

AGN:

Caroline Bradley

SPRING SEMESTER 2013

# **CONTRACTS**

**THREE HOURS.**

**THIS IS A CLOSED-BOOK EXAM.**

Try to show thought and critical analysis of the materials and issues dealt with in the course.

DO read the questions carefully and think about your answers before beginning to write.

DO refer to statutory provisions, cases and other materials where appropriate. If you make general statements, try to back them up with specific references.

DO NOT use abbreviations unless you explain what you are using them to stand for.

DO NOT make assumptions in answering the hypothetical.

DO explain what further information you might need in order to answer the question properly.

DO write legibly and clearly.

**You will get credit for following these instructions, and may be penalized for failing to do so.**

**Note that there is some potential for overlap in answers to these questions. Avoid substantial overlap in your answers, because, as a general rule, you will only get credit once for each piece of information you give me. If you incorporate information in one answer into the other answer, for example by writing "see above", or "see answer to Question x" in your second answer, your grade for the second answer may suffer.**

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

Tom is the Chairman of Peter Group (PG), which is in the business of developing shopping centers throughout the US. PG shopping centers have a distinctive design, and have a reputation for providing a high quality shopping experience for their customers. PG has been developing a shopping center in Arcadia City (PGAC), which is the capital of Arcadia, a state in the US. This is PG's first shopping center in Arcadia. PG signed a contract with Cosmo Construction (CC) for Cosmo to build PGAC after Cosmo competed with a number of other construction companies to build PGAC. Cosmo was the lowest bidder with experience in building commercial buildings in Arcadia City. Although there were other lower bids for the contract Tom felt that experience in building in Arcadia City was important because the city's building code is very demanding and the city's building inspectors take the job of enforcing compliance with the code very seriously. Cosmo planned to be able to build the shopping center for a low price because it relies on hiring undocumented construction workers (although in fact Cosmo underestimated the cost of building PGAC and stands to lose money on the contract). A large proportion of construction workers in Arcadia are undocumented.

The contract between PG and Cosmo provides that in the event of any delay in completing the construction project Cosmo will pay damages to PG at an amount determined by a formula. The contract states that the parties recognize that in the event of any delay in completing the construction it will be difficult to quantify PG's damages and that the formula is based on the average profits PG makes from its shopping centers throughout the US. Tom knows that PG's new shopping centers, especially new shopping centers based in areas where PG does not have an established presence, are less profitable than established shopping centers. Cosmo agreed to the formula because its management was confident of completing the work on time.

-continued-

Total Tile (TT) contracted with Cosmo to provide mold resistant tile for the shopping center, but has failed to deliver the tile on time. Cosmo paid half of the contract price for the tile on signing the contract with Total Tile. Total Tile is the only manufacturer of mold resistant tile in Arcadia, and it informed Cosmo that it would be able to deliver the tile 3 months after the delivery date specified in the contract.

PG has signed a number of contracts to lease retail space in the shopping center to prospective tenants. One of these contracts gives Gigi Grocery (GGG) the exclusive right to operate an organic grocery store in the shopping center. Gigi Grocery is doing well in Arcadia, but the owners of Gigi Grocery were very happy about the contract with PG because they know that grocery stores based in PG's other shopping centers are very profitable, and they were sure that after an initial period they would benefit from customers flocking to PGAC. However Anna, who is Gigi's marketing director, met Bob, the owner of a rival organic grocery chain, at an organic food retailers' conference. Bob told Anna that he had signed a contract with PG to operate an organic grocery store in a new shopping center located right next door to PGAC. The new shopping center will have a name that does not refer to PG, but it will be designed to look just like PG's other shopping centers. Bob said that he had negotiated a reduction in lease payments because the proximity of the Gigi store in PGAC will make the new location less profitable than it would otherwise be. Bob says he thinks that the connection to PG will be important for his company.

**Answer the following 3 questions based on the facts set out above:**

1. What contract remedies does Cosmo have against Total Tile for its failure to deliver the mold resistant tile on time? Would you need to know any additional facts to answer this question? (15 points)

-continued-

2. Gigi Grocery is concerned that the profitability of its store in PGAC will be very much reduced by the proximity of a competing store. What arguments can Gigi Grocery make that PG is in breach of contract in these circumstances? (15 points)

3. PG tells Cosmo that Cosmo is in breach of the contract for the construction of PGAC because of the delay. PG says that it will not pay Cosmo for the construction work that Cosmo has done because Cosmo has used undocumented workers, which is illegal. In addition PG says that Cosmo must pay damages for the delay under the contractual formula. PG states that it would be willing to pay Cosmo 40% of the value of the work Cosmo has done in full and final settlement. Cosmo is in financial difficulties and agrees. Cosmo thinks that it can get away with paying its undocumented workers less than it had originally agreed to pay them because they are unlikely to sue. Discuss. (30 points)

## **SECTION B (40% of the exam grade)**

### **ANSWER ONE QUESTION FROM THIS SECTION**

1. Do courts rewrite contracts? Should they do so?
2. “Should the courts, as the arm of the state, enforce every statement made in the form of a promise? The courts have never thought so. But as soon as we accept the need to divide the enforceable from the unenforceable, we encounter the difficult task of articulating the criteria for deciding which is which” (from the casebook, in the introduction to contract in the family setting).

Discuss, either with respect to the domestic context or more generally.

**Appendix****UCC § 2-606. What Constitutes Acceptance of Goods.**

- (1) Acceptance of goods occurs when the buyer
- (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
  - (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
  - (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.
- (2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

**UCC § 2-608. Revocation of Acceptance in Whole or in Part.**

- (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
- (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
  - (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
- (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
- (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

**UCC § 2-706. Seller's Resale Including Contract for Resale.**

- (1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.
- (2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.
- (3) Where the resale is at private sale the seller must give the buyer reasonable

notification of his intention to resell.

(4) Where the resale is at public sale

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser that buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707) or a buyer that has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2-711).

**UCC § 2-708. Seller's Damages for Non-acceptance or Repudiation.**

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

**UCC § 2-709. Action for the Price.**

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have

been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2-610), a seller that is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

### **UCC § 2-710. Seller's Incidental Damages.**

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

### **UCC § 2-711 Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods**

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract ..., the buyer may cancel and whether or not he or she has done so may in addition to recovering so much of the price as has been paid:

(a) "Cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) Recover damages for non-delivery as provided in this Article (Section 2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also:

(a) If the goods have been identified recover them as provided in this Article (Section 2-502); or

(b) In a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his or her possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

### **UCC § 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.

**UCC § 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.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

**UCC § 2-714. Buyer's Damages for Breach in Regard to Accepted Goods.**

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

**UCC § 2-715. Buyer's Incidental and Consequential Damages.**

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

**UCC § 2-718. Liquidation or Limitation of Damages; Deposits.**

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated

damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes:

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706).