

K - Chirlstein Summary

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Chapter 1 - Background elements

Why law governing K → lapse of time b/w agreement and performance

Common Law -

- expectation damage rule = compensating injured party in amount sufficient to put in as good as position as would have occupied if k performed in full
- mitigation of damages - injured party required to mitigate damages

Steps

1. is there a K
2. what does K require
3. do acts/omissions complained of constitute a breach

Governing Rules

- generally - look to K
- if K silent - parties deemed to adopted legal rules supplied by statute/common law

Chapter 2 - Consideration and Bargained for Exchange

- **Restatement § 17** - K formation requires
 - a **bargain**
 - assent of the parties
 - **consideration** - either return promise or actual performance
 - exceptions
- **Restatement § 19** - promise may be expressed in acts/commencement of performance
- Statute of Frauds - sales of land, suretyships > 1 yr for agreement to be enforceable
- **UCC 2-201** - writing required for >\$500 for agreement to be enforceable

Promises to make Gift

- general rule - promise to make future gift <> enforceable
- **Hammer v. Sidway** - surrendering freedom to act = consideration for a promise
- **Ricketts v. Scothorn** - donee relying in good faith on promise changes position → donor estopped from claiming lack of consideration
- nominal consideration - courts generally <> inquiry into adequacy of consideration
 - important issue = bargain

Exceptions to requirement of consideration

Reliance/Promissory Estoppel

- **Restatement § 90** - promise where promisor *expects to/does* induce action of promisee = binding if injustice avoided only by enforcement (remedy may be limited as justice requires)
- promissory estoppel -
 - applies as substitute for consideration
- consider if promise actually communicated so as to induce reliance

Moral Obligation and Past Consideration

- Dr. emergency treatment - assumed to be responding to patient request for services
 - can recover fair value of services
- moral obligation = insufficient
 - **Mills v. Wyman** - promise to pay for prior care for adult son = not enforceable
 - no pre-existing obligation
- material benefit plus promise (irrespective of moral obligation) = sufficient
 - **Webb v. McGowan** - promise to pay party injured as result of protecting promisor = enforceable
- consider circumstances - did promisee pressure promisor into making promise
- **Restatement § 86** - promise made in recognition of past benefit = enforceable to extent required to prevent injustice unless benefit conferred as a gift or promisor otherwise not enriched
- **Restatement § 82/83** - renewing past debts

Chapter 3 - Contract Formation

- revocation - any time prior to acceptance
- **Restatement § 17** - manifestation of mutual assent required
- **Peerless** - mutual assent required on same thing

Offer

- "quotations" - not generally an offer - implies reservation of right to accept/reject ensuing orders
- advertisements - not generally an offer - unless provide sufficient detail as to quantity/offeree (Lefkowitz v. Great Minneapolis)
- time limit - offer remains open for reasonable time if unstated
- unilateral offer = revocable prior to completion of performance

Acceptance

- acceptance controlled by offer (offeror = master of offer)
- **UCC 2-206** - offer may be accepted by any reasonable medium - including commencement of performance; unless otherwise unambiguously indicated offer to buy goods for prompt shipment = construed as inviting acceptance by either return promise or shipment
- **Restatement § 32 and § 62** - similar rule → acceptance by performance = explicit promise to perform
- commencing performance - **Ever-Tite v. Green** - loading truck = commencing performance = acceptance
- **Restatement § 45** - commencement of performance in response to unilateral offer → creates option K allowing offeree right to complete performance (or not)

Revocation

- promise to hold offer open w/o consideration (nudum pactum) = not binding and can always be w/d on notice to offeree (**Dickenson v. Dodd**)
- actual knowledge of revocation = effective even w/o receipt of actual revocation
- promise to keep open = benefit which requires consideration in order to be beneficial
- **Restatement § 87** - recital of nominal consideration = sufficient to bind offeror (**to any promise or only re: option??**)
- **UCC 2-205** - firm offer allowed w/o consideration where made in writing for period ≥ 3 months
- option K -
 - promissory estoppel - **Restatement § 90** - no consideration required to make offer binding where subsidiary promise to hold open intended to induce reliance - limited as justice requires
 - unilateral K - part performance creates option K (Restatement 45)

Reliance

- more flexible than promissory estoppel - K formalities not required = **rectification of harm**

Mirror Image Rule

- additional terms generally not binding
- **Restatement § 59 (= common law)** - acceptance = effective only if mirror image (if conditional → rejection)
- **Restatement § 39** - counter offer = rejection unless offeree manifests contrary intent (e.g., inquiry)
- **UCC 2-207** - if acceptance includes additional terms = valid w/o additional terms - unless offeree explicit that acceptance only w/ additional terms
 - additional terms treated as proposals (= last shot rule) unless material (→ presumed rejected)

Chapter 4 - Unfairness and Unconscionability

Incapacity

- K = voidable where either party lacks capacity

Duress

- duress negates assent (required for binding acceptance)
- pre-existing duty rule - promise to perform duty already bound to do \neq consideration
 - not applicable where both parties give something of additional value
- **Restatement § 73** - affirms pre-existing duty rule
- **Restatement § 89** - promise binding K duty = enforceable if modification = fair/equitable in view of circumstances not existing at time of K
- **UCC 2-209** - no pre-existing duty rule - subsequent modification valid if made in good faith for legitimate commercial reason
 - consider competing interests of parties - motives of one party vs. impact on other party (motives probably more relevant to UCC consideration)

Misrepresentation/Concealment

- K = voidable where acceptance induced by misrepresentation (even where no intent to defraud)

- **Common Law** - non-disclosure of material fact = no liability (Swinton v. Whitinsville)
- **Restatement § 161** - non-disclosure of fact re: basic assumption = misrepresentation = lack of good faith

Standardized Forms and Unconscionability

- standardized forms - minimize transaction costs
- Henningson v. Bloomfield - contractual disclaimer = void b/c public policy to protect avg. people
- unconscionability - from
 - unequal bargaining power - terms unreasonably favorable to one party
 - lack of available alternatives/meaningful choice
- **UCC 2-302** - unconscionability
 - theory = avoid unconscionability - by explaining provisions to non-imposing party (Williams v. Walker Thomas Furniture)
 - practice = substantive fairness
- relevant time = time K entered into
- unconscionability doctrine - mechanism whereby choice function allocated to court

Chapter 5 - Contract Interpretation

- **UCC 2-313** - any K description = express warranty (Frigalment v. Inter. Sales)

Custom/prior conduct

- UCC/Restatement - courts look to establish reasonable K understanding

Parol Evidence Rule (only applies to written agreements)

- **Restatement 213** - completely integrated written K discharges any prior agreement w/i its scope
- integrated agreement - determined by judge
- Mitchell v. Lath (not in Farnsworth's book) - earlier oral agreement allowed only where
 - oral agreement = collateral = capable of being expressed in separate agreement
 - does not contradict terms of written agreement
 - written agreement <> fully integrated
- Masterson v. Sine -
 - rejected whether K appears complete on face
 - collateral oral agreement excluded only when fact finder may be misled (credibility of evidence = basis for decision)
 - steps
 - is evidence credible
 - can K be deemed as integrated
- look for true intent of parties

Gap Filling - Best Efforts/Other Flexible Commitments

- exclusive dealing/best efforts/reasonable efforts = enforceable standard of conduct- may omit quantity term
- failure to use best efforts/reasonable efforts = actionable breach
- **UCC 2-306** - K w/ "output or requirements" quantity → means output/requirements as may occur in good faith, except that no quantity unreasonably disproportionate to prior output may be tendered/demanded
- consider duty of one party to make effort (Bloor v. Falstaff Brewing)

- consider relationship as co-venture/partnership

Chapter 6 - Performance and Breach

- breach → injured party may i) cease own performance and ii) sue for damages

Express Conditions

- **condition precedent** - requires action of one party before other party required to perform
- **condition subsequent** - required performance after other party's performance
- conditions - allocate risk of non-occurrence of critical event
- courts - generally try to interpret K to minimize promisee's reliance loss
- **Restatement 227** - if uncertain as to intended effect of condition - preferred interpretation minimizes forfeiture
- **K w/ "satisfaction" clauses** - one of two test applies (Mattei v. Hopper)
 - objective = satisfaction as to commercial value - reasonable person standard (objective) applies (difficult to apply/determine)
 - subjective = satisfaction as to fancy tastes - good faith standard (subjective) applies
 - Rosenthal - no clear rule as to which test applies - have to objectively look at parties' intent
- **Condition v Duty v. Both**
 - condition precedent - failure discharges promisor from own obligation and creates no claim
 - promise - failure constitutes breach; promisor obligated to perform unless breach = material
 - promissory condition - failure discharges promisor's performance + creates claim (Internatio-Rotterdam v. River Brand)
- **Oral Modification/Waiver**
 - Universal Builders v. Moon Motor Lodge -
 - waiver preferred/no oral modification clause subordinated
 - required relier to show received approval/incurred expense in reliance

Problems of Performance

- **constructive conditions of exchange**
 - bilateral K -
 - require simultaneous performance - no problem
 - require consecutive performance - requires substantial performance prior to promisor's performance (Stewart v. Newbury)
 - **Restatement 234** - where one performance requires time → assumed to be required first unless otherwise indicated from circumstances/K
- **substantial performance (diminution of value)** (Jacobs & Young v. Kent)
 - focus - **essence** of K
 - applies where - default = inadvertent + trivial breach (consider breach in relation to **essence** of K)
 - rule - perfect performance not required where substantial performance occurs

- remedy - limited to diminution in value of property due to breach
- minimize economic waste (avoid unreasonable/unjust cost)
- may be applied to specific items w/i larger breach (Plante v. Jacobs - living room wall)
- consumers preference disregarded if (Plante v. Jacobs)
 - cost of satisfying preference = high
 - market value of product relatively same either way
- **perfect tender (sale of goods)**
 - **UCC 2-601** - perfect tender required - buyer may reject if no perfect tender
 - **UCC 2-602** - exceptions
 - buyer must seasonably notify seller of rejection
 - **UCC 2-508** - seller allowed to cure w/ conforming delivery w/i K period
 - **UCC 2-608** - buyer who has accepted may reject only if non-conformity substantially impairs value AND either assumed defect w/b cured or defect undetectable AND w/i reasonable time AND no alteration to goods has occurred
 - damages - **UCC 2-714** - buyer recovers difference in value of K goods/delivered goods (plus incidental and consequential damages UCC 2-715)
- **material breach**
 - **Restatement 235** - non-material breach = partial breach <> excuse performance → may sue for damages
 - **Restatement 225/237** - material breach = total breach = non occurrence of condition → suspends performance (until timely cure affected)
- **anticipatory breach/repudiation**
 - **Restatement 253/common law** - repudiation = total breach → discharges injured party's duty to perform and allows immediate action
 - **demand for assurance** - **Restatement 251/UCC 2-609** - non-breaching party w/ reasonable grounds for believing breach may occur may demand assurance
 - Restatement - if no assurance → suspend performance until assurance provided
 - UCC 2-609 - if no assurance → seller may treat K as repudiated

Chapter 7 - Mistake and Impossibility

Mistake

- mutual mistake = each party assents to different position = void
- risk assumption - did either party assume risk of unforeseen occurrence
 - **Restatement 152** - mutual mistake → K = voidable unless adverse party bore risk
 - expert - presumption against mistake when dealing w/ customer? (expert v. expert = neither bears more burden of risk)
 - separates inadvertent errors from misjudgments
- mutual mistake = voidable K (Sherwood v. Walker (cow))
- unilateral mistake = voidable K
- counterfeit = void (recovery from last party allowed) (Beachcomber - coin b/w experts)
- **misjudgment ≠ mistake**

Impossibility and Frustration

- **impossible** - performance = impossible (Taylor v. Caldwell - music hall)

- condition implied by law (effectively)
- elements required (Transatlantic Financing v. U.S. - shipping thru Suez Canal/South Africa)
 - **unexpected occurrence**
 - **failure to have allocated risk** of occurrence in K or by custom
 - **commercial impracticability** - consider relative percentage cost of altered performance
- **frustration** - performance possible but foundation/purpose of K eliminated (Krell v. Henry)
 - **Restatement 265** - supervening frustration
 - unexpected <> unforeseeable
- **leave losses where lie** - do court decisions effectively reach this result?

Chapter 8 - Remedies

Types of Remedies

- choice of remedies = elective at initiative of non-breaching party
- **expectation damages** = money damages = customary damages - put non-breaching party in as good as position as w/h/b w/o breach
 - remedy = value lost (expenses incurred) + lost profit
 - **UCC 2-712** - buyer remedy = difference b/w cover and K price
 - **UCC 2-706** - seller's remedy = difference b/w sale in "commercially reasonable" manner and K price
 - **UCC 2-708** - loss volume exception - seller remedy = lost profit (applies where standard damages do not put seller in as good as position b/c capacity = infinite)
 - limitations -
 - mitigation required
 - employment - comparable and not of different or inferior kind
 - diminution in value rule - applies where cost of remedying defect excessive in relation to structure (i.e., avoid economic waste)
 - not applicable (to save breacher) where breach = willful/deliberate
 - foreseeability - recovery allowed only for reasonably foreseeable damages (**Hadley v. Baxendale**)
 - certainty - damages allowed to extent loss = certain (w/ doubts resolved against breacher)
- **incidental and consequential damages (UCC 2-715)**
 - allowed where goods sold b/w merchants ≠ perfect tender
 - damages must be **foreseeable** (Webb v. McGowen)
- **specific performance (equity)** - allowed if unique property, damages not calculable
 - **Restatement 359** - encourage liberalize granting of specific performance when damages inadequate
 - **UCC 2-716** - encourage liberalize granting of specific performance when damages inadequate
 - pro = more accurate to let parties negotiate than court to calculate damages
 - con = judicial oversight required

- **reliance** - restore injured party to position prior to K (similar to tort)
 - alternative to measuring non-breaching party's loss
 - remedy = costs incurred (no profit)
- **restitution** - prevent unjust enrichment (not a K remedy (= equity))
 - remedy = value of benefits conferred
 - **Restatement 370/373** -
 - quantum meruit = reasonable worth of benefit conveyed
 - claim must be all or nothing - cannot mix w/ claim for other remedy (**Transatlantic Financing v. U.S.**)
 - situations
 - **losing K** - 3 possible solutions
 - restitution (Restatement 373) - quantum meruit recovery may be greatest to breacher (consider limited to price of K (Chirlstein's "constrained restitution"))
 - reliance (K damages) - (Restatement 349) - reliance = costs less loss caused by breach
 - loss sharing - recover proportional to stage of completion (both parties bear loss)
 - **breaching PL (Restatement 374)**- always entitled to offset benefit conveyed against loss caused

Liquidated Damages

- subject to judicial review
- **Restatement 356** - liquidated damages allowed so long as reasonable in light of anticipated/actual loss from breach and difficulties in proving loss
- penalty = excessive liquidated remedy = against public policy = not allowed