Caroline Bradley FALL SEMESTER 2013

CONTRACTS: NOTES ON THE EXAM

General Comments

Read the question carefully. If the question refers to Heather's purchase order and then states that SS's letter is sent "on the same day" do not treat SS's letter as being sent "the next day." If the question asks where Heather should bring a breach of warranty claim it does not seem to be relevant to write about whether or not she has such a claim.

Try to **organize your answers effectively**. This means that you should begin with the issues that come first in the analysis, For example tell me why the UCC applies before explaining how it applies. Tell me whether or not there is a contract or how we might think about this issue before discussing what the terms of the contract are. If you make seemingly conflicting arguments explain why it makes sense to argue the facts in two or more different ways (it may). If you don't explain I may assume you don't understand how to think about the issue. Do not jump about from one issue to another and then back again.

The exam instructions clearly state: "**DO NOT make assumptions in answering the hypothetical**." Therefore you should not make assumptions. This means it is unwise to write anything that begins "I assume" or "we can assume." But it also means that assuming that a document described in the facts of the question as a "purchase order" after the facts states that two parties "agree that SS will provide Heather with her requirements for the SS RFID tags for her handbags for the next two years at an agreed price per tag" is an offer is not a good idea. The facts described at least raise the possibility that an oral agreement (a contract) was made and followed by written confirmations of which the "purchase order" is one. During the semester we saw a number of examples of situations where the name given to a document did not determine its legal nature. This was one of those examples.

Explain — don't assert. Don't just tell me the UCC applies — tell me why.

SECTION A (60% of the exam grade or 60 points)

1. (25 points) If Heather wants to claim that the SS RFID tags did not conform to the express and implied warranties SS gave about the tags, should she commence an arbitration in Arcadia under AAA rules, or an arbitration in Ruritania under RAA rules, or should she sue SS in court?

Answers to this question should begin by stating that the RFID tags are movable goods and thus the UCC applies to an agreement to buy and sell them. Beginning to discuss the application of the UCC without stating the basis for its application misses a step in the analysis. Note that the fact that merchants are the parties may change the application of the rules but is not a basis for the application of the UCC. Some answers

were written as if the fact that the parties are merchants was relevant to the question whether the UCC applied. But if the RFID tags were sold by or to consumers the UCC would still apply.

The question states that Heather and SS agree by telephone to sell and purchase SS's RFID tags: "Heather and SS agree that SS will provide Heather with her requirements for the SS RFID tags for her handbags for the next two years at an agreed price per tag." It is not entirely clear that they have a binding contract at this point although it seems likely, especially as the UCC has gap-filling provisions which apply where the parties to a contract have not spelled out all the details of their contract. So those answers which immediately jumped to discussing the writings as if they were an offer and an acceptance did not address an important component of the facts given. Some answers gave details for the requirements of offer, acceptance and consideration which are unnecessary to answer this question because UCC §2-207 applies.

After the telephone conversation Heather and SS each then send to the other their own written communications with their own standard form provisions (the UCC requires writing for contracts for the sale of goods for $500 or more but there is writing here, so this does not seem to be an issue). The question states that Heather's standard form purchase order was drafted by her attorney. With respect to the SS letter the question states that it includes SS's standard form dispute resolution provision. Thus this is a battle of the forms situation and UCC §2-207 applies. This statute was provided with the exam, thus the question invites a close reading of the text and application to the facts.

If there was an oral contract then each of the writings is a "written confirmation" under UCC §2-207(1). Both are sent the day after the oral contract, thus would seem to be sent within a reasonable time. The question states that the oral agreement is for a contract for two years, but SS's writing refers to a contract for one year. This difference between the telephone understanding of two years and SS's written reference to one year raises the possibility that there was no contract concluded in the telephone conversation. Thus we could consider the writings as a possible offer and acceptance rather than as conflicting confirmations. If we do need to consider the writings as an offer or acceptance it is not clear which document is which as they seem to have been sent at the same time. And it is perhaps not just an issue of determining which document is the offer because the other document does not seem like an acceptance if it is sent before the offer is received. I think this difficulty should matter more from the perspective of determining what are the terms of the contract than for deciding whether or not there is a contract at all as, apart from the one or two year duration they seem to have reached agreement on the critical terms (and there is also conduct under §2-207(3)). A number of the answers assumed that one or other of the documents (mostly the purchase order) was the offer and that the other document should be considered as a possible acceptance but I do not think you can assume that based on these facts.

If either document expressly stated that there could only be a contract on its terms (UCC §2-207(1): "unless acceptance is expressly made conditional on assent to the additional or different terms," or UCC §2-207(2):"offer expressly limits acceptance to

the terms of the offer," and see Dorton v Collins & Aikman, Itoh v Jordan) this would result in a lack of a binding contract. The facts given do not suggest any sort of express limitation of these types.

If there is no contract under UCC §2-207(1), there is conduct: the parties have in fact bought and sold the tags and so UCC §2-207(3) would apply. In such a case the terms of the contract would be those "on which the writings of the parties agree, together with any supplementary terms incorporated" under the UCC. The two writings do not agree with respect to dispute resolution: both do provide for arbitration but they refer to different rules to govern the arbitration and different arbitration venues. The parties may want to argue that there is agreement with respect to the fact of arbitration but not as to the details. The UCC default rules would not help with the details.

If there is a contract under UCC §2-207(1) we have two written confirmations of the oral contract, although the documents suggest different terms. Thus, although it related to differences in an offer and an acceptance, and not to confirmations, Northrop v Litronic seems to be relevant. In that case we learned that the majority rule is that discrepant terms in an offer and acceptance drop out. If this case reflected the relevant rule for confirmations neither arbitration provision would apply and disputes would need to be resolved in court.

Focusing on the two documents as confirmations it might be possible to see each as two separate sets of proposals for addition to the contract each of which should be evaluated under §2-207(2) - the idea would be that in contrast to thinking of the terms in an offer and acceptance as different thus precluding application of 2-207(2) where the issue is with respect to confirmations each includes additional terms (which happen to be different) so it would be easier to justify analyzing them under 2–207(2). UCC §2-207 does not provide a way of sorting out conflicts between different written confirmations, but it could be used to evaluate each proposal separately against the terms of the oral contract. This would allow us to think in terms of §2-207(2) but the evaluation would produce the same result here as applying Northrop v Litronic: each proposal to change the dispute resolution mechanism from the court-based default to arbitration would likely constitute a material alteration (e.g. Bayway Refining v Oxygenated Marketing & Trading) and would not therefore become part of the contract. If arbitration is usual in the industry this would make a difference. Also, it is possible that this sort of characterization of arbitration provisions as material alterations might conflict with AT&T v Concepcion.

The facts do illustrate that either under Northrop v Litronic or under the separate consideration of the confirmations with respect to the oral contract UCC §2-207 may produce a situation where although the parties both thought that arbitration was desirable their contract might require them to go to court to resolve their dispute.

In Northrop v Litronic Judge Posner did suggest two ways of applying §2-207 differently from the majority rule. One would give preference to the terms of the offer, and the other (Posner's preferred view) would (as between merchants as is the case here (UCC §2-104) would apply the provisions of the acceptance if they did not materially alter the terms of the contract. Here we don't have a clear offer and a clear acceptance so applying this sort of analysis would be difficult.

What, then, should Heather do? There is some uncertainty as to what the terms

of the deal are. As a practical matter she might want to start an arbitration in Arcadia and hope that SS will decide that arbitration in Arcadia under AAA rules is a better way of resolving the dispute than to try to insist on arbitration in Ruritania and risk a court deciding that disputes should be resolved in court. If SS does challenge the arbitration she has two arguments that might work in her favor: an argument that there was no binding contract, that UCC §2-207(3) applies because of the conduct and that there was agreement about arbitration, and an argument that treating arbitration as a material alteration under UCC §2-207(2) is pre-empted under the FAA as a consequence of AT&T v Concepcion.

Some answers discussed whether there were any warranties. Question 1 does not ask whether Heather has a claim with respect to breach of warranties, it asks where she should bring such a claim. Thus discussion of the basis for warranty claims is not invited by the question. Question 1 begins "If Heather wants to claim that the SS RFID tags did not conform to the express and implied warranties SS gave about the tags..." which suggests that there are in fact express and implied warranties. But there is not much in the facts of the question to allow for real discussion of this issue. Similarly, the question tells us that the agreement between Heather and SS is for Heather's requirements of the RFID tags. But the facts don't suggest any issue with respect to the requirements aspects of the relationship. And there is much more to be discussed with respect to this question, so focusing on these issues would not be the best use of your time.

Some people worried about the AAA rules and AT&T v Concepcion. During the semester we did discuss arbitration rules promulgated by different private bodies like the AAA (a hypo I gave you referred to AAA and JAMA arbitration rules and on the blog I gave you some information about the National Grain and Feed Association's requirements that its active members arbitrate disputes). These are rules which control how arbitrations are carried out rather than state statutes that limit arbitration.

2. (25 Points) What effect, if any, does the text message sent out after purchases of the Heather bags have on the rights of Heather, the biker gang members and Luxe Handbag Rentals? Can Heather force the biker gang members and Luxe Handbag Rentals to return the bags they bought? Would it make a difference if the restrictions on use of the bag, and the provision about dispute resolution were spelled out on a label attached to the handle of the bag rather than in a text message as described in the facts set out above?

The question first asks about the effect of the text message and then about whether it would make a difference if the restrictions were on a label attached to the handle of the bag. The handbags are movable goods and therefore the UCC applies. With respect to the text message (limitations on use specified in a manner that brings the restrictions to the attention of the purchaser after purchase) the question describes facts similar to those in Step-Saver v Wyse and Pro-CD v Zeidenberg and Hill v Gateway. Thus it raises the issue of what restrictions on use might be imposed on a purchaser who did not know of the restrictions in advance. Step-Saver suggests that

such terms cannot become terms of the agreement between Heather and the purchasers of her bags on the basis of applying UCC §2-207 to the vendor's terms communicated after purchase (via the box top license) and seeing the terms as additional terms. Under 2-207(2) additional terms are merely proposals for addition to the contract where the sale is to a non-merchant, and where the sale is to a merchant such terms may become terms of the contract if they do not materially alter the contract. Non-merchant members of the biker gangs should not therefore be subject to the requirement to use their bags "appropriately and in a way that does not harm the Heather brand" on pain of termination of their rights to the bags. With respect to Luxe Handbag Rentals the issue would be whether the non-transferable license would be a material alteration to the contract terms. I cannot imagine that it would not. Purchasers of handbags normally have the right to do anything with their bags that is not unlawful. The arbitration provision in this case is for arbitration in the context of transactions which sometimes involve consumers. In AT&T v Concepcion we saw that California courts were concerned that such agreements could be considered to be unconscionable. The Supreme Court held these arguments were pre-empted by the Federal Arbitration Act.

However, in Pro-CD and Gateway, Judge Easterbrook declined to apply §2-207 on the basis that the cases were not battle of the forms cases. In those cases Easterbrook treated the after-communicated terms as binding contractual terms. Thus the question invites you to discuss these two different approaches. It also raises the question whether restrictions on the use of handbags are like or not like restrictions on commercial exploitation of software or an arbitration provision. In addition, whereas the after-communicated terms were provided with the goods sold in ProCD and Gateway, in this case they were provided separately by text message. A number of answers asked whether it was made clear that purchasers had the right to return the bags if they did not agree to the terms as Easterbrook said was the case in ProCD and Gateway.

As to the labels on the handles, the effect might be different depending on whether the bags were bought online (where the situation would be more like the communication of restrictions by text message) or in a store, where the purchaser might see the restrictions before deciding to buy the handbag. Even in the case of a store purchase there might be an issue about whether the restriction was sufficiently brought to the attention of the purchase, especially as restrictions like those in the question are not usual for handbags. So Specht v Netscape could be relevant here, although the facts are quite different.

A number of answers to this question cited ProCD and Gateway and did not refer to Step-Saver. Some of these answers stated specifically that they were citing ProCD and Gateway because they were cases involving consumer transactions. Thus this is a version of Easterbrook's argument that UCC §2-207 only applies in battle of the forms transactions. However the cases we read show that not all courts think this way. Plus §2-207(2) has different rules for transactions between merchants and transactions which are not between merchants, suggesting that sales of goods to non-merchants (or consumers) are within the scope of the statute.

From an economic perspective I wonder whether the facts in the question are really like those in ProCD. In that case the software producer was trying to maximize

profits by selling the product to different types of purchaser at different prices (price segmentation) and in Hill v Gateway the arbitration agreement was arguably relevant to the price at which the computer was offered. In both of these cases the terms were relevant to the deal the customer obtained (they would have had to pay a higher price without the term, thus they paid less for the goods with these terms than they would otherwise have done). But Heather is trying to restrict use of her bags to enable her to sell more bags (restriction on transfer) and at a higher price (restriction on inappropriate use). Perhaps the difference might lead even Easterbrook to a different conclusion in this case?

Answers to this question also focused on the issue of whether the restrictions on use of the bags were too indefinite to be able to be enforced by Heather, and some suggested that the duty of good faith might be used to limit Heather's ability to invoke her rights under the new terms if they were treated as being binding on the purchasers.

3. (10 points) Does Flora have a legal right to the $5000? Explain your answer.

The question tells us that Heather attributes her success as a designer to the help of Flora (Heather's professor at the Arcadian Design Institute) and that Flora, who was suffering from financial difficulties, contacted Heather on seeing this. Heather then promised to give Flora $5000. The promise to Flora is a gratuitous promise with no consideration. Gratitude for Flora's help in the past does not constitute consideration (eg. Feinberg v Pfeiffer). A person may be morally bound to keep a promise to pay another without being bound to do so as a matter of law (eg Mills v Wyman, Harrington v Taylor but contrast Webb v McGowin). However, if Flora has relied to her detriment on this promise a court may grant her a remedy based on Restatement 2nd. § 90.

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SECTION B (40% of the exam grade)

There follow some very brief comments on the two Section B questions. In addition I will provide examples of two good answers.

1. We have seen that contract law sometimes seems to focus on promoting certainty through an emphasis on formalities, whereas at other times contract law seems to focus on fairness. Discuss whether the cases you have read this semester balance these interests appropriately.

Of the two section B questions this was the more predictable (approximately 2/3 of the class chose to answer this essay question), and it is almost the same formulation of the question that appeared on the blog. And we discussed this question in class. The question asks about cases and whether they balance appropriately the interest in certainty and the interest in fairness. I think it would be a good idea to explain why certainty, and/or fairness, might be objectives of contract law. But the question also links certainty to formalities rather than focusing on certainty delinked from formalities, so it would make sense to discuss whether and, if so, how formalities are connected to certainty. Here you could mention Fuller's analysis of the purposes of formalities:

cautionary, evidence, and channelling (Casebook p 31-2) and Perillo's recognition that writing has a clarifying function (sort out ambiguities, disagreements etc) and a managerial function (control subordinates through standard forms (Casebook p 278). Requiring contracts to be win writing helps with all 3 of Fuller's purposes and also with Perillo's. You could also discuss consideration and offer an acceptance from the perspective of Fuller's functions of formalities.

2. Assess the role of good faith in contract law based on the materials you read for this class this semester.

Approximately 1/3 of the section B answers were responses to this question. The materials we read which directly addressed good faith were (1) the cases on illusory promises where good faith helped the court find that what might appear to be an illusory promise had content based on good faith (e.g. Mattei v Hopper, Wood v Lucy, Lady Duff Gordon and Structural Polymer v Zoltek); and (2) the cases involving the duty to negotiate in good faith (e.g. Channel Home Centers v Grossman, Siga v Pharmathene). A duty of good faith is implied by law (e.g. Mattei v Hopper, the UCC), or it may be expressly imposed under a contract (Siga v Pharmathene). In these cases where the courts invoke the duty of good faith it prevents a party to a contract from acting opportunistically. But the prevention of opportunism is a broader concern. Although US law does not as a formal matter recognize a duty to negotiate in good faith (apart from an express agreement to negotiate in good faith) a number of the cases in the casebook relating to contract negotiations seem to suggest that there is in fact something very close to a duty to negotiate in good faith. Promissory estoppel provides a remedy for injustice, and the remedy a court awards may be limited as justice requires, thus promissory estoppel also seems to be connected to the idea of good faith.