

Advanced Contracts (Sales and Leases)
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Sample Exam Questions Set #1 - Model Answers

1. Buyer wrote Seller on March 1 offering to purchase 100 juniper saplings from Seller at a price of \$5 per sapling, with delivery to be made by Seller no later than June 15. In addition, Buyer's March 1st letter stated "If you do not make delivery of the trees by June 15, this offer will expire." On June 15, Seller's truck pulled up to Buyer's tree lot in order to deliver the saplings. Seller's driver presented Buyer with an invoice for 100 juniper saplings, total amount due of \$500. Buyer refused delivery. Assuming that Buyer is a merchant, as that term is defined in § 2-104(1) of the Uniform Commercial Code, does Seller have any remedy against Buyer?

Because Buyer is a merchant, there is a question of whether his offer to buy rose to the level of a "firm offer" under § 2-205 of the Uniform Commercial Code, which tempers a merchant's ability to revoke an offer that is made in such a way that the offeree reasonably believes it to be irrevocable for some period of time. In this case, even if Buyer's offer was a firm offer when made, it would have expired as a matter of law after 3 months – on or about June 1, two weeks prior to the Seller's attempted acceptance.

Nonetheless, it's still an offer and still permits Seller to accept by delivering the trees no later than June 15th. The next question is whether, by so accepting, Seller could form a binding contract with Buyer in the absence of a signed agreement between the two parties. Section 2-201(1) requires that a contract for the sale of goods for a price of \$500 or more must be evidenced by "some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker." Here, the second part of § 2-201 is clearly satisfied: the March 1st writing is signed by Buyer, who is the party against whom Seller seeks to enforce the contract, if any, evidenced by the March 1st letter. The trickier question is whether the March 1st letter is "sufficient to indicate that a contract for sale has been made between the parties." It appears the answer to this question is "No." There is no evidence of a prior oral agreement of which the March 1st letter might be a written confirmation, as contemplated by § 2-201(2). Nor did Buyer first accept the trees when delivered and then attempt to avoid the contract, as contemplated by § 2-201(3)(c).

Thus, it appears as if Seller has no viable claim against Buyer under Article 2.

2. On July 1, 2002, Monica, a fruit merchant, mailed Chandler, a fruitstand operator, a written offer to sell up to 500 crates of mangoes (30 mangoes per crate) for \$6.00 per crate. By the terms of Monica's offer, Chandler had the exclusive right to accept or decline the offer until July 10, 2002 at 5:00 p.m. Chandler received Monica's written offer on July 3rd.

On July 5, Monica wrote Chandler revoking the offer. Monica promptly placed the letter in the mail, properly addressed and with adequate postage. Later that same day, Monica sold all 500 crates of mangoes to Phoebe, a mango-loving vegetarian (or, should it be "fruititarian"?), at a price of \$6.50 per crate.

On July 6, Chandler wrote Monica that Chandler would purchase 100 crates of mangoes from Monica for \$6.00 per crate, provided that Monica deliver the mangoes no later than August 1, 2002 and that Monica pay any delivery costs.

Monica received Chandler's July 6th letter on July 8th. Monica immediately sent a fax to Chandler informing Chandler that Monica had revoked the offer and sold the mangoes to Phoebe. Chandler received Monica's July 5th letter later on July 8th.

Your client, Chandler, believes that he has a valid contract to purchase 100 crates of mangoes from Monica for \$6.00 per crate. Do you agree? If so, why? If not, why not?

Yes, Chandler has an enforceable contract to buy mangoes from Monica. First, Monica's 7/1 offer was a "firm offer" subject to UCC § 2-205, because (1) it is written, (2) Monica is a merchant, and (3) the offer contains language of non-revocability. Therefore, Monica could not revoke the offer prior to 5:00 p.m. on 7/10. So, even if Chandler had received Monica's revocation before Chandler accepted (which is not what, in fact, happened), Chandler's acceptance would still be effective as long as Monica received the acceptance (1) prior to receiving Chandler's 7/3 counteroffer and (2) prior to 5:00 p.m. on 7/10.

Second, the agreement between Chandler and Monica, as represented by Monica's 7/1 firm offer and Chandler's faxed acceptance, satisfies the statute of frauds. The statute of frauds is "in play" because this is a contract for the sale of goods valued at \$500 or more. § 2-201. What the statute requires is a signed writing by the party against whom enforcement is sought. *Id.* Here, Chandler is trying to enforce the contract against Monica, so what we need is a signed writing by Monica that evidences the contract Chandler seeks to enforce. The 7/1 firm offer is written by Monica, and identifies the quantity of goods to be sold. Even if it is not signed in the formal sense of the word (*i.e.*, a signature), it most likely was made on Monica's letterhead or on an invoice with Monica's name printed on it or some other document attributing it to Monica. The comments to § 2-201 indicate that any of these would satisfy the "signature" requirement. Moreover, if necessary, we can piece the contract together using more than one document. Here the firm offer plus the acceptance would leave no doubt as to the terms of the deal or the parties' intent to enter into an agreement on those terms.

The fact that Chandler, a merchant, proposed additional terms (delivery deadline and delivery costs) in his 7/6 acceptance does not alter the fact that it is an acceptance under §§ 2-204

& 2-207(1). Whether or not these additional terms would actually become part of the contract would require a § 2-207(2) analysis that is not called for here. But there is nothing in the facts to suggest that Chandler's 7/6 acceptance was expressly conditional on Monica's agreement to the additional terms; therefore, Chandler's 7/6 acceptance is not a counteroffer.

3. Dharma and Greg orally agree to lease the equipment they need to set up their own microbrewery from Drew. The fair market value of the equipment is presently \$500. Dharma and Greg agree to pay Drew ten monthly installments of \$99 each. At the end of the lease term, Dharma and Greg have the option to purchase the equipment for \$1. The expected fair market value of the equipment at the end of the lease is \$250. Do Dharma and Greg need to get the agreement in writing in order to ensure their rights? If so, why? If not, why not?

If this is truly a lease for a period of ten months, with lease payments totaling \$990, then the lease falls outside of § 2A-201 and need not be in writing in order to be enforced. Section 2A-201 only requires a writing when total lease payments, excluding any renewal or purchase option fee, equal or exceed \$1,000. If this "lease" is truly a "disguised sale" for \$991, then § 2-201 may apply, in which case Dharma and Greg will need a writing, signed by Drew, in order to enforce their agreement in the event that Drew refuses to fully perform.

With these facts, it is not manifestly clear one way or the other whether the transaction is a lease or a sale. The facts that the total monthly payments are almost double the fair market value of the equipment and that Dharma and Greg have the option to purchase the equipment for much less than its expected fair market value at the end of the term weigh in favor of this being a "disguised sale." On the other hand, the fact that the equipment will still have significant economic value at the end of the ten-month term weighs in favor of the transaction being a lease.

4. After negotiations, Buyer mailed to Seller a written order for the purchase of 281,000 "spade bit blanks," for use in the manufacture of spade bits. The goods were to be delivered in installments by the dates stipulated in the purchase order. In addition, the purchase order contained, inter alia, the following "condition" of purchase: "No modification of this contract shall be binding upon Buyer unless made in writing and signed by Buyer's authorized representative. Buyer shall have the right to make changes in the Order by a notice, in writing, to Seller." Seller accepted the purchase order in a written acknowledgment and commenced to manufacture the bits.

Seller was consistently late in tendering delivery. Buyer, however, accepted the late deliveries without declaring a breach or invoking the written modification condition. After accepting 144,000 blanks, however, Buyer, invoking the delivery schedule in the purchase order, cancelled the contract for breach and sued the Seller for damages. (There was some evidence that Buyer cancelled because of a dispute with a sub-purchaser of the completed spade bit rather than Seller's delays).

A. Is the “no modification” condition in the purchase order enforceable against the Seller?

The “no modification” clause would be part of the parties’ contract. It was included in the Buyer’s offer and the Seller accepted the Buyer’s offer and commenced performance accordingly. Section 2-209(2) requires that such a clause, except when it is between merchants and when it appears on a form supplied by one of the merchants, must be separately signed by the other party. *See also* Comment 3 to § 2-209. Here, because both parties are merchants, there is no requirement that Seller have separately signed the “no modification” clause.

B. Assuming the “no modification” condition is valid, did Buyer’s conduct of accepting Seller’s late deliveries “waive” either the contract delivery schedule or the “no modification” condition?

Buyer’s acceptance of prior late deliveries without protest waived Buyer’s right to complain about the tardiness of those deliveries. Section 2-209(4) provides that an attempt to modify contract terms can, if not objected to, operate as a waiver, even though it may not satisfy the writing requirements of the contract, of § 2-209(2), or of § 2-209(3). Here, Seller attempted to modify the performance schedule of the contract. Buyer’s failure to object and his acceptance of the tardy goods is a waiver under § 2-209(4).

Section 2-209(5) provides that those earlier waivers do not preclude Buyer from demanding strict compliance as to subsequent deliveries, as long as Buyer gives Seller reasonable notification that Buyer demands strict compliance as to future deliveries. Here, though, Buyer did not retract its earlier waivers and demand strict compliance; rather, Buyer simply used Seller’s earlier tardiness as a reason to cancel the contract.

5. Sugarbakers is a small but successful interior design business. Wanting to expand into graphic design and advertising, Sugarbakers’ principal, Suzanne Sugarbaker, contracted with an upstart computer engineering firm, Dilbert & Co., to design customized graphics software. Dilbert & Co.’s chief engineer, Dilbert – who Suzanne met on a flight from Atlanta to San Jose, California (where Dilbert & Co. is headquartered) – promptly designed and tested the software. Claiming that he was unsatisfied with the software’s performance on Sugarbakers’ existing computers, Dilbert suggested that Sugarbakers buy a new computer specially designed for graphics software, the Dogbert Y2K Special (“DY2KS”), to run the new software. The DY2KS is manufactured by Dilbert & Co. Delighted with Dilbert’s demonstration of the custom software using the DY2KS, Suzanne willingly agreed to buy the DY2KS to run the software. The parties amended their contract to include Sugarbakers’ purchase and Dilbert & Co.’s delivery of the DY2KS.

Less than two weeks after taking delivery of the software and the DY2KS, Suzanne began to notice a recurrent glitch that caused a small, bespectacled dog to appear randomly in the graphical layouts she designed using the DY2KS. Acting on a hunch, Suzanne discovered the same glitch while running other software that had been installed on the DY2KS. When she called Dilbert & Co. to complain, her call was directed to their customer service specialist, Dinosaur Bob, who threatened to give Suzanne a wedgie if she

didn't stop complaining. The problem persisted, causing Sugarbakers to lose a lucrative advertising contract for the Greater Atlanta Garfield Fan Club. Finally fed up with it all, and wanting to prevent any further loss of business, Sugarbakers purchased a MicroSpaz 3000GT computer for \$3,000, new graphics software for \$2,000, and filed suit against Dilbert & Co., alleging breach of any and all applicable express and/or implied warranties.

The parties' pleadings and discovery reveal, in addition to the foregoing, that: (1) Sugarbakers paid Dilbert & Co. \$25,000 to design the custom software; (2) Sugarbakers paid Dilbert & Co. \$2,500 for the DY2KS computer; (3) Sugarbakers paid Dilbert & Co. the entire \$27,500 prior to taking delivery of the software and the DY2KS; (4) the parties agree that any glitch is a "hardware" problem with the DY2KS, not a "software" problem; (5) Sugarbakers' expert witness has opined that the software designed by Dilbert & Co. would have performed as well or better on any number of other commercially-available computers as it did on the DY2KS before the glitch appeared; (6) Suzanne's assistant, Theo, loaded the software onto another computer and ran it for several weeks without ever encountering the glitch; (7) the warranty card that accompanied the DY2KS computer did not disclaim any implied warranties and expressly warranted that the computer would operate free of any errors, other than those caused by third-party software, for a period of no less than one year from the date of purchase; (8) the contract Sugarbakers lost with the Greater Atlanta Garfield Fan Club would have netted Sugarbakers a profit of at least \$25,000; and (9) the MicroSpaz 3000GT and the new graphics software have been glitch-free.

On the eve of trial, Dilbert & Co. moved for summary judgment on Sugarbakers' warranty claims on the grounds that (1) that Article 2 does not govern its dispute with Sugarbakers and, therefore, it did not owe Sugarbakers any implied warranty(-ies); and, (2) even if it did owe Sugarbakers one or more express and/or implied warranty(-ies), Dilbert & Co. did not, as a matter of law, breach any express and/or implied warranty(-ies). Sugarbakers responded that the dispute is governed by Article 2 and that Dilbert & Co. did, in fact, breach both express and implied warranties covering the software and the DY2KS computer.

You are the law clerk for the trial judge considering Dilbert & Co.'s motion and preparing, if she decides to deny the motion, for a mandatory settlement conference and possibly a trial on the merits. Your judge wants you to answer the following questions:

A. Should Article 2 of the UCC govern Sugarbakers' claims against Dilbert & Co. in this lawsuit? If so, why? If not, why not?

The question here is whether the contract is for the sale of goods or for services. Courts applying the UCC recognize two distinct tests to answer this question. The "majority" rule is the "predominant purpose" test, which asks whether the plaintiff's predominant purpose in entering into the transaction as a whole was to purchase or sell goods or services. If the plaintiff's predominant purpose was to purchase or sell goods, then Article 2 applies to the whole transaction (including the service part of it); if the plaintiff's predominant purpose was to purchase or sell services, then Article 2 does not apply to any part of the transaction (not even

the goods). The “minority” rule is the “gravamen of the action” test, which focuses on what part of the transaction gives rise to the plaintiff’s claim. If the plaintiff’s claim arises from the goods component of the transaction, then Article 2 applies to the complaint, even if the predominant purpose of the transaction was to sell or buy services. If the plaintiff’s claim arises from the services component of the transaction, then Article 2 does not apply, even if the predominant purpose of the transaction was to sell or buy goods.

It appears that the predominant purpose of the transaction was the purchase of customized computer software. Sugarbakers only purchased the DY2KS computer because it was recommended to run the software that Sugarbakers engaged Dilbert & Co. to write. This reading of the facts is supported by the relative expenditures on the software and hardware: Sugarbakers paid Dilbert & Co. \$25,000 to design the software, and paid a mere \$2,500 for the computer. Software design, although it often yields one or more diskettes or CDs containing the code, is primarily a service, rather than a good. This is particularly true in this case, because the software did not exist – and, therefore, was not identifiable, much less tangible nor movable – at the time the parties entered into the contract. See § 2-105. Therefore, if Sugarbakers’ predominant purpose was to purchase services – to wit, the custom software – then Article 2 would not apply to the transaction if the court applied the “predominant purpose” test.

On the other hand, if the court applied the “gravamen of the action” test, Article 2 would govern Sugarbakers’ complaints against Dilbert & Co. The parties stipulate that the Dogbert glitch is a “hardware” problem, rather than a “software” problem – that is to say, the defect originated with the DY2KS computer, rather than with the customized software. The computer is clearly a “good” under § 2-105. Therefore, Article 2 would apply to the complaint if the court applied the “gravamen of the action” test.

B. Assuming that Article 2 does govern, does Sugarbakers have a viable claim against Dilbert & Co. for breach of one or more warranty(-ies) with regard to the software?

Unless explicitly waived, disclaimed, or otherwise limited, every contract for the sale of goods by a merchant includes an implied warranty that the goods, *inter alia*, are fit for the ordinary purpose for which such goods are used. § 2-314(2)(b). Unless explicitly waived, disclaimed, or otherwise limited, where the seller at the time of contracting has reason to know (1) the particular purpose for which the goods are sought and (2) that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, the seller warrants that the goods shall be fit for the buyer’s particular purpose. § 2-315. The facts include nothing about any representations about or attempted disclaimers of either implied warranty with respect to the software. Therefore, if the custom software is a good, the sale of which is governed by Article 2, then Dilbert & Co. will be held to any implied warranty that applies. Dilbert & Co. made no express warranties about the software.

Even if Article 2 governs, the custom software is not a “good” for the reasons expressed in “A.” Therefore, by their terms, neither 2-314 nor 2-315 apply. Suppose the court decided that the custom software was a good. Was there a breach of one or both warranty(-ies)? The parties have stipulated that the defect, if any, is in the hardware, not the software. While the glitch appears when running the custom software on the DY2KS, it does not appear when running the

custom software on any other computer. Moreover, when using the DY2KS, the glitch appears on other software as well as the custom graphics software. It would seem, then, that there is a lack of proof to support a claim that the software is unfit for either its ordinary purpose or any particular purpose known to Dilbert & Co.

C. Assuming that Article 2 does govern, does Sugarbakers have a viable claim against Dilbert & Co. for breach of one or more warranty(-ies) with regard to the DY2KS computer?

The computer is clearly a good, for the reasons set forth in “A,” and may be subject to one or both of the implied warranties discussed at the beginning of “B.”

The parties stipulated that the warranty card did not disclaim *any* implied warranties. The question now is: Was there a breach of one or both warranty(-ies)? With respect to the computer, the answer seems to clearly be “yes.” The parties have stipulated that the Dogbert glitch was a problem with the DY2KS computer. A computer that displays a glitch when running graphics software is arguably not “fit for the ordinary purpose for which” the computer is used. Therefore, Sugarbakers should have a good claim under § 2-314.

As for the warranty of fitness, clearly Dilbert & Co. knew the particular purpose to which Sugarbakers would put both the custom software and the DY2KS computer at the time Dilbert & Co. agreed to sell the DY2KS. Moreover, Dilbert & Co. knew at the time of contracting that Sugarbakers was relying on Dilbert & Co.’s particular expertise to select or furnish the appropriate hardware on which to run the custom software. So, it would seem that the implied warranty of fitness, likewise, applies to the computer. However, “‘particular purpose’ ... envisages a specific use by the buyer which is peculiar to the nature of [the buyer’s] business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.” § 2-315 cmt. 2. While Dilbert stated that the DY2KS was “specially designed for graphics software,” he did not state that it was specially designed to run the customized software he had created for Sugarbakers. Many computers have special characteristics that enable them to run graphics software. The DY2KS may have been able to run any number of graphics software applications well. It does not seem that the purpose for which Sugarbakers bought the DY2KS, at Dilbert’s suggestion, was sufficiently “particular” to give rise to a warranty of fitness under § 2-315.

Sugarbakers should also have a viable claim for breach of express warranty under § 2-313. The warranty card expressly warranted the computer against defects, other than those caused by third-party software. The custom software was designed by the seller of the computer, Dogbert & Co.; therefore, it is not “third party” software. In addition, Dilbert & Co. represented before Sugarbakers purchased the DY2KS that it was “specially designed for graphics software.” That statement may have formed part of the basis of the bargain.

D. Now, assume that Dilbert & Co.’s manufacturing facility that produced the DY2KS computer is located in Cabo San Lucas, Mexico. Mexico is a signatory of the CISG. Would the parties’ contract be governed by the CISG? Please explain.

Article 1(1)(a) limits the CISG’s application to, *inter alia*, contracts for the sale of goods between Contracting States. Both the U.S. and Mexico are Contracting States. Therefore, this transaction *could* be governed by the CISG. However, unless Sugarbakers knew about the Mexican factory at the time it ordered the chairs, this contract should not be covered by the CISG. In a case where a party has more than one place of business, the place of business is that “which has the closest relationship to the contract and its performance, having regard to the circumstances *known to or contemplated by the parties at any time before or at the conclusion of the contract.*” Art. 10. Here we would want to ask what Sugarbakers knew, at the time of contract formation, about the location of the factory where the DY2KS computer was going to be manufactured. Article 1(2) reinforces the significance of Sugarbakers’ knowledge about the Mexican factory at the time of contract formation by providing that “[t]he fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.” Thus, if Sugarbakers had no reason to know about the Mexican factory, this contract should not be covered by the CISG.

What about the fact that the contract was for both goods (the computer) and services (the custom software)? If this is deemed a “mixed” contract (goods and services), Article 3(2) talks about “preponderant purpose.” Recall the cases we discussed involving goods and services.