

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- understand when gap-fillers are used and when they are superseded (K 8-9)
 - gap-fillers are superseded when terms are supplied by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