

Advanced Contracts (Sales and Leases)
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Sample Exam Questions - Set #2

CAVEATS: These questions are examples only. They cover only material primarily from the second half of the course; and, thus, are not representative of the make-up of a final exam. These questions assume familiarity with all of the assigned materials. These questions are also of varying degrees of difficulty. On the real exam, some would be worth relatively more points and some relatively fewer to reflect this.

1. K&T, Inc., (“K&T”) is the manufacturer of the MM-180, a computer-controlled machine tool capable of performing automatically a series of machining operations on metal parts. Master Engravers, Inc., (“Masters”) manufactures and engraves component parts for industrial application.

In response to a proposal from K&T, Master issued a purchase order for the MM-180. The order was promptly acknowledged and accepted by K&T. The purchase price was \$167,000. The agreement between the parties included the following provisions:

12. **WARRANTY, DISCLAIMER, LIMITATION OF LIABILITY AND REMEDY:** Seller warrants the products furnished hereunder to be free from defects in material and workmanship for the shorter of (i) twelve (12) months from the date of delivery * * * or (ii) four thousand (4,000) operating hours.

* * *

14. THE WARRANTY EXPRESSED HEREIN IS IN LIEU OF ANY OTHER WARRANTIES EXPRESS OR IMPLIED INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND IS IN LIEU OF ANY AND ALL OTHER OBLIGATIONS OR LIABILITY ON SELLER’S PART. UNDER NO CIRCUMSTANCES WILL SELLER BE LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES, OR FOR ANY OTHER LOSS, DAMAGE OR EXPENSE OF ANY KIND, INCLUDING LOSS OF PROFITS ARISING IN CONNECTION WITH THIS CONTRACT OR WITH THE USE OR INABILITY TO USE SELLER’S PRODUCTS FURNISHED UNDER THIS CONTRACT. SELLER’S MAXIMUM LIABILITY SHALL NOT EXCEED AND BUYER’S REMEDY IS LIMITED TO EITHER (i) REPAIR OR REPLACEMENT OF THE DEFECTIVE PART OF PRODUCT, OR AT

SELLER'S OPTION, (ii) RETURN OF THE PRODUCT AND REFUND OF THE PURCHASE PRICE, AND SUCH REMEDY SHALL BE BUYER'S ENTIRE AND EXCLUSIVE REMEDY.

Both of the foregoing provisions were located on the front page of the standard form contract executed by the parties.

K&T delivered the MM-180 on June 1, 2000. At the time of delivery, Master's engineers inspected the machine. It appeared to be satisfactory with the exception of components that did not appear to be properly sized or placed. The K&T representatives assured Master's engineers that the sizing and placement of these components would not negatively impact the MM-180's performance capabilities. On June 8, 2000, Master paid the full purchase price for the machine.

A week after Master paid the purchase price, the machine began to malfunction. In fact, over the next several weeks, the MM-180 malfunctioned frequently, and was inoperable from 40% to 50% of the time available for its use. This degree of "downtime" is substantially more than the industry average of five percent "downtime" for comparable machines.

In addition, between June 14, 2000 and December 1, 2000, K&T made 13 service calls in attempting to repair the machine. Certain of these calls related specifically to replacing improperly sized and placed components. These and other repair efforts were able to reduce the MM-180's "downtime" to between 25 and 40% of the time available for its use. While additional repairs may further reduce the "downtime," it is clear that repairs will not bring the machine close to the five percent industry average.

As a result of defects in the MM-180 and the resulting "downtime," K&T lost profits on unfilled customer orders.

Consequently, on December 1, 2000, Master's president called K&T's president and stated as follows: "the MM-180 is a disaster and we're getting out of this deal." K&T's president replied, "we are certain the problem can be cured. We just need a little more time." "No, you've had all the time we're going to give you" was the response from Master's president.

After the December 1 conversation, the parties did not communicate until February 3, 2001 when Master returned the MM-180 to K&T. Between the December communication and February 3, Master continued to use the MM-180 notwithstanding its problems. The evidence reveals that Master's use during this period was occasioned by its inability to obtain a replacement machine and its desire to minimize its rapidly increasing lost profits.

- A. Assume the agreement does not contain paragraphs 12 and 14. Does the UCC give Master the right to return the MM-180 to K&T and seek damages?
- B. Assume the agreement does contain paragraphs 12 and 14. What remedial options, if any, are available to Master?

2. In *Cereo v. Takigawa Kogyo Co.*, 676 N.Y.S.2d 364 (N.Y. App. Div. 1998), the Plaintiff (Cereo) was injured while repairing a machine with a leaky air line. When someone turned off the power at an operating panel, a pneumatically controlled roller returned to an “up” position and crushed plaintiff’s foot. The machine that injured the Plaintiff had been modified by defendant Reliance prior to the Plaintiff’s injury. Plaintiff sued Reliance, among others, claiming Reliance had negligently redesigned the machine’s operating panels, by failing to install lock-out devices that would have prevented the power from being shut off while the Plaintiff was working on the machine. Reliance moved for summary judgment alleging that it performed the modification pursuant to a subcontract with its co-defendant Fordees, who had sold the machine to Cereo’s employer; and, therefore, that it was not in privity with Plaintiff, and that Plaintiff could not sue it for breach of warranty. Applying New York’s version of the Uniform Commercial Code, the court of appeals denied Reliance’s motion for summary judgment, holding that “[p]rivity is not required in a personal injury action for breach of express or implied warranty.”

- A. Assuming that the quoted passage accurately describes the full extent to which privity was not required under New York’s UCC at the time the case was decided, what version of § 2-318 did New York law most closely resemble at the time the case was decided?
- B. Same facts as “A,” except that the machine belonged to Cereo’s brother, and Cereo was working on the machine in his brother’s garage when he was injured.
 - 1. Would Reliance be entitled to summary judgment applying the same provision of the New York UCC? If so, why? If not, why not?
 - 2. Would Reliance be entitled to summary judgment applying the most restrictive (*i.e.*, least “plaintiff-friendly”) version of the same UCC provision?
- C. Same facts as “A,” except that Reliance’s contract with Fordees expressly disclaimed “any and all warranties not expressly set forth herein.” If the contract included no express warranties about the machine’s safety, should the inclusion of this disclaimer change the court’s ruling on Reliance’s motion for summary judgment? If so, why? If not, why not?
- D. Same facts as “A,” except that Reliance’s contract with Fordees stated that “any and all warranties expressed herein or implied hereby extend only to the purchaser of this machine.” Should the inclusion of this disclaimer change the court’s ruling on Reliance’s motion for summary judgment? If so, why? If not, why not?

3. Seller, whose place of business is Boston, contracted to sell 80 boxes of clothing to Buyer, whose place of business is Las Vegas. The price term in the contract was “\$1,800 FOB Las Vegas.” Seller contracted with Interstate Freight to ship the boxes to Buyer. Interstate picked the boxes up from Seller’s factory and transported them to Interstate’s terminal, where they would be loaded on a truck carrying shipments for several buyers in Nevada. Before the boxes could be loaded on the truck, they were destroyed when a fire broke out at the terminal.

- A. Is Buyer obligated to pay the \$1,800?
- B. How would your answer to Part “A” differ if the delivery term in the contract was “FOB Boston”?
- C. What if the fire that broke out at Interstate’s terminal was intentionally set by an employee of Interstate?
- D. What if the fire that broke out at Interstate’s terminal was intentionally set by an employee of Seller?

4. 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.

Assuming that Monica’s sale to Phoebe constituted a breach of her contract with Chandler and that

- 1. Monica can acquire another 100 crates of mangoes in time to deliver them to Chandler by August 8th,
- 2. Chandler can purchase replacement mangoes for delivery on or before August 1st from another seller, Ross, for \$7.00 per crate (including delivery),
- 3. the market price of mangoes on July 6th was \$6.50 per crate,
- 4. the market price of mangoes on August 1st will be \$7.00 per crate, and
- 5. Chandler sells 50 crates of mangoes per week to his customers at a price of 3 for \$1,

what remedy or remedies do/does Article 2 afford Chandler against Monica? Please explain.

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. Assuming that Article 2 governs this transaction and that Dilbert & Co. breached one or more implied or express warranty(-ies), what damages might Sugarbakers be entitled to recover and why?
- B. Assume, instead, that this transaction is governed by the CISG, and that Dilbert & Co. breached one or more warranty(-ies) recognized by the CISG, what remedy or remedies would the CISG afford Sugarbakers against Dilbert & Co.? Please explain.