

STETSON UNIVERSITY COLLEGE OF LAW  
Gulfport, Florida

GENERAL INSTRUCTIONS

THE ATTENTION OF ALL STUDENTS IS CALLED TO THE FOLLOWING  
INSTRUCTIONS:

1. The answers and the pledge are to be identified by examination number only. DO NOT WRITE OR TYPE YOUR NAME ON ANY BLUEBOOKS, SCANTRON SHEETS, OR ANYWHERE ON THE EXAMINATION; USE YOUR EXAMINATION NUMBER INSTEAD.
2. During the course of the examination, ABSOLUTELY NO EXAMINATION MATERIALS MAY BE REMOVED FROM THE EXAM ROOM. This includes the exam, any Scantron sheets, bluebooks, or examination answers.
3. This examination ends at the expiration of the time indicated, or when the examination is turned in, whichever comes first.
4. The professor will be permitted to grade only answers that have been submitted during the examination, in the method indicated by the professor.
5. At the conclusion of the time prescribed for the examination, students are forbidden from communicating with the professor with reference to the final examination until the grades have been turned in to the Registrar's Office except that students may communicate with the professor at any time concerning matters related to the Code of Student Professionalism and Conduct or the Academic Honor Code.

TIME: 4 HRS.

SPECIAL INSTRUCTIONS

1. You have been given an envelope containing a copy of the examination. Blue books and extra scratch paper are available at the front of the room. Each student must turn in everything (including scratch paper, but especially the exam) in the envelope I have provided, at the end of the examination. BEFORE YOU DO ANYTHING ELSE, PLEASE WRITE YOUR EXAMINATION NUMBER ON EVERYTHING - THE EXAMINATION, THE ENVELOPE, THE BLUE BOOKS, AND THE SCRATCH PAPER.
2. This is an open-book examination. You may use the assigned texts, your notes, any handouts distributed in class or through TWEN, and any outline(s) you prepared either alone or in conjunction with others. You may not use any commercial outlines, hornbooks, or treatises.
3. This examination consists of seven (7) pages consisting of three short answer questions (worth 15% of your grade), one conceptual essay question (worth 15% of your grade), and two memoranda based on a single fact pattern: a longer memoranda (worth 50% of your grade), and a shorter

memoranda (worth 20% of your grade). Please use your time accordingly. You should also check at this time to make sure you have all seven (7) pages of the exam.

**INSTRUCTIONS FOR THE ESSAY QUESTIONS ONLY**

4. If you are writing the exam by hand, legibility is crucial. Skipping lines and writing on only one side of the paper will help me to read your work.
5. Please do not spend time simply re-stating the facts as an introduction to your answer. The only facts that should appear in your answer are the ones you use and apply in your analysis. If you believe that you require any additional facts or need to make any assumptions, make sure that you identify such matters in your answer.
6. You should address ALL of the issues presented by each essay question, even if you believe that the resolution of a particular issue is dispositive.
7. Citing code sections and case names is preferred but optional – just make sure I can understand what you are talking about.
8. Please ORGANIZE your answers. To this effect, I strongly recommend that you spend some time outlining your answers before you begin to write.
9. If you are about to run out of time, do your best to outline the rest of your answer so I can see where you were planning to go with the part you were unable to complete.

**END OF INSTRUCTIONS - GOOD LUCK!**

SHORT ANSWER QUESTIONS (15% of your grade)

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Each question below is worth 5% of your grade, and can be answered in about a paragraph or two. Therefore, for those typing, please use no more than 500 words per question, and for those using blue books, please use no more than two (2) bluebook pages per question.

1. Maggie Merchant, a door-to-door vacuum cleaner salesperson, knocked on Gullible Gary's door one sunny afternoon. Gary opened the door, invited Maggie in, and listened to her sale's pitch. He then told her that he needed a vacuum cleaner powerful enough to clean his new shag rug, and asked her whether her vacuums were rugged enough. She told him that her vacuums would do the trick, so he bought one. Shortly after she left, Gary plugged in the vacuum cleaner and started to vacuum his shag rug, when the vacuum's motor suddenly blew up. If Gary sues Maggie, what will he allege, and who will likely prevail?
2. Owner Oliver contracted with an insurance company ("Company") to insure his building for \$500,000 against loss by fire. The Company policy provided that "the proceeds shall be payable only if Oliver gives written notification of any loss within twenty (20) days after its occurrence." A fire destroyed the building, but Oliver gave only oral notification of the loss within the 20-day period. After the 20-day period expires, Oliver reread his policy and realized that his notification should have been in writing. He ran to Company's headquarters, and Company told him that his oral notification was sufficient. Must Company pay Oliver for the loss? Why or why not?
3. Elderly Elmer, a 100-year old illiterate man, lives with and depends for his support on Nefarious Nephew. One day, Nephew tells Elmer that he will no longer support him unless Elmer makes a contract to sell him a tract of land. Elmer is thereby induced to make the proposed contract. If Elmer subsequently refuses to perform, and Nephew sues, who will prevail, and why?

CONCEPTUAL ESSAY QUESTION (15% of your grade)

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In his book, *Contract as Promise*, Charles Fried wrote:

“The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust... . An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance... . There will, of course, be great social utility to a general regime of trust and confidence in promises and truthfulness. But this just shows that a regime of mutual respect allows men and women to accomplish what in a jungle of unrestrained self-interest could not be accomplished... .

The utilitarian counting the advantages affirms the general importance of enforcing *contracts*. The moralist of duty, however, sees *promising* as a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise. The moralist of duty thus posits a general obligation to keep promises, of which the obligation of contract will be only a special case—that special case in which certain promises have attained legal as well as moral force. But since a contract is first of all a promise, the contract must be kept because a promise must be kept.”<sup>1</sup>

Do you agree or disagree with this statement? Why? In your answer, please draw on any relevant PCL articles and cases we have discussed in class this semester.

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<sup>1</sup> CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 16-17 (1981).

**FACT-PATTERN ESSAY QUESTION (Memorandum # 1 re: Buyer and Seller worth 50% of your grade, and Memorandum # 2 re: Buyer and Factory worth 20% of your grade)**

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Buyer is a new import-export business located in Gulfport, Florida, who hoped to turn a profit by entering into the widget market, where it would buy widgets from wholesale companies at a low price, and sell those widgets to factories at a high price. After locating Seller, headquartered in Canada, Buyer submitted a purchase order to Seller on August 15 “to buy, at the going market rate, all of the Grade A steel widgets that we may require over the next three (3) years.” The purchase order went on to state that “At this time, we estimate that we will need about 100 widgets per month, but, as we are a new company, we expect this number to grow over time. Further, because quality is important to us, and because the New York Widget Company makes high-quality widgets, all Grade A steel widgets that we order from Seller must be manufactured exclusively by the New York Widget Company.” At the time this purchase order was sent, the “going market rate” for steel widgets was \$10 per widget.

In response to Buyer’s request, Seller sent a box of 100 Grade A steel widgets manufactured by the New York Widget Company (“New York Widgets”), along with an invoice charging Buyer \$10 per widget, and an acknowledgment form dated August 19. On the face of Seller’s form, the following statement appears:

Seller’s acceptance is, however, expressly conditional on Buyer’s assent to the additional or different terms and conditions set forth below and printed on the reverse side. If these terms and conditions are not acceptable, Buyer should notify seller at once.

One of the terms on the reverse side of Seller’s form was a broad provision for arbitration, stating that “Any controversy arising under or in connection with the contract shall be submitted to arbitration in Moscow, Russia.” Upon receiving the widgets, Buyer immediately paid Seller for the widgets, but neither expressly assented nor objected to the additional arbitration term in Seller’s form.

Buyer’s first month in business was not as successful as it hoped, as Buyer was unable to find any factories to whom it could sell its widgets, which were sitting, unused, in its inventory. September and October were not much better. In both September and October, Seller sent an additional box of 100 New York widgets to Buyer, along with an invoice for \$10 per widget,<sup>2</sup> and each time, Buyer immediately paid Seller the full balance due, even though it could not find a factory interested in buying any of the (now 300) widgets sitting unused in its inventory.

In November, however, Buyer finally got its big break, or so it thought. On November 1, the United Steelworkers went on strike, and, due to the shortage in steel, the market price of steel widgets increased to \$20. This sharp spike left many factories scrambling to find new suppliers, and Buyer pounced. On November 10, Buyer was approached by Factory at a convention, who explained that it desperately needed 1000 “Grade A steel widgets manufactured by the New York Widget Company,” or it would be forced to go out of business. Buyer told Factory that it had 300 conforming widgets sitting in inventory, which it could sell to them for \$50 per widget. Further, Buyer said it could obtain 700 additional widgets, which it could deliver to Factory by November 19. Factory did not like these prices, but disliked the prospect of going out of business even more. Therefore, Factory’s purchasing agent, who could find no other supplier of New York Widgets, agreed to these prices and, after shaking hands with Buyer at the convention to seal the deal, both parties went on their way. The next day, on November 11, Buyer sent to Factory the 300 New York Widgets in its inventory, along with an invoice for \$50 per widget, and Factory immediately paid the balance due.

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<sup>2</sup> The “going market rate” for widgets was still \$10 per widget at this time.

Upon returning to its office, Buyer called Seller to obtain the 700 additional widgets it would need to complete its order with Factory, and demanded an additional 1000 widgets (for a total of 1,700 widgets) to take advantage of the low contract prices. Seller explained to buyer that it only expected Buyer to demand 100 or so widgets, and probably would not be able to meet its demand for 1700 widgets “at the current rate.” The Seller did say, however, that it might be able to meet Buyer’s demand for a “few extra dollars.” Buyer said it was willing to pay an additional \$5 per widget, above and beyond the agreed-upon contract price, and Seller said that it would see what it could do.

The Seller desperately scrambled around for several days, calling every contact it knew, but was only able to obtain 400 New York Widgets. It did, however, learn that it could obtain 300 Grade A steel widgets from the Boston Widget Company (“Boston Widgets”), which were identical in every respect (e.g., price, quality, color, durability) to the New York Widgets, except the former were manufactured in Boston. Believing that Buyer would not mind the Boston Widgets, which were, after all, identical in all respects to the New York Widgets except for their place of manufacture, Seller ordered 300 Boston Widgets and, when they arrived, packaged them with the 400 New York Widgets, and sent the entire shipment of 700 widgets to Buyer. Attached to this shipment was an invoice for “700 Grade A steel widgets from the New York Widget Company,” with a list price of \$25 per widget, which, as the invoice explained, reflected the current market price of \$20 per widget, plus the additional \$5 per widget that Buyer agreed to pay to Seller. Seller also attached a note explaining that Seller tried, but was unable, to obtain the additional 1,000 widgets requested by Buyer due to the strike.

On November 15, Buyer received the 700 widgets, read the invoice, and immediately telephoned Seller. Buyer was upset because he only received 700 (rather than 1,700) widgets, and claimed that Seller was in breach, which Seller denied. Buyer was also upset because, as he explained to Seller, he thought the parties had a contract pursuant to which Seller agreed to supply Buyer with all the widgets it should require at the “going market rate.” According to the Buyer, because the price of widgets was \$10 per widget at the moment of contract formation, the price of widgets should have remained at \$10 per widget throughout the duration of the contract. Seller had a different understanding of the matter, and explained to Buyer that the words “going market rate” meant that the Seller would supply the widgets to Buyer and invoice him at the market rate prevailing at the time of each shipment, which, in this case, was \$20 per widget. Neither the Buyer nor the Seller could not come to an agreement regarding the quantity of widgets owed, nor the price that should be paid for the widgets, and both were both furious when they hung up the telephone.

After calming down, Buyer realized that it would still make a substantial profit on the widgets from its contract with Factory, and subsequently delivered the remaining 700 widgets to Factory, which arrived at Factory’s headquarters on November 19. However, on November 18, the United Steelworkers ended their strike, and the market price of steel widgets returned to its previous price of \$10 per widget. Not surprisingly, Factory wanted out of its contract with Buyer, and, upon receiving the widgets, inspected the widgets with the utmost scrutiny to find any little defect. Indeed, a close inspection by Factory revealed, much to its delight, that many of the widgets were manufactured by the Boston Widget Company, rather than the New York Widget Company, and immediately used this fact to reject the shipment and cancel the contract. The next day, on November 20, Factory returned all 1000 widgets to Buyer, refusing to pay for the most recent shipment of 700 widgets, and demanding a refund for the 300 widgets it had already purchased and received.

Buyer was furious, both at Factory and Seller, and called Seller on the telephone to voice its displeasure, and to blame it for Factory’s breach. Buyer told Seller’s president that, as far as it was concerned, Seller could consider their contract to be at an end. Seller told Buyer that it expected Buyer to comply with their agreement, and demanded from the Buyer a written statement that it would perform. Buyer refused to send anything to Seller, and hung up the phone in disgust.

**ASSIGNMENT:** Buyer approached your law firm to seek advice regarding its potential claims against Seller and Factory. You are an associate, and the senior partner has asked you to write **two memoranda**. The **FIRST** memorandum should analyze Buyer's case against Seller (50% of your grade), and the **SECOND** memorandum should analyze Buyer's case against Factory (20% of your grade). Each memorandum should include a discussion of all relevant issues, including your client's chance of success on each issue, and should recommend a course of action for your client to pursue.

**HINT #1:** The senior partner is particularly concerned about the enforceability of the arbitration clause between Buyer and Seller, which should be addressed in your **FIRST** memorandum. Although she personally believes that the CISG should apply to determine the enforceability of the arbitration clause, she is not sure whether any of the other parties are aware of this fact, and would therefore like you to analyze the enforceability of this provision under both the UCC and CISG, and to recommend which law would be most favorable to your client. For all other issues, the partner has asked you to apply only the UCC or common law principles, as appropriate.

**HINT #2:** There is no need to discuss damages in either memorandum. Therefore, if you believe, for example, that one party owes money to the other party, it is sufficient to state this fact without calculating the exact amount owed.

**HINT #3:** Please make sure to write **TWO SEPARATE** memoranda. For those using a bluebook, please use a **separate** bluebook for each memorandum. For those using Exam Soft, please write each memorandum as though you were answering a separate essay question.

**END OF EXAMINATION**

Congratulations!

ON MY HONOR, I HAVE NEITHER  
GIVEN NOR RECEIVED AID ON  
THIS EXAMINATION.