RESTATEMENTS
§ 20: Effect of Misunderstanding
(1) Both parties, different understandings, material term, no reason to know
different understanding → on contract
(2) Manifestation of one party’s governs where other party knows/has
reason to know of 1st party’s understanding
§ 32: Invitation of Promise or Performance
Where offer ambiguous, acceptance can occur by either return promise or act
§ 45: Option Contract Created By Part Performance Or Tender
(1) Where offer invites offeree to accept by rendering performance and not
promise, option contract created when offeree tenders, begins, or tenders
beginning of it.
(2) Offeror’s duty of performance under any option contract so created
conditional on completion or tender of invited performance in accordance
with terms of offer.
§ 62: Effect of Performance by Offeree Where Offer Invites Either
Performance or Promise
(1) Where offer invites offeree to choose between acceptance by promise and
by performance, the tender or beginning of invited performance or tender
of a beginning of it is acceptance by performance.
(2) Such acceptance operates as promise to render complete performance –
turns into bilateral contract
§ 77: Illusory or Alternative Promises
If each of all promises supported by consideration indiv, then not illusory
§ 87(1): Option Contract
Must be in writing, signed, and recite purported consideration
§ 87(2): Option Contract
Offer which offeror should reasonably expect to induce action/ forbearance of
substantial character on part of offeree before acceptance and which does
induce such action/forbearance is binding as option contract to extent
necessary to avoid injustice Examples: Drennan, Hoffman
§ 90: Promissory Estoppel
Promisor reasonably expects reliance, does induce reliance; charitable sub.
marriage settlement binding with no reliance; Rarely consequential damages
FIVE-STEP ANALYSIS FOR CONTRACTS
1. Is there an agreement?
2. Is there a breach of a promise?
3. Is the promise supported by consideration or something else? M.C., P.E., Seal
4. Even if promise supported by consideration, etc., is there another
obstacle to enforcement? Stat. of Fraud/Limitat/PER
5. Is there a way to overcome this obstacle?
§ 2-102: pertains to sales of goods – sales to consumers, farmers
§ 2-201: Statute of Frauds: If contract price $500 or greater, must be “some
writing” and signed by party to be charged.
How to get around? Equitable doctrine of part performance; detrimental
reliance; restitution; equitable estoppel; moral consideration
§ 2-204: Formation in General: “Even though 1+ terms left open contract
for sale does not fail for indefiniteness if parties have intended to make
contract and there is reasonably certain basis for giving appropriate remedy”
§ 2-205: “Firm Offer” Must be in writing, separately signed by parties, and
reasonable time period, but not greater than 3 months (similar to Rest. § 87(1))
§ 2-206: Offer & Acceptance in Formation of Contract
Unless otherwise unambiguously indicated by language or circumstances, an
offer to make contract shall be construed as inviting acceptance in any manner
and by any medium reasonable under circumstances (similar to Rest. § 32)
§ 2-313: Express Warranties by Affirmation, Promise, Description, Sample:
Affirmation of fact or promise made by seller, description of goods
which form basis of bargain, sample or model (indicates whole are of same
quality) → all create express warranties. But mere affirmation of value of
goods or statement purporting to be seller’s opinion not create warranty
§ 2-314: Implied Warranty: Implies merchantability of goods that: 1) pass
without objection in trade 2) fair avg quality 3) fit for ordinary purposes 3)
even kind, quality & quantity 4) adequately packaged, contained, labeled 5)
conforms to promise or affirmations of fact made on container/label, if any 6)
course of dealing or usage of trade
§ 2-315: Implied Warranty: Fitness for Particular Purpose
If seller knows particular purpose of goods and buyer relying on seller’s
skill/judgment, implied warranty arises that goods will be fit for such purpose.
§ 2-316: Exclusion or Modification of Warranties
Disclaimers that limit effect of implied or express warranties
§ 2-712: Buyer’s Cover: Buyer may cover in good faith and get:
(cost of cover - contract price)
+ consequential/incidental damages
– expenses saved by seller’s breach
§ 2-713: Buyer’s Damages after Repudiation
(market price @ time of breach - contract price)
+ consequential/incidental damages
– expenses saved by seller’s breach
§ 2-715: Buyer’s Incidental & Consequential Damages
(1) Incidental damages: expenses reasonably incurred in inspection, receipt,
transportation and care and custody of goods rightfully rejected
(2) Consequential damages include any loss resulting from general or
particular requirements/needs of which seller at time of contracting had
reason to know and which could not reasonably be prevented by cover or
otherwise; and injury to person or property proximately related to breach
of warranty
PAROL EVIDENCE RULE
Final expression of parties? If so, is it complete or partial? If partial, are the
terms additional or contradictory?
Williston: Judge look to 4 corners of doc
Corbin: Judge look to extrinsic evidence
Pros of PER:
1. Evidentiary, channeling functions served (parties have greater
confidence of reliability of agmt)
2. Cautionary function = parties more thoughtful
3. Reduces litigation costs; less scope of disagreement if litigation
4. Reduces likelihood of fraud

Drawbacks/Cons of PER:
1. Unfair to unsophisticated parties
2. Increases upfront costs (counter: cautionary, and agmts never
perfect)
3. Advent of less formal transactions (partly over phone) → makes
cumbersome
4. Extent to which written agmts reflect parties’ intent is dubious (i.e
adhesion contracts, unequal bargaining)

Escapes from PER:
1. Condition precedent (Long Island Trust promissory note)
2. Tort, i.e. fraud/deceit/misrepresentation
3. Disclaimers will bar earlier convos if specific enough (Lafazia v. Howe)
4. Reformation of deed: to reflect true intentions of parties (Hoffman v.
Chapman)
5. Rescission → not argument on K but against it
6. Mistake, i.e. mutual mistake
7. Ambiguity (Bethlehem, Robert Industries)
8. Restitution

Mitchell (ice box); Hatley (“unsophisticated,” no counsel); Luria Bros.
(merger clause imp); Long Island Trust (condition; promissory note); Lipsit
(fraud allegation by former employee); Lafazia v. Howe (2 disclaimers &
merger clause); Robert Industries (look @ circumstances but doc paramount)

CHANGES IN CONTRACT LAW
Battle of Forms - § 2-207
Promissory Estoppel/Detrimental Reliance

Battle of Forms
1. Is there more or less an acceptance? Unless acceptance conditional
on assent to additional terms, K prob formed
2. What are terms of the acceptance?
   a. Additional → will become part of agmt
   b. Contradictory → knocked out; then gap-fillers
3. Conduct by both parties indicate existence of contract, even if
   writings say otherwise.
   → Alternative to tradition of contract
   → Designed to allow for contract formation in general (modern mass
contracts – standardized forms) SEE ALSO: INDEFINITENESS

Detrimental Reliance
Decreasing strength of statement:
1. Reliance on statement of fact: equitable estoppel
2. Promise: P.E., § 87(1), Seal
3. Offer:
   a. Unilateral: § 45, § 62
   b. Bilateral: § 62, 87(2), Drennan


Promissory Estoppel v. Detrimental Reliance; K law should reign in P.E./DR in commercial setting

Traditional areas of P.E. (charitable subscription, promises to make family gift, gratuitous bailment) require that promisor reasonable expects promisee to rely is analogous to “mutual assent.” If promisor knew/should have known, then liability after fact makes sense. Akin to duties of common carriers/innkeepers, where function drives K obligations, have not specifically contracted for heightened duties. In family gift, charitable sub, and gratuitous bailment, promises in these instances buttressed by nature of relationships or context of promise. Family (cases usually fighting executors, not promisor). Charity heightened duties. In family gift, charitable sub, and gratuitous bailment, themselves re: trade-off bet. higher transaction costs upfront or long-run  subs may ban together and unionize or demand more predictability, but unlikely  loss of good faith, increase litigation costs

INDEFINITENESS/UNDERSTATED

Would be costly to draft for every contingency. Most carefully crafted doc will not be free from ambiguity

Battle of Forms: result of fast-paced commercial trades; most agmts don’t end up disputed; for parties who want predictability, can draft & review more cautiously; encourages clarity (best form of justice); parties can decide for themselves re: trade-off bet. higher transaction costs upfront or risk of greater litigation costs later; law need not interfere with cost/benefit analysis. UCC § 2-204(3): supply missing term; merchants will know rules of UCC; if terms not sufficiently definite, implicitly consent to UCC terms. Can draft otherwise if not (Joseph Martin – “to be agreed upon”. Empiro v. Ball-Co (agmt in principle “subject to”); also UCC §§ 2-305, 1-310 – fill in mkt price, how payment made). M.M., etc.; add terms to address low-probability contingencies. Good faith. Express/Implied Warranties. Rule could be ambiguity resolved against drafting party – may increase transaction costs since neither party wants burden, except in mass contracts, and could be good thing for adhesion contracts. See PER cases (esp. Robert Industries, Lafazia)

COUNTER: Judge Posner has said that fear/distrust in accuracy of litigation to recontract int/negotiations is warranted, but parties can just draft more carefully, or else beware!

IMPOSSIBILITY/M.M./FRUSTRATION OF PURPOSE

Re: assumed conditions
All args against the contract

- Mutual Mistake: both parties have misunderstanding about present material fact (Sherwood v. Walker (cow); Beachcomber Coins (both parties mistaken re: coin)
- Impossibility: future event renders performance impossible (death, destruction of property) – Taylor v. Caldwell (music hall)
- Impracticability: becomes much more $$$ & unduly burdensome
- Frustration of purpose: future event frustrates purpose of why parties entered into contract (Krell v. Henry – coronation)

Analysis:
1. What was intent of parties?
2. Was there some underlying assumption about event/fact?
3. Who has burden of insurance/assumption of risk of this occurrence?
4. To figure out #3, who as ownership/control?  if one of parties, then MM/FoP/Impossibility prob does not apply (Tompkins)

UNCONSCIONABILITY/CONSTRUCTIVE FRAUD

Catch-all categories; Args against the contract

Constructive Fraud – elements:
1. Confidential relation of parties
2. Reliance by P upon advice/judgment of D in P’s business affairs

3. Gross inadequacy of price paid
4. P’s offer to restore purchase price and rescind transaction, and D’s rejection of offer

Jackson v. Seymour ⇒ constructive fraud

UNCONSCIONABILITY: potential elements: duress, incompetence, fraud/theft, conflict of interest, confidential relationship

1. Substantive injustice (gross inequity in price): may bar specific performance; courts unlikely to enforce but maybe just damages ⇒ this element alone not enough to bar enforcement based on unconscionability
2. Procedural injustice (way contract formed, i.e. duress, fraud): may lead to rescission, if coupled with substantive injustice

Waters v. Min, Williams, Woolstons ⇒ unconscionability

EXPECTANCY DAMAGES

Specific performance, or
Damages (Loss in value ⇒ default or Cost of completion)

Expectancy Measure:
P has not yet received from D (loss in value)
+ incidental costs (i.e. transaction costs)
+ consequential costs (foreseeable costs)
(+ “wasted expenditures” ⇒ common carriers/innkeepers)
- + losses P can avoid by entering another contract + mitigate + costs avoided

Hawkins (hand), Sullivan (nose), Groves ($12K vs. $60K), Peeyhouse ($300 v. $29K), Acme Mills (efficient breach), Luten Bridge, Kearsage, Parker,
Floor Lady, Neri (lost profit + incidental damages), Hadley v. Braxendale (mill shaft; consequential damages not foreseeable), Victoria Laundry (foreseeable conseq damages), Algenon Blair (not breaching party, restitution at 28% completion), Britton v. Thacher (restitution not > expectancy), Oliver v. Campbell (substantial performance = K price, even if < reasonable value);

SEE ALSO re: Reliance: Chicago Cussem, Anglia Television

TOPICS

Grounds for Enforcement of Promises
1. Tort, Gift, Restitution
2. Contract (Consideration, Sealed deed or other formality (rarely used but still useful), Promissory Estoppel)
3. Detrimental Reliance (could be own category of “Grounds for Enforcement of Promises”)

Intent and Formation of Contract

Mutual Assent, Unconscionability, Offer and Acceptance, Misunderstanding, Control over Contract Formation, Conduct Concluding Contract, Effects of Adopting a Writing/PER

Variations on Theme of Intent

Methods of Finding Contract Voidable

Mutual Mistake, Impossibility, Frustration of purpose, Unilateral Mistake, Unconscionability

Methods for Finding Contract Enforceable

Express Warranty, Implied Warranty

Tort doctrines

Constructive fraud, Intentional fraud, Silent fraud, Innocent misrepresentation

Remedies

Expectancy, Reliance, Restitution

OTHER THEMES

Goal of remedies
1. Specific performance vs. damages
   a. Damages will depend on how measuring expectancy
   b. Fear of overcompensation ⇒ court will drop down from the disproportionate value (i.e. Peeyhouse) ⇒ desire the loss of value because of fear of overcompensation by awarding cost of completion which was disproportionately higher ($300 vs. $29K)
2. Should you be able to make second choices re: compensation
   a. Efficient breach may suggest that this is okay (One of reasons why specific performance not awarded)
   b. However, tendency towards under-compensation:
      1. A range of possible damages ⇒ may drop down to reliance
   c. Commercial parties have fear of disclosing profit margins, reluctant to ask for expectancy damages, which would require discovery