Dated: November 5, 2015

**Memorandum to Students**

**Study Guide for Sales**

**Topics 1–4**

**Fall 2015**

**University of North Dakota School of Law**

**Prof. Eric E. Johnson**

**I. Formation**

**Topic 1: The Role and Scope of Codes in Sales Systems**

Reading:

* Keating, Assignment 1, pp. 1-24
* Hull, Ch. 1 and Ch. 2.A.-2.C., pp. 1-14

Class sessions:

* No. 1, 2
* Aug 25, 27

Problems we did in class:

* 1.1
* 1.2
* 1.4
* 1.5

Key code sections:

* 1-201(b)(3)
  + definition of agreement
* 1-302
  + variation of UCC rules by agreement
* 1-303(a)(b)(c) & (d)
  + course of performance, course of dealing, and usage of trade
* 2-102
  + general scope of Article 2
* 2-105(1)
  + definition of goods
* 2-104
  + definition of merchant
* 2-308(a)
  + gap-filler for place of delivery

Key learning objectives:

* be able to compare and contrast the code system vs. the common-law
  + understand the importance of looking to the statute for answers
* for a sales contract, understand the hierarchy of importance among contractual provisions, the UCC code provisions, and the common law
  + in general, as far as the rules that control the deal and any dispute about it, from highest to lowest what controls is:
    - contractual provisions
    - the UCC
      * but note that some UCC rules cannot be contracted around
    - the common law
      * but note that some common-law rules, like fraud, can’t be contracted around
* for a sales contract, understand the hierarchy of importance among express terms, course of performance, course of dealing, and usage of trade
  + as far as the content of the contract, from highest to lowest what controls is:
    - express terms
    - course of performance
    - course of dealing
    - usage of trade
* understand when gap-fillers are used and when they are superseded (K 8-9)
  + gap-fillers are superseded when terms are supplied by
    - express term of the contract
    - course of performance
    - course of dealing
    - usage of trade
* understand the scope of a “good” under the UCC
  + *Adel* case illustrates this, esp. K 15-17
* be able to apply the gravamen test and predominant purpose test to mixed contracts (H 12-14, K 11-12)
  + predominant-purpose test looks at the deal
  + gravamen test looks at the dispute
* be able to apply the UCC definitions rather than the common-sense definitions of terms in interpreting UCC provisions (Jones dissent to *Cook v. Downing,* K 19-21)
* understand the basics of licenses (not in reading, but discussed at length in class)
  + a license is a legally binding consent
  + a license has legal effect as an affirmative defense
  + a license is not a contract, but might be part of a contract

**Topic 2: Scope Issues with Leases, CISG, and Real Estate**

Reading:

* Keating, Assignment 2, pp. 25-47
* Hull, Ch. 10.A.-10.C., pp. 199-209

Class sessions:

* No. 2, 3
* Aug 27, Sept 1

Problems we did in class:

* 2.1 (subparts (a)-(e) only)
* 2.5
* 2.6

Key code sections:

* 2A-103(1)(j)
  + definition of lease
* 1-203
  + lease vs. security interest
* 2-107
  + goods vs. real property
* CISG Articles 1, 2, 3, 10
  + when CISG applies

Key learning objectives:

* understand something of the business interests and real-world stakes in leases and sales with security interests
  + appreciate, at a very general level, the business concerns relevant to categorizing transactions as leases or sales with a disguised security interest
  + appreciate how the need for financing drives transactional forms
  + appreciate why parties might want a security interest
  + appreciate the relative benefit, from the seller’s perspective of wanting to get paid or to get back the goods, of categorizing a transaction as a lease, a secured transaction, or an unsecured sale
  + appreciate the relative benefit, from the perspective of a third party seeking to claim the goods, of categorizing a transaction as an unsecured sale, a secured transaction, or a lease
  + *Carlson v. Giachetti* and *In Re Carlson* illustrate this (K 27-36)
* be able to analyze whether a transaction is a true lease
* be able to analyze whether a sales transaction is governed by CISG
  + apply CISG provisions regarding scope
  + understand the application of choice-of-law provisions of contracts and the applicability of CISG
  + understand what is necessary to prevent application of CISG in a contract and have UCC govern instead
    - must not only choose a certain UCC jurisdiction (e.g., New York) but also expressly state CISG does not apply (since New York is part of USA, a CISG signatory)
    - *Valero v. Greeni Oy* illustrates this (K 38-43, esp. 41-43)
* be able to analyze whether a transaction involving sales of things on or taken from land are governed by UCC Article 2 or the common law

**Topic 3: The Process of Sales Contract Formation**

Reading:

* Keating, Assignment 3, pp. 48-71
* Hull, Ch. 3.A.-3.D., pp. 21-44
* ProCD, Inc. v. Zeidenberg, pp. 9.25-9.27 of Field book

Class sessions:

* No. 4, 5
* Sept 3, 5

Problems we did in class:

* 3.1 (🡨 but note that this problem is not particularly useful in studying for the exam)
* 3.2
* 3.4 (subpart (a) only)

Key code sections:

* 2-204
  + contract formation, indefiniteness
* 2-205
  + firm offers
* 2-206
  + offer and acceptance in contract formation
* 2-207
  + additional terms in acceptance or confirmation
  + a/k/a “battle of the forms”

Key learning objectives:

* understand the key aspects of contract formation under 2-204
  + contracts can be formed by express communications or purely by conduct
  + it’s not necessary to be able to determine the exact moment a contract is formed
  + open (un-agreed-upon) terms do not prevent the formation of a valid, enforceable contract, so long as there is some basis upon which a court could provide a remedy
* understand how firm offers can be binding under 2-205
  + firm offers can be binding if they have consideration (same as the common law)
    - *note that problem 4.1(a) on leases is analogous*
  + firm offers without consideration are binding if:
    - by a merchant
    - in a signed writing
    - assurance given it will be held open (not revoked)
    - but the irrevocability period for a without-consideration firm offer cannot exceed three months
* understand how offers can be made and validly accepted under 2-206
  + an offer can invite acceptance in any reasonable manner
  + an offer can be accepted by shipping goods
    - shipping conforming goods counts as acceptance
    - even shipping non-conforming goods can count as an acceptance (the situation in problem 3.2(b))
    - but understand that a shipment of non-conforming goods will be construed as a counter-offer if it’s offered as an “accommodation,” which the seller can do by seasonably notifying the buyer that the shipment is intended as an accommodation
* understand what happens where the offer and acceptance are not the same
  + understand the common-law background
    - under the common law, the offer and acceptance must be the same for a contract to be formed by them (the “mirror-image rule”)
    - under the common law, a purported acceptance that doesn’t match the offer will be construed as a counter-offer
      * if conduct by the recipient subsequently establishes that there is a contract, then the party receiving the purported acceptance (the counter-offer) will be construed to have accepted that counter-offer by conduct, and the terms of the counter-offer will control (a situation giving rise to what’s called the “last-shot” rule)
  + understand in general about 2-207 (the “battle of the forms”):
    - 2-207 was intended to change the common-law rules where the offer and acceptance are not the same
    - 2-207 permits contract formation even where offer and acceptance are not the same, abrogating the mirror-image rule
    - 2-207 is intended to avoid the harsh results of the last-shot rule
  + understand when 2-207 is not an issue, including
    - when the offer and acceptance match
    - when there is an acceptance by conduct prior to any differing writing (the situation in problem 3.2(a)&(b))
    - where the purported acceptance comes too late to count as a valid acceptance (the situation in problem 3.2(c))
  + understand that inconsistent expressions in offer and acceptance can create a contract (2-207(1))
    - but recognize acceptances expressly made conditional on assent to additional or different terms will not operate as an acceptance (2-207(1))
      * understand that in such a situation, if the parties’ conduct indicates a contract was nonetheless formed, 2-207(3) applies
    - be able to distinguish between different terms and additional terms and understand the consequences that follow from that distinction
      * for additional terms, where there is a valid contract, be able to apply 2-207(2) (problem 3.4(a) regarding the arbitration clause is an example)
      * for different terms, where there is a valid contract, be able to apply the majority “knock-out rule” where the conflicting terms drop out of the contract and gap-fillers are used to fill-out the contract (problem 3.4(a) regarding remedies and the consequential-damages limitation is an example)
  + understand that when there are writings that don’t establish a contract, but conduct that does, 2-207(3) provides that the terms of the contract are those terms that the parties’ writings agree on, together with gap-fillers
* understand the relationship of licenses to contracts (related to our discussion of *ProCD*)
  + a license is not a contract, but a license can be a term of a contract; that is, a license can be a thing bargained for
  + be able to recognize when a contract containing a license will not preclude non-contractual causes of action based on extracontractually existing rights (such as causes of action for trespass or copyright infringement)
    - when the license is made conditional upon some condition not met
  + be able to recognize when a contract containing a license will preclude non-contractual causes of action based on extracontractually existing rights (such as causes of action for trespass or copyright infringement)
    - when the license is given as part of the bargain (i.e., not made conditional)

**Topic 4: Formation with Leases, International Sales, and Real Estate**

Reading:

* Keating, Assignment No. 4, pp. 72-86, (we are skipping 87-92)
* Hull, Ch. 3.E.-end, pp. 44-49

Class sessions:

* No. 5
* Sept 5

Problems we did in class:

* 4.1
* 4.2
* 4.3

Key code sections:

* 2A-204
  + lease contract formation, indefiniteness
  + *mirrors 2-204*
* 2A-205
  + firm offers
  + *mirrors 2-205*
* 2A-206
  + offer and acceptance in lease contract formation
  + *very similar to 2-206, missing the part about inviting shipment and acceptance by shipping conforming or non-conforming goods*
* CISG Article 16, 17
  + firm offers
* CISG Articles 18, 19
  + offer and acceptance

Key learning objectives:

* understand the key aspects of contract formation under 2A-204*(the following mirrors 2-204:)*
  + contracts can be formed by express communications or purely by conduct
  + it’s not necessary to be able to determine the exact moment a contract is formed
  + open (un-agreed-upon) terms do not prevent the formation of a valid, enforceable contract, so long as there is some basis upon which a court could provide a remedy
* understand how firm offers can be binding under 2A-205 *(the following is virtually the same as for 2-205:)*
  + firm offers can be binding if they have consideration (same as the common law) (an example is problem 4.1(a))
  + firm offers without consideration are binding if:
    - by a merchant
    - in a signed writing
    - assurance given it will be held open (not revoked)
    - but the irrevocability period for a without-consideration firm offer cannot exceed three months
* understand how offers can be made and validly accepted under 2A-206*(close to 2-206:)*
  + an offer can invite acceptance in any reasonable manner
* understand the CISG provides for the enforceability of irrevocable offers without consideration and without being capped by law as to duration
* understand the general contours of the CISG with regard to offer and acceptance, in particular that it is similar to the UCC in rejecting the mirror-image rule, but that it does not clearly reject the last-shot rule
* with regard to real estate, have a general understanding of how residential real estate deals come together in terms of offer, acceptance, and contingencies