

## ISSUES CHECKLIST - CONTRACTS

### APPLICABLE LAW

- UCC
  - Merchants
- Common law
- Mixed contracts

### CONTRACT FORMATION

- Mutual assent: offer and acceptance
  - Offer
    - Expression of a promise
      - Unilateral contract
      - Bilateral contract
    - Certain and definite terms
      - Missing terms
        - UCC open price term
        - UCC quantity term required
        - Real estate offers
      - Vague terms
      - Advertisements
    - Communication to offeree
  - Termination of offer
    - Lapse of time
    - Revocation by offeror
      - Irrevocable offer
        - Common law option contract
        - UCC Merchant's firm offer
        - Detrimental reliance
        - Unilateral contract – start of performance
    - Rejection by offeree
    - Counteroffer by offeree
    - Operation of law
      - Death or incapacity of either party
        - Exceptions
          - Options contract
          - Unilateral contract – part performance
      - Destruction of subject matter
      - Supervening illegality
  - Acceptance
    - Bilateral contract
      - Promise to perform
        - Common law – Mirror image rule
        - UCC – no mirror image rule
      - Beginning performance
    - Unilateral contract
      - Full performance
    - Mailbox rule

- Consideration
  - Adequacy of consideration
  - Pre-existing legal duty
  - Illusory promises
  - Past consideration
  - Substitutes for consideration
    - Surrendering a legal claim
    - Part-payment for settlement of existing debt
    - Promissory estoppel
    - Payment of debt barred by statute of limitations
- Defenses to formation
  - Mistake
    - Mutual mistake
    - Unilateral mistake
  - Misrepresentation
    - Fraudulent misrepresentation
    - Non-fraudulent misrepresentation
  - Undue influence
  - Duress
  - Incapacity
    - Infancy
      - Necessaries
      - Affirm/disaffirm
      - Restitution
    - Mental incapacity/intoxicated persons
      - Affirm/disaffirm
      - Necessaries
      - Restitution
- Defenses to enforceability
  - Statute of Frauds
    - Common law – when writing not required
      - Full performance – services contract
      - Real estate contract – 2 of 3 satisfied
      - Estoppel
    - UCC – when writing not required
      - Full performance of party seeking to enforce contract
      - Part performance – enforceable to extent money paid
      - Specially manufactured goods
      - Merchant's confirmatory memo
      - Judicial admissions
    - Amendment of a contract – SOF for amendment
  - Illegality
    - Subject matter/consideration illegal
    - Subject matter legal/purpose illegal
  - Unconscionability (unfairness)
    - Substantive unconscionability
    - Procedural unconscionability

## DETERMINING AND CHANGING A CONTRACTS TERMS

- Interpretation of terms under common law
- Parol evidence rule
  - Integration
    - Total integration
    - Partial integration
  - Role of merger clause
  - UCC presumption of partial integration
  - Exceptions – admissible evidence
    - Mistake in integration
    - Explanation of ambiguous/disputed terms
    - Formation defenses
    - Subsequent modifications
    - Conditions precedent
    - Collateral agreements
    - UCC: usual performance/dealing between parties
- UCC essential terms
  - Quantity term
  - Gap fillers
- UCC delivery terms and risk of loss
  - If no place of delivery agreed upon
  - Hierarchy of risk of loss
    - Common carrier contract
      - Shipment contract
      - Destination contract
      - FAS contract
    - Non-carrier contract
      - Where seller a merchant
      - Where seller not a merchant
    - Effect of breach of party
      - Defective goods
      - Buyer revokes acceptance
- UCC warranties
  - Express warranties (automatic with all sellers)
  - Implied warranty of merchantability (automatic with merchants)
  - Implied warranty of fitness for a particular purpose (automatic with all sellers)
  - Warranty of title (automatic with all sellers)
  - Warranty against infringement (automatic with merchants)
  - Disclaimer
  - Limitations of remedies
    - Invalidity – unconscionability
  - Damages for breach of warranty
- Modification of terms
  - Consideration – common law
    - Unanticipated circumstances
  - Consideration – UCC
- Accord and satisfaction
  - Consideration
- Implied condition of good faith and fair dealing

## PERFORMANCE, DISCHARGE AND BREACH

- Performance
  - Common law – substantial performance
  - UCC – perfect tender rule
  - Conditions
    - Express conditions
      - Condition precedent
      - Condition subsequent
    - Constructive conditions
    - Implied conditions
      - Default rule
    - Excusing a condition
      - Hindering or preventing condition from occurring
      - Actual breach

- Anticipatory repudiation
- Unwillingness to perform
- Substantial performance by other party
- Divisible contract
- Waiver
- Inability to perform
  - Impossibility
  - Impracticability
  - Frustration

- Discharge of duty to perform
  - Mutual rescission
    - Unilateral rescission
  - Condition subsequent occurs
  - Illegality
  - Impossibility
    - Death – unique services
  - Impracticability
    - Subjective test
  - Frustration
    - Supervening act
    - Foreseeability
    - Purpose destroyed
    - Purpose realized at time of contract creation
  - Modification of contract
  - Novation
  - Cancellation
    - Consideration
  - Release
    - Writing requirement
  - Substitution
    - Intent to discard old contract
  - Accord and satisfaction
    - Consideration
  - Account stated
  - Lapse
- Breach
  - Common law breaches
    - Material breach
      - Action available for nonbreaching party
      - Anticipatory repudiation
        - Options for nonbreaching party
        - Retraction
      - Time of the essence
    - Minor breach
      - Action available for nonbreaching party
      - Paired with anticipatory repudiation
      - Timeliness (time not of the essence)
  - Breach under UCC
    - Perfect tender rule
      - Time of the essence
      - Exceptions
        - Installment contract
        - Seller's right to cure
          - After deadline
    - Seller's right to cure
    - Accommodation
    - Buyer's right to reject defective goods
      - When right to reject is cut off
      - When acceptance is revocable
    - Buyer's responsibility after rejection
      - Reasonable care
      - Obey reasonable instructions
      - Reship, store or resell and recover expenses

- Anticipatory repudiation under UCC
  - Requesting assurances
  - Non-breaching party options
  - Retraction

- Grounds for reformation
  - Mutual mistake
  - Unilateral mistake
  - Innocent/intention misrepresentation
- Defenses
  - Laches
  - Sale to bona fide purchaser

## REMEDIES

- Monetary remedies
  - Compensatory damages
    - Expectation damages
      - Contracts for sale of goods
      - Contracts for sale of land
      - Employment contracts
      - Construction contracts
    - Consequential damages
      - Foreseeability
      - Causation
      - Certainty
  - Reliance damages
    - Choice of expectation or reliance damages
  - Incidental damages
  - Punitive damages
  - Liquidated damages
    - Difficult to estimate damages
    - Reasonable amount/not penalty
  - Mitigation
- Non-monetary remedies
  - Rescission
    - Defenses
      - Unclean hands
      - Laches
    - Election of remedies – damages or rescission
- Equitable remedies
  - Specific performance
    - Valid contract
    - Certain terms
    - Satisfied conditions precedent
    - Money damages inadequate
    - Feasible to enforce
    - Defenses
      - Laches
      - Unclean hands
      - Hardship
      - Sale to a bona fide purchaser
      - Statute of Frauds
  - Restitution – unjust enrichment
    - Part performance by non-breaching party
    - Benefit conferred
    - Breaching party claiming restitution
  - Implied in law contract
  - Replevin
  - Injunction
  - Reformation
    - Valid contract

- Nonmonetary remedies under UCC
  - Buyer's nonmonetary remedies
    - Cancellation of contract
    - Replevin
    - Specific performance
  - Seller's nonmonetary remedies
    - Right to withhold goods
    - Right to recover goods
      - Insolvency
    - Right to demand assurances

## THIRD PARTIES

- Third party beneficiaries
  - Intended beneficiaries
  - Vesting
  - Rights of third party beneficiary
    - Creditor/donee beneficiary
- Assignment and delegation
  - Assignment
    - Validity
      - Writing (not required)
    - Contractual provisions
      - Prohibitions on assignments
      - Invalidations of assignments
    - Revocability
      - Assignment for value
      - Gratuitous assignments
    - Rights of assignees
      - Against obligor
      - Against assignor
    - Multiple assignments for consideration
    - Common law restraints
      - Personal service contracts
    - Requirements and output contracts
      - Under common law
      - Under UCC
  - Delegation
    - Restrictions
      - Personal judgement/skill
      - Requirements/output
      - Special trust
      - Contractual restriction
    - Waiver of right to object
    - Liability of delegator
      - Novation