. **Implied in Law (aka Constructive Conditions)** **also see under "Excuse":*
 - 1. §2-601 Perfect Tender Rule states that: If the goods or tender of delivery fail in any respect to conform to the K, the buyer may (a) reject the whole, (b) accept the whole, or (c) accept any commercial unit or units and reject the rest.
 - 2. §2-602 Buyer has a rightful rejection within a reasonable time, so long as the seller has been seasonably notified. The buyer has a duty to take reasonable care for the goods until the seller removes them from buyer's possession.
 - 3. §2-606 The buyer can only reject if he has not previously "accepted" the goods. Acceptance is presumed if there is no rejection after a reasonable opportunity to inspect; however, acceptance can be revoked if buyer discovers a defect that substantially impairs the value of the goods.
 - 4. §2-508 A seller can cure non-conforming delivery of goods by:
 - a. (1) seasonably notifying the buyer of his intention to cure within the time specified for performance in the K
 - b. (2) where seller reasonably believes the goods would not be rejected, seller may have a reasonable time (reasonable amount beyond K time limit) to cure so long as he seasonably notifies the buyer
 - 5. §2-607 Buyer must inform seller of discovery of nonconformity within a reasonable time or before pursuing any remedy after an acceptance
 - 6. §2-608 Rejection after acceptance may take place within a reasonable period of time if it is difficult to discover the nonconformity (due to either difficulty of discovery or seller's assurances) and it would be reasonable to assume that the non-conforming goods would be cured
 - 7. §2-612 In dealing with installment K's (delivery in separate lots), unless shipment gives assurance of cure, the buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured.

What is the Conditions Temporal Relationship with the Promise?

- i. **Precedent:** a condition that must occur before a duty on the part of presently discussed party will arise

- ii. Concurrent: A type of condition precedent which exists only when the parties to a contract are to exchange performances at the same time. (i.e. delivery and payment occur simultaneously)
 - 1. Each party **MUST** tender (ready, willing, and able) performance to the other.
 - 2. Ex. If seller fails, Buyer can't sue for breach unless he shows he tendered performance.
 - 3. Promises in exchange for each other are "dependent promises."
- iii. Subsequent: an event by previous agreement that will terminate an absolute duty to perform after it has occurred.

those Conditions been SATISFIED?

- 1. Express and implied in fact conditions must be fully satisfied.
- 2. Constructive Conditions must be substantially performed.
 - a. "SUBSTANTIAL PERFORMANCE"
 - i. i.e. "Installment Contracts" –performance is a constructive condition to the other party's performance (party must substantially complete to receive payment)
 - b. *Failure to "Substantially Perform"*
 - i. Right to "Cure": both the buyer's right to reject and his right to revoke an acceptance are subject to the seller's right to cure the non-conformity.
 - 1. If a party fails and defects can be easily cured, the other party's duty to give a return performance is "suspended." Defaulter has chance to cure, if defect so substantial that it cannot be cured within a reasonable time OR defaulter fails to take advantage of chance to cure, the other party is completely discharged and may also sue for breach.
 - 2. In "installment contracts" buyer may reject any installment which is non-conforming to the contract. If non-conformity "substantially impairs the value of that installment and cannot be cured, the buyer may reject the whole if defect substantially impairs the value of the whole contract.

those Conditions been EXCUSED?

in some instances the "non-occurrence" of a condition is "excused," so that the other party must nonetheless perform.

- 1. WAIVER
 - a. A waiver is a voluntary and intentional relinquishment of a known right.
 - b. A party who owes a conditional duty may indicate that he will not insist on the occurrence of the condition before performing. –willing to forego the benefit by waiving the condition. (i.e. expressly stated) OR implied
 - c. Promisor "continues performance" after learning that a condition of duty has failed to occur, his conduct is regarded as a waiver of the condition. (right to damages is not lost, even if he continues performance after breach)
- 2. ELECTION
 - a. to continue performance after a condition has failed. Under the majority view, an election cannot be withdrawn, even if the other party has not relied to his detriment on it. If the failed condition constitutes a breach, election does not foreclose an action for damages.
 - b. *Election is an after the fact or subsequent waiver.* Once the other side has failed to perform, it is no longer the other party's election to (a) treat it as a breach or (b) elect to ignore the late performance. *Election is not retractable.
- 3. WRONGFUL PREVENTION
 - a. When one party's duty is conditioned on an event, and that same party's wrongful conduct prevents the occurrence of the condition, the non-occurrence of the condition is excused, and the party **MUST** perform despite the non-occurrence.

- b. “Implied promise of cooperation” –consequence of a breach is that the “non-occurrence” of the co excused, and the party MUST perform. (i.e. B takes care of old lady D, D kicks him out after promis him when she dies and leave money for him in her will, B may still recover even though he didn’t liv her for the remaining 5 years.)
- 4. IMPOSSIBILITY/IMPRACTICABILITY/FRUSTRATION OF PURPOSE (*Discuss under “Discharge”)
- 5. RELIEF FROM FORFEITURE
 - a. (*Fall back argument to divisibility) Is the contract divisible? Will the court excuse the condition?
 - b. What are the plaintiffs interests how are they damage. How much are they actually gonna lose, con to the defendant, how much will the def be harmed if relief from forfeiture granted, and then balai society’s interests. Balancing of the equities.*
 - c. Relief from forfeiture? So lopsided so unfair that the court should relieve this condition, how much plaintiff be harmed? What happens to the defendant? Society’s interests?
- 6. ANTICIPATORY REPUDIATION: where the party indicates that he will refuse to perform and assurances of th repudiation are obtained. (if a party indicates that he will → see *relief from forfeiture)
- 7. UCC: Has the condition been excused by the UCC?
 - a. §2-601 Perfect Tender Rule states that: If the goods or tender of delivery fail in any respect to confc the K, the buyer may (a) reject the whole, (b) accept the whole, or (c) accept any commercial unit o and reject the rest.
 - b. §2-602 Buyer has a rightful rejection within a reasonable time, so long as the seller has been seaso notified. The buyer has a duty to reasonable car for the goods until the seller removes them from b possession.
 - c. §2-606 The buyer can only reject if he has not previously “accepted” the goods. Acceptance will be presumed if there is no rejection after a reasonable opportunity to inspect; however, acceptance n revoked if buyer discovers a defect that substantially impairs the value of the goods.
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 - g. §2-612 In dealing with installment K’s (delivery in separate lots), unless shipment gives assurance of the buyer may reject any installment which is non-conforming if the non-conformity substantially ir the value of that installment and cannot be cured.
 - h. FAILURE: If there has been a failure of the condition by non-occurrence or less than substantial cor can it be severed?
 - i. *Non-occurrence* is the failure of a condition to occur VS. *Less than substantial compliance* is nc the benefit of the bargain.
 - i. Is the K DIVISIBLE to satisfy/excuse the severable portion?
 - i. Definition: A K is divisible if it can be apportioned into corresponding pairs of part performanc that the parts of each pair are properly regarded as agreed equivalent.

ii. If K is divisible, is there substantial performance?

1. Definition: Substantial performance must not destroy the value/purpose of the K. Non-breaching party must still get the benefit of the bargain.

***Fall back argument to Divisibility → Relief from Forfeiture (*see arg and def under “Excused?”).*

****Has the promise ripened into an absolute obligation?***

is the promise itself been DISCHARGED?

- IMPOSSIBILITY
- IMPRACTICABILITY
- FRUSTRATION OF PURPOSE

there a BREACH? (***see handwritten outline***)

a. Definition: Breach is the failure to perform contractual duty which has arisen and has not been excused or discharged.

b. ANTICIPATORY REPUDIATION (*See written notes***)

• COMMON LAW –MATERIAL v. MINOR

- When did it occur?
- How much of the benefit of K has been conferred?
- How intentional was it?
 - Is the breach material or minor?
 - Material: non-breaching party does not receive the benefit of the bargain
 - Minor: a breach where non-breaching party still received the benefit of their bargain
 - Look to the guide-posts to determine material v. minor:
 - *Benefit conferred* (the greater the non-breaching party is deprived, the more likely it is a material breach)
 - *Willfulness/intentional* (more willful, more likely to be material) (wrongful prevention/anticipatory repudiation)
 - *Time the breach occurred* (towards the beginning, more likely to be material)

i. If material, is it divisible?

A K is divisible if it can be apportioned into corresponding pairs of part performance so that the parts of each pair are properly regarded as agreed equivalents.

ii. Substantial performance (**see additional notes under “Satisfied”*)

- a. Substantial performance must not destroy the value/purpose of the K. Non-breaching party must still get the benefit of the bargain.
- b. If one party fails to substantially perform, the other party’s remaining duties do not fall due.
- c. If there is substantial performance on the part of the breaching party, it is a minor

breach.

• **UCC –Just BREACH** (*no material/minor discussion!!!*)

(b) Under UCC, it is only breach. The issue becomes: Did they fulfill the promise or has it been breached?

- i. Breach can be established if there is a violation of §2-601 and none of the exceptions to get around the perfect tender rule apply
- ii. If there has been a breach of §2-601, the following may be used as defenses:

§2-614 Substitution of performance

(1) if a method of delivery is impracticable or impossible,
seller and buyer must accept a reasonable alternative

(2) Seller may withhold delivery due to the
government/state actions, which create temporary impossibility

§2-615 A seller has a defense to breach so long as performance was made impracticable by the occurrence of a government/state regulation

§2-616 Seller must notify buyer of delay, then buyer must terminate or modify within 30 days

**If all defenses fail, there is a breach. Analyze damages.*

DAMAGES

What is the REMEDY for that breach?

- a. LEGAL REMEDIES (***see handwritten outline***)
 - i. Liquidated Damages Clause
 - ii. Expectancy Damages
 - iii. Reliance Damages
 - iv. Consequential Damages
 1. Incidental Damages
- b. EQUITABLE REMEDIES
 - i. Specific Performance
 - ii. Injunction

Quasi-Contract? (**See handwritten outline***)

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