

Terms & Conditions

Principals of Common Law
CONTRACTS – PART II
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PRACTICE EXAM QUESTION

Baker is a renowned pastry chef. Café, a sole proprietorship, is a well-known restaurant in need of hiring a pastry chef. Baker and Café's Owner had extensive conversations regarding Baker coming to work at Café. On May 1, a week after those conversations occurred, Baker sent Café a signed letter dated May 1 stating, "I will work for Café as a head pastry chef for two years for an annual salary of \$100,000." On the morning of May 7, Café's Owner telephoned Baker and said, "The \$100,000 is pretty stiff. Could you possibly consider working for less"? Baker replied: "I am a renowned pastry chef. I will not work for any less." Later that morning, Café's Owner sent Baker a signed letter by regular mail stating: "You obviously think you are too good for my restaurant. I am no longer interested in hiring you to work at Café." Later that afternoon, Café's Owner had a change of heart and sent Baker a registered, express-mail signed letter stating: "Okay, if you really won't work for less, I agree to pay you the \$100,000 a year you demand to work as head pastry chef at Café for two years." On May 10, the registered, express-mail letter was delivered to Baker's office. The regular mail letter containing the rejection was still on its way. Baker accepted delivery of the registered, express-mail letter from the postal carrier and placed it on his desk without opening it.

On May 11, before Baker read the registered, express-mail letter on his desk, he accepted an offer to work for Restaurant. As a courtesy, Baker called Café's Owner and said, "Sorry, I just took a job at Restaurant. Too bad you couldn't afford me." Café's Owner responded, "You can't work for Restaurant, I already accepted your offer to work for Café for \$100,000 a year."

Does Café have a contract with Baker? Explain

PRACTICE EXAM QUESTION

- Who made the offer?
- How was the offer communicated?
- Which acceptance prevails?
- Was there consideration?
- Are there other arguments by either party? (What other issues are raised?)
- What happens if Baker refuses to take the job?

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1 Breach of Contract

2 Damages & Specific Performance

3 Terms & Conditions

4 Practical Example

PERFORMANCE AND BREACH

PERFORMANCE

- **Complete performance**– contracting party has fulfilled every duty
- **Substantial performance**– contracting party has performed all material terms but there are non-material aspects not complete.

EXAMPLE: I enter into a contract to build a house for Ellen. I build the house, but fail to paint the interior the color described in the contract.

- There is substantial performance
- No claim for breach
- Ellen may recover or offset the cost of painting the walls when paying me.

PERFORMANCE AND BREACH

BREACH

If a contracting party fails to perform an absolute duty owed under a contract

- **Partial Breach** – sometimes referred to as immaterial, when a party fails to fulfill a contract term that was negligible
- **Material Breach** – when a party fails to uphold a **significant** portion of the contract and it is enough to cause the rest of the contract to **fail**

EXAMPLE: I deliver roses on the morning of your wedding. You pay \$1200. The roses are all wilted and unusable. You call another florist and pay \$1200.

- ***Even though I performed and delivered flowers on the correct date, my performance was faulty***
- ***I can't now perform because wedding is over***
- ***Partial breach would be some of the flowers were wilted; recovery of part of the cost***

BREACH

- **Total Breach**

When a party fails entirely to complete the contract.

Remedies:

- Excuse the innocent party from any further obligations
- Sue for damages incurred

EXAMPLE: Wedding flower scenario.

I am supposed to deliver roses on the morning of June 1. I don't show up. You call another florist for a last-minute delivery. The cost is \$2000. It turns out, I wrote the wrong date and had scheduled delivery on July 1.

- ***You don't have to pay the \$1200 under the contract (your performance is excused); and***
- ***You can claim \$800 in damages.***

BREACH

- **Efficient Breach**

When a party makes a conscious decision to breach a contract after balancing the costs of complying against fulfilling the contract obligations.

EXAMPLE: I offer to sell Rob my computer for \$1000. We enter a contract. Lisa then offers me \$2000 for my computer. Should I breach the agreement with Rob and enter an agreement with Lisa?

DISCUSSION:

- Should the decision of whether to breach a contract be limited to an economic consideration or should there be a moral consideration?
- Should ethics play a role in business transactions?

REMEDIES: DAMAGES

- 3 Types of Damages

- **Expectation**: Places you in the position you would have been had the promise been performed
“BENEFIT OF THE BARGAIN”
- **Reliance**: Places the promisee in the position he would have been had the promise not been made
“AS IF THE PARTIES NEVER MET”
- **Restitution**: Places the promisor in the position he would have been had the promise not been made. *“DISGORGE PROFITS FROM BREACHING PARTY”*

REMEDIES: DAMAGES

- Measurement of Expectation Damages
 - Loss of value caused by failure to perform PLUS
 - Incidental and consequential loss caused by breach MINUS
 - Any cost that could have been avoided by not having to perform

<https://www.youtube.com/watch?v=qx22TyCge7w>

Hawkins v. McGee “The Hairy Hand” – McGee gave oral warranty that he would give perfect hand. Supreme Court reassesses expectation damages holding that damages should be: Value of a properly working hand – value of hand delivered) + (pain and suffering inflicted – pain and suffering from routine surgery).

REMEDIES: DAMAGES

- **Reliance Damages**

- Loss to the innocent party **without a benefit** to the breaching party

- **Restitution**

- Awarded to compensate the innocent party **for the benefit** they gave breaching party. Only used when expectation damages aren't practical (contract is unenforceable but party has conferred a benefit already)

EXAMPLE: Stacy is a builder. She hires Sam to build her new house for \$100,000. She buys \$10,000 worth of materials and starts building. Sam then refuses to pay and says there is no contract. What are Stacy's damages?

- Expectation damages – awarded to compensate expected future income. Stacy expected to receive \$100,000 in fees minus any expected expenses.
- Reliance damages – the amount it would take to restore Stacy to the economic position before the promise. Stacy spent \$10,000.
- Restitution –the value of the benefit to Sam.

REMEDIES: DAMAGES

Liquidated Damages – a pre-determined form of money award; the parties' best estimate of the amount of loss incurred if a breach occurs

EXAMPLE: I put my house on the market. The contract says you will pay me \$100,000 when the house closes in 60 days. You put a downpayment of \$10,000. If we don't close on the house, the innocent party keeps the \$10,000.

Conditions to liquidated damages clauses:

- Loss to the innocent party is too uncertain or difficult to calculate
- Specified damages are reasonable considering the innocent parties' actual loss
- The damages are not meant as a penalty

REMEDIES: DAMAGES

Punitive— meant as punishment, when a party's conduct is beyond merely negligent or intentional (grossly negligent or reckless)

Special Damages - Incidental and Consequential

- Typically disclaimed in contracts
- Include property damage, personal injury, attorneys' fee, lost profits, loss of use, liability of buyer to customers, loss of goodwill, interest on money withheld by customers, and damages related to third party claims.

REMEDIES: DAMAGES

Additional concepts:

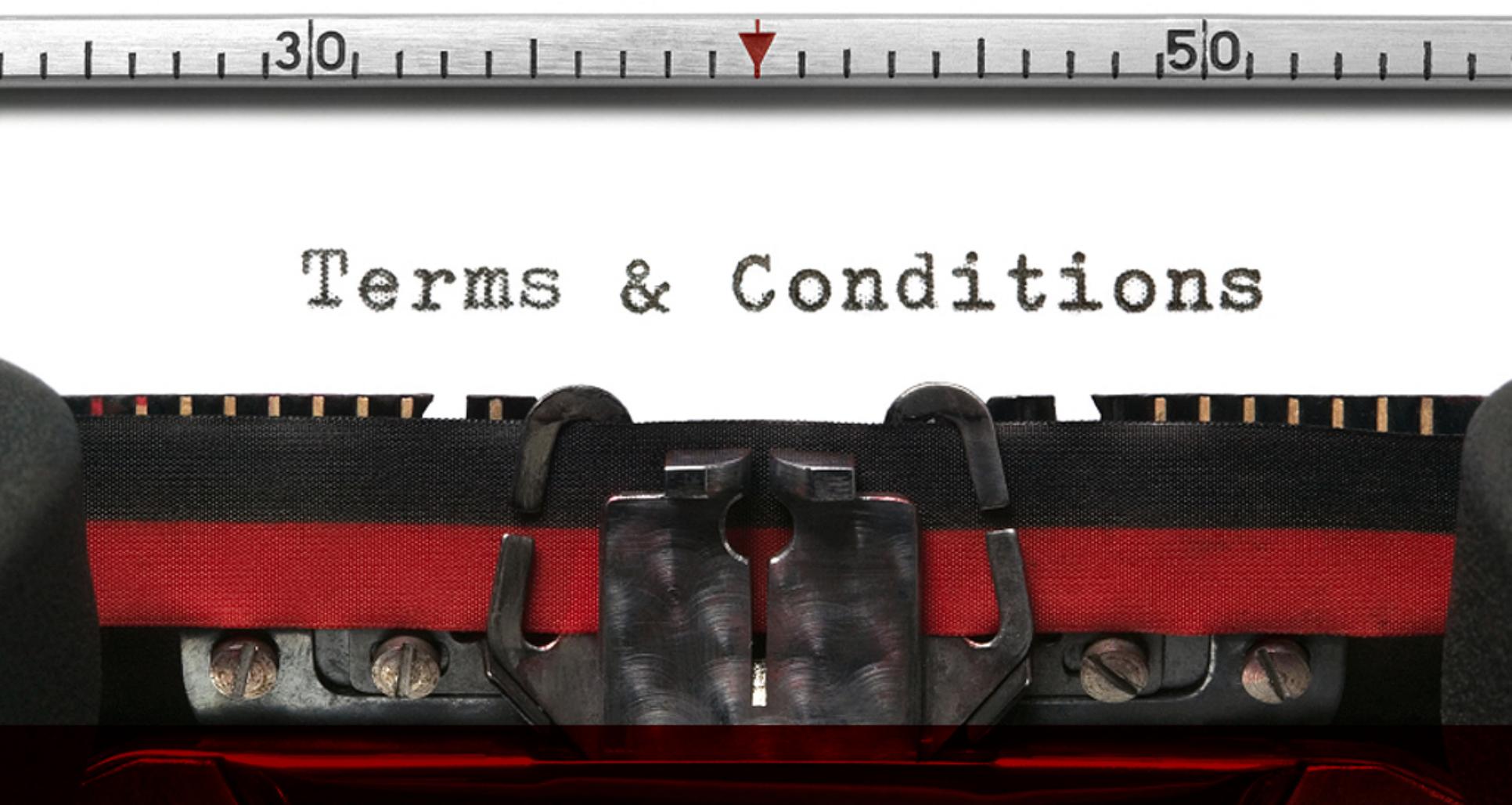
- Foreseeability of the harm – can't recover for unforeseen losses
- Uncertainty doctrine – no damages if uncertainty, encourages explicitness in contracts
- Duty to mitigate – innocent party has the duty to reasonably lessen damages/harm
- Specific performance – sometimes an innocent party will be forced to perform (e.g. default rule in land contracts); personal service contracts will never be specifically enforced bc domination and humiliation of forcing personal service makes remedy unenforceable

SPECIFIC TERMS & CONDITIONS

Key Terms:

- Parties (privity of contract)
- Price
- Term (length of contract)
- Confidentiality
- Governing Law/Venue
- Dispute Resolution (waiver of right to jury trial, arbitration)
- Representations and Warranties
- Default
- Insurance/Indemnities

SAMPLE CONSULTING AGREEMENT



Terms & Conditions

Thank you!