Contracts § 3 Fall 2024
Professor DeWolf October 3, 2024

# SAMPLE ANSWER TO MID-TERM EXAM

## Multiple Choice

1. (a) Correct
   (b) Incorrect. It doesn't matter whether Brown or Smith is a merchant; the rules are the same.
   (c) Incorrect. Smith's reply was a request rather than a rejection.
   (d) Incorrect. Smith didn't know that Brown purchased a different automobile; also, Smith might have more than one automobile.

2. (a) Incorrect. It doesn't matter whether the grocery store is a merchant.
   (b) Correct.
   (c) Incorrect. The offer was to give a discount on the items, and that is sufficiently precise to make the agreement enforceable.
   (d) Incorrect. A reasonable person wouldn't know how many people would show up and the offer was not so manifestly unreasonable as to alert the offeree that it was not serious.

3. (a) Incorrect. The "last shot" rule has been abandoned under the UCC.
   (b) Correct.
   (c) Incorrect. Scott is under a duty to read the contract presented to it.
   (d) Incorrect. The term is not inconsistent with commercial practice, and in any event it is within the range of what an offeror can propose.

4. (a) Incorrect. There was never any consideration for the promise.
   (b) Incorrect. The consideration was all in the past; there was no additional consideration for future performance.
   (c) Incorrect. Family member may make enforceable promises to one another.
   (d) Correct. Because Gary got no consideration in exchange for his promise, there is no enforceable agreement.

5. (a) Incorrect. An agreement may be enforceable even though it doesn't state a specific duration.
   (b) Incorrect. A donative promise lacks any consideration in exchange for the promise. Here Beth did promise something in return.
   (c) Incorrect. A text may be a commercially reasonable method of communication.
   (d) Correct.

ESSAY

This case is loosely based on *Alcala v. Vergruggen Palletizing Solutions, Inc.*, 172 Idaho 188, 531 P.3d 1085 (2023), which held that the UCC applied to the transaction.

The key question to answer in this case is whether or not the additional term that Volm added to the acceptance will become part of the contract. Ordinarily, a contract is formed when two parties agree to the essential terms of the contract. Here there is a question as to whether there was agreement as to Volm's additional terms. However, it is not a case in which the court would find that there was no contract because the parties never agreed; because the contract was essentially performed, it becomes a question of what terms the parties agreed to. SunRiver will claim it never agreed to the additional term, whereas Volm will argue that SunRiver's acquiescence meant that they agreed to it.

The first question is what law governs the transaction. If it was a transaction for goods, then the UCC would govern. If it was a transaction for services, then the common law would govern. This appears to be a "hybrid" transaction, including both goods (the equipment) and services (design, installation, training, etc.). Most courts apply a "predominant factor" test to determine which body of law applies. [A minority of courts separate the contract components into goods (to which the UCC applies) and services (to which the common law applies). Here it would be difficult to separate the two, at least in terms of deciding whether the "limitation on remedy" proposed by Volm would apply.]

In favor of applying the UCC, the contract is called "Equipment Sale Agreement," and the ultimate goal was to supply equipment that reduced SunRiver's costs. In favor of classifying it as a services contract, Volm provided substantial design, installation and training services were provided. If the original proposal contained a break-out of costs for equipment as distinguished from services, that might be revealing, but the billing schedule seems to be more consistent with a services contract than one that focuses just on equipment. In short, because it could go either way, we should analyze the problem under both bodies of law.

Under the common law, a contract is only formed when the acceptance is the "mirror image" of the offer. Here, however, there would be no question that a contract was formed, because all of the work was done and half of the expected payment was made; the question is not whether there was a contract, but whether the additional term proposed by Volm would govern the case. In such cases courts often follow a "last shot" rule, which enforces the most recent version of the contract, on the theory (more theory than reality) that the receiving party could object or propose different terms if they were unacceptable. If that rule prevailed, then Volm's limitation on remedy would apply.

If the UCC applied, then we would look at UCC § 2-207, which would affirm that a contract was indeed formed, even if the parties didn't agree on the term of the contract specified the remedies available to the buyer. In addition, because both parties are merchants, UCC § 2-

207(2) specifies what happens if an additional term is added to the acceptance of an agreement. Here SunRiver made a counteroffer of $1.5 million, and Volm accepted that counteroffer with the addition of a term limiting its obligations. SunRiver would counter by pointing out that, in its original (counter)offer, it specified that its willingness to pay $1.5 million was contingent upon the equipment providing substantial cost savings. By adding a term that "knocked out" that term, SunRiver would argue, Volm didn't just add a term, they actually directly contradicted something that SunRiver had already made clear. Thus, SunRiver would argue, the additional term didn't fit the description of § 2-207(2) and would thus not qualify for presumptive inclusion in the contract. In addition, SunRiver could argue that by effectively disclaiming the right to recover in the event the machines didn't work, Volm's proposed additional term resulted in a "material alteration" of the terms of the contract (UCC § 2-207(2)(b) and would be an exception to the presumptive inclusion principle of § 2-207(2).

Overall, I would need additional facts and more information about the way in which this jurisdiction handles hybrid transactions before rendering a more definitive answer to the question.

CHECKLIST

- **Overview**
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- Contract is **formed** by mutually enforceable promises
- Requires agreement to **essential terms**
- **There was** a contract, the issue is whether the additional term was part of it
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- **What law** applies?
- Transactions for **goods** are governed by the UCC
- Transactions for **services** are governed by the common law of contracts
- **Hybrid** transactions
- **Predominant factor** test
- It's hard to **separate** the two, so one or the other would govern
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- It was called an **Equipment Sale Agreement**, suggesting UCC
- But services were **extensive**
- Did the original contract **break out** services and goods?
- Would **billing practice** favor one or the other?
- Analysis must include **both bodies of law**
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- **Common law** requires **"mirror image";** but here there actually was a contract
- Would the **"last shot"** rule apply?
- If so, Volm's limitation on remedy would be **effective**
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- If **UCC** governs, then **§ 2-207** would apply
- Both parties are **merchants**
- Under § 2-207(2) default rule is that **additional term applies**
- However, **can't contradict** existing term
- Here the limitation on remedy **appears to contradict** the condition set by SR
- In addition, § 2-207(2)(b) rejects an additional term if it **materially alters** the contract
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- Court could **rule either way**
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Exam # _____