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Contracts

I. APPLICABLE LAW

- a. Two kinds
 - i. CL
 - 1. real estate, personal services,
 - ii. UCC Article 2: *read sales lecture*
 - 1. Governs transactions that involve a sale of goods, things that are moveable at the time of transaction
 - 2. Not applicable if goods to be severed by *buyer* and is sale of un-extracted oil, gas, minerals, or structures.
 - iii. Mixed
 - 1. determine predominant purpose of the contract
 - 2. apply that law to the *entire* contract, UNLESS
 - a. K divides payment based on goods and services

II. FORMATION OF CONTRACT

- a. OFFERS
 - i. Offer is a manifestation of intent to be presently bound to a specific undertaking communicated to offeree creating power of acceptance in offeree, unless offer terminates
 - ii. General RULE: offer need NOT contain all material terms
 - 1. Except: sale of real estate must have price
 - 2. UCC:
 - a. Must contain quantity
 - b. If no price, then offer if parties so intend (agreement can be shown by *conduct*)
 - 3. If ambiguous on price (eg, “a fair” or “reasonable”) price, then no offer under CL or UCC
 - 4. Output/Requirements contracts:
 - a. Offer can be vague
 - b. Increased quantities so long as not “unreasonably disproportionate”
 - c. Parties must use *best efforts* to perform
 - 5. Advertisements
 - a. General RULE: An advertisement is not an offer, UNLESS
 - i. Promise in nature of a *reward*
 - ii. Specific as to quantity and expressly indicate who can accept
- b. TERMINATION OF OFFERS
 - i. Lapse of time

1. reasonable time
2. stated time
- ii. Words or Conduct of Offeror -- Revocation
 1. unambiguous statement by offeror to offeree of unwillingness or inability to contract
 2. unambiguous conduct by offeror indicating an unwillingness or inability to contract that offeree is aware of
- iii. When is revocation effective?
 1. RULE: Revocation of offer sent through the mail is not effective until received
 2. RULE: An offer cannot be revoked after it has been accepted
- iv. Offers that cannot be revoked:
 1. Option contract
 - a. Promise to keep offer open; and
 - b. Promise supported by payment or other consideration
 2. UCC Firm Offer
 - a. Cannot be revoked for up to 3 months if:
 - i. Offer to buy or sell goods
 - ii. Signed, written promise to keep the offer open;
 - iii. Party is a merchant
 1. **merchant:** engaged in a business or profession; may also be a seller who regularly deals in goods of the kind
 3. Detrimental Reliance
 - a. Offer cannot be revoked if there has been detrimental reliance by the offeree that is *reasonably foreseeable*
 4. Executory Unilateral K
 - a. Start of performance, *not mere preparation*, makes unilateral contract irrevocable for reasonable time
 - i. NB: if only preparation, check detrimental reliance!!
- v. Words or Conduct of the Offeree – Rejection
 1. Counteroffer
 - a. Terminates offer; and becomes a new offer
 - b. Watch out for:
 - i. Mere bargaining (Will you take \$200?)
 - ii. If a statement (I'll pay \$200) = counteroffer
 2. Conditional Acceptance
 - a. Terminate offer; and becomes new offer
 - b. "I accept" if, provided that, so long as, but, on condition that
 3. Additional Terms
 - a. *CL only* Mirror Image Rule
 - i. An acceptance adding new terms is treated as a counteroffer
 - b. *UCC* permitted alterations if

- i. Seasonable expression of acceptance creates a contract
 - 1. NB: see prob 34, 36 in OICW
 - ii. Questions to ask?
 - 1. is there a contract? (seasonable issue)
 - 2. is additional term a part of the contract?
 - a. If at least *one* party is NOT a merchant, then additional term is merely a proposal
 - b. If *both* are merchants, then:
 - i. Additional term is part of the contract, UNLESS offeror rejects within a reasonable time OR it *materially changes* the original offer
 - c. UCC Different terms (“Knock-Out” Rule)
 - i. If acceptance contains contradictory terms, the K consists only of the terms on which the offer and acceptance agree.
 - ii. Inconsistent terms replaced by **gap-fillers**
 - d. UCC Written confirmation of Oral Agreements
 - i. After oral agreement, written confirmation with additional terms treated same as alteration rule (non-merchant: proposal; merchant: reject or material change)
- vi. Death of Party Prior to Acceptance
 - 1. RULE: Death or incapacity of either party terminates offer
 - 2. Exceptions:
 - a. Option K
 - b. Part performance of offer to enter into unilateral K
- c. ACCEPTANCE
 - i. Who can accept?
 - 1. Only a person who knows about the offer; or
 - 2. the person to whom the offer was made
 - 3. Look out for *assignment*:
 - a. *Offers* canNOT be assigned
 - b. *Options* can be assigned UNLESS the option otherwise provides [thus, txfr ability to accept underlying offer]
 - ii. Method of acceptance? FIVE main types:
 - 1. In response to offer, Offeree fully performs
 - a. Full performance is **always** acceptance, UNLESS failure to notify of performance
 - i. Failure to notify discharges contractual duty
 - ii. NB: watchout for *geographic* separation of parties
 - 2. If the offeree *starts* to perform

- a. RULE: If offer does not require a particular method of acceptance, then start of performance indicates acceptance
 - i. NB: if states performance required to accept, then we have a unilateral K and *full performance* required for acceptance
- 3. offeree *promises* to perform
 - a. RULE: most offers can be accepted by a promise to perform
- 4. offeror and offeree are at different places and there are conflicting communications (“mail box rule”)
 - a. RULE: a communication is effective when *received*.
 - i. N/A to
 - 1. offer stipulating “accepted when received”
 - 2. option contracts
 - b. RULE: but an acceptance is effective when sent IF
 - i. Made in a manner and by a means invited; and
 - ii. Offeree has not *already sent a rejection*
- 5. seller of goods sends the wrong goods
 - a. RULE: a buyer’s offer to buy seeking *prompt shipment* can be accepted either by seller’s 1) promise to ship or 2) by shipment of conforming or non-conforming goods
 - b. RULE: Shipping the “wrong” goods is simultaneously an acceptance and a breach
 - c. **Exception:** Accommodation
 - i. Shipping wrong goods with *explanation* of why different goods are sent
 - ii. Creates NO contract; and NO resultant breach; merely creates counteroffer

III. CONSIDERATION or a CONSIDERATION SUBSTITUTE

- a. Def: bargained-for legal detriment
- b. Analysis steps:
 - i. Look at each promise separately
 - ii. Identify each promisor and determine if detriment was incurred
- c. Types of Consideration
 - i. Performance, something not legally obligated to do
 - ii. Forebearance, not doing something legally entitled to do
 - iii. Promise to perform
 - iv. Promise to forbear
- d. Probable Bar issues (esp, v-vii)
 - i. Was there anything bargained for?
 - ii. Did the party incur a legal detriment?
 - iii. Was the promise consideration for another promise?
 - 1. illusory promise exception: “I promise unless I change my mind.”
 - iv. Amount of consideration irrelevant
 - v. Past consideration is NOT consideration
 - 1. exception: expressly requested and expectation of payment

- vi. CL only: Pre-existing duty rule
 - 1. RULE: doing what legally obligated to do is not sufficient consideration for consideration
 - 2. Exceptions:
 - a. Addition to or change in performance
 - b. Unforeseen difficulty so severe as to excuse performance
 - c. Third party promise to pay additional money
 - 3. UCC has no pre-existing duty rule, but uses the good faith test for changes in existing sale of goods contracts
 - a. NB: no need for new consideration
- vii. Part payment of a debt
 - 1. if debt is *due* and *undisputed*, then part payment is NOT consideration for the release of the debt
 - 2. if not due or is disputed, then part payment is consideration
- e. Consideration substitutes
 - i. *Written* promise to satisfy an obligation for which there is a defense to payment
 - ii. A *seal* is not a consideration substitute (ie, no legal significance)
 - iii. Promissory estoppel is the main substitute:
 - 1. promise
 - 2. reliance that is reasonable, detriment, and foreseeable
 - 3. enforcement necessary to avoid injustice

DEFENSES TO ENFORCEMENT

IV. PROMISSORS LACK OF CAPACITY

- a. Who lacks capacity?
 - i. Under 18
 - ii. Mental incompetent
 - iii. Intoxicated person, *if other party has reason to know*
- b. Consequences of incapacity
 - i. Right to disaffirm by person *without capacity*
 - 1. NB: incapable party may still sue for breach!
 - 2. if incapable is sued, then assert defense of incapacity
 - ii. implied affirmation by retaining benefits after gaining capacity
 - 1. K made before capacity; person gains capacity; keeps subject matter of K without complaint after capacity gained
 - iii. Liability for necessities
 - 1. this is quasi-contract liability

V. STATUTE OF FRAUDS

- a. Three main issues:
 - i. Is the K within the SF?
 - ii. If so, is the SF satisfied?
 - iii. Is there a SF defense?
- b. Is the K within the SF?
 - i. Promise *in consideration of marriage*: eg, prenup, postnup

- ii. Promise by estate rep to pay debt of decedent: ie, look for a *personal guarantee* of payment
- iii. Promise to pay *debt of another*
 - 1. Main purpose exception: if guarantee has main purpose of benefiting the guarantor, then not in SF
- iv. Service contract not capable of being performed *within one year*
 - 1. look for specific time period mentioned
 - 2. specific date more than one year from date of K
 - 3. BUT,
 - a. *task* mentioned but no time mentioned is OUTSIDE SF
 - b. *lifetime* deal not in SF because could die in less than year
- v. Transfer of *interest in real estate* of a term of more than one year
 - 1. sale of land is forever
 - 2. easement/lease greater than one year
- vi. Sale of *goods for \$500 or more*
- c. If within SF, is the SF satisfied?
 - i. If yes, then there is no SF defense
 - ii. How to satisfy?
 - 1. Performance**
 - a. Services Contract
 - i. Full performance by either party satisfies the SF
 - ii. Part performance does NOT satisfy the SF
 - 1. review Q #92 in OICW
 - b. Sale of Goods Contracts
 - i. Ordinary goods
 - 1. RULE: Part performance of K satisfies SF to the extent of the performance
 - a. delivered goods: satisfies SF
 - b. undelivered goods: no satisfaction
 - ii. Specially Manufactured Goods Exception
 - 1. SF is satisfied as soon as seller makes a *substantial beginning*: ie, enough work to know the good is custom made
 - c. Real Estate
 - i. Part performance requires 2 of the 3:
 - 1. full or part payment;
 - 2. possession; and/or
 - 3. improvements
 - ii. NB: full payment alone does NOT satisfy the SF
- 2. A Writing**
 - a. Non-UCC SF issue
 - i. Examine the writing for:
 - 1. contents of writing to see if it contains *all material terms* [ie, who and what]; and
 - 2. *signed* by the person to be charged [ie, D]
 - b. UCC SF issue

- i. Examine for:
 - 1. the ONLY material term: QUANTITY
 - a. if quantity incorrect, creates a “ceiling” on enforcement
 - 2. *signed* by D, UNLESS
 - a. both parties are *merchants* and party receiving the signed writing *fails to respond* within 10 days
 - 3. Judicial Admission Rule [not very important]
 - a. Statement by D that there was an agreement; and
 - b. Statement is made either in testimony, pleading, or discovery
- d. Is there a SF defense?
 - i. If SF is NOT satisfied, then YES, there is a defense.
- e. Indirect Testing of the SF
 - i. Authorization to enter into contract for someone else
 - 1. written proof not always required.
 - 2. Required when:
 - a. *Equal dignities doctrine*: if underlying K is within SF, then need written authorization from principal
 - ii. Contract Modification
 - 1. when does law require written evidence of modification of a written contract?
 - a. RULE: Would agreement, *as modified*, fall within the SF?
 - i. Yes, need written evidence of modification
 - ii. Applies to CL and UCC
 - 2. What if agreement in writing and requires that all modifications be in writing?
 - a. Ignore K language at **CL**; apply above modification rule
 - b. Under **UCC**, provision requiring written modification is valid unless waived

VI. ILLEGALITY, MISREPRESENTATION, DURESS

- a. Illegality
 - i. If *subject matter* is illegal, the agreement is void
 - ii. If subject matter is legal but *purpose is illegal*, the agreement is enforceable only by the person who did not know of the illegal purpose
- b. Misrepresentation¹ [words before contract]
 - i. False assertion OR concealment of fact that
 - 1. can be an INNOCENT misrepresentation
 - ii. *Induces* the contract
- c. Duress
 - i. Physical or economic
 - ii. Economic duress most common: elements:
 - 1. bad guy

¹ NB: on MBE, if issue is rescission of contract, then it is a contracts question; but if it is about money damages for the misrepresentation, then we have a torts question

2. threat to breach a contract
3. vulnerable guy (no reasonable alternative)

VII. UNCONSCIONABILITY

- a. Not heavily tested
- b. Empowers court to refuse to enforce all or part of an agreement
- c. Unfair surprise or oppressive terms
- d. Tested at time agreement was made

VIII. MISUNDERSTANDING

- a. No contract if:
 - i. Parties use a material term that is open to at least two reasonable interpretations; and
 - ii. Each party attaches different meaning to the term; and
 - iii. Neither party knows or has reason to know the term is open to at least two *reasonable* interpretations
- b. If one party knows of the ambiguity, then
 - i. There is a K under the terms as understood by the OTHER party

IX. MISTAKE OF FACT EXISTING AT TIME OF CONTRACT

- a. Mutual Mistake [words in contract]
 - i. There will be no contract if:
 1. both parties mistaken; and
 2. basic assumption of fact; and
 3. *materially* affects the agreed exchange; and
 4. not a risk that either party bears
 - ii. Bar Exam fact patterns
 1. subject matter mistake
 - a. eg, painting turns out to be fake
 - b. this is material
 2. value mistake
 - a. no matter how much difference in price, value never meets materiality requirement
- b. Unilateral mistake
 - i. RULE: no legal significance, UNLESS
 - ii. Other party takes advantage of obvious mistake by other party

TERMS OF THE CONTRACT

X. PAROL EVIDENCE RULE

- a. Policy: final writing of deal is more reliable than things said earlier
- b. Vocabulary
 - i. *Integration*: written agreement that is final agreement
 - ii. *Partial Integration*: writing is final, but not complete
 - iii. *Complete Integration*: writing is final and not complete
 - iv. *Merger clause*: “this is the complete and final agreement”
 - v. *Parol evidence*:
 1. words of a party/parties to contract
 2. came before integration

- 3. oral or written
- vi. *Reformation*: equitable action to modify written K to include parol evid
- c. Triggering facts:
 - i. Court finds a final agreement; AND
 - ii. Oral statement at time of agreement OR earlier oral or written statement by the parties (prior or contemporaneous)²
- d. Four possible fact patterns:
 - i. Changing the written deal (“**reformation**”)
 - 1. court cannot even consider parol evid where there is attempt to change the written deal
 - 2. *Mistake in integration exception* (scrivener’s error)
 - ii. Is there a defense to enforcement (ie, misrepresentation, fraud, duress)
 - 1. here, P will ask for **rescission**, not reformation
 - iii. Explaining term in the written deal
 - 1. notwithstanding parol evid, earlier info can be considered to *resolve ambiguities* in the final agreement
 - iv. Adding to the written deal
 - 1. only fact pattern where level of integration matters
 - 2. fully integrated: can’t consider parol evid
 - 3. partially integrated OR that the additional terms would ordinarily be in a separate agreement: may consider parol evid

XI. CONDUCT AND COURSE OF PERFORMANCE

- a. Important vocabulary: listed in order of persuasive force; used as **gap-fillers**
 - i. *Course of performance*: same people, same contract (ie, installment K)
 - ii. *Course of dealing*: same people, different but similar contract
 - iii. *Custom and usage*: different but similar people, different but similar contract

XII. UCC TERMS IN SALES OF GOODS CONTRACTS (“gapfiller” terms)

- a. Delivery Obligations of a seller of goods
 - i. No place of delivery has been agreed upon
 - ii. Delivery obligations of seller if delivery by a common carrier
 - 1. Shipment contracts [highly tested]
 - a. Seller completes obligation when:
 - i. Gets the goods to a common carrier;
 - ii. Make reasonable arrangements for delivery; and
 - iii. Notifies the buyer
 - 2. Destination contracts
 - a. Seller does not complete delivery obligation until goods arrive where buyer is
 - 3. determining which
 - a. FOB city name
 - i. If city is where seller is, then shipment contract
 - ii. If city where buyer is, then delivery contract
- b. Risk of loss [UCC issue]
 - i. K is formed but before buyer gets goods

² NB: parol evidence rule does not apply to POST-CONTRACT statements or writings

- ii. Goods damaged
- iii. Neither party is at fault
- iv. Four risk of loss rules listed in order of application (if unsatisfied, go to next rule)
 - 1. Is there an agreement on loss allocation?
 - 2. A breaching party liable for uninsured loss even if breach is unrelated to the real problem
 - 3. Delivery by common carrier other than seller [often **tested**]
 - a. Risk of loss shifts from seller to buyer *at the time that the seller completes its delivery obligations*
 - b. Seller must give Buyer notice of shipment
 - 4. Is *seller* a merchant? (buyer's status is irrelevant!!)
 - a. Risk stays on merchant-seller until buyer receives goods
 - b. If not a merchant, then risk shifts to buyer when he "tenders" the goods
 - i. Tender = anytime seller tells buyer where something is and how to get it
- v. Effect of Breach on ROL
 - 1. if tender so non-conforming that Buyer had right to reject, then ROL remains on seller until *cure* or *acceptance*.
 - 2. if Buyer wrongfully rejects, ROL remains on buyer for a reasonable time
- c. Miscellaneous terms
 - i. Price: a reasonable price at time of delivery
 - ii. Place of tender: seller's location
 - iii. Time for performance: within a reasonable time
 - iv. When payment Due: time of delivery
- d. Warranties of Quality
 - i. Express
 - 1. words that promise, describe, state facts OR use of sample or model (non-verbal express warranty) and become *basis of the bargain*
 - 2. not mere opinion or **puffing**
 - ii. Implied warranty of merchantability
 - 1. added by operation of law. Elements:
 - a. purchase good from a merchant (special def here: "deals in goods of the kind")
 - b. Means the warranty is: goods are fit for ordinary purpose
 - iii. Implied warranty of fitness for a particular purpose
 - 1. Added by operation of law. Elements:
 - a. Buyer has a *particular purpose*;
 - b. Buyer is *relying on seller to select* suitable goods; and
 - c. Seller has *reason to know* of purpose and reliance
- e. Contractual Limitations on Warranty Liability
 - i. Disclaimer: eliminates only *implied* warranties
 - 1. disclaim by "as is" or "with all faults"; or

2. **conspicuous** *written* language of disclaimer mentioning merchantability
- ii. Limitation of remedies
 1. possible to limit remedies, even for express warranties
 2. general test is unconscionability
 3. prima facie unconscionable if breach of warranty on consumer goods causes personal injury

PERFORMANCE

XIII. COMMON LAW PERFORMANCE TEST

- a. Look to terms of contract

XIV. SALE OF GOODS PERFORMANCE CONCEPTS

- a. Six concepts of importance

i. *Perfect tender*

1. general std of Art 2
2. seller obligated to deliver what K called for
3. Creates three choices:
 - a. Accept and sue for damages
 - b. Reject everything and sue for damages
 - c. Keep some and reject others and sue for damages

ii. *Rejection* of the goods (always **notice** to S when rejecting)

1. Must occur before acceptance of goods
2. Options:
 - a. Reject the whole or any commercial units or retain and sue for damages
 - b. Can also cure, installment contract, acceptance
3. Duty of Care:
 - a. Buyer must take reasonable care of rejected goods and obey reasonable requests from seller for their disposition
 - b. Can resell goods that are perishable or threaten to decline in value (B keeps fee for his trouble)

iii. *Cure*

1. seller's reasonable ground to believe the goods would be "ok"
 - a. NB: normally with info about "prior dealings"
2. time for performance has not yet expired

iv. *Installment Sales Contracts*

1. Def: requires or authorizes delivery in
 - a. Separate lots to be
 - b. Separately accepted
2. Buyer can reject **ONLY** where there is a *substantial impairment* in the installment that cannot be cured (imperfect tender not enough)

v. *Acceptance of the Goods*

1. if acceptance, can't reject
2. payment without opportunity for inspection is **NOT** acceptance

3. NB: implied acceptance if retention after opportunity to inspect and no objection made by buyer
- vi. *Revocation of acceptance of the goods* [on MBE for sure]³
 1. nonconformity substantially impairs the value of the goods;
 2. excusable ignorance of grounds for revocation or reasonable reliance on seller's assurance of satisfaction;
 3. revocation NOTICE within a reasonable time after discovery of nonconformity; and
 4. buyer can return the good substantially unchanged
- b. Payment concepts
 - i. By any manner current in ordinary course of business
 - ii. Seller can demand cash, but
 - iii. If demand in cash, buyer gets additional reasonable time

REMEDIES FOR AN UNEXCUSED NONPERFORMANCE

XV. REMEDIES

a. Specific Performance/Injunction

- i. Equitable remedy
- ii. Look at equitable maxims:
 1. does P have unclean hands?
 2. are money damages adequate? If yes, no equitable remedy
- iii. Areas where there is specific performance:
 1. contracts for **sale of land**
 2. when we have **unique goods**
 - a. antique; art; custom-made
 3. **No** specific performance for **services contracts**
 - a. But may get injunction to bar other similar performance
- iv. Areas where there is reclamation:
 1. right of seller to get its goods back. Elements:
 - a. buyer was *insolvent* when receiving goods
 - b. seller demands return within *10 days* of receipt
 - i. NB: "reasonable time" if buyer expressly claims he is solvent
 - c. buyer *still has goods* at time of demand
- v. Rights of good faith purchaser in entrustment
 1. owner leaves goods with a person who sells goods of that kind
 2. seller wrongfully sells goods to 3rd party
 3. BFP of goods from seller cuts off rights of original owner/entruster
 4. Remedy: owner sues seller for conversion

b. Money Damages

- i. Damages vocabulary
 1. expectation:
 2. reliance:
 3. restitution

³ see chart p. 47 of OICW

4. incidental
5. consequential
6. avoidable
7. liquidated
8. limitation of remedies
- ii. Measure of Damages
 1. Default RULE: courts in Oregon generally base damages on the protection of the *expectation interest* (ie, put P in same economic position as if contract had been performed)
 2. Alternative RULE: Protection of the *reliance interest* (ie, put P in same economic position as if the K had never happened)
 3. Alternative RULE: protection of the *restitution interests* (ie, put D in the same economic position as if K had never happened)
- iii. Damage rules for Sales of Goods (mainly expectation based)
 1. Two relevant facts for the answer:
 - a. Who breached?; and
 - b. Who has the goods?
 2. Seller breaches, buyer keeps goods
 - a. FMV if perfect minus FMV value *as delivered*
 3. Seller breaches, seller keeps the goods
 - a. Market prices at time of discovery of the breach minus contract price; OR
 - b. replacement price (covering) minus contract price
 - i. replacement must be reasonable
 4. Buyer breaches, buyer has goods
 - a. Contract price
 5. Buyer breaches, seller has goods
 - a. Contract price minus market price at time and place of delivery; OR
 - b. Contract price minus resale prices
 - c. In some situations, provable *lost profits* [aka “lost volume selling”]
 - i. Regular inventory; unlimited supply; damages are lost profits
- iv. Additions and Limitations
 1. Incidental damages
 - a. Costs incurred in dealing with breach
 2. Foreseeable consequential (special/unique to P) damages [essay question]
 - a. Damages arising from P’s special circumstances; AND
 - b. Recoverable only if D had *reason to know* at the time of the contract
 3. Subtract avoidable damages
 - a. No recovery for damages that could have been avoided *without undue burden* on P
 - b. Burden of pleading and proof is on D

4. Certainty test
 - a. Proof of damages must be *reasonably certain*
- v. Contract provisions regarding damages: Liquidated damages
 1. if term exists, the key is whether it is VALID:
 - a. damages were difficult to forecast at time K was made; and
 - b. provision is a reasonable forecast
 2. ie, it can't be so high as to be a punishment
 - a. where there is a "single number" to cover ANY and all situations of breach, always INVALID

EXCUSE OF NONPERFORMANCE OF CONTRACT BECAUSE SOMETHING HAPPENED AFTER CONTRACT WAS MADE

XVI. EXCUSE B/C OTHER PARTY'S IMPROPER PERFORMANCE

- a. CL and material breach rules; three general rules: [see hypos #177, 178]
 - i. Damages can be recovered for any breach
 - ii. Only a material breach by one party excuses the other party from performing
 - iii. Whether a breach is material is a FACT question
 - iv. NB: Don't forget *divisible contract exception*
- b. UCC and Perfect Tender Rule
 - i. Less than perfect tender gives buyer option of rejecting goods (which is same as excuse not to perform)

XVII. EXCUSE B/C OF FAILURE OF PERFORMANCE CONDITION

- a. What is a performance condition?
 - i. If condition appears in *response* to an offer, then this is conditional acceptance (see above)
 - ii. If condition is inside the agreement, then it is a performance condition.
 - iii. Def performance condition: A mutually agreed upon promise modifier.
 1. Words that give it away: if, provided that, so long as, subject to, in the event that, unless, when, until, and on condition that.
- b. What is the standard for satisfying an express condition?
 - i. General RULE: strict compliance with performance conditions
- c. How can an express condition be excused?
 - i. Identify person who *benefits from* or is *protected by* the condition
 - ii. The protected person has legal power to give up the protection

XVIII. EXCUSE OF PERFORMANCE BY REASON OF OTHER PARTY'S ANTICIPATORY REPUDIATION OR INABILITY TO PERFORM

- a. **Anticipatory Repudiation**
 - i. An *unambiguous* statement that
 1. the repudiating party will not perform
 2. made *prior to* the time that performance was due
 - ii. Therefore, nonperformance of the OTHER party is excused by the anticipatory repudiation
 - iii. Anticipatory repudiation

1. gives rise to immediate claim for damages, UNLESS performance complete, then must wait until contract payment date

iv. Retraction/Reversal

1. of AR is possible, so long as
 - a. no material change in position by the other party
2. thus, duty to perform is reimposed, but may be
 - a. delayed until adequate assurance is provided

b. Inability to Perform

- i. Usually requires that other side's performance is unique and cannot be replaced by \$\$ (eg, a *barter* transaction for artwork)

XIX. EXCUSE BY REASON OF A LATER CONTRACT

a. Rescission (cancellation)

- i. Is performance still remaining from each of the contract parties?
 1. yes, it is *executory*, so valid
 2. no, if one party has *completely performed*, then cannot rescind

b. Accord and Satisfaction ("if" and "then")

- i. Definitions:
 1. Accord: An agreement by the parties to an existing obligation to accept a *different performance*⁴ in satisfaction of the existing obligation
 2. Satisfaction: the different performance is completed
- ii. Effect of Accord and Satisfaction
 1. if satisfaction fulfilled, then parties former performance is excused (see #196)
 2. if neither original nor satisfaction performance accomplished, then can sue on either contract, but not both

c. Modification/Substituted Agreement

- i. Agreement by parties to an existing obligation to accept a *different agreement* in satisfaction of the existing obligation
- ii. Once modification made, then old obligation disappears (unlike A & S)
- iii. Know the difference just in case.

d. Novation

- i. Agreement between BOTH parties to an existing contract to
- ii. *Substitute* a new party
 1. same performance, different party
- iii. Effect
 1. Excuses the contracted for performance of the party who is substituted for or replaced

iv. Vs. Delegation

1. no need for both parties to agree, but
2. does not excuse performance of original party

XX. EXCUSE OF PERFORMANCE BY REASON OF A LATER, UNFORESEEN EVENT

- a. Bar exam: likely to get question where something bad happens, but is NOT an excuse to performance

⁴ If the later agreement is to merely do LESS OF THE SAME THING, then we are going to look for a consideration answer (see #195)

- b. Elements:
 - i. Something happens after contract, but before performance;
 - ii. It was unforeseen; and
 - iii. Makes performance impossible, commercially impracticable, or frustrates the purpose of the performance
- c. Impossibility
 - i. Objective
 - ii. Can't be done
- d. Impracticable
 - i. Subjective
 - ii. Only be done with extreme and unreasonably difficulty and expense
- e. Types:
 - i. Damage or destruction of subject matter AFTER contract formation
 - 1. Sale of goods: combine with *risk of loss rules*!
 - a. Risk of loss on seller:
 - i. If goods unique, then excused
 - ii. If goods replaceable, then not excused
 - b. Risk of loss passes to buyer
 - i. Nonperformance NEVER excused
 - ii. Death AFTER contract formation
 - 1. General RULE: Death does not make contract obligations disappear
 - 2. Exception: one party is a "special" person
 - a. Ie, if impossible to replace performance by money or another person (eg, famous painter), then performance is excused
 - iii. Subsequent law or regulation
 - 1. later law makes performance of the contract illegal
 - a. excused by *impossibility*
 - 2. later law makes mutually understood purpose of contract illegal
 - a. excuse is by *frustration of purpose*

THIRD PARTY PROBLEMS

XXI. PERSON TRYING TO ENFORCE A CONTRACT SHE DID NOT MAKE: TPB

- a. Five elements need
 - i. Identify a problem as TPB problem
 - ii. Use vocabulary of TPB law
 - iii. Deal with efforts to cancel or modify a TPB contract
 - iv. Figure out who can sue whom
 - v. Assert any available defenses
- b. **Vocabulary: Master This!**
 - i. Third-party beneficiary
 - ii. Promisor: person making promise that benefits the third party
 - 1. Jumbo in #213; Allstate in 212
 - iii. Promisee: person who obtains the promise that benefits the third party

1. Sharon stone #213; Conviser #212
- iv. Intended/incidental
 1. unlikely on bar; highly fact specific
 2. if TPB named, then intended
 3. if TPB not named, then incidental
- v. intended donee beneficiary or creditor beneficiary
 1. donee: majority
 2. creditor: if money owed prior to formation of contractor
- c. Efforts to cancel or modify
 - i. Does third party know of, has relied on, or assented as requested
 - ii. If so, then rights have vested and K cannot be
 1. cancelled or modified without TPB's consent UNLESS
 2. K provides otherwise
- d. Who can **sue** whom?
 - i. Beneficiary can sue promisor
 - ii. Promisee can sue promisor
 1. but, no recovery by TPB if promisee recovers
 - iii. Donee beneficiary cannot sue promisee, but creditor beneficiary can sue promisee on pre-existing debt
- e. Defenses
 - i. If TPB sues promisor, promisor can assert any defenses that he would have if had been sued by promisee

XXII. PERSON TRYING TO ENFORCE A CONTRACT SHE DID NOT MAKE:

ASSIGNMENT OF RIGHTS

- a. What is an assignment?
 - i. Transfer of rights under a contract in **two steps**: [TPB: one step]
 1. contract between only two parties
 2. one of the parties' later transfer of rights under that contract to a third party
- b. Vocabulary
 - i. Assignor: party to K who later transfers rights under K to another
 - ii. Assignee: not a party to original K; can enforce K due to assignment
 - iii. Obligor: other party to original contract
- c. Limitations on Assignment
 - i. Contract provisions
 1. prohibition: "rights hereunder not assignable"
 - a. RULE: prohibition takes away the *right* to assign, but not *power* to assign.
 - i. Therefore, an assignment would be a breach, but assignee who does not know of prohibition can still enforce K
 2. invalidation: "all assignment of rights under this K are void"
 - a. RULE: takes away BOTH the *right* and the *power* to assign.
 - i. Therefore, breach by assignor and no rights in assignee

- ii. **Common Law:** common on MBE
 - 1. Even if K says nothing about assignments, CL
 - a. Prohibits assignment that *substantially changes* the duties of the obligor
 - b. Examples:
 - i. Assignment of *right* to payment [permitted]
 - ii. Assignment of right to contract *performance* other than right to payment [often prohibited]

- iii. **UCC**

- 1. unless indicated to contrary, a prohibition on assignment means only bar to *delegation* to assignee of assignor's performance

- d. Requirements for Assignment

- i. General RULE: consideration is NOT required
 - ii. Watch for *present assignment*, not a **promise** to assign
 - 1. if promise, then we need consideration
 - iii. distinguish *existing but conditional rights* from *future rights*
 - 1. existing may be assigned
 - 2. future, non-existent rights, CANNOT be assigned

- e. Right of Assignee

- i. Assignee can sue obligor
 - ii. Obligor has same defenses against assignee as it would have against assignor
 - iii. Payment by obligor to assignor is effective until obligor *knows of* the assignment
 - 1. similarly, modification agreements between obligor and assignor are effective if the obligor did not know of the assignment
 - iv. **Warranties** of assignor IN AN ASSIGNMENT FOR VALUE
 - 1. exception to notion that no consideration needed
 - 2. assignor warrants that he will not do anything to *impair the value of the assignment*

- f. Multiple Assignments

- i. Gratuitous assignments
 - 1. General RULE: *last* assignee in time wins
 - 2. Exception: detrimental reliance or writing indicating ownership
 - ii. Assignments for consideration
 - 1. General RULE: *first* assignee for consideration wins
 - 2. Limited Exception:
 - a. Later assignee does not know of earlier assignment and is first assignee to receive payment/judgment/novation/indicia of ownership.

XXIII. DISPUTES ARISING FROM A PERSON'S PERFORMING A CONTRACT SHE DID NOT MAKE: DELEGATION OF DUTIES

- a. What is delegation?
 - i. Party to a K transfers work under the K to a 3rd party
- b. Relationship of assignment and delegation
- c. Which duties are delegable?

- i. General RULE: all duties are delegable, except:
 - 1. delegations prohibited by K
 - 2. assignments prohibited by K
 - 3. K calls for very special skills
 - 4. person to perform has very special reputation
- d. What if third party does not perform?
 - i. Where mere duty is delegated, delegatee cannot recover from obligee if obligee refused to pay [see #242]
 - ii. Delegating party **always** remains liable
 - iii. Delegatee liable only if she receives consideration from delegating party
 - 1. NB: a delegation for consideration creates a TPB contract

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