**Contract Law**

What is the APPLICABLE LAW?

The UCC governs all contracts for **the sale of goods.**

**(但し**common law apply unless the UCC provides contrary provisions**)**

Mixed deal: the applicable law is determined by **the predominate purpose**

(all or nothing approach)

Exception: if the contract **divides payment** between goods and non-goods,

then apply UCC to sale of goods and common law to rest.

2-105: “Goods” means **all movable thing**. “Goods” also includes the unborn young of

animals and growing crops and other identified things

 (uncut timber, computer software and other electronic informationも含む)

 Merchant

The UCC has additional rules that apply when both parties are merchants.

Merchants are those who deal in the type of goods or have specialized knowledge or skill

regarding the goods.

 **UCC** 2-104.

 "**Merchant**" means a person who deals in goods of the kind or otherwise by his occupation

 holds himself out as having knowledge or skill peculiar to the practices or goods involved in the

 transaction….

Formation of contracts

A valid contract requires 1) offer, 2) acceptance, 3) consideration, and 4) no formation defenses.

① Offer

**An offer is a manifestation of**

1) a present intent to be legally bound to a contract,

2) with certain and definite terms,

3) communicated to an identifiable offeree.

1) Offers vs Invitations to make offers

§ 26. Preliminary Negotiations

A manifestation of willingness to enter into a bargain is not an offer if the person to

whom it is addressed **knows or has reason to know** that the person making it **does not**

**intend to conclude a bargain** until he has made a further manifestation of assent.

・An advertisement is usually an invitation. ※ 別論点として論じるべき

However, 1) if clear words intending to be immediately bound are used,

 (or associated with a stated reward such as “first come, first serve”).

and 2) there is certainty of all the terms,

⇒ an advertisement could be an offer, rather than an invitation.

※ case lawのみ, 定義は適当でＯＫ

論証例：the words "first come first served" indicate a intent to be immediately

 bound.

・Generally, quotations are not considered offers, but in this case circumstances and

language of letter (giving dates, “for immediate acceptance”) indicates intent to be

immediately bound.

 Fairmount Glass Work v. Crunden-Martin Woodenware Co. (1899)

 P: request for quotation → D: “we quote you Mason fruit jars…Pints $4.50, quarts

 $5.00, for immediate acceptance, and shipment not later than May 15…”

 Hold: D’s quotation is an offer. “immediate acceptance” implied the next and last step

 in the transaction was expected to be P’s yes or no.

2) Under common law, essential terms (subject, price, quantity) must be covered.

 UCC – Quantity

Requirement K 　　　　– Terms of exclusivity.

Real estate 　 　　– ID of land and price.

 2 Acceptance

Acceptance is 1) **manifestation of unconditional assent to the terms of an offer,**

2) **in a manner prescribed or authorized in the offer,**

3) **by the offeree with power of acceptance.**

 ※ knowledge of the offerが原則要件

**§ 51. Effect of Part Performance Without Knowledge of Offer**

Unless the offeror manifests a contrary intention, an offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance.

⇒ 履行途中でofferを知った場合に, 履行を完遂させることでacceptanceできる

**Methods of Accepting an Offer**

 The offeror has the power to state the terms upon which acceptance must be made.

If the offer is silent as to the means of communication, the offeree can accept

1) by means used by the offer or equivalent to the means or

2) by means customarily used in similar transactions.

Unilateral Contract (Acceptance by Performance)

Most offers can be accepted by either a promise to perform or performance

However, when an offer that expressly requires performance as the only possible

method of acceptance, it can be accepted only by performance.

例: 5月1日までに論文を提出すれば審査の上，一つの論文に1000＄を出す

　 → 論文出します！と約束しても契約不成立。準備初めてなければ申込撤回可能

**§ 32.** Invitation of Promise or Performance

 In case of doubt an offer is interpreted as inviting the offeree to accept

 either by promising to perform what the offer requests or by rendering the

 performance, as the offeree chooses.

**§ 50.** (2) Acceptance by performance requires that at least part of what the offer

requests be performed or tendered and includes acceptance by a

performance which operates as a return promise.

**一般;**Acceptance by Promise: § 56.

原則：the offeree must communicates acceptance to the offeror

“the offeror receive the acceptance **seasonably***.”***に効力発生**

例外：**Mailbox Rule**

**Acceptances are effective on dispatch** (占有喪失時に効力発生)

 ※ 適切に発送される必要がある (宛先を書き間違えていればダメ)

※ Everything else (offers, revocations, etc.) is effective when received.

**§ 63. Time When Acceptance Takes Effect**

Unless the offer provides otherwise,

(a) an acceptance …is operative …as soon as put **out of the offeree's possession**,

without regard to whether it ever reaches the offeror; but

(b) an acceptance under an option contract is not operative until received by the offeror.

**Exception**

 ① offer states otherwise

 “the acceptance must be received on March 16.” →3月15日に送っても

3月16日までに到達しなければ効力無し。

② if sends rejection then sends acceptance (whichever arrives 1st is effective)

 同時にrejectionとacceptanceを発信した場合には, rejectionが先に到達

すればacceptance発信時に効力は発生しない

 ※ rejectionが到達後, acceptanceのレターと小切手を送付買主が小切手受領

　　　　　　　　　　　　 → rejection到達時にacceptanceの能力はなくなるので契約は不成立

③ irrevocable offer = acceptance under option contract

**§ 63** (b) an acceptance under an option contract is not operative until received by the offeror.

**例外**:Acceptance by Performance

1) **Full performance** is always acceptance.

2) **Start** of performance

**Start of performance is acceptance for bilateral contracts in general.**

**However, start of performance is not acceptance of unilateral contract offers.**

**Completion of performance is required.**

**※** viewed as an implied promise to perform.

 Ever-Tite Roofing Corp. v. Green (La.1955)

 Got credit report 10 days after the contract / sent a crew of workman and a truck

 loaded with supplies to the Green’s house.→ start of performance / cannot revoke.

例：Ｉf the offeree were to immediately pick up a brush and begin painting the house

while the offeror was looking, this action will be considered a promise.

**§ 53. Acceptance by Performance; Manifestation of Intention Not to Accept**

(1) An offer can be accepted by the rendering of a performance only if the offer invites such an acceptance. (This inviting can be expressed or implied)

(2) Except as stated in § 69 (silence 例外), the rendering of a performance does

not constitute an acceptance if within a reasonable time the offeree exercises

reasonable diligence to notify the offeror of non-acceptance.

 Necessity of Notification

When the offeree has reason to believe that the offeror will not learn of acceptance,

the acceptance is not effective until the offeror is given reasonably prompt notice

 　　　 (1) offer invites an offeree to accept by rendering a performance,であれば通知不要

(2) offerorが履行開始知らないことを分かっている場合など通知必要

 (多くのoutlineで 省略されている論点↓)

**§ 54. Acceptance by Performance; Necessity of Notification to Offeror**

(1) Where an offer invites an offeree to accept by rendering a performance, no

notification is necessary to make such an acceptance effective…

(2) If an offeree who accepts by rendering a performance has reason to know

that the offeror has no adequate means of learning of the performance with

reasonable promptness and certainty, the contractual duty of the offeror is

discharged unless

 (a) the offeree exercises reasonable diligence to notify the offeror of acceptance,

 (b) the offeror learns of the performance within a reasonable time, or

 (c) the offer indicates that notification of acceptance is not required.

MBE;「A社が機械代金を支払わないときは当社が代わりに支払います」という書面を使いA社がB

社から機械購入→ B社は保証者が知らないと考えられる時は通知をしないと保証効力はない.

なお, acceptance by performanceであり速やかに通知すれば，機械販売時点で効力発生。

「彼に100万円を貸してくれたら, 彼が返済しない時は私が責任をもって返します」という手

紙であれば，unilateral contract. 貸した時点で保証契約成立。

3) By **shipment** of goods [UCC § 2-206](http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=1002112&DocName=ULUCCS2%2D206&FindType=L&AP=&fn=_top&rs=WLW6.09&mt=LawSchoolPractitioner&vr=2.0) ※ 注文品を発送すれば契約成立

**The shipment of non-conforming goods will be bothan acceptance and a breachof the contract. However, if the** [**seller**](https://www.law.cornell.edu/ucc/2/2-103#Seller_2-103) **seasonably notifies the** [**buyer**](https://www.law.cornell.edu/ucc/2/2-103#Buyer_2-103) **that the shipment is offered only as an accommodation to the buyer it constitutes counteroffer and no breach.**

An order for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of goods.

= Acceptance by Performanceの原則通り

但し原則その後の通知必須：comment 3

“The beginning of performance by an offeree can be effective as acceptance so as to bind the offeror only if followed within a reasonable time by notice to the offeror.”

 **※** the offer or party practice or usage may indicate **conducts without notice** is

envisaged as acceptance.

UCC特別例外 2-206：不適合品の発送: Improper performance

 　　　　　 代替品（accommodation）である旨の通知あり → counter offerになる。

代替品（accommodation）である旨の通知なし → accept & breachになる。

A shipment of non-conforming goods does not constitute an acceptance if

the [seller](https://www.law.cornell.edu/ucc/2/2-103#Seller_2-103) seasonably notifies the [buyer](https://www.law.cornell.edu/ucc/2/2-103#Buyer_2-103) that the shipment is offered only as

an accommodation(便宜) to the buyer.

 売主が上記通知をしないと

→A non-conforming shipment of goods will be bothan acceptance and a

breachof the contract ※ common lawではcounter-offer?

UCC seller’s acceptance＝1) a promise to ship

2) prompt shipment

3) shipping non-conforming goods, unless sent as

an accommodation

§ 2-206. **Offer and Acceptance in Formation of Contract.**

(1) Unless otherwise unambiguously indicated by the language or circumstance

 (b) an order or other offer to buy [goods](https://www.law.cornell.edu/ucc/2/2-105#Goods_2-105) for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of [conforming](https://www.law.cornell.edu/ucc/2/2-106#conforming_2-106) or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the [seller](https://www.law.cornell.edu/ucc/2/2-103#Seller_2-103) seasonably notifies the [buyer](https://www.law.cornell.edu/ucc/2/2-103#Buyer_2-103) that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of

acceptance an offeror who is not notified of acceptance within a reasonable

time may treat the offer as having lapsed before acceptance.

　両者に共通の例外

**Acceptance by Silence or Exercise of Dominion** Restatement 2nd § 69

**In general, silence does not constitute acceptance, but it can be acceptance if; 1) the parties have been treating silence as an acceptance through their past**

**dealings,**

**2) they agree that that silence is treated as an acceptance, or**

**3) the offeree takes benefits with reasonable opportunity to reject them.**

：1) Where an offeree **takes the benefit** of offered **services** (not goods)

with a) reasonable opportunity to reject them and

b) reason to know that they were offered with the expectation of compensation.

例：無料を期待する理由もなかったが子への20回のピアノレッスンを黙認

2) a) Where the offeror has given the offeree **reason to understand** that assent may be manifested by silence,

b) and the offeree in remaining silent intends to accept the offer.

例：●●というレアカード100＄で買うから見つけたら送ってよ→送ってもらいsilence

3) Where because of **previous dealings**, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

　 例：過去１年間注文書があるたびに通知もせずに商品発送。あるとき注文書受けて無視

※ 約束したものと違う商品を受領しやむなく使用する場合でもacceptance（損害賠償の問題）

**Exercise of Dominion**

 4) a) An offeree who does any act inconsistent with the offeror's ownership of offered proper

b) unless they are manifestly unreasonable.

例：送り付け商法。放置して契約成立しないが，その本を妻にプレゼントすれば成立

　　　　　　　　　　→いずれも契約成立なら履行利益の賠償が可能になる。

**Power of Acceptance (Has the offer been terminated?)** (4 methods)

§ 36. Methods of Termination of the Power of Acceptance

(1) An offeree's power of acceptance may be terminated by

(a) **rejection** or counter-offer by the offeree,

(b) **lapse of time**,

(c) **revocation** by the offeror, or

(d) **death or incapacity** of the offeror or offeree.

(2) In addition, an offeree's power of acceptance is terminated by the nonoccurrence

of any condition of acceptance under the terms of the offer.

① Lapse of time a) Time stated in offer or b) Reasonable time after offer.

 ※オプション契約でなければ7カ月後のacceptanceはtoo late

② By Operation of LAW a) Death or Incapacity

死亡を知らなくても消滅. オプション契約ではofferor死亡後も承諾可

※ 死亡の前に, 履行に着手していればacceptanceで既に契約成立

b) Destruction

③ Revocation = manifestation of intent not to enter into contract

**Offer can be revoked before acceptance takes place. However, the revocation**

**must be communicated effectively directly or indirectly**

※ Functional equivalents rule = offerと機能的に等価な手段であればoffereeが気づか

なくてもrevocationは有効.

Restatement 2nd § 42, 43

An offeree's power of acceptance is terminated

1) when the offeree **receives** from the offeror a **manifestation of an**

**intention** not to enter into the proposed contract, or

2) when the offeror takes definite action **inconsistent with an intention** to

enter into the proposed contract and the offeree **acquires reliable**

**information** to that effect.

**Offers that CANNOT be revoked**

a) Option Contract

b) UCC "Firm Offer Rule"

c) Detrimental Reliance

d) **Start of performance** as to **unilateral** contract

a) Option Contract

Promise NOT to revoke AND Supported by additional consideration

§ 25. An option contract is a promise which limits the promisor's power to revoke an offer.

b) UCC "**Firm Offer** Rule"

An offer 1) by a merchant to buy or sell goods 2) in a signed writing which

 manifests an intent not to revoke is not revocable for the time stated 3) up to 3

 months.

 **§ 2-205**

 An offer 1) by a [merchant](https://www.law.cornell.edu/ucc/2/2-104#Merchant_2-104) 2) to buy or sell [goods](https://www.law.cornell.edu/ucc/2/2-105#Goods_2-105) 3) in a signed writing

 which by its terms gives assurance that it will be held open

→ is not revocable for up to **3 months**

例：半年は価格を変えませんというoffer → ４か月後のacceptanceはOK

∵３か月はrevokeできないだけ。revocationなければ効力は存続.

c) Detrimental Reliance

 **Offer that reasonably induces detrimental reliance**

– Reliance that is: reasonably, foreseeable and detrimental

e.g.General Contractor – Whenever a general contractor relies on bid from

sub-contractors to submit a bid, an option K is formed.

d) **Start of performance** pursuant to an offer to enter into a **unilateral** contract

⇒ irrevocable for a reasonable time to complete performance

 例：明日までに中古車をもってきたら100万で買うよ＝looking for performance, not promise

⇒ 実行まで撤回できる（相手方が履行に着手していなければ）

Patterson v. Pattberg, (NY, 1928)

 D offered to reduce the debts by $780 if P prepaid the entire amount due by May 31. Late in

 May, P appeared at the D’s door and said “I have come to pay”. D said “It is too late, I have

 sold the mortgage” Hold: the revocation is valid because D had not accepted performance.

 着手しているのでは？（私見） The appellate court found that the performance was the actual

 payment. (Later, NY enacted a Statute making what Pattberg did illegal)

§45. Option Contract Created by Part Performance or Tender

(1) Where an offer invites an offeree to accept by rendering a performance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.

④ Rejection : A manifestation of intention not to accept an offer :§ 38. (2)

Effective when received.

※ オプション契約では，期間内では拒絶の後も承諾可能 (relianceあれば例外)

Under irrevocable offers, or option contracts, a rejection will not terminate the power of acceptance unless reasonably relied on by the offeror in good faith, and then only to the extent to avoid injustice.

**Counteroffer:** terminates the offer and becomes a new offer.

 **Under the common law, the mirror image rule applies. Acceptance must mirror the offer. Manifestation of acceptance that adds new or different terms is not valid acceptance and treated as a counter offer.**

The Mirror Image Rule

 **＝** the acceptance must be in conformity with the offer.

※ a reply that merely request information constitutes inquiry rather than a

counteroffer;「～も含んでいますよね」は質問でありcounter offerにならない

例：1000万円で家を売りますとoffer→前庭にブランコはついていますか？→NO

→了解，購入します

例：1000万円で家を売りますとoffer

→「安くしてくれない？」単なる交渉，「安くしないと払えない」rejection

**Under the UCC**

**1) A definite and seasonable expression of acceptance that states additional or**

**different terms operates as acceptance.**

**2) If both parties are merchants, the new terms become a part of the contract**

**unless a) the new terms materially alter the agreement,**

**b) the offer expressly forbids modifications, or**

**c) the new terms are objected.**

 **If one party is not a merchant, the new or different terms are considered**

**mere proposals.**

materially alterの例：i) warranty disclaimer, ii) clause that materially shorten the deadline,

iii) clauses that change industry standard or past course of dealing

・a disclaimer of consequential damages clause (裁判例)

・仲裁条項は近年not material (但し上訴を禁止する仲裁条項はsplit)

**UCC § 2-207**

**(1)** that is sent within a reasonable time **operates as an acceptance even though it**

**states terms additional to or different from those offered** or agreed upon,

unless acceptance is expressly made conditional on assent to the additional or

different terms.

**(2)** When an acceptance is made **between merchants** that deviates from the original

offer, under [UCC](http://amzn.to/1QR2T1q) the new terms automatically become a part of the contract

unless 1) the new terms **materially alter** the agreement,

2) the offer expressly forbids modifications,

or 3) the new terms are **objected** within a reasonable period of time.

 (3) **Conduct** by both parties **which recognizes the existence of a** [**contract**](https://www.law.cornell.edu/ucc/2/2-106#contract_2-106) is sufficient to establish a [contract for sale](https://www.law.cornell.edu/ucc/2/2-106#Contract for sale_2-106), although the writings of the parties do not otherwise establish a contract. 有効前提の行為あれば, 本来契約無効でも有効に成立

In such case the terms of the particular contract consist of those terms on which the

writings of the parties agree, **together with any supplementary terms**

incorporated under any other provisions of this Act. 合意がない部分はUCC gap-filler

 ※ offerとacceptanceの条項が矛盾するときは？

 (additional termについては規定があるがdifferent termは明文なし）

多数説：**Knockout rule**

 **Different terms “knock each other out”, which means both are**

 **removed from the contract.** **UCC gap-fillers are applied to what is left.**

 **An implied-in-fact contract**

**UCC 2-204(3):** Even though one or more terms are left open a contract for sale doesnot fail for

indefiniteness if the parties have intended to make a contract and there is a

reasonably certain basis for giving an appropriateremedy.

 **Res § 4. How a Promise May Be Made**

A promise may be stated in words either oral or written, or may be inferred wholly

or partly from conduct.

Often such contracts involve a course of dealing between the parties or a common trade usage. The legal elements of an implied-in-fact contract are the same as an express contract: offer and acceptance, consideration and mutuality of intent. However, some of the terms may be established by the parties' conducts.

2-204: A contract for sale of goods may be made in any manner sufficient to show agreement,

including conduct by both parties which recognizes the existence of such a contract.

→ 契約成立時不明でもＯＫ　例: 双方が同時に同じofferをして，双方それを信じて行動

③ Consideration

**Consideration is 1) the bargained-for exchange 2) of legal value** (benefit or detriment)

= a benefit or detriment which is bargained for between the parties

 1) → Parties must exchange something.

2) → More than sham consideration (peppercorn)

Courts require a party incur a **legal detriment**

Forms of Consideration

 1) Performance or promise to perform.

 2) Forbearance or promise to forbear – If it benefits the promisor

 ※ condition on a gratuitous promiseとconsiderationの区別方法

　　　 a) language of parties

b) context: commercial? or family?

c) benefits: detriment creates benefits to the promisor ?

Illusory promise

　 **Illusory promise that gives the promisor unfettered discretion to perform or not to perform is not consideration**;Not valid "promise to sell me all the cars I want"

例:注文主は, この注文を9月1日まで無条件で取り消すことができる.

→ illusory promiseであり同注文にacceptanceしても9月1日までは契約不成立

Ex. A promised to sell B at $1,000 a ton as many tons of widgets, not exceeding 10 tons, as B may

 choose to order within the next 90 days → illusory promise, A can refuse the order.

 If, B promised to order exclusively from S→ the promise constitutes the consideration

Forbearance to Sue

**A promise to refrain from suing on a claim may constitute consideration if**

**the claim is valid or claimant in good faith believed claim was valid.**

 ※ 相手方が権利無効と知っていても無関係

※ Aが無効と知りつつ裁判をし相手方100万払うと言うので和解

⇒ Invalid，A did not provide consideration ∵bad faith

Past or Moral Consideration

**Promise for something already done does not satisfy the bargain element.**

**例外 Moral consideration**

 ・Promise by debtor who has been discharged by statute of limitations or

bankruptcy to repay

・When 1) D received "material benefit" (i.e. P saves D’s life),

2) necessary to prevent injustice. (旧判例とRes. 2nd§ 86を混ぜた私製基準)

※ 多くの州で否定。MBEでは命を助けてもらったお礼も強制不能と考える.

Pre-Existing Duty Rule

Common law

**Performing or promising to perform an existing legal duty may not**

**constitute consideration**

 **New consideration** is required for modification of a contract

 例外1) The modification is **fair and equitable** in view of **circumstances**

**not anticipated**.

2) **Third party promises** to pay.

3) There is an **honest dispute** as to the duty.

 ※ mutual modificationであれば適用無し∵双方の義務変更が約因に

 § 89. Modification Of Executory Contract

  A promise modifying a duty under a contract not fully performed on either side is binding

(a) if the modification is fair and equitable in view of circumstances not anticipated by

the parties when the contract was made; or

(b) to the extent provided by statute; or

(c) to the extent that justice requires enforcement in view of material change of position

in reliance on the promise. i.e., **estoppel**

Resの例

・工事中にsolid rockが見つかったので値上げ○

・型式を誤り300ドルで契約したが1200ドルにすべきこと気づき利益いらないので1000ドルにしてく

れとお願いし了解される○

・週90ドルで1年雇っていたが人が10月後150＄で雇うという誘いをライバルから受けたと言うので

月120ドルに増額○

　　　　　　・材料費高騰は微妙。大規模ストライクが原因で双方準備前に値上げ○，半分ほど納入し買主が同製品を

改良した製品の売買契約を結んだ後✕

UCC

**New consideration** is not required for modification of a contract if modifying

agreement is made in **Good faith.**

**Res.§ 73. Performance of Legal Duty**

Performance of a legal duty owed to a promisor **which is neither doubtful nor the**

**subject of honest dispute is not consideration**; but a similar performance is

**consideration if it differs from what was required** by the duty in a way which

reflects more than a pretense of bargain.

※ 第三者に対して負う債務の履行は？

例：Aと道路を掃除する契約，Bに同じ道路を掃除ことの契約を結びお金をもらえる？

Traditionally→ NO　Modernly→ OK

※ 書面でない修正を無効とする条項 = no-oral-modification clause (建築請負で多い)

 UCC → 有効

 Common law → 無効 (一部州も効力認める)

∵1) Parol evidence is admissible because it is subsequent agreement.

2) Any prior agreement, including no-oral-modification clause can be modified.

但しthe contractor has relied on a verbal request for extras =「追加費用出す」の言

の信頼下の追加工事代金を，同条項あっても請求可能であることには争い無し

Part payment as consideration for RELEASE (promise to forgive debt)

is Valid consideration, if the debt is 1) **not yet due** or **2) disputed.**

= if it is 1) paying before the payment is due 2) paying part of a disputed amount.

**Consideration Substitutes** ～ Enforceability of Promises without consideration

**① Promissory Estoppel** Only use if no valid contract

**Under the doctrine of promissory estoppel, a promise that reasonably induces detrimental reliance is enforceable if it is necessary to avoid injustice**

1) Promise

2) **Reliance** that is reasonable, detrimental, and foreseeable

3) Enforcement is necessary to **avoid injustice**

**§ 90. Promise Reasonably Inducing Action or Forbearance**

A promise 1) which the promisor should reasonably expect to induce action or

forbearance on the part of the promisee or a third person and 2) which does induce

such action or forbearance

→ is binding 3) if injustice can be avoided only by enforcement of the promise.

⇒ The remedy granted for breach may be limited as justice requires.

MBE Trick:もっとも安い見積もりを出したら仕事をくれると言われて, 時間と費用をかけて下請

が見積もり作成 → considerationあり, promissory estoppelは弱い主張.

タバコをやめたら1000＄はlegal detrimentがconsiderationだからestoppelは弱い

主張（なお，5年やめたらならSOFに注意）

**② Seals :** abolished in sale of goods contracts, and in about half the states. not in MBE

 ※ executed gift (actual or symbolic delivery with intent to give a giftは有効)

 ※ condition on gratuitous promiseとconsiderationの差は微妙

 1) language, 2) context (commerceかfamilyか), 3) benefit (promisorに利益与えるか) の総合判断

④ Defenses to enforceability (voidかvoidableかは州により違う例多い)

　 詐欺防止　　　　　 Ⓐ Statute of frauds

意思欠缺 Ⓑ Incapacity, ⓒMistake / ⓓAmbiguity

不当手段 Ⓔ Misrepresentation/ Fraud, ⒻDuress/ⒼUnconscionability

公序良俗 Ⓗ Public policy

**Ⓐ Statute of Frauds**

**Under the Statute of Frauds (“SOF”), certain contracts that are within the SOF is not enforceable unless they are evidenced by a writing signed by the party sought to be bound (if SOF is not satisfied by 1) writing 2) performance 3) judicial admission or 4) promissory estoppel).**

**Contracts within the SOF**

Marriages – Promise in consideration of marriage (i.e. if you marry him…)

Year – **Contract not capable of being performed within a year**

**from the date of the Agreement** (NOT the date of performance)

Task (no time) – always possible to complete within a year → doesn't apply

**Life** – can end at any moment → doesn't apply

Land 　　 – Transfers of Interest in **Real Estate**. Exception: leases of a **year or less**

Executor – Promise by **executor** to pay the debts of the decedent with his own money.

Goods – contracts for the sale of goods for the price of **$500** **or more** (UCC)

Surety – Promises to Answer for Debts of Another

× when 1) the main purpose of the guarantor is to protect his own interest or

 2) a creditor discharges the original debtor on the faith that he can collect

例: あいつが授業料を払ってくれない時は俺が払うよ

 **How to Satisfy the SOF (3 pattern)**

1. Writing(several pieces OK)

要件§ 131 a) the **ID** of **Subject Matter**

b) the **ID** of the parties

c) the **signature** of the party to be bound

d) the essential terms (**UCC** = quantity, 例外output or requirement contract)

Signed Writing ~ liberal requirement

1) several writings may be read together

 § 132 The memorandum may consist of several writings if one of the writings is signed and the

writings in the circumstances clearly indicate that they relate to the same transaction.

2) can have been made for any purpose, before or after contract performed

Signature ~ liberal requirement

1) any symbol used with the intention to authenticate the writing

 ~ stationery, initials, logo, letterhead etc...

2) no mutuality requirement:

§ 134may be any symbol made or adopted with intention, actual or apparent,

to authenticate the writing as that of the signer

UCC 1-201. “Signed" includes using any symbol executed or adopted with present

intention to adopt or accept a writing 　※ ＵＣＣ全般の定義

UCC (Merchants') Confirmatory Memo Rule (2-201)　相手のサイン必要の例外

 1) **Between merchants** ※双方がmerchantである必要

2) i) if within a **reasonable time** ii) **a writing** in confirmation is received

 （OK even if confirmation was not signed by the party）

→ it satisfies the requirements of SOF (quantity term must be included)

3) unless written notice of **objection** is given within **10 days** after it’s received.

2. Performance

**①** Service Contracts **→ Full performance** by either party **satisfies**

**(Part performance** NOT ⇒ quasi contractが問題)

例：6年のコンサル契約，3年してもSOFで契約はenforceable

**②** Sale of Goods Contracts (UCC)

**1)** – **Part performance of a contract**

1) payment is made or 2) goods are accepted

– Part performance of a K for the sale of goods **satisfies SOF**,

but ONLY to the extent of the part performance **if the contract is divisible.**

問: ダイヤを100個送ってくれと電話→売主は直ぐに発送→買主受領拒否できる？

　　　　　　　　答: できる∵ SOF違反, 本例外はacceptanceが必要

**2-201** enforceable…with respect to goods which payment has been made and

 accepted or which have been received and accepted

**2) Seller’s** Part Performance of **Specially Manufactured Goods**

– SOF is satisfied as soon as seller makes a **"substantial beginning" of**

**making or obtaining the specially manufactured goods**.

**③** Real Estate Transfer Contract (州で微妙に違う)

Part performance can satisfy SOF if the buyer has done any 2 of the following

① Takes possession, ② Pays full or partial payment, ③ Makes Improvements

∵契約の成立が説明できるから ⇒ 説明できるかが重要

(借主としての行為とみなされるなら例外不適用)

3.Judicial Admission

– If a D asserting a SOF defense **admits in a pleading** or **testimony** that he had entered

into an agreement with the P, then there is no SOF defense ∵No need for protection

**※** courts will use promissory estoppel to remove the contract from the statute of frauds.

4.Promissory Estoppel SOFにおいて同法理はrestitutionとともに常に検討が必要,

**Under the doctrine of promissory estoppel, a promise that reasonably induces detrimental reliance is enforceable notwithstanding SOF if it is necessary to avoid injustice.**

 **Res.**§ 139. Enforcement by Virtue of Action in Reliance

A promise 1) which **the promisor should reasonably expect to induce action or**

**forbearance** on the part of the promisee or a third person

and 2) which does induce the action or forbearance

is enforceable **notwithstanding the Statute of Frauds**

 3) if injustice can be avoided only by enforcement of the promise.

⇒ The remedy granted for breach is to be limited as justice require.

　　　（少なくともstrong evidenceが必要 ∵でないとすべてのSOF違反を救済する可能性）

**Modification**

1 . Modification of K must be in writing if the deal with the alleged change **would be**

**within the SOF**. (i.e. lease for 3 months. Subsequent claim it was for 3 years)

 書面必要: $300→$600, $500 →$600, 5カ月契約→15カ月契約

書面不要: $600→$300, 15カ月契約→5カ月契約 (伝統ルール，書面要求する州多し)

2 . Contract provision requires a writing to modify.　※詳細上述

→ CL: ignore the provision.　UCC: effective unless waived.

 ※ 10万円で売買⇒「約束の５月末に間に合わないから６月末にして」「いいよ」

をmodificationとする書面がないのでダメ，しかし通常はwaiver of condition

と考える。

**Ⓑ Lack of capacity**

1) Infancy – under 18

2) Incompetents – lacks mental ability to understand agreement

3) Intoxicated persons (if other party has reason to know)

 → Voidable (void: below minimum age and被後見人)

Ratification – Implied affirmation by retaining benefits after gaining capacity

Necessities　　　　　– Quasi-contract liability. must pay a reasonable amount.

**ⓒ** **Ambiguity**

There will be NO contract if

1) Parties use a **material term** that is open to at least two reasonable interpretations,

2) **EACH party attaches a different meaning** to the term, AND

3) **Neither party knows** or has reason to know the term is open to at least two

 reasonable interpretations.

**ⓓ Mistakes**

**Mutual mistake**

 **If there is a mutual mistake of material fact, the contract is voidable (unless the party bears the risk) Mistake = a belief that is not in accord with the facts.**

 ※ a mistake must be about the nature of the goods, not merely the value.

例：絵画の画家が違った場合はvoidable, 画家は同じだが、評価価格が違うは×

 Res. 2nd§152

1) Where a mistake of both parties at the time a contract was made 2) as to a basic assumption on which the contract was made

3) has a material effect on the agreed exchange of performances,

→ the contract is voidable by the adversely affected party

4) unless he bears the risk of the mistake under the rule stated in § 154

※§ 154 . A party bears the risk of a mistake when

(a) the risk is **allocated** to him **by agreement** of the parties,

or (b) he is aware that he has only **limited knowledge** with respect to the

facts to which the mistake relates but treats his limited knowledge as

sufficient

or (c) the risk is allocated to him by the court on the ground that it is

reasonable in the circumstances to do so.

Sherwood v. Walker, (Mich. 1887)：乳牛に関する動産回復訴訟（replevin）

「アバロウニの薔薇2 世」事件the case of Rose 2nd of Abalone

**Facts:** アンガス牛のブリーダーが乳牛は不妊症であると考えて畜牛として地方銀行のエグゼク

ティブに売却。実は乳牛の体内に子牛。代価は畜牛相場の$80 。子牛を孕むと$1,000

**Hold :** 錯誤認め請求認容（専門家の売主がbear the riskでは？の批判もある）

**Unilateral mistake**

**If one party’s mistake of material fact exists and the other party had a reason to know the mistake, the contract is voidable (unless the party bears the risk)**

1) both parties → one party 2)3)

＆ 4) the other party **had a reason to know** of the mistake

 **(**or the effect of the mistake is such that enforcement of the contract would be

unconscionable)

**§ 266. Existing Impracticability or Frustration 錯誤の一種**

(1) Where, at the time a contract is made, a party's performance under it is impracticable without his

fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.

Mineral Park v. Howard, (1916)

**Facts:** P and D contracted to give D the right to haul gravel and earth from his property for a construction

project. D agreed to take all gravel needed for the job. However, D only took a portion of the

gravel. D alleged that he did not haul the more gravel because it was under water.

**Hold:** A thing is impracticable when it can only be done at an **excessive and unreasonable** cost.

D’s failure is justified by impracticability.

Sherwood v. Walker, (1887)

**Facts:** D entered into contract to erect a building P’ lot. The lot had quicksand, and the building collapsed

twice before builders abandoned project and refused to perform. P sued for damages.

**Hold:** Where a party contracts to undertake a duty that in itself is possible, short of an act of God, the law,

or the other party to the contract, he must perform.

The court found that the contractor **assumed the risk** of the land being difficult to build on and

therefore was obligated to perform.

**Ⓔ Misrepresentation**  voidable

**Misrepresentation**

If a party's manifestation of assent is induced by either a fraudulent or a

negligent material misrepresentation by the other party on which the

recipient is justified in relying, the contract is voidable by the recipient.

1) intentional = Fraudulent Misrepresentation

2) negligent and material = Non-fraudulent Misrepresentation

 **§ 164. When a Misrepresentation Makes a Contract Voidable**

(1) If a party's manifestation of assent is induced by either a fraudulent or a

material misrepresentation by the other party upon which the recipient is

justified in relying, the contract is voidable by the recipient.

**Fraudulent Non Disclosure**

1) nondisclosure 2) of a material fact 3) the aggrieved party reasonably relied on it

＆4) the non-disclosuring party had a duty to disclose.

 duty: a) relationship of trust and confidence

b) the stated fact was rendered untrue or fraudulent.

c) where he knows the mistaken assumption of the other party and the duty of

 good faith would require disclosure. (相手の誤解を知りつつ放置)

MBE: 銀行に資産報告をした後に，融資の決定までに急激に新産状況が悪化すれば開

示義務有り∵the stated fact was rendered fraudulent.

**§ 161. When Non-Disclosure Is Equivalent to an Assertion**

A person's non-disclosure of a fact known to him is equivalent to an assertion

that the fact does not exist in the following cases only:

(a) where he knows that disclosure of the fact is necessary to prevent some

previous assertion from being a misrepresentation or from being fraudulent

or material.

(b) where he knows that disclosure of the fact would correct a mistake of the

other party as to a basic assumption on which that party is making the

contract and if non-disclosure of the fact amounts to a failure to act in good

faith and in accordance with reasonable standards of fair dealing.

(c) where he knows that disclosure of the fact would correct a mistake of

the other party as to the contents or effect of a writing, evidencing or

embodying an agreement in whole or in part.

(d) where the other person is entitled to know the fact because of a relation

of trust and confidence between them.

**Ⓕ Duress 174,175** → the contract is voidable

**The contract is voidable if it is induced by duress.**

**Duress arises**

 if the party's **manifestation of assent** is

1) **physically** compelled

or 2) induced by an improper threat that leaves the victim **no reasonable alternative**.

**Undue influence** §177

= Undue influence is unfair persuasion of a party

1) who is under the domination of the person exercising the persuasion or

2) who by virtue of the relation between them is justified in assuming that that

person will not act in a manner inconsistent with his welfare.

例：死にそうな母親のところに言ってもう見舞いに来ないと言って家を安く売らせる

**Ⓖ Unconscionability** (太文字はRes.208のcomment)

If a contract…is unconscionable, a court may refuse to enforce the contract, or

may …limit the application of any unconscionable term

① substantive unconscionability, such as

1)gross **disparity in the values exchanged** (= overpricing)

2) grossly disproportionate consequences **for a minor breach**

3) a provision **binding on only one party**

② **procedural unconscionability**, such as

 1) near miss cases: almost meeting the requirements of **incompetence or duress**

2) when there is **gross inequality of bargaining power**

 trigger defense.

**Ⓗ Public policy (including Illegality)**

 1) the subject of the contract is **prohibited by law.** (gambling)

2) the **purpose** is crime.

 3) the K performance would a) constitute a tort or b) **violate certain values and freedoms.**

 **※ sources: Legislation, Judicial decisions.**

Contract content and meaning

**1 Interpreting Indefinite Contracts**

**§ 201. Whose Meaning Prevails**

1) the parties have attached the same meaning　　　→ interpreted in accordance with that meaning.

 2) a party did not know of any different meaning attached by the other, and the other knew

the meaning attached by the first party → that meaning

**Courts’ interpretive priority** (1) express terms (2) course of dealing (3) usage of trade

UCC (1) course of performance (2) course of dealing (3) usage of trade

**2 Parol Evidence Rule**

**The rule bars extrinsic evidence prior to, or contemporaneous with,**

**a final (= integrated) written agreement** (only apply to a final agreement)

**※ final (= integrated)**でも**partial**と**complete**で扱いが違う

1. Always inadmissible to contradict

2. OK 1) to show **defense to contract formation** (duress, mistake, lack of consideration etc)

 2) to show existence of **condition precedent**

例：株式購入を書面で契約，取締役会承認が必要と口頭で合意

　　 ⇒ Parol evidence is admissible to show condition precedent.

Common Law **partial** (not complete) integration → admissible to **supplement**

**ambiguous** terms　 → admissible to **interpret or explain**

 　　　　　　 ＝完全合意があっても契約が曖昧であればparol evidenceで解釈できる

曖昧でなくてもpartial integrationであれば, parol evidenceで補完できる。

 　UCC2-202 may be explained or supplemented

 　 (a) by course of dealing or usage of trade or by course of performance

　　　　　 ※ a completely integrated agreement**でもＯＫ**

 and (b) by evidence of consistent additional terms .

 ※ partial (=collateral) integrationであれば

§ 2-202. Final Written Expression: Parol or Extrinsic Evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

 (a) by course of dealing or usage of trade ..or by course of performance ; and

 (b) by evidence of consistent additional terms unless the court finds the writing to have

been intended also as a complete and exclusive statement of the terms of the

agreement.

**Merger clause is presumption of complete integration.**

 merger clause: “complete and entire agreement”

※ Plain-meaning rule / Four corners rule もっとも厳格, 今や少数派

 The court will only turn to parol evidence if the terms available are wholly ambiguous.

 Admission Rule　CAも

One can bring in parol evidence even if the contract is unambiguous on its face, if the parol evidence creates ambiguity.

**3 UCC default rule**

**・**合意がなければ履行地はthe seller’s place of business

→ 勝手に設置予定場所に運んでも履行としては無効

合意がなければ支払義務は商品受領時に発生

→ 合意がなかったから支払は後で！でとはできない

2-308 Unless otherwise agreed (a) the place for delivery of goods is the seller's place of business

and payment is due at the time and the place where the buyer is to receive the goods.

1. **Warranties of Quality**

 **Express warranties are created by 1) affirmation of fact or promise which**

 **relates to the goods, 2) a description of goods or 3) by use of a model or sample.**

 　　 Express Warranty – Sec. 2-313.

Express warranties by the seller are created as follows:

(a) **Affirmation of fact** or promise made by the seller which relates to the goods

(e.g. “I promise this will last 2 years”)

(b) A description of the goods (“100% steel”)

(c) **A sample or model** : an express warranty that the whole of the goods shall conform

to the sample or model. (This is what it will look like)

 ※ not necessary 1) words such as “warrant” 2) specific intention to make a warranty

 　　 　BUT　1) an affirmation merely of the value of the goods

or 2) a statement purporting to be merely the seller's opinion of the goods

→ does not create a warranty ＝ Puffing & Opinion (“top quality!”)

Implied Warranty of Merchantability Sec. 2314.

 **When seller is a merchant** who deals in goods of the kind**, a warranty that good**

**are merchantable is implied.**

 **Goods are merchantable when they are of average quality and fit for the**

 **ordinary purpose.**

・ A warranty that the goods shall be merchantable is implied

 1) if the seller is a **merchant** 2) with respect to **goods of that kind.**

・ Goods to be merchantable must be at least such as

 (a) in the case of fungible goods, are of **fair average quality** ※fungible=代替可能な

 (b) are fit for the **ordinary purposes**

Implied Warranty of fitness for a particular purpose Sec. 2315.

arises when:

1) buyer has a **particular purpose,**

2) buyer is **relying on the seller's skill** or judgment to select, and

3) seller has **reason to know of purpose and reliance**.

**Disclaimer**

to exclude or modify the implied warranty

1) of merchantability, the language must **mention merchantability** and in case of a writing **must be conspicuous,** and

1)’ of fitness the exclusion must be by a **writing and conspicuous.**

or 2) notwithstanding 1)&1)’, “as is”. “with all faults” or other language which in

common understanding calls the buyer's attention to the exclusion of warranties.

 (“There are no warranties which extend beyond the description on the face hereof.”⇒ OK)

 ※ 商品の箱を開けて出てくる説明書記載のdisclaimerは効果なし, no agreements.

1. **Risk of Loss** UCC § 2-509

 In 1) the Absence of Breach and 2) Agreement ⇒ when ROL pass to B

**Risk of loss shifts from seller to buyer at the time that the seller completes its**

**delivery obligations.**

1. 509(1) Carrier Case (公共=common, UCCには同文言なし)

交通機関利用契約: if a contract requires or authorizes the seller to ship goods by carrier

 運送人による搬送が要求されるか認められているとき

(a) shipment contract 発送契約(特定目的地での引渡が要求されてない)→運送人への引渡時

=If the contract does not require the seller to deliver the goods at a particular destination,

the risk of loss passes to the buyer **when the goods are duly delivered to the carrier**

(b) destination contract 持参債務(特定目的地での引渡が要求)→引き受けを可能にする提供時

=If the contract does require the seller to deliver the goods at a particular destination,

the risk of loss passes to the buyer when **the goods are tendered** at that destination **in**

**a manner that enables the buyer to take delivery.**

まとめ＝at the time the seller completes his delivery obligation (欠陥品発送ではだめ）

2.509 (3) Non-Carrier Case交通機関利用しないとき＝引取債務等 (商人売主は受領させるまでと加重)

 [seller](https://www.law.cornell.edu/ucc/2/2-103#Seller_2-103) is a [merchant](https://www.law.cornell.edu/ucc/2/2-104#Merchant_2-104)　　 on his [**receipt**](https://www.law.cornell.edu/ucc/2/2-103#Receipt_2-103)（physical possession）占有移転時

 non-merchant on **tender of delivery**　　　　　 買主引取可能時

※ **Shipment Contracts Are Presumed:判例**

 ：Where the terms of an agreement are ambiguous, there is a strong presumption under the

 U.C.C. favoring shipment contracts. Unless the parties “expressly specify” that the

 contract requires the seller to deliver to a particular destination.

・瑕疵ある物である場合には危険は移動しない。買主の履行拒絶では早めに移転。

Common law : 馬の売買契約。20日に承諾通知発信，22日到着。21日馬死亡→支払義務有

UCC　　　 : 受領又は交通機関への提供までは危険は移転しないので, 支払義務は消滅

※　F.O.B ＝ “Free on board” is always followed by location. Risk passes at the location.

 参考: 所有権の移転　Transfer of Title，Passing of title

 (被保険利益=[insurable interest](https://ejje.weblio.jp/content/insurable%2Binterest)と差押債権者にとってtitleは意味がある）

 原則when the seller has completed delivery obligations (送付義務終了時)

 ※特定物は契約時，他は発送時＝when goods are shipped等に特定

 物品の特定時前は所有権移転せずunder UCC

**EXCUSE of Non-Performance**

 **When performance is due, any non-performance is breach.**

 **Performance is due when**

 **1) time to performance arrives，**

 **2) conditions precedent are met or excused, and**

 **3) the performance is not discharged.**

**§ 235. Effect of Performance as Discharge and of Non-Performance as Breach**

**(1) Full performance of a duty under a contract discharges the duty.**

**(2) When performance of a duty under a contract is due, any non-performance**

**is a breach.**

 **1) CONDITION**

**§ 224. Condition Defined**

**A condition is an event**, not certain to occur, which must occur, unless its

nonoccurrence is excused, before performance under a contract becomes due.

FORMING of condition: condition? promise?

**§ 226. How an Event May Be Made a Condition**

An event may be made a condition either by the agreement of the parties or by a

term supplied by the court. (後者がconstructive condition)

Constructive Condition＝擬制条件：同時履行は明示されなくても擬制される

　　　　 **§ 234. Order of Performances**

1) Where all or part of the performances to be exchanged under an exchange of

promises can be rendered simultaneously, they are to that extent due

simultaneously, unless the language or the circumstances indicate the

contrary.

2) Except to the extent stated in Subsection (1), where the performance of only

one party under such an exchange requires a period of time, his performance

must be done first.

 **§ 2-511**

Unless otherwise agreed tender of payment is a condition to the seller’s duty to tender and complete any delivery

　　　 　Condition? or Promise?

 Rule: If language is unclear as to whether it’s a **promise or condition**, then they’re usually construed as a **promise** in order to **avoid** **forfeiture.**

 (後述の通り明示的に条件でもavoidance of forfeitureで条件無効にされ得る)

**§ 227. Standards of Preference with Regard to Conditions**

(1) In resolving doubts as to whether an event is made a condition

 of an obligor's duty, …an interpretation is preferred that will

 reduce the obligee's risk of forfeiture, unless the event is

a) within the obligee's control or

b) the circumstances indicate that he has assumed the risk.

問題例・ 50％時間短縮するシステム開発の依頼を受ける。49％しか時間短縮できない

　　　　 → 明確でなければconditionでなくpromise. substantial performanceでOK

 裁判例・「気に入ったらお金払って」＝個人的満足も明示的条件であれば有効，意思優先

 （死亡娘の写真引き延ばし事件）∵ b) assumption of the risk

・「注文主から完全な支払後30日以内に払う」

 → 条件ではないのが合理的意思として支払命じる

∵ 注文主の経済状態を知る有利な地位 = a) within the obligee's control

・「2週間前に積込港の指示を出す」という条項があったが出さないので契約解除

 → 約束ではなく条件として契約終了認める ∵遅れは倉庫管理等に大きな支障

　 (約束となるとmaterial breachないとして損害賠償だけの問題)

UCC 2-311 買主が必要な希望商品の特定をしない時は？

 (a) is excused for any resulting delay in his own performance; and

(b) may also either i) proceed to perform in any reasonable manner or

 ii) after the time for a material part of his own performance treat

the failure to specify or to cooperate as a breach by failure to

deliver or accept the goods.→買主適宜特定できる.大きく遅れれば解除可能

※ Promissory condition ＝ 条件であるとともに約束

 condition → only discharge, no damages.

 promise → may discharge, OK damages

 promissory condition: 両方の性格をもつ

例「売上出たら利益折半するよ」→ 単なる条件であれば売上出なければ無責

 約束的条件であれば損害賠償義務を負う

STANDARD for satisfying an express Condition

**Strict compliance** is required. Generally, if the express condition does not occur.

 → all remaining contractual obligations are executed.

 (constructive conditionならば**Substantial compliance)**

**§ 225. Effects of the Non-Occurrence of a Condition**

1) Performance of a duty subject to a condition cannot become due unless the

 condition occurs or its non-occurrence is excused.

2) the non-occurrence of a condition discharges the duty when the condition can

 no longer occur.

3) Non-occurrence of a condition is not a breach by a party unless he is under a

 duty that the condition occur. (promissory condition)

 Difference from Promise

Promise : If A breached a promise, then B can withhold performance, but only if

 A’s breach is material. If A substantially performed, then B must

 perform (but may deduct damages).

Condition: If A failed to satisfy a condition, then B can withhold performance.

 condition → absolute duty to perform

 promise → substantial performanceでＯＫ

EXCUSE of a Condition (Elimination of a condition)

Waiver 1) Statement giving up the protections of conditions

2) by **person protected by the condition**

3) after the event was to occur

・「変更指示書がないと追加工事支払義務なし」という条項のある建築工事。注文主が圧力

を加えた，工事の進捗状況を代理人が見ていたという事情からwaiver認定 (case law)

※ 事象がもっぱら一当事者の管理下にあるか，他方当事者が一方に依存しているかが重

要な判断基準

・即時払いの約束を３回にわたり10日後払にしたが異議無し。次も10日後払をしたので契

 約解除し,残期間の請求できるか ⇒ waiverの可能性大

※ modificationに似ているが，合意に基づかず，considerationは不要。materialでない変更

※ 実務ではanti-waiver clauseを利用するが有効性には限界あり

※ Acts without knowledge cannot constitutes the waiver.

Estoppel 上記1)＆2)’ BEFORE the event was to occur, and 3) requires **reliance.**

 ※ waiverとかなり共通, Resではrelianceがwaiverの重要なファクターとする

Prevention If the party protected by the condition **prevents the occurrence** of the condition

※Avoidance of Forfeiture

Sometimes courts excuse the non-occurrence of a condition to **avoid excessive harm** to the party NOT protected by the condition.

 **2) Discharge**

 **Performance of a duty is discharged by 1) material breach, 2) anticipatory**

**repudiation, and 3) excuse by reason of a later contract or event.**

 **1.MATERIAL BREACH** (Common Law)

 　 1 . Damages can be recovered for any breach　※ materialでなくても損害賠償はＯＫ

 問：６月１日までに請負代金１０００万円で建築を約束。６月２日に完成。請負人が注文主に１０００

万円を請求すると，遅れたことを理由に支払い拒否。請負人は１０００万円受けとれる？

　　　　　　　答：もらえない ∵ material breachではないので反対債権は消滅しないがliable for damages

 because of breach of contract.

 　2 . Only material breach

 1) **discharges** the other party’s duty 2) **terminate** the contract 3) **compel** performance

= if there is **substantial performance** then the breach is **not material**

 **Material** § 241

Its materiality has to be measured in its total circumstances, such as,

**the extent to which**

1) the Non-breaching party

a) is **deprived of substantial benefit (損害の重大性)**

b) can be **adequately compensated (損害賠償で済むか)**

 2) the Breaching party

a) acted in **good faith** 　 **(行為の悪質性)**

b) will **suffer forfeiture　 　 (失う利益の大きさ)**

c) is likely to **perform remainder** of the contract **(治癒の容易さ)**

 \* Failure is less likely to be regarded as material if it occurs late ∵治癒困難, time is of essenceか

**以下原文**

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking

account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with

standards of good faith and fair dealing.

**Time**

If the contract expressly provides that the time is of the essence, then failure to

perform on time will be a material breach.

⇔ if not, finishing late is NOT a material breach.

※ In contracts for the sale of goods, the perfect tender rule makes time of the essence by

allowing the buyer to reject the goods if the delivery fails to conform to the contract

in any respect without a "time is of the essence" provision.

UCC

 The UCC requires that goods be perfectly tendered.

In contracts for the sale of goods, courts consider delivery dates to be very important. A seller's failure to deliver by the date required is usually considered a breach even without a "time is of the essence" provision.

That's not the case when it comes to the date for paying for the goods, however. Courts give the parties more leeway to miss payment dates because a late payment can always be addressed by charging interest on the amount due.

Divisible contract exception

Failure to perform on one element of the contract does not necessarily put the promisor in breach of the entire contract and **does not excuse performance of the other segments** by the parties.

例：３軒建築契約で２軒目でmaterial breach→３軒目建築義務残存，注文主の１軒分代金支払義務も残存

※: If there is a Material Breach there is no **contract law** right to recover BUT still may

recover under **Quasi-Contract** recovery.

※ Whether a breach is material is a **question of fact**

※ No material breach talk for Sale of Goods : Perfect Tender Rule or Installment Sales Contracts.

 **2.UCC rule about Performance**

**Performance of a duty is discharged by 1) rightful rejection, or**

**2) revocation of acceptance. (not by material breach)**

**§ 2-711. The buyer may cancel the contract by 1) rightful rejection or**

**2) revocation of acceptance.**

1 . **Perfect tender**

 **UCC requires a perfect tender which means the seller’s performance must be**

**perfect.**

 ・後述の通り①分割給付契約②目的物受領後の拒絶では実質的にcommon lawと同じ。

 “reasonably believed the buyer would accept”を瑕疵が軽微のとき考えれば瑕疵が軽微

 ならcure可能となり, 実はperfect tender rule適用はまれ.

2. **Buyer’s Option**

**A less than perfect tender by the seller gives the buyer option**

**1) to reject all and sue for damages or**

**2) accept all and sue for damages or**

**3) accept some goods and reject the rest and sue for damages.**

 　3)から8個のレタス注文で7個しかなこなければ，それだけを受け取れる。その場合，7

個分の代金支払義務を負い，1個分の損害賠償請求できる。

**2-601 Improper delivery; buyer's rights.**

 If the goods or the tender of delivery fail in any respect to conform to the

 contract, the buyer may (a) reject the whole; or (b) accept the whole; or

 (c) accept any commercial unit or units and reject the rest.

3**. Rejection of Goods** 2-602

Rejection of [goods](https://www.law.cornell.edu/ucc/2/2-105#Goods_2-105) must be within a reasonable time after their delivery or tender. It is ineffective unless the [buyer](https://www.law.cornell.edu/ucc/2/2-103#Buyer_2-103) seasonably notifies the [seller](https://www.law.cornell.edu/ucc/2/2-103#Seller_2-103).

 = 1) Rejection must be **within a reasonable time,** and

 2) the buyer must **seasonably notify** the [seller](https://www.law.cornell.edu/ucc/2/2-103#Seller_2-103).

**Rejection is limited by a) cure, b) installment contract, c) acceptance**

 **a) Sellers ability to cure** UCC § 2-508

**A seller who fails to make a perfect tender has an option of curing.**

**1) If time for performance has not expired, the seller may cure by**

**reasonable notice and new tender.**

**2) The seller has a reasonable time of curing even after time for**

**performance has expired, if the seller reasonably believed the buyer**

**would accept.**

・Time for performance has not EXPIRED:

→ The seller may "cure" by: 1) **reasonable notice &** 2) **new tender.**

・Time for performance has EXPIRED:

 　　→1) **reasonable notice** 2) **reasonably believed the buyer would accept**

⇒ he has a **further reasonable time** (cf :based on prior dealings).

**b) Installment Sales Contracts** (perfect tender rule does not apply)

**An installment contract requires or authorizes 1) delivery in separate lots, 2) to be separately accepted.**

§ 2-612. "Installment contract"; Breach.

(1) An "installment contract" is one which requires or authorizes the delivery of [goods](https://www.law.cornell.edu/ucc/2/2-105#Goods_2-105) in separate [lots](https://www.law.cornell.edu/ucc/2/2-105#Lot_2-105) to be separately accepted, even though the [contract](https://www.law.cornell.edu/ucc/2/2-106#contract_2-106) contains a clause "each delivery is a separate contract" or its equivalent.

**The buyer has the right to reject an installment only where there is a substantial impairment that cannot be cured** by a subsequent delivery**.**

つまり分割給付契約では, 言葉は違うがmaterial breachがないと受領拒絶不可

(2) 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

…; but if the non-conformity does not fall within subsection (3) and the seller

gives adequate assurance of its cure, the buyer must accept that installment.

**When non-conformity substantially impairs the value of the whole**

**contract, there is a breach of the whole.**

 (3)Whenever non-conformity or default with respect to one or more installments

substantially impairs the value of the whole contract is a breach of the whole.

But the aggrieved party reinstates the contract if he accepts a non-conforming

installment without seasonably notifying of cancellation…

 例：毎月10台6か月車を売る契約。3月目でお金を払わなくても，残り3か月

 の車を売る義務は消滅しない。

**c) Acceptance of the Goods (注 ≠ acceptance of an offer)**

**If the buyer accepts the goods, he cannot later reject them.**

 **However, payment without opportunity for inspection is not acceptance.**

 Implied acceptance (UCC2-606)

 **If the buyer keeps the goods without objection implies acceptance.**

 Implied acceptance occurs, when the buyer

 1) keeps the goods, 2) without objection, 3) after having an opportunity to

 inspect. (reasonable enough time, does not actually have to inspect.)

**Revocation of Acceptance**

**The buyer may revoke the acceptance and cancel the contract when**

**1) nonconformity substantially impairs the value of the goods,**

**2) there is excusable ignorance, and**

**3) revocation occurs within a reasonable time after discovery.**

**A** [**buyer**](https://www.law.cornell.edu/ucc/2/2-103#Buyer_2-103) **who so revokes has the same rights and duties as if he had**

**rejected them.**

2-608 (1)The [buyer](https://www.law.cornell.edu/ucc/2/2-103#Buyer_2-103) may revoke his acceptance of a [lot](https://www.law.cornell.edu/ucc/2/2-105#Lot_2-105) or [commercial unit](https://www.law.cornell.edu/ucc/2/2-105#Commercial unit_2-105), whose non-conformity substantially impairs its value to him

if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the [seller's](https://www.law.cornell.edu/ucc/2/2-103#Seller_2-103) assurances

(2) Revocation of acceptance must occur within a reasonable time

after the [buyer](https://www.law.cornell.edu/ucc/2/2-103#Buyer_2-103) discovers or should have discovered the ground

for it…

**2. Anticipatory Repudiation**

 **Willfulがポイント** = he willfully is going to commit a breach of the contract in the future.

通常定義：Manifestation of a **willful** intention not to perform

厳密定義：Statement or conduct indicating **unwillingness** or an inability to perform

 their contractual obligations, before the **performance is due.**

※ Repudiationは広い意味。履行期前に行うことがanticipatory

**§ 250** A repudiation is

(a) a statement by the obligor to the obligee indicating that the obligor will commit a breach … or

(b) a voluntary affirmative act which renders the obligor unable or

 apparently unable to perform without such a breach.

 \* 典型は不動産を別の第三者に売却

※ The party's words or conduct must show a fixed intention

・一番多いパターン (争い無くrepudiation)

a simple statement that the speaker is **not going to perform** as promised

 例：契約代金では赤字であり，代金を追加してくれないとこれ以上工事はできない

・次に多いパターン (争い無くrepudiation)

a denial that a contract exists, or that an option is still open.

 　 ⇔ No repudiation is found in a party's questioning the validity of an agreement

so long as he does not threaten to discontinue his performance thereunder nor…

**効果**　**§ 253. Effect of a Repudiation**

 1) his repudiation alone **gives rise to a claim for damages** for total breach.

 2) one party's repudiation **discharges (excuses)** the other party's remaining duties

to render performance.

 ※ May also **ignore** the repudiation and urge performance. However, the innocent

party must try to mitigate damages. must act quickly to avoid potential losses.

Retraction – May be **reversed or retracted** so long as there has NOT been a **material**

**change** in position by the other party　　・retraction = 撤回

→ If retracted, the duty to perform is re-imposed, but performance can be delayed

until adequate assurance is provided.

**※ Reasonable Assurance for Insecurity** (UCC2-609 – Sale of Goods)

If the words or conduct give "**reasonable grounds for insecurity**"

→the party can

1) make a **written demand adequate assurance,** and ※書面要件追加

 2) **suspend performance** until such assurance is received, if it is **commercially reasonable**.

※ Unreasonable requests could be considered a repudiation of the agreement by the seller.

※「期日に間に合いそうもない」はrepudiationまでいかない→ but, assurance請求可能

→ If the buyer fails to provide adequate assurance within a reasonable time,

then the seller can treat the contract as repudiated.

※ restatement 251にも同様の規定ある。ただしコモンローでは州によってだいぶ違う。

 **3. Excuse by Reason of a LATER Contract or Event**

By assent: 1) Mutual Rescission 2) Accord and Satisfaction 3) Modification 4) Novation

By event : 5) Impossibility / Impracticability / Frustration of Purpose

**1) Mutual Rescission** (Cancellation)

 　**The contract may be discharged by mutual rescission so long as the contract is**

 **executory on both sides.**

※ Cannot recover under contract law because the contract is eliminated.

(Can still recover under quasi contract)

※ May be made orally unless within the SOF. (原則SOFは不適用)

**2) Accord and Satisfaction**  Restatement 2nd 281

 　　　 An accord = a contract under which an obligee **promises to accept a different**

**performance** **in satisfaction of the obligor's existing duty**.

→ Performance of the accord discharges the original duty.

 Requirement

When the accord involves an agreement for performance,

**substituted performance**

 **1) must differ significantly from the original performance or**

 **2) it’s obligation must be in dispute. (≠pre-existing duty)**

When the accord involves an agreement for payment, the obligation

must be in a good-faith dispute.

Accord is a contract, thus must have all element of the valid contract

such as 1) offer 2) acceptance and 3) consideration.

・1000円の支払義務がある人に500円で許すと言ってもaccord 不成立

∵pre-existing duty rule, 但し履行期限前支払はconsiderationになる

※An accord and satisfaction differs from a modification in that a modification immediately discharges a preexisting duty, whereas an accord and satisfaction does not discharge a preexisting duty until the agreed upon, alternate performance occurs.

例：10万円の工事代金を支払ってこないと思っていたら”this check is in full and final satisfaction of you 100,000＄bill”と書かれたcheckが郵送されてきたので受領

　　　　　→disputeがなかったのだとすればaccord and satisfactionは成立しない.

 既にgenuine disputeがあったのであればaccord and satisfactionが成立する.

If there is a breach,

→ the obligee may enforce either the original duty or duty under the accord.

例: 50万の借金。明日支払うなら3万でOKと言われ努力すると返答，申出撤回は可？

→ OK. unequivocalでなければacceptanceでない. modificationでもaccordでも同じ。

 \* Payment earlier can be consideration. Then even if he said “I promise to pay

 tomorrow”, then it is not accord.

**3) Modification** (Substitute agreement)

An **agreement** by the parties to change an **existing obligation.**

Mutual Modification

 requires 1) the agreement said above, and 2) difference from the original contract

(must not be a mere pretense)

・一方のみの変更はpre-existing duty ruleにより規制される

**4) Novation** – i.e., same performance, new party

1) Agreement between BOTH parties

2) replacing a party to an agreement with a new party.

 → the original debtor is totally released from the obligation.

Delegation v. Novation

Novation requires **agreement of BOTH** parties⇔Delegation does not require the agreement

Novation **excuses the person** from any liability for performance⇔Delegation does not

**5) Impossibility / Impracticability / Frustration of Purpose** – (Unforeseen Event)

**Impossibility**

**The duty to perform is discharged when a party's performance is made objectively impossible by the occurrence of an unforeseen event after a contract is made.**

**Impracticability**

**The duty to perform is discharged when a party's performance is made extremely difficult by the occurrence of an unforeseen event after a contract is made.**

**Frustration of Purpose**

**The duty to perform is discharged when a party's principal purpose that is understood by both parties is substantially frustrated by the occurrence of an unforeseen event after a contract is made.**

**Frustration of purpose** 　**Res.2nd§265**

Where, after a contract is made, a party's principal purpose is made substantially

frustrated

1) without his fault

2) by the occurrence of an event the non-occurrence of which was a basic

 assumption on which the contract was made,

(≒not reasonably foreseen event and the purpose must be understood by both）

⇒ his remaining duties to render performance are discharged,

3) unless the language or the circumstances indicate the contrary.

(≒not bearing the risk, not assuming the risk)

　**Impracticability** (restatement 2nd section 265: including impossibility)

Where, after a contract is made, a party's principal purpose is made

impracticable,

1) without his fault

2) by the occurrence of an event the non-occurrence of which was a basic

assumption on which the contract was made,

3) unless the language or the circumstances indicate the contrary.

Impossibility

– (objective) CAN’T be done

例. the subject matter is destroyed, the performer dies, law renders the performance illegal

Death or Physical Incapacity AFTER contract

Death does NOT make a person's contract obligations disappear.

 　　　→ Exception – Death of party to contract who is "special" may excuse for impossibility.

Impracticability

– (subjective) 　Can only be done with **extreme and unreasonable** difficulty and

 expense that were NOT anticipated

 例.shortage by war or embargo, crop failure, unforeseen shutdown of major source of supply

= the increase in the cost is far beyond what either party anticipated.

UCC 2-615 & comment:

Increased cost alone does not excuse performance

∵ the parties may assume that risk of change in market conditions.

　　　　　・建設中建物滅失では免責されない, 修理中建物の滅失では免責ＯＫが多数判例

・契約時に既にあったfactに双方契約後気づいたのであればmistakeの問題

・‟unusual rain” = unusual indicates it sometimes occur → foreseeable。

SUBSEQUENT law or regulation

① Later law makes performance of **contract illegal** – excuse by **impossibility**

② Later law makes **mutually understood purpose** of contract illegal

– excuse by **frustration of purpose**

**共通の効果：Discharge →** his remaining duties to render performance are discharged.

前払金の返金を受けられるかは州による（戴冠式事件では否定, 伝統的解釈）

 The case from “Concepts and Case Analysis” – Risk Allocation Approach

 Taylor v. Caldwell (1863) : The music hall was burnt.

 Looks correct. Usually landlords insure premises, tenants not. It is same.

Canadian Industrial Alcohol Co v. Dunbar Molasses (1932) ※molasses=糖蜜

 Dunbar was not able to provide molasses because National Sugar cut back its output.

 Dunbar did not contracted at all National Sugar, he just expected supply.

Cardozo: Shout supply can discharge his duty only when (a) the refinery had been

 destroyed, (b) the sugar crop failed; or (c) ravages or war; or even (d)

 breach of contract by supplier.

 UCC 2-615 Commnt

 4. Increased cost alone does not excuse performance…But a severe shortage of

 raw materials or of supplies due to a contingency such as war, embargo, local

 crop failure, unforeseen shutdown of major sources of supply…, is within the

 contemplation of this section.

 5. There is no excuse under this section, however, unless the seller has employed

 all due measures to assure himself that his source will not fail.

 Krell v. Henry (1903) 戴冠式事件

 Illness is foreseeable in general. The important thing is that the coronation was like

 condition, that is, “basic assumption”.

 Transatlantic Financing Corporation v. United States (1977) : Suez Canal was closed.

 Hold: Requirement (1) an unexpected occurrence (2) a failure to have allocated the

risk by agreement or custom and (3) commercial impracticability.

 →(1) unexpected

(2) the risk does not appear to have been allocated in the agreement or by custom

(3) It is not always the case that cost alone may never constitute impracticability,

but here, the added expense is not significant. 15%.

The Plaintiff is also in a better position to purchase insurance for the

contingency as a commercial shipper. ⇒ 第３要件欠缺としてdischarge認めず

批判: The tension in the Middle East was present. P was an experienced

 shipping company and could estimate the cost at the shutdown of the

 canal. There is assumption of risk. Usually change of cost is foreseeable.

 The importance lies the basic assumption. 第２要件欠缺とすべき

 Temporary Impracticability

 半年契約中に女優が病気になり緊急入院

　　　　　 →原則: this merely suspend the duty of performing until the impossibility ends.

例外: Materially burdensome

 ※ 上記は女優が退院後出演義務があるかという論点。公演者側が契約を解除できるか

はmaterial breachに該当するかという問題。

Res 269: Impracticability of performance… that is only temporary suspends the obligor’s

duty…does not discharge his duty…unless his performance after the cessation of the

impracticability would be materially burdensome.

Remedies

**In a contract case the injured party has a right to expectation damages that put an injured party in a position he would have been in had the contract been performed.**

**It is measured by 1) “what was promised” minus “what was given” (or “the price of substitute performance”‐“the contract price”) minus any cost saved plus 2) incidental damages and consequential damages.**

**They must be causal, foreseeable, certain and unavoidable.**

Damages TYPE

 　(a) **Expectation** damages

= an monetary award that put an injured party in a position he would have been in

**had the contract been performed**,

(b) **Reliance** damages

= an monetary award that put an injured party in a position he would have been in

**had the contract not been made**,

(c) **Restitution** damages

= an award that obligates the defendant to pay plaintiff the value of a benefit unjustly

obtained.

 → いずれかを選択して請求可能

**Expectation damage**

COMMON LAW Measure of Damages **in General** (Res.2nd 347)

the injured party has a right to damages based on his expectation interest as measured by

(a) the loss in the value = **General damages**

“what was promised”－“what was given” or

“the price of substitute performance”－“the contract price”

＋(b) any other loss, including **incidental or consequential loss**,

　 －(c) i) any payments received and ii) any cost saved as a result

※ Subject to the limitations stated in §§ 350-53, mitigation, being unforeseeable, uncertainty

例：建築工事が途中で終了なら？⇒ expected profits + amount of loss – amount saved

**§ 348. Alternatives to Loss in Value of Performance**

(1) If a breach delays the use of property and the loss in value to the injured party is not

proved with reasonable certainty, he may recover damages based on **the rental value of**

**the property or on interest on the value of the property**.

(2) If a breach results in defective or unfinished construction and the loss in value to the

injured party is not proved with sufficient certainty, he may recover damages based on

 (a) the diminution in the market price of the property caused by the breach, or

(b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

例: 期間1年の賃貸借契約を結び50万円をかけ引越ししたが不当入居拒否(賃料月額2

0万円)。やむ無く1月40万円でホテル住まい, その後同様の物件を月額30万円で

見つけ入居。

(a) general damages cover price-contract price = 10万×12月＝120万円

(b) consequential damages 引越し代は無理 ∵契約履行されていも支出した

ホテル代は微妙⇒予見可能であったかの問題

 **UCC Buyer's damages** for non-delivery or repudiation（2-712,713)

Buyer can recover

① “the cost of cover (or the market price※)” ※when the buyer learned of the breach

less “the contract price” = **the general damages**

and② **incidental** damages, and ③ **consequential** damages

less④ **expenses saved** in consequence of the seller's breach.

　 （受領済みならfair market value if perfect － fair market value as delivered）

(2)The buyer may recover from the seller as damages the difference between the

cost of cover and the contract price together with any incidental or consequential

damages as hereinafter defined (Section 2-715), but less expenses saved in

consequence of the seller's breach

(1) After a breach within the preceding section the buyer may "cover" by making in

good faith and without unreasonable delay any reasonable purchase of or

contract to purchase goods in substitution for those due from the seller.

Buyer's Incidental and Consequential Damages（2-715）.

　 **Incidental damages**

　 1) expenses incurred in inspection, receipt, transportation and care and **custody** of goods

　 　 2) any commercially reasonable expenses **in connection with effecting cover**

　 3) any other reasonable expense **incident to the delay or other breach**.

　　 **Consequential damages**

 (a) any loss 1) resulting from general or particular requirements and needs 　**causal**

　　　 2) of which the seller had reason to know at the time of contracting 　　**foreseeable**

　 3) which could not reasonably be prevented by cover or otherwise 　　**unavoidable**

 (b) injury to person or property proximately resulting from any breach of warranty.

例: 時価700円のものを1000円で売買契約。売主が債務不履行

→カバー価格700円－契約価格1000円=はマイナス.compensatory damagesは０

＝losing contract, restitutionary damages要検討

**UCC Seller's Damages** for Non-acceptance or Repudiation (2-706,708)

Seller can recover

 ① “the contract price” less

“the resale price” or the market price at the time and place for tender

and② incidental damages (in some situation, lost profits)

less③ expenses saved in consequence of the buyer's breach.

LOST PROFITS for lost volume seller : 708(2)

 the measure of damages above is inadequate

to put the seller in as good a position as performance would have done

(volume seller is one whose supply exceeds the demand) ※UCCに定義なし

→ then the measure of damages is

1) the profit which the seller would have made from full performance by the buyer,

2) together with any incidental damages

※: 売主にconsequential damagesなし. 日本と同じお金は特別な地位

**Reliance damages Reliance damages** (Res.2nd 349)

 **Reliance damage is a monetary award that put an injured party in a position**

 **he would have been in had the contract not been made**

適用場面：expectation damages are unavailable or uncertain

As an alternative to the measure of damages stated in § 347,

The injured party has a right to damages **based on his reliance interest,**

including (a) **expenditures made in preparation** for performance or in performance,

－(b) **any loss** that the party in breach can prove with reasonable certainty

**the injured party would have suffered had the contract been performed.**

※ Reliance damages cannot exceed the contract price.

**Restitutionary damages** (contractとは別のrestatementあるが, bar examでは浅い理解で十分)

 **Restitutionary damages are remedy that obligates (compels) the defendant**

 **to pay plaintiff the value of a benefit unjustly obtained.**

一般要件

1) D has been **enriched** (Benefit to D)

2) at the **P’s expense**, (Loss to P) AND

3) under the circumstances it would be **unjust** for the D to retain the benefit

⇒ P is entitled to restitution for the benefit transferred.

 ※ 何が”unjust”かはRes. of restitutionで議論。諸説ある。essayでは適当な規範でOK

　 ①利益の性質(現金か土地改良か) ②無料前提で行われたか及び受領者のその認識 ③行為の非良心性

④利得返還を得られない危険の引受け ④契約前の「準備」であることが明確か・・・等々

**Recovery in Quasi-contract = implied in law contract**

**※上記の一部，明確ルール無い, 一番よく出題: acceptance of offerが認定できない事例**

 1) When one party provided a benefit to another

2) with the “reasonable expectation” of compensation, and

3) party receiving the benefit would be unjustly enriched,

　　　　 → the providing party may recover the benefits provided.

 　Defense: Gift

 **Unenforceable Contract**

If a contract is unenforceable or avoided after the plaintiff has performed,

 the plaintiff can get restitutionary damages for the benefit provided to the

 defendant.

§ 375. Restitution When Contract Is Within **Statute of Frauds**

§ 376. Restitution When Contract Is **Voidable**

§ 377. Restitution in Cases of **Impracticability, Frustration, Non-Occurrence of**

**Condition or Disclaimer by Beneficiary**

 **Breach of a Contract**

Where the contract is materially breached, the non-breaching party can recover

 the value of her performance, even in excess of the contract rate.

 適用場面：契約金額が安すぎて履行利益が無いとき＝losing contract

 (但しexpectation damagesを超える請求は不可)

§ 374. Restitution **in Favor of Party in Breach**

 if a party justifiably refuses to perform on the ground that his remaining duties of

 performance have been discharged by the other party's breach

 The breaching party may recover the value of benefits conferred.

**Exceptions or Limitations**

 **①**Duty to mitigate

No recovery for damages that could have reasonably been avoided.

②Reasonable certainty

His losses are certain in nature and not just speculative.　 ※ New companyは立証困難

③Foreseeability (at time of formation)

**Liquidated Damages** Res.§356≒UCC2-718 損害立証困難＆合理的予測

A liquated damages provision will be enforced if at the time a contract is entered into

 　　　　 (1) the damages amount is **difficult to estimate** and

(2) the amount is **reasonable** in the light of the anticipated or actual loss caused

 by the breach.

 ・手付金＝deposit as liquidated damagesであり合理的であればenforceable

・invalid = clause that provides that one can get either actual damages or liquidated damage

・a one-sided remedies provision buried in the fine print of an adhesion contract may be nconscionable

**※** Punitive Damages :355

Punitive damages are not recoverable for a breach of contract

unless the conduct constituting **the breach is also a tort.**

　　有期雇用契約解雇の損害

　　　The amount of salary for the period－the employer proves the employee has earned

 from **ther similar employment**  弁護士として首になり土方として働けた分は減額されない

Third-party rights

**Third Party Beneficiary**

　 Promisee (行為を約束された人) ←promise Promisor (行為を約束した人)

 Third-Party Beneficiary(第三受益者)

 ・一つの多いパターンは，promisorがpromiseeの債務を代わりに払うと約束

　　　　 そのような際は, beneficiaryをcreditor beneficiaryという。

1. Discharge or modification of a duty **§ 311**

The parties may NOT cancel or modify the contract if the third parties’ **rights have VESTED**.

　Discharge or modification of a duty to an intended beneficiary is ineffective

1) if a term of the **promise** creating the duty so provide,

In the absence of such a term, the promisor and promisee retain power to discharge or

modify the duty by subsequent agreement.

2) Such a power terminates when the beneficiary, before he receives notification of the discharge or modification, either

a) brings a **suit** to enforce the promise,

b) **materially changes** his position in justifiable reliance on the promise

c) manifests **assent** to it at the request of promisor or promisee

　　　　・ベテラン大工が病気になり工事の続きを新人に任せる→施主が同意すれば施主はintended

third beneficiaryでvest ⇒工事に瑕疵あれば直接施主に責任負う

(non-delegableは抗弁だが工事を許可すればwaive)

2. Who can Sue Whom?

Only intended beneficiaries have contract law rights.

Intended if:1) Named in the contract, or

2) Some relationship with the promise to indicate intent to benefit.

§ 302. Intended and Incidental Beneficiaries

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either i) the performance of the promise will satisfy an obligation of the promise to pay money to the beneficiary; or ii) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

例： 隣の家の工事で良い景観を得る隣人がintended beneficiaryでないことは明らか。

　　下請は施主の，施主は下請けのintended beneficiaryでは一般的にない

　 ∵双方，元請との契約内容は知らないのが通常であり，recognition of a right to

 performanceが存在しない (原則論, 特別な事情があれば別)

① Beneficiary can recover from promisor.

But, Donee beneficiary can NOT recover from promisee unless detrimental reliance.

Creditor beneficiary can recover from promisee. BUT ONLY on pre-existing debt.

② Promisee can recover from promisor for specific performance

3. Defenses

The promisor can assert ANY defense against the third party that he can assert against

the promisee.

**Assignment** Transfer of rights of the contract

　 Obligor (債務者) 　→　 Obligee = Assignor (債権者)

　　　　　 ↓債権譲渡

　 　 Assignee

**§ 317. Assignment of a Right**

An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.

※ (銀行に)返済できない時はBから回収することを許すはassignmentではない。

∵ not present intent, his right is not extinguished.

**Requirement**

Assignor must manifest an intent to **immediately** and completely transfer her rights.

**Consideration** is NOT required, BUT gratuitous assignments **can be revoked**.

 **Writing** is NOT required.

There are certain situations in which the assignment must be in writing.

 1) Assignment of wages (statutes may prohibit this assignment)

 2) Assignment of any interest in real property

 3) Assignment of choses in action worth over $5,000 **UCC**

**Notice →不要** (債務者対抗要件に過ぎない)

**Assignability** Res.§317

The assignor may assign any right unless

(1) doing so would **materially change the duty** of the obligor.

 ・payment money or provision of goods to a different party → No materially change

・performance depending on personal discretion (employment) → materially change

 ・requirement / output contract → materially change（UCCは裁量を狭くしているから有効説も）

(2) statute or public policy forbids the assignment（例: torts claim）

(3) the contract itself precludes assignment.

　 ・A prohibition of assignment of "the contract" ⇒ delegation禁止と推定

**§ 322. Contractual Prohibition of Assignment**

(1) Unless the circumstances indicate the contrary, a contract term **prohibiting assignment of "the contract" bars only the delegation** to an assignee of the performance by the assignor of a duty or condition.

問: “this contract may not be assigned”と規定。請負人が制作者を別会社に変更.OK？

　　　　　　　⇒ NO. the provision means that duties cannot be delegated

 (this is not assignment but delegation.)

・construed narrowly; “prohibit”だけでは譲渡可能 (ただしbreach)

(2) A contract term prohibiting assignment of rights under the contract, unless a

different intention is manifested,

(b) gives the obligor a right to damages…but **does not render the assignment**

**ineffective**;

 ・UCC2-210→損害賠償請求権，履行終了後の反対履行請求権の譲渡禁止は不可(譲渡自由を拡大)

**Res. § 322** (2)…(a) does not forbid assignment of a right to damages for breach of the whole

contract or a right arising out of the assignor's due performance of his entire obligation;

・原則: An assignment of "the contract" or of "all my rights under the contract" is an

assignment of rights and a delegation of performance of the duties of the assignor.

**= § 328.** an assignment of "the contract" or of "all my rights under the contract" or an

assignment in similar general terms is an assignment of the assignor's rights and a

delegation of his unperformed duties under the contract.（推定規定）

**Revocability**

 1.Assignments for consideration are irrevocable.

 2.**Gratuitous assignment** 出題頻度極めて稀

原則撤回可能 Res2nd § 332

例外1) Detrimental reliance

2) the assignment is accompanied by delivery of a writing of a type customarily accepted

as a symbol or as evidence of the right assign ＝token chose

 (such as a stock certificate or the passbook to a savings account.)

3) the assignment is in a writing either signed or under seal that is delivered by the

assignor (simple chose: a contract right not embodied in any for of token.)

4) Obligor has already performed

Gratuitous assignment may be revoked by:

1) death or bankruptcy of assignor

2) notice to either assignee or obligor,

3) assignor takes performance directly from obligor,

4) subsequent assignment of same rights by assignor to another.

**Rights of Assignee**

・**Assignee** can recover from the obligor

・**Assignor** for consideration CANNOT recover from obligor (New contract formed)

Assignor for NO consideration can recover from obligor.

・**Obligor** has same defenses against assignee as against the assignor

Payment by obligor to assignor is effective until obligor KNOWS of the assignment.

Similarly modification agreements between obligor and assignor are also effective if the

obligor did not KNOW of assignment.

**Warranty**

Assignment for Consideration includes a warranty by assignor that

1) Right assigned actually exists

2) Right assigned are NOT subject to any defenses by the obligor

3) Assignor will do nothing to impair the value of the assignment

**Multiple Assignments 二重譲渡** 出題頻度極めて稀

1. Gratuitous Assignments

General rule: **LAST assignee wins**∵free revocation

Detrimental Reliance Exception

– Not revocable if: The assignee has relied on the assignment in a way that is

**reasonable, foreseeable, and detrimental.**

2. Assignment for Consideration

General rule: **FIRST assignee for consideration wins**

Exceptions:

① A subsequent assignee will take priority

if he 1) does NOT KNOW of the earlier assignment,

2) is the first to obtain payment, a judgment, a novation, or indicia of ownership

※ The first to NOTIFY is not part of the exception. 日本と異なる

② Detrimental Reliance – 要件同じ

**Delegation**

　 Obligor / Delegator (債務者) 　→　 Obligee (債権者)

　　　　 　↓ 債務引受

　　 Delegatee

– Transfer his duties or burdens under the contract by a party to a third party

who was not a party to the contract.

When a third party agrees to satisfy the performance obligation, a delegation occurs.

1. Rule – Generally ALL contractual duties are delegable.

2. Limitations

1) The CONTRACT prohibits delegations OR prohibits assignments.

※ The Bar uses the term "assignment" involving both and sometimes just a delegation.

2) There is a **substantial interest in personal performance** by the original party.

 (the duty involves special skill, reputation)

**§ 318.** a promise requires performance by a particular person only to the extent that the obligee

has a substantial interest in having that person perform or control the acts promised.

※ special skillによるDutyは一般にnon-delegable（他のspecial skillを有する者にも×）

→店内の内装をデザインする仕事は（同等の評判のある者に対しても）not delegate

3.What if the third party does not perform

Delegator ALWAYS remains liable. (契約の地位を移転しても原則免責されない)

Delegatee is liable only if he receives consideration from delegator party. =assumes the

liability.

Delegator may recover from the delegate.

Obligee may recover from delegatee **as a third party beneficiary.**

**Output contract＆Requirement contract**

Output contract : Seller contracts to sell ALL the goods it produces to buyer

Requirement contract : Buyer contracts to buy ALL the goods needed from seller

（以前は不明確又は約因無しとして無効であった）

Definite terms

The K is valid **without specific quantity.** Quantity must be **set in good faith**.

Illusionary promise？(consideration)

 Both requirement and output contracts can appear illusory but they are not.

 These contracts are not illusory because the implied obligation of good faith requires both parties to use their best efforts.

UCC Sec. 2-306.

 2)A lawful agreement by either the seller or the buyer for **exclusive dealing** in the kind of

goods concerned imposes an obligation … to use **best efforts** to supply the goods or to use

**best efforts** to promote their sale.

 **※ Obligation of good faith and fair dealingは常に存在する＝ honesty in fact**

Exclusiveならbest effortsに要件が加重

§ 1-304. Obligation of Good Faith.

Every [contract](https://www.law.cornell.edu/ucc/1/1-201#Contract) or duty within the [Uniform Commercial Code](http://www.law.cornell.edu/ucc) imposes an obligation of [good faith](https://www.law.cornell.edu/ucc/1/1-201#Goodfaith) in its performance and enforcement.

§ 2-103 "Good faith" in the case of a [merchant](https://www.law.cornell.edu/ucc/2/2-104#Merchant_2-104) means honesty in fact and the observance of

reasonable commercial standards of fair dealing in the trade.

Limitation

The K might not be enforced if the buyer makes demands that are **unreasonable** compared

 to either 1) prior estimates or 2) normal prior output or requirements UCC § 2-306

**ローン約束**

1. 基本的に履行利益賠償は不可能　∵ no consideration for the lender’s promise, not unforeseeable.

2.　　　　　Specific Performanceも厳しい　　　　　　 ∵ not unique

3. Promissory estoppel, tort theory (misrepresentation, interference with a contract等) はある。

→ reliance damages請求可能 例: ローン約束を信じて，多額の費用をかけて解体工事をした

※ 一般的にrecovery to the additional cost of obtaining a loan from another lenderはOK

例: ８％の利息の約束が１０％でしか借りれなかったら差額の賠償請求 (認める例多い)

 ※ よくParol Evidence Ruleの壁が問題になる.

**以上**