

CONTRACTS: BAR EXAM CHECKLIST

1) GENERAL VOCABULARY

- a) Contract: Legally Enforceable agreement
 - i) Express: Based on words (written or spoken)
 - ii) Implied: Requires conduct
- b) Quasi-Contract: equitable remedy
 - i) P confers benefit
 - ii) P reasonably expected to be paid
 - iii) D was unjustly enrich if P is not paid
- c) Bilateral
 - i) Results from an offer that is **open as to the method of acceptance**.
 - ii) NOTE: **Most** contracts are bilateral
- d) Unilateral
 - i) Results from an offer that **expressly requires performance as the only possible method of acceptance**
 - ii) Includes rewards, prizes, and contests

2) APPLICABLE LAW

- a) Common Law derived largely from case law
 - i) Service contracts
 - ii) Real estate contracts
- b) Articles 1 & 2 of the UCC
 - i) Applies to the sale of goods
 - ii) Mixed Deals
 - (1) All or nothing: Either Art. 2 applies or it doesn't (E.g., A contracts with B to sell car and to give 2 parking lessons. Article 2 applies)
 - (2) Most Important Test: If sale of goods is the most important part of the transaction, UCC applies
 - (3) Divisible Payment Exception: apply UCC to sale of goods and common law to the rest (E.g., contract price is \$5100; \$5000 for goods and \$100 for services)
- c) Article 2A of the UCC
 - i) Applies to the lease of goods
 - ii) Largely the same as Art. 2

3) FORMATION

- a) Offers
 - i) General Rule: Manifestation by words or conduct showing intent to contract
 - ii) Look to the first communication in the fact pattern for offer questions
 - iii) Material Terms
 - (1) Offer need not contain all material terms
 - (2) Price and description required in **real estate contracts**
 - (3) UCC has NO price requirement; offer is an offer if the parties so **intend**
 - iv) Vague or Ambiguous Material Terms
 - (1) "For a fair price"
 - (2) Invalid offer under **UCC and Common Law**
 - v) Requirement/Output Contracts
 - (1) Quantity determined by buyer's requirements or seller's output is generally valid
 - (2) Exception: Limitations or increases must be **reasonably proportionate**

- vi) Price quotes are generally not offers (unless in response to specific inquiry)
- vii) Advertisements are not offers unless
 - (1) Reward
 - (2) Specific quantity and specific person who can accept

b) Termination of Offers: Offer dies (cannot be accepted) if terminated

i) Time Lapse

- (1) Time stated expires *or*
- (2) Reasonable time lapses
- (3) Multiple months is probably a lapse
- (4) NOTE: Look for dates in the fact pattern

ii) Offeror's Words or Conduct

- (1) **Direct statement** to offeree of unwillingness or inability to contract
- (2) **Conduct** by offeror that **offeree is aware** of indicating unwillingness or inability to contract
- (3) Revocation of offer not effective until **received by offeree**
- (4) Offer cannot be revoked after accepted

iii) Irrevocable offers

- (1) Option contracts:
 - (a) offeror promises to keep offer open and
 - (b) offeree gives consideration
- (2) UCC Firm Offer Rule
 - (a) Offer to buy or sell goods
 - (b) Signed, written **promise to keep the offer open**
 - (c) Offeror is a merchant
 - (d) Offer open for **up to three months**
- (3) Detrimental Reliance
 - (a) Offeree detrimentally relied on the offer
 - (b) Reliance was reasonably foreseeable
 - (c) Usually applies with general contractors and subcontractors (General uses sub's bid to make General's bid)
- (4) Start of Performance
 - (a) Unilateral contract
 - (b) Requires performance as acceptance
 - (c) Offer irrevocable for a reasonable time to complete performance
 - (d) Must be more than mere preparation (if preparation, use detrimental reliance argument)

iv) Rejection of Offer

- (1) Counter Offer
 - (a) Terminates offer and becomes new offer
 - (b) Bargaining does not terminate original offer
 - (i) If the question has a "?" it is bargaining
 - (ii) If the question has a "." it is a counteroffer
 - (c) Offeree cannot accept original offer once he makes a counteroffer and it is rejected
- (2) Conditional Acceptance
 - (a) Words of condition (if, provided, so long as, on condition that)
 - (b) "Acceptance is expressly conditioned on these terms"
- (3) Additional Terms at Common Law: Mirror Image Rule
 - (a) Acceptance must be the mirror image of the offer
 - (b) Acceptance that adds new terms is a counter offer

- (4) UCC 2-207 Eliminates Mirror Image Rule
 - (a) Issue Spotting
 - (i) Offer to buy or sell goods
 - (ii) Response adds additional terms
 - (b) Is there a contract?
 - (i) Response to offers that add terms are acceptances (seasonable expression of acceptance)
 - (ii) "Acceptance is expressly conditioned on these terms" is not a contract
 - (c) Is the term a part of the contract
 - (i) If parties are merchants yes unless (1) materially changes the offer or (2) offeror objects to the change
 - (ii) If one or both are not merchants, additional term is a proposal and must be separately accepted or rejected
- v) Death
 - (1) Death of a party before acceptance terminates offer
 - (2) Exception
 - (a) Option contract
 - (b) Part performance of offer to enter into unilateral contract
- c) Acceptance
 - i) Who Can Accept?
 - (1) Acceptance only by person who knows about the offer and is the person to whom it was made
 - (2) Only way they can test is if there's a reward
 - ii) Agreement will control method of acceptance (usually not on the bar exam)
 - iii) Offeree Performs
 - (1) Acceptance depends on whether **notice** is required to accept
 - (2) Notice required if offeree has reason to believe that offeror will not learn of acceptance (**look for offeror and offeree in different locations**)
 - (3) Notice not required if offer dispenses with notice requirement
 - iv) Offeree begins performance
 - (1) Acceptance for bilateral contracts
 - (a) Where offer is **open to method of acceptance**
 - (b) E.g., O offers P to paint home for \$1000; offer silent as to acceptance. P starts painting. P has accepted
 - (2) Not acceptance for unilateral
 - (a) Offer states that **acceptance only by performance**
 - (b) **Completion** of performance is required
 - (c) E.g., O offers P to paint home for \$1000; offer says performance required for acceptance. P starts painting. P has not accepted
 - v) Offeree promises to perform
 - (1) Most offers can be accepted by a promise to perform
 - (2) If offer states performance required, promise to perform is not enough for acceptance
 - vi) Mailbox Rule: Offeror and Offeree are at **different locations** and there are **conflicting communications**
 - (1) Offer invites acceptance by mail (i.e., offer was mailed, says so, or silent as to acceptance)
 - (2) Acceptance effective **when mailed**
 - (3) NOTE: Revocation of offer only effective when received by offeree
 - (4) For multiple communications, rule is **whichever gets there first controls**

vii) Seller Sends Wrong Goods under UCC

- (1) General rule: If seller sends wrong goods, it acts as seller's acceptance and a breach
- (2) Accommodation Exception: Acts as a counter offer and no breach if
 - (a) Seller sent goods as an **accommodation** and
 - (b) Explains **why** he sent the wrong goods

viii) Offeree is Silent

- (1) General Rule: Silence is not acceptance
- (2) Exceptions: Offeree, by words or conduct, agrees that silence is acceptance
- (3) E.g., "If you don't hear from me before Friday, I accept your offer."

d) Consideration

i) Introductory Materials

- (1) Consideration Defined: Bargained-for legal detriment
 - (a) "Bargained-for" means asked for by the promisor in exchange for promisor's promise
 - (b) "Legal detriment" means any detriment
- (2) Methods
 - (a) Look at each promise separately
 - (b) Identify promisor and ask what he bargained for
 - (c) Identify the promisee and determine the detriment
- (3) Forms of Consideration
 - (a) Performance
 - (b) Forbearance
 - (c) Promise to Perform
 - (d) Promise to Forbear

ii) Promise as Consideration

- (1) Executory Contracts
- (2) E.g., B promises to buy S's house and S promises to sell his house to B.

iii) Illusory Promise

- (1) Almost always a wrong answer
- (2) Promise in which the promisor has not committed herself in any manner, i.e., no new detriment
- (3) E.g., A agrees to sell car to B unless A changes his mind. That's illusory. If the facts said "... unless A notifies B otherwise" would not be illusory

iv) Adequacy of consideration is **irrelevant**

v) Past Consideration

- (1) General Rule
 - (a) Past consideration cannot be consideration, i.e., can't bargain for something that already happened
 - (b) E.g., A saved B's life. C, B's dad, promises to pay A \$5000. Later, C changes his mind. Promise is not legally enforceable
- (2) **Very** Limited Exception
 - (a) Promisor expressly requests something and
 - (b) Promisor knows that promisee expects payment
 - (c) E.g., C asks A to save B's life. After A saves B's life, C promises to pay A \$5000. Later, C changes his mind. Promise is legally enforceable

vi) Preexisting Contractual or Statutory Duties

- (1) Common Law General Rule
 - (a) Doing what you were already required to do is not consideration for a promise to do it

- (b) E.g., A agrees with B to perform 5 songs for \$5000 at B's event. A then says he won't perform unless he's paid \$6000. B promises to pay \$6000, but after the gig, pays the original price. The promise to pay the additional \$1000 is not enforceable because no new detriment to A.
 - (2) Exceptions to Common Law General Rule
 - (a) Addition to or Change in Performance Exception
 - (i) E.g., A agrees with B to perform 5 songs for \$5000 at B's event. A then says he won't perform unless he's paid \$6000. B promises to pay \$6000 if he does 5 more songs. The promise to pay the additional \$1000 is enforceable because new detriment (5 more songs)
 - (b) Unforeseen Difficulty so Severe Excuses Performance
 - (i) E.g., A agrees with B to perform 5 songs for \$5000 at B's event. Sound equipment doesn't work right. B promises to pay \$6000 if A puts on the show. The promise to pay the additional \$1000 is enforceable because new detriment (playing with inoperative sound)
 - (c) Third Party Promise to Pay for Preexisting Obligations or Duties are Enforceable
 - (3) UCC Rule
 - (a) **Good faith test** for changes in existing sale of goods contract
 - (b) E.g., A agrees to sell toys to B for \$1000. Before delivery, A says he can't do it for less than \$1500 because of a shortage. B agrees to pay the \$500. B's promise is enforceable.
- vii) Promise to Forgive Balance of Debt
- (1) If debt is **due** and **undisputed**, part payment is **not** consideration for forgiving the debt
 - (2) If debt is not due, early payment is a new detriment
 - (3) E.g., A owes B \$400. Debt is due and undisputed. B agrees to take \$200 to satisfy the debt. A pays \$200. B did **not** get new consideration and can recover the other \$200. Same facts, but debt is not due. A cannot sue for the other \$200 because A paid early and B accepted it as full satisfaction.
- viii) Written Promise to Pay Debt Barred by Technical Defense (Statute of Limitations): Consideration Substitute
- (1) Written Promise to satisfy obligation that is unenforceable because statute of limitations has run is enforceable without consideration
 - (2) Elements
 - (a) Existing debt
 - (b) Can't enforce it because of statute of limitations
 - (c) In writing
 - (d) Promise is to pay a new amount to satisfy the debt (usually less than the original debt)
 - (3) E.g., A owes B \$1000. SOL has run. A writes letter promising to pay \$600 for the debt. B gets \$600
- ix) Promissory Estoppel: Consideration Substitute
- (1) Use **only if no other possible consideration**
 - (2) Don't choose this if it's in the (A) slot
 - (3) Elements
 - (a) Promise
 - (b) Reliance is reasonable, detrimental, and foreseeable
 - (c) Enforcement necessary to avoid injustice
 - (4) Distinguish Consideration
 - (a) Parties ask each other to do something = consideration
 - (b) Acts of reliance = promissory estoppel
- e) Lack of Capacity
- i) Who?
 - (1) Infants
 - (2) Mentally incompetent
 - (3) Intoxicated unless other person knows

- ii) Consequences
 - (1) Party without capacity can avoid or disaffirm the contract
 - (2) Party without capacity affirms by retaining benefit after gaining capacity
- iii) Liability for Necessaries
 - (1) Food, clothing, medical care, shelter
 - (2) Liability based on quasi-contract law
- f) Statute of Frauds (Big for MBE and Essays)
 - i) Look for **oral agreement** in the fact patterns
 - ii) Contracts within the Statute
 - (1) Promise in Consideration of Marriage
 - (a) Not promise to marry
 - (b) E.g., H claims that W agreed to get rid of property before marriage. SOF applies
 - (2) Promise by Executor to Pay Obligation from Executor's Funds
 - (a) Promise to pay obligation of decedent from executor funds
 - (b) E.g., Funeral home says that Executor agreed to pay funeral home out of pocket. SOF applies
 - (3) Guarantees (Answering for Debts of Others)
 - (a) "I will pay you" does not come within the statute of frauds
 - (b) "**I will pay you if A doesn't**" comes within the statute of frauds
 - (c) Usually a **wrong** answer on the MBE
 - (d) Exception: Main purpose for the promise is to benefit the guarantor
 - (4) Service Contract Performed **More than One Year** after Contract Date
 - (a) Specific Time Period (i.e., "3 years" = statute applies)
 - (b) Specific Time of Performance (i.e., contract date is Jan. 1 1999; perform by Feb. 2000 = statute applies)
 - (c) Tasks **Excluded** (i.e., nothing said about time): Focus on what might have happened with **unlimited resources**
 - (d) Contracts "For Life" **Excluded**
 - (5) Transfers of Interest in Real Estate **More than a Year**
 - (6) UCC Sale of Goods for **\$500 or More**
 - iii) Satisfying Statute of Frauds
 - (1) Performance
 - (a) Service Contracts
 - (i) Full performance satisfies the statute of frauds
 - (ii) Part Performance does not satisfy statute
 - (b) UCC Sale of Goods
 - (i) Ordinary Goods
 - 1. Delivered Goods: part performance satisfies the state
 - 2. Undelivered goods: part performance does not satisfy
 - (ii) Specially Manufactured Goods
 - 1. Custom made goods *and*
 - 2. Substantial beginning
 - (c) Real Estate Transfer Contract
 - (i) Full cash payment does not satisfy the statute of frauds
 - (ii) Part performance **and** two of the following satisfies:
 - 1. Payment
 - 2. Possession
 - 3. Improvements

- (2) **Writings** that Satisfy the statute of frauds
 - (a) Common Law
 - (i) All material terms: **who and what?**
 - (ii) Signed by the **party to be charged**
 - (b) UCC
 - (i) Quantity: **How many?**
 - (ii) Signed by the **party to be charged**
 - (iii) Exception to Signature Requirement
 - 1. Merchants *and*
 - 2. Party claiming no contract receives a **writing** with the **quantity term**
 - 3. Fails to respond within 10 days
- (3) Judicial Admission (UCC Sale of Goods)
 - (a) Acknowledgement of an agreement
 - (b) In pleadings, testimony, discovery
- iv) Other Issues
 - (1) Authorization to Enter into Contract for Someone Else: **Equal Dignity Doctrine**
 - (a) Authorization to execute a contract for someone else
 - (b) Must be signed and in writing if the original contract must have been also
 - (c) E.g., A sends B to sign a one year lease agreement for A. No written authorization requirement. If the lease agreement was for 2 years, need written authorization.
 - (2) Contract Modification
 - (a) Written Modification Required
 - (i) Look at the deal with the modification as a whole
 - (ii) If deal with the change is within statute, then modification must be in writing
 - (iii) E.g., A leases building to B for one year. A claims that they later agreed to a three year lease. Modification must be in writing (time for contract more than a year now)
 - (iv) E.g., A sells 600 toys to B for \$600. B claims that they modified the price to \$100. Modification need not be in writing because no longer \$500 or more.
 - (b) Modification Clause in Contracts
 - (i) Common Law
 - 1. Disregard the writing
 - 2. Ignore the modification clause
 - 3. Apply the Written Modification Rule
 - (ii) UCC Rule: Modification clause is effective unless **waived**
- g) Illegality
 - i) Illegal Subject Matter: agreement is void
 - ii) Legal subject matter but illegal purpose: agreement is enforceable by the person who did not know of the illegal purpose
- h) Misrepresentation
 - i) False Assertion of fact *or*
 - ii) Concealment of facts
 - iii) Effect
 - (1) **Fraudulent or material** misrepresentation of **terms** is **voidable**
 - (2) Misrepresentation of **nature of contract** is **void**
- i) Duress
 - i) Improper threat to breach unless new deal made *and*
 - ii) Other party has no reasonable alternative source of supply

- j) Unconscionability
 - i) Unfair surprise and oppressive terms
 - ii) At the time agreement made
 - iii) Determined by the court
- k) Ambiguity
 - i) Material term open to at least two reasonable interpretations
 - ii) Each party attaches a different meaning to the term
 - iii) Neither party knows or has reason to know that the term is open to two interpretations
- l) Mistake of Fact
 - i) Mutual Mistake of Fact
 - (1) Both parties mistaken
 - (a) Mistaken as to **what it is** = no contract
 - (b) Mistaken as to **what it is worth** = contract
 - (2) Basic assumption of fact
 - (3) Materially affects the agreed exchange
 - ii) Unilateral Mistake of Fact
 - (1) General Rule: Party cannot avoid a contract for mistake made by only one party
 - (2) Exceptions
 - (a) Mistaken party can avoid contract for obvious mistakes known to the other party
 - (b) Mistakes discovered before significant reliance by the other party

4) TERMS

- a) Vocabulary for Parol Evidence Rule
 - i) Integration: final agreement
 - ii) Partial Integration: written and final, but **incomplete**
 - iii) Complete Integration: written, final, and **complete**
 - iv) Merger Clause: "This is the complete and final agreement of the parties"
- b) Triggering Facts for Parol Evidence Rule
 - i) Written contract that court finds is the final agreement *and*
 - (1) **Oral statement** made **at the time the contract was signed** or
 - (2) **Earlier oral or written statements** by the parties to the contract
- c) Fact Patterns for Parol Evidence Rule
 - i) Changing the Written Deal
 - (1) Partial or complete integration
 - (2) General Rule: can't change the written deal based on earlier agreements that are inconsistent with the terms of the contract
 - (3) Exception: clerical errors
 - ii) Establishing a Defense to the Enforcement of the Written Deal
 - (1) Partial or complete
 - (2) Earlier words of parties to determine defenses like **misrepresentation, fraud, duress**
 - iii) Explanatory Terms
 - (1) Despite the parol evidence rule,
 - (2) Parol can be considered to resolve **ambiguities** in the written contract

- iv) Adding to the Written Deal
 - (1) Partial Integration: agreements with **consistent additional** terms admissible
 - (2) Complete Integration: agreements with terms that would **naturally and normally** be in a separate agreement are admissible
- d) Conduct & Course of Performance (In order of Importance)
 - i) Course of Performance: Same Parties, Same Contract
 - ii) Course of Dealing: Same Parties, different but similar contract
 - iii) Custom & Usage: different but similar people, different but similar contract
- e) UCC Gap Fillers
 - i) Delivery Obligations
 - (1) No agreement
 - (a) Place of delivery is seller's place
 - (b) Exception: Both parties know that the goods are some place else (in which case, this place would be place of delivery)
 - (2) Agreement about Place of Delivery by Common Carrier: Seller's Obligation
 - (a) Shipment Contracts
 - (i) Seller gets the goods to the carrier
 - (ii) Makes reasonable arrangements for delivery
 - (iii) Notifies the buyer
 - (b) Destination Contracts
 - (i) Obligation is complete when **goods arrive at the buyer's location**
 - (c) Determining Shipment or Destination
 - (i) FOB Seller's Location = Shipment
 - (ii) FOB Buyer's Location = Destination
 - ii) Risk of Loss (K formed; before buyer gets goods; goods are damaged/destroyed; B and S not to blame)
 - (1) Agreement Controls (if there is one; if not, go through 2-4 below)
 - (2) Any Breach: Breaching party has the risk of loss
 - (3) Delivery by Common Carrier other than Seller: ROL shifts once seller completes delivery obligations (see above)
 - (4) No Agreement, No Breach, No Delivery by Common Carrier
 - (a) Merchant Seller: risk of loss shifts to buyer when buyer **receives the goods**
 - (b) Non-merchant Seller: When seller **tenders the goods** (makes them available)
 - iii) Warranties of Quality
 - (1) Express
 - (a) Words of promise, description, or facts
 - (b) Puffing excluded (i.e., **opinions**)
 - (c) Samples and Models are **express warranties** warranting that the goods will be like the sample or model
 - (d) Correlates with parol evidence rule
 - (2) Implied Merchantability
 - (a) Any merchant that **deals with goods of that kind**
 - (b) Goods fit for **ordinary purpose**
 - (3) Implied Fitness
 - (a) Buyer has particular purpose
 - (b) Relies on seller to select suitable goods
 - (c) Seller has reason to know of purpose and reliance
 - (d) Warrants that goods will fit the particular purpose
 - (4) Disclaimers ("No warranties")
 - (a) Eliminates **Implied Warranties**
 - (b) **As is** or **with all faults** (for both implied warranties) *or*
 - (c) **CONSPICUOUS** language of disclaimer mentioning **merchantability** (for merchantability)

- (5) Limitations (Warranty liability limited to . . .")
- (a) Can limit implied **and express** warranties
 - (b) Test is **unconscionability at the time of the contract**
 - (c) Limitation is prima facie unconscionable if **breach of warranty** of **consumer goods** that results in **personal injury**

5) PERFORMANCE

- a) UCC Sale of Goods
 - i) General Rule: Seller must make **perfect tender**
 - ii) Cure: Seller gets opportunity to cure if:
 - (1) Time of performance **has not yet expired** (sends wrong goods before deadline) *or*
 - (2) Time of performance **has expired** *and* seller has **reasonable grounds for believing that the improper tender would be acceptable**
 - iii) Rejection of Goods
 - (1) Rejection must occur **before acceptance** (otherwise, must revoke acceptance)
 - (2) General Rule: no perfect tender = ability to reject
 - (3) Exception: Installment contracts—
 - (a) Contract **requires or authorizes**
 - (b) Delivery in **separate lots**
 - (c) **Separately accepted**
 - iv) Acceptance
 - (1) Express Acceptance ("I accept")
 - (2) Payment General Rule: Payment without opportunity for inspection **is not acceptance**
 - (3) Exception: buyer **retains** good **without objection** after a **opportunity for inspection** (multiple weeks)
 - (4) Effect: Buyer cannot reject if he accepts
 - v) Revocation of Acceptance
 - (1) Nonconformity **substantially impairs the value** of the goods
 - (2) **Excusable ignorance** *and*
 - (3) Revocation comes within a **reasonable time after discovery** of nonconformity
 - vi) Payment
 - (1) Cash unless otherwise agreed
 - (2) Buyer can pay by check
 - (3) Seller can reject the check but must give buyer reasonable time to get cash

	REJECTION	REVOCATION OF ACCEPTANCE
TIMING	Early: Before Acceptance	Later: After Acceptance
STANDARD	Generally: Perfect Tender	Substantial Impairment
OTHER REQUIREMENTS	<ul style="list-style-type: none"> • Buyer must seasonably notify seller • Hold the goods for the seller • Follow reasonable instructions of seller 	
CONSEQUENCES	<ul style="list-style-type: none"> • Goods go back to the seller • Buyer has no payment obligations 	

b) Conditions of Performance

i) Terminology

- (1) Condition: Mutually agreed upon promise modifier
- (2) True Condition: event beyond the influence of either party that affects duty to perform
- (3) Covenant: E.g., "Seller covenants that it will sail the next day"
- (4) Condition with Express Covenant: "Seller covenants that it will sail the next day and Buyer promises to pay **if seller sails the next day**"
- (5) Condition with Implied Covenant: "This sale is conditioned on B's obtaining an 8% mortgage" (B implies a covenant to get an 8% mortgage)

ii) Words of Condition

- (1) If
- (2) Provided that
- (3) So long as
- (4) Subject to
- (5) In the event that
- (6) Until
- (7) On condition that
- (8) NOTE: Most do NOT have express conditions

iii) Standard for Satisfying **Express** Condition

- (1) General Rule: Strict compliance with the condition
- (2) Exception: Condition based on approval by one of the contracting parties
 - (a) Satisfied if reasonable person would approve
 - (b) Exception: art or other matters that are inherently discretionary

iv) Excusing Express Condition

- (1) Estoppel
 - (a) Identify the person who benefits from or is protected by condition
 - (b) See if that person gave up the benefit or protection with a statement **before** the condition was to occur and requires a change of position
- (2) Waiver
 - (a) Identify the person who benefits from or is protected by condition
 - (b) See if that person gave up the benefit or protection with a statement **after** the condition was to occur and does not require a change of position

v) Constructive Condition

- (1) Identification
 - (a) Keyed to the order of performance
 - (b) E.g., silent as to the time of payment: A goes to get a haircut. Completing the haircut is a constructive condition to payment.
- (2) Rule: **Substantial performance** satisfies the condition (compare express condition, where strict compliance is required)
- (3) Exception: Divisible Contract
 - (a) Divides performance of each party into the same number of parts
 - (b) Substantial performance applied to each divisible part of the contract
 - (c) E.g., A and B agree that A will paint 20 apartments for \$500 each. A paints 4 apartments. B must pay A for 4 apartments because the condition has been met for each apartment. If the contract was for 20 apartments for \$10000, and A only painted 4, **no** substantial performance. Under the same contract, if A painted 19, substantial performance is satisfied.

6) EXCUSE OF NONPERFORMANCE

- a) Excuse by Reason of Breach
 - i) Sale of Goods: perfect tender rule
 - ii) Common Law: Material Breach (question of fact)
- b) Anticipatory Repudiation or Inability to Perform
 - i) Anticipatory Repudiation
 - (1) Unambiguous statement
 - (2) Repudiating party will not perform
 - (3) Made before time that performance due
 - (4) Excuses non-repudiating party's duty to perform and give immediate claim for damages unless non-repudiating party already performed
 - (5) Can be retracted if **timely**. If timely, performance can be delayed until adequate assurance is provided
 - ii) Inability to Perform
 - (1) Agreement for services in exchange for something other than money
 - (2) Before performance, the thing is gone
 - (3) Performance excused for party that was going to get the thing
- c) Excuse by Later Contract
 - i) Rescission (Cancellation)
 - (1) Mutual rescission **before performance ends** excuses performance
 - (2) Mutual rescission **after performance ends** does not excuse performance
 - ii) Accord and Satisfaction (substituted **performance**)
 - (1) Accord: agreement to an existing obligation to accept different **performance** to satisfy the existing obligation
 - (2) Satisfaction: performing the newly agreed performance to fulfill the obligation
 - (3) Accord Alone: Suspends enforcement of the original obligation to provide time to perform the accord
 - (4) No Satisfaction: Claimant can sue under the old obligation or the accord, BUT NOT BOTH
 - iii) Modification (Substituted **agreement**)
 - (1) Mutual agreement
 - (2) Accept a different **agreement** to satisfy an existing obligation
 - iv) Novation (substituted **party**)
 - (1) Mutual agreement
 - (2) Substitute a new party
 - (3) Performs the same performance
 - (4) Excuses the party that was substituted
- d) Excuse by Later Unforeseen Event
 - i) Test
 - (1) Event after contract formation but before complete performance
 - (2) Unforeseen
 - (3) Makes performance **impossible, commercially impracticable or frustrates the purpose** of the performance
 - (4) Unforeseen event never excuses buyer's performance if the buyer has the risk of loss

- ii) Death
 - (1) Death of a party to contract after formation does not excuse performance **unless** decedent was a **special person**
 - (2) E.g., hired notable architect to design building and he dies. Performance excused.
- iii) 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

7) BREACH REMEDIES

- a) Punitive and Liquidated Damages
 - i) **No** punitive damages (always a wrong answer)
 - ii) Liquidated Damages
 - (1) Amount of possible damages for later breach is difficult to determine
 - (2) Provision is a reasonable forecast of possible damages
 - (3) E.g., single sum liquidation provision is **suspect**
- b) General Damages
 - i) Approach
 - (1) Who's the Π ?
 - (2) What would Π receive if contract was performed?
 - (3) What did Π actually get?
 - ii) General Rule
 - (1) Expectation interests of the Π
 - (2) Put the Π in a position she would have been had the contract been performed
 - iii) Incidental Damages
 - (1) Costs incurred in dealing with the breach
 - (2) E.g., costs of finding replacement
 - iv) Foreseeable Consequential Damages
 - (1) Special damages where loss is specific to this particular Π
 - (2) Must be reasonably contemplated by both parties at the time of the contract
 - v) Avoidable Damages
 - (1) No recovery for loss that could've been avoided
 - (2) Burden of proof is on the Δ to show that Π could have avoided the loss
 - (3) Applies in employment contracts most frequently
 - (a) Comparable job in same geographic area
 - (b) Need not take the job but can't recover full damages
 - (c) Δ has to plead and prove avoidable damages
- c) Sale of Goods
 - i) Seller breach, buyer keeps goods: Fair market value if perfect tender – fair market value as delivered
 - ii) Seller breach, seller has the goods: Replacement price – contract price
 - iii) Buyer breaches, buyer has the goods: Seller gets contract price
 - iv) Buyer breaches, seller has the goods: Contract price – market price **and** provable lost profits
 - (1) Lost Profits
 - (a) Regular inventory
 - (b) Breach followed by resale at the same price
 - (c) Provable lost profit is recoverable

d) Equitable Remedies

i) Quasi Contract

ii) Specific Performance

- (1) Always **specific performance** for real estate
- (2) Specific performance for **goods** if
 - (a) Unique goods
 - (b) Antiques, art, custom-made goods
 - (c) Fact pattern will tell you
- (3) Contracts for Services
 - (a) No specific performance
 - (b) Injunction to stop party from competing: **negative specific performance**

iii) Reformation (Almost Always Wrong Answer)

- (1) For **mistake** (clerical errors) or
- (2) **Fraudulent misrepresentation**

iv) Adequate Assurance of Future Performance

- (1) One party learns something after the contract
- (2) Reasonable grounds for insecurity about the other party's performance
- (3) Written demand for adequate assurance

v) Reclamation

- (1) Right of unpaid seller to get goods back from buyer if
 - (a) Buyer is insolvent at the time he receives the goods
 - (b) Seller demands return
 - (i) Within 10 days of receipt or
 - (ii) Reasonable time if buyer expressly said he was insolvent before delivery
 - (c) Buyer still has the goods at the time of demand

vi) Good Faith Purchasers

- (1) Owner leaves goods with seller who sells goods of that kind
- (2) Seller wrongfully sells the goods to third party
- (3) Owner can't sue good faith purchaser

8) THIRD-PARTIES

a) Third Party Beneficiaries

i) Terminology

- (1) Third party beneficiary contract: two parties contracting with the intent of benefiting a third party (e.g., insurance policies)
- (2) Third party beneficiary: not a party to the contract but able to enforce
- (3) Promisor: person who makes the promise that benefits the third party (e.g., insurance company)
- (4) Promisee: person who obtains the promise that benefits the third party (e.g., policy holder)
- (5) Intended beneficiary: named beneficiary with contract rights
- (6) Creditor beneficiary: Promisee owes the beneficiary money
- (7) Donor beneficiary: all others (this is usually the case)

ii) Cancellation or Modification

- (1) Can't cancel or modify **after** beneficiary knows about the contract
- (2) If the rights have vested, contract can't be modified or cancelled without consent of beneficiary or the contract provides otherwise

iii) Who Can Sue?

- (1) Beneficiary can sue promisor
- (2) Promisee can sue promisor
- (3) Donee beneficiary cannot sue promisee but creditor beneficiary can sue on the pre-existing debt

iv) Defenses

- (1) If beneficiary sues promisor, promisor can assert defenses it has against promisee
- (2) E.g., policy holder doesn't pay; beneficiary sues insurance company; company can defend by saying promisee didn't pay

b) Assignments

i) Terminology

- (1) Assignment: transfer of rights under contract in two steps: (1) contract between only two parties; (2) one of the parties later transfers rights under that contract to a third party
- (2) Assignor: transfers rights
- (3) Assignee: not a party but able to enforce
- (4) Obligor: the other party to the contract

ii) Limitations by Contract

- (1) Prohibition: Clause takes away right to assign but not the power to assign. Assignee can still enforce **if he did not know about the prohibition** ("Rights hereunder are not assignable")
- (2) Invalidation: Clause makes any assignment **void** ("Assignments are void")

iii) Limitations under Common Law

- (1) Assignment invalid if it **substantially changes the duties of the obligor**
- (2) Assignment of the right to payment is generally ok
- (3) Assignment of other performance rights generally not ok

iv) Requirements to Assign

- (1) Language of present assignment
- (2) **I assign** is only sufficient; "I promise to assign" or something similar is **no good**
- (3) No consideration is required

v) Rights of Assignee

- (1) Assignee can sue the obligor
- (2) Obligor has the same defenses against the assignee as it would have against the assignor
- (3) Obligor can continue to pay assignor **until obligor learns of the assignment**

vi) Multiple Assignments

- (1) Gratuitous Assignments: **Last** assignee wins
- (2) Assignments for Consideration: **First** assignee for consideration wins
- (3) Warranty: Assignor makes warranty that the rights assigned are assignable and enforceable

c) Delegation of Duties

i) Defined

- (1) Party to a contract transfers work under that contract to a third party
- (2) E.g., P contracts to paint O's house for \$1000. P and X agree that X will paint O's house

ii) Assignment and Delegation

- (1) Assignment: Party gets rights to payment or performance
- (2) Delegation: Party gets work to do
- (3) E.g., P contracts to paint O's house for \$1000. P and X agree that X will paint O's house. X will get the \$1000 from O. This is both an assignment and a delegation.

- iii) Delegable duties
 - (1) General Rule: contractual duties are delegable
 - (2) Exception
 - (a) Contract prohibits delegation
 - (b) Contract prohibits **assignments**
 - (c) Contract calls for **very special skills**
 - (d) Contract calls for **very special reputation**
- iv) Consequences of Delegation
 - (1) Delegating party always remains liable
 - (2) Delegatee liable only if she receives consideration from delegating party
 - (3) Delegation and assignment combined can create a third party beneficiary relationship

d) Third Party Beneficiary Quick Rules

- i) Did the Right Vests?
 - (1) Detrimental reliance
 - (2) 3d party accepts in a manner expressly stated by the agreement
 - (3) 3d party files lawsuit
- ii) Creditor or Donee Beneficiary?
 - (1) Facts are silent, donee beneficiary
 - (2) Donee beneficiary can only sue promisor; Creditor beneficiary can sue promisee

iii) 3d party has **no greater rights** than the original parties

e) Assignment and Delegation Quick Rules

- i) "Assign contract" = assignment **and** delegation; "I assign" = assignment; read the **facts** for delegation
- ii) When rights are assigned, assignor cannot receive further benefits
- iii) When duties are delegated, delegating party is secondarily liable

9) MISCELLANEOUS MATERIALS

- a) "Modern trend" means the **minority view**
- b) "Moral consideration" means **past consideration**
- c) Contract for distributorships and franchises are **common law**
- d) Never infer facts on the MBE
- e) Read the facts carefully
- f) Underline
 - i) Terms of the offer and acceptance
 - ii) Dates
 - iii) Oral/telephone communications
 - iv) Sale of goods subject matter

10) FOCUS SUBJECTS

- a) Formation (13-15 Questions)
- b) 3d Party Beneficiaries
- c) Assignment and Delegation
- d) Article 2
 - i) Non-conforming goods
 - ii) Battle of the forms
 - iii) Contract modification w/o consideration
 - iv) \$500 + contract for the sale of goods