Final Examination

Contracts, Fall 2015

Prof. Warner

The exam is 3 hours long.

The exam is open book; you may use material on your computers, as well as commercial or personal printed materials.

Steve Sowle owns and operates Crique du Sowlé, the sole Sowle soul circus. For his premiere in Las Vegas, Sowle is negotiating with Ruddy Stein of the circus supply company, Equipment Roche, for trapezes and other equipment. Sowle sends Stein a note saying, “I need trapezes, free ropes, aerial silks. Can you supply them?” Stein responds, “What if I send you our standard purchase order agreement for you to fill out specifying exactly what and how much you want? Fill it out, send it back to me. I’ll check our supply, but I am sure we can do it.” Sowle agrees to the arrangement, and Stein sends an unsigned purchase order agreement for Sowle to fill out. Sowle does so, specifying in detail the type and quantity of the equipment he needs, including “40 red aerial silks.” The purchase order includes the delivery date of June 13 and specifies all other relevant aspects of the deal. The purchase order also contains this clause:

*Entire agreement clause*: this agreement represents the complete and final statement of the parties’ obligations. Neither party is relying on any oral or written representations not contained in this agreement.

Sowle signs the form and returns it with a note that says, “All filled out and signed! Ready for you to accept. Great dealing with you.” After he sends it, and before Stein can respond, Sowle calls Stein and says, “I said 40 *red* silks, but can we make that blue silks instead?” Stein agrees. “Blue it is,” he says. When he is ready to sign the agreement, Stein calls Sowle and says “I notice that the written agreement still has ‘red aerial silks’ in it instead of blue. But we agreed the red means blue right?” Sowle says, “Right! We are OK.” Stein says, “I am good with that,” and he signs the agreement while still on the phone and tells Sowle, “I am sending back my signed acceptance.” He does so with a note that says, “I include the following provision which is incorporated in the purchase order form as if contained therein:

In the event a dispute shall arise between the parties to this contract, it is hereby agreed that the dispute shall be referred to United States Arbitration and Mediation for arbitration in accordance with United States Arbitration and Mediation Rules of Arbitration. The arbitrator’s decision shall be final and binding and judgment may be entered thereon.

Sowle and Stein have no further communications about the agreement.

Sowle then contacts the choreographer, Professor Ostrzecer—Dr. O, as she is widely known--to design dances for his performers. Dr. O offers to design the dances, detailing the terms in writing. Sowle says, “I want to think about it.” Dr. O says, “My current intention is to hold this offer open for five days, but you had better hurry. A lot of people want my services.” Sowle calls two days later to accept, but before he can open his mouth, Dr. O says, “I was just about to call you. I am revoking my offer.” Sowle says, “You can’t do that! Your offer was irrevocable for five days!”

Sowle decides to give up on Dr. O and turns to the famous choreographer, Richard “Right Moves” Wright to design dances for his performers. After preliminary discussions, Wright sends Sowle a detailed agreement, which Wright has signed. After he sends it, Wright calls Sowle and says, “We discussed the dance notation to use—whether to use Labanotation or Benesh Movement Notation. I forgot to add in the written agreement that the choice of dance notation at my sole discretion. I orally add that now. So consider that along with the written agreement. The whole package is for your acceptance. If you say ‘Yes’ we have a deal.” Sowle signs and returns the agreement and adds a note that says, “The choice of dance notation is at Wright’s sole discretion. This provision is incorporated in the agreement as if contained therein.” He adds, “Great. Glad our deal is done!.”

A month before the delivery of the materials from Ruddy Stein, Sowle reads an article in the respected magazine, *Main Arena*, that Cirque Du Soleil has ordered so many blue aerial silks that they are in very short supply. The supply is so low that many suppliers of equipment strongly suspect that they may not be able to keep their contracts with their buyers for the blue silks. Sowle writes to Stein and expresses his concern that Stein may not be able to deliver the aerial silks specified in their contract. Stein reassures him the he already has an adequate supply in his warehouse. *Even so, Sowle says, “I am not paying the money due on June 5.* I’ll pay when you deliver.”

Unfortunately, a week before June 13, there is a completely unexpected fire in Stein’s warehouse. The fire is not Stein’s (or Sowle’s) fault. As a result, Stein is unable to deliver 40 blue aerial silks. In the current market, it is for all practical purposes impossible to find enough blue aerial silks for sale. On June 11, he delivers 40 red silks instead. Sowle rejects the delivery, and Stein seasonably notifies Sowle of his intention to cure. Unfortunately, it is still practically impossible to find blue aerial silks for sale, and June 13 passes without a delivery of blue silks from Stein. However, on June 14, Stein’s long lost aunt, a circus acrobat in her youth, reads about Stein’s problems on Stein’s Facebook page, and she donates 40 blue aerial silks from her personal collection of circus paraphernalia. Stein delivers 40 blue silks on June 16. Sowle could not find blue aerial silks himself, so he gladly accepts Stein’s late delivery and pays the full amount due. The delay meant that Sowle had to postpone the opening of his show. The unavoidable costs in actors’ salaries and other consequences of the postponement are $50,000. Sowle had discussed these consequences of a delay in delivery with Stein when they were negotiating the contract.

Wright delivers the dance notation in Labanotation. Sowle is upset. He says, “When we agreed that you would choose the notation at your discretion, I thought we both understood that you would choose Benesh Movement Notation. I can’t make heads or tails of Labanotation.” Wright says, “We made it my choice, and I had Labanotation in mind all along.”

Questions

(1) Did Sowle and Stein satisfy the requirements of offer and acceptance with regard to the agreement for the delivery of trapezes, free ropes, aerial silks? Begin your analysis with Sowle’s initial communication to Stein. Assume that Sowle and Stein are merchants. You may assume that if there is an expression of acceptance, it is definite and seasonable.

(2) No matter how you answer question (1), assume Sowle and Stein did satisfy the requirements of offer and acceptance. Does the resulting agreement contain an arbitration clause? You may assume that the offer did not contain any limitations on changing its terms. You may also assume that Sowle and Stein are merchants.

(3) Assume that Sowle and Stein’s oral agreement concerning the blue aerial silks satisfies the requirements of offer, acceptance, and consideration, and assume that the agreement concerning the delivery of trapezes, free ropes, aerial silks is an enforceable agreement. Does the parol evidence rule make the oral agreement unenforceable?

Use parol evidence the rule as stated in class, and use only the normal inclusion test for scope. Even you find the written agreement is not a complete integration, consider the issue of scope by assuming that it is a complete integration.

(4) Is Sowle correct when he claims that Dr. O’s offer is irrevocable? Assume that Dr. O made an offer when she sent the written proposal.

(5) Did Sowle breach when he refused to pay on June 5?

Note this question only asks if Sowle breached. It does *not* ask you to calculate Stein’s damages, if any.

(6) Stein claims he owes no damages to Sowle. Evaluate that claim and explain what damages, if any, Stein owes Sowle. Assume that the amount Sowle paid Stein for the blue silks is the same at the market price at the time and place at which Sowle learned of the breach by Stein.

(7) Assume Sowle and Wright have an enforceable written agreement for Wright’s services as a choreographer. Sowle claims that the agreement requires Wright to use Benesh Movement Notation. Is Sowle correct? Assume there is no trade usage with regard to “dance notation.”

UCC and Restatement Sections

Caution! There is no guarantee that all sections are relevant and applicable.

UCC

§ 2-207. Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which 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) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. 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.

§2 508. Cure by Seller of Improper Tender or Delivery; Replacement

(1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

§2 609. Right to Adequate Assurance of Performance

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party (1) the other may in writing demand adequate assurance of due performance and until he receives such assurance may (2) if commercially reasonable suspend any performance for which he has not already received the agreed return.

§2‑712. "Cover"; Buyer's Procurement of Substitute Goods

(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.

(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.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

§2‑713. Buyer's Damages for Non‑Delivery or Repudiation

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2‑723), the measure of damages for non‑delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2‑715), but less expenses saved in consequence of the seller's breach.

Restatement

Restatement (Second) Contracts § 201

201. WHOSE MEANING PREVAILS

(1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.

(2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

(3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.