

**June 2018 Baby Bar
Question 1 Contracts
Model Answer**

1. Can Food Bank enforce the contract between Buyer and Seller? Discuss.

U.C.C.

The U.C.C. applies to transactions in goods.

The contract deals with the selling of 2,500 pounds of Canadian wild rice, thus it is a transaction in goods.

Thus, the U.C.C. applies.

Merchant

A merchant deals in goods of a kind.

Seller imports food products to local food distributors, thus deals in goods of a kind. Buyer, is a distributor, thus he deals in goods of a kind.

Thus, both Seller and Buyer are merchants.

Valid Contract

A valid contract requires a showing of mutual assent and consideration.

The facts state Seller and Buyer entered into a valid written contract under which Seller promised to deliver to Buyer on or before May 1, of this year 2,500 pounds of Canadian wild rice, packed in 100 pound sacks, at \$6.00 per pound, total price \$15,000. In addition, Seller agrees to deliver free of charge an additional 200 pounds of the identical product to Food Bank. Since the parties entered into a contract there was mutual assent.

Further, Buyer bargained to pay \$15,000 to Seller in exchange for Seller's return promise to deliver 2,500 pounds of Canadian wild rice. Seller bargained to deliver 2,500 pounds of rice in exchange for Buyer's return promise to pay \$15,000 to Seller. Thus, there is consideration.

Therefore, a valid contract exists.

Having Found a Contract between Seller and Buyer, Does It Raise Rights in Food Bank as a Third Party Beneficiary?

Third Party Beneficiary

A third party beneficiary contract is one wherein performance by the promisor will benefit a third party. The status arises at the formation stage of the contract.

As part of the contract between Seller and Buyer, Seller agreed to deliver free of charge 200 pounds of Canadian wild rice to Food Bank. The performance of this promise was meant to fulfill Seller's pledge which would act to benefit Food Bank, the third party.

Food Bank's rights were created at the time that Seller and Buyer entered into the contract. Food Bank's status arose at the formation stage of the contract, i.e., for the sale of Canadian wild rice.

Therefore, Food Bank has enforceable rights as a third party beneficiary.

Privity of Contract

Privity of contract is the interest or relationship which exists between two or more contracting parties.

Seller will assert that Food Bank was not a party to contract and, therefore, has no interest or relationship in that contract upon which to sue since Seller made its promise to deliver Canadian wild rice to Buyer, not Food Bank.

Food Bank will rebut that although it was not a party to the Seller-Buyer contract, privity is not required for it to assert its rights as a third party beneficiary under **Lawrence v. Fox**.

Thus, the lack of privity will not bar Food Bank from asserting its rights.

Intent to Benefit

Intent to benefit is defined as the promisee's intent to extract a promise from the promisor to benefit a third party.

Food Bank will contend that when Buyer, a supporter of Food Bank, insisted on a provision in the contract stating Seller agreed to deliver 200 pounds of identical product to Food Bank, the extracted promise was intended to benefit Food Bank. This promise was made at the time of the creation of the Seller-Buyer contract which further demonstrates Seller's beneficial intent.

Classification - Donee Beneficiary

If the promisee's primary intent is to confer a benefit to the third party, the third party is a donee beneficiary.

Seller will argue that the promise to deliver 200 pounds of the identical product that Buyer ordered was a benefit to Food Bank. Thus, the Seller-Buyer contract created a benefit owed to Food Bank. Buyer was a supporter of Food Bank and insisted Seller to supply 200 pounds of Canadian wild rice to benefit Food Bank. When Buyer contracted with Seller requiring a supply 200 pounds of Canadian wild rice to Food Bank, Buyer intended to benefit Food Bank under the terms of the Seller-Buyer contract.

Therefore, Food Bank would be classified as a donee beneficiary.

Vesting

The rights of any donee beneficiary vest when it has notice of and assents to the promise, or brings suit to enforce the promise or materially changes position in justifiable reliance thereon.

If the court should rule that Food Bank was a donee beneficiary, Food Bank will argue that Buyer informed it of Seller's promise, thus there was notice and assent to the Seller-Buyer contract.

In addition, Food Bank decided to use the rice as part of its upcoming fundraising campaign and spent \$300 for 200 one-pound bags labeled "Famous Canadian Wild Rice – Thank You from The Food Bank."

When Food Bank spent the money on the bags to promote its campaign such action caused a material change by which its rights vested as a third party donee beneficiary.

Hence, Food Bank can sue Seller under the original obligation.

Food Bank will step in the shoes and any defenses under the contract that are applicable can bar Food Bank's rights. Since Seller has a viable defense to the Seller-Buyer contract, Food Bank will not be able to enforce the contract. See infra.

2. What, if any, defenses does Seller have? Discuss

Conditions

Implied-In-Law – Constructive Condition Precedent

A condition is a fact or event which the happening or non-happening of either creates or extinguishes an absolute duty to perform.

Seller must supply Buyer with 2,500 pounds of Canadian wild rice packed in 100 pounds sacks before Buyer's duty to pay arises.

Therefore, Seller's duty was a constructive condition precedent to Buyer's duty to pay.

Impossibility

A duty may be discharged by impossibility. This doctrine applies an objective method; thus in order for impossibility to apply the proponent must show an unforeseeable event, and that nobody could have performed the terms of the contract.

Seller will argue that his Canadian producer switched to metric weights because it now exports much of its wild rice to Europe and at the time of making the contract he was not aware that the wild rice would not be bagged in 100 pound sacks. Thus, there was an unforeseeable event.

Furthermore, Seller was not the fault of the change to pack the wild rice in 50-kilogram sacks versus 100 pounds sacks. However, it is not objectively impossible for Seller to perform since he could have another supplier supply him with the wild rice in 100 pound sacks. Therefore, the doctrine of impossibility will not discharge Seller of his duty.

Impracticability

Impracticability requires that a party encounter extreme and unreasonable difficulty or expense that was not anticipated. A mere change in the difficulty or expense due to normal risks that could have been anticipated will not warrant discharge by impracticability.

Seller will argue that change from pounds to metric was not foreseeable at the time of making the contract with Buyer. Furthermore, Seller was not the fault of his supplier changing to the metric system. However, Buyer will argue that the change from pounds to metric did not inhibit Seller's ability to obtain the rice from another supplier. To find a supplier that packs the wild rice by the pound versus in kilograms would not be unreasonably difficult. Thus, Seller will not be able to discharge his duty under the doctrine of impracticability.

Frustration of Purpose

The defense of frustration of purpose requires that due to an unforeseeable event, the value of the contract, as contemplated by both parties, is totally destroyed.

Seller will argue since he ordered 2,500 pounds of Canadian wild rice packed in 100-pound sacks and was under the belief that he would be getting 2,500 pounds of Canadian wild rice packed in 100-pound sacks, but received 2,500 pounds of Canadian wild rice in 50-kilogram sacks which is 110.2 pounds per sack, his purpose under the contract had been frustrated since the Canadian wild rice is not in 100 pound sacks.

However, Seller did receive the 2,500 pounds of Canadian wild rice. Hence, the act of Seller's importer of delivering 2,500 pounds of the Canadian wild rice does not totally destroy the purpose of the contract between Seller and Buyer, nor is it an unforeseen event based on the terms of the signed contract. I.e. requesting 2,500 pounds.

Thus, frustration of purpose is not a valid excuse.

Anticipatory Repudiation

Anticipatory repudiation is an unequivocal expression repudiating the intent to perform a contract.

Buyer refused to accept delivery of the Canadian wild rice. In addition, Buyer faxed Seller stating Seller failed to satisfy the obligation under the contract, and hereby terminates the purchase agreement. Buyer's language is an unequivocal expression repudiating his intent to perform.

Therefore, Buyer's anticipatory repudiation would excuse Seller condition to supply the Canadian wild rice to Buyer and Food Bank.

Voluntary Disablement

Voluntary disablement is an anticipatory repudiation through conduct.

When Buyer faxed Seller stating "Because you failed to satisfy your obligation under the contract, I hereby terminate our purchase agreement" such conduct demonstrated his anticipatory repudiation through conduct.

Therefore, Buyer's conduct would excuse Seller's condition to continue delivering the Canadian wild rice.

Breach

A breach is an unjustified failure to perform which goes to the essence of the bargain. When

When Buyer faxed Seller telling them they would not accept the delivery of the Canadian wild rice, it establishes an unjustified failure to perform going to the essence of the contract.

However, Buyer will contend that Seller did not comply with the contract and deliver the Canadian wild rice in 100 pound sacks. Thus, under the perfect tender rule Seller is in breach.

Therefore, it was Seller's major breach that gave rise to Buyer's refusal of the contract.

Therefore, there was no major breach by Buyer.

3. What, if any, relief can Food Bank seek? Discuss

General Damages - Expectation Damages

General damages are damages that flow from a breach of the contract. The non-reaching party is entitled to expectancy damages under the contract.

The basic remedy where the seller does not deliver the goods is the difference between the contract price and either the market place or the cost of buying replacement goods.

Food Bank was to get 200 pounds of Canadian wild rice at no cost. Food Bank will recover damages in the amount that gives him the benefit of the bargain he would have received had Seller had not breached the contract, which be the fair market value of the Canadian wild rice

Special Damages - Consequential Damages

Consequential damages are awarded in addition to the standard measure and will be given if a reasonable person would have foreseen at the time of entering into the contract that such damages would result from the breach.

Food Bank will argue that it is a well-known, and the Canadian wild rice was going to be used for a donation campaign. Thus, Seller should have foreseen at the time of entering into the contract that if they breach it will cause Food Bank to lose donations in the amount of \$10,000. However, Seller was unaware of the campaign, thus, unforeseeable.

In addition, in order to recover special damages, Food Bank will have to prove with reasonable certainty the amount of donations that it would have collected had Seller not breached. It appears Food Bank will have a hard time to show what donations would have been made based on the campaign. Therefore, their damage is too speculative.

No special damages will be awarded.

Specific performance

Specific performance is an equitable remedy that the courts allow in circumstances involving a unique chattel such that upon the non-performing party's breach payment of money damages would not be an adequate remedy.

In this case, Seller is selling Canadian wild rice, which is not a unique chattel, and since Buyer has terminated the contracts Seller is refusing to deliver the 200 pounds of Canadian wild rice to Food Bank. Since Food Bank can go out and buy the Canadian wild rice from another source, the court will not act in equity and order Seller to deliver the 200 pounds of Canadian wild rice, since damages can make Food Bank whole.