Course Introduction

I. Introduction to the Exchange of Goods

A. Why Do People Buy and Lease Goods?: Division of labor and resources; benefits of specialization.

B. How Do People Buy and Lease Goods?

1. From Barter to Sale: Exchange of goods/services for goods/services vs. sale of goods/services for money earned by the buyer/lessee from providing her own goods/services to a third party.

2. From Sales to Leases: Transfer of ownership vs. transfer of use.

C. How Do We Govern Sales and Leases of Goods?

1. Formation Rules: Rules that specify the requisites of a valid sale or lease contract (e.g., offer, acceptance, consideration). For example:

   a. §§ 2-204 & 2A-204: A contract for the sale or lease of goods

      i. may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such contract;

      ii. may be found even though the moment of its making is undetermined; and

      iii. may be formed even though one or more terms are left open, as long as the parties intended to make a contract and there is a reasonably certain basis for giving a remedy.

   b. § 2-207(1): A definite and seasonable expression of acceptance ... operates as an acceptance even though its states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
c. **Firm Offers**: At common law, an enforceable option requires separate consideration to support the option. *No separate consideration* is required to make an option binding under Articles 2 & 2A if the option is given by a merchant, in writing, spelling out the irrevocability of the offer, §§ 2-205 & 2A-205.

2. **Validation Rules**: Rules that specify the requisites of a legally enforceable sale or lease contract. Examples:

   a. “Seal,” “Attestation,” and similar requirements; and

   b. **Statutes of Frauds**: A writing signed by the party against whom enforcement is sought must evidence certain contracts in order for a party to enforce the contract.

      i. § 2-201: Contracts for the sale of goods for $500 or more.

         ♦ The 2003 amendments raise the minimum amount required to trigger § 2-201 to $5,000. § R2-201(1).

      ii. § 2A-201: Contracts for the lease of goods, with total lease payments of $1,000 or more.

3. **Suppletive Rules (“Gap Fillers”)**: Rules that supplement “incomplete” transactions, in the absence of contrary express language.

   a. Examples:

      1). “Open Price” Term, § 2-305;

      2). **Delivery in One or More Installments**, § 2-307;

      3). **Place of Delivery**, § 2-308;

      4). **Time for Performance**, § 2-309(a);

      5). **Contract Termination**, § 2-309(b)-(c);

      6). **Time for Payment**, § 2-310(a), (c) & (d);

      7). **Implied Warranties**

         a). **Good Title/Noninfringement**, §§ 2-312 & 2A-211;

         b). **Merchantability**, §§ 2-314 & 2A-212;

         c). **Fitness for a Particular Purpose**, §§ 2-315 & 2A-213;
8). Delivery Costs, §§ 2-319 & 2-320; and


b. One of the most significant differences between contracts governed by the UCC and those governed by common law is the extent to which the UCC implies terms and conditions into the contract

1). **without regard to whether the contract is ambiguous or not integrated** as written, and

2). as if those implied terms were an explicit part of the parties’ agreement.

c. However,

1). implied terms may be written “out” of the contract, § 1-102(3) – that is to say, express terms “trump” implied terms, *see also* §§ 1-205(4) & 2-208(2); § R1-303.

2). A UCC “gap filler” may also be “trumped” by

a). the parties’ **course of performing** the contract at issue, §§ R1-303(a) & 2-208(1);

b). the parties’ **course of dealing** with respect to prior agreements, §§ R1-303(b) & 1-205(1) & (3);

c). a **usage of trade or custom** common to the particular industry and/or locale, §§ R1-303(c) & 1-205(2) & (5);

3). **Hierarchy of Terms**: 

a). **Express Terms** trump

b). **Course of Performance**, which trumps

c). **Course of Dealing**, which trumps

d). **Usage of Trade**, which trumps

e). **Terms Implied as a Matter of Law**, which trump

f). **Consistent Additional Terms**, §§ R1-303(e); 1-205(4) & 2-208(3).
4. **Interpretive Rules**: Rules that help resolve any apparent ambiguity in the terms of and/or the implementation of an agreement. Examples:

   
   b. **Course of Dealing**, §§ R1-303(b) & 1-205(1) & (3);
   
   c. **Usage of Trade**, §§ R1-303(c) & 1-205(2) & (5); and
   
   d. **Course of Performance**, §§ R1-303(a) & 2-208(1).

5. **Rules of Performance and Breach**: Rules that dictate what will and will not constitute nonperformance by one party sufficient to give rise to a claim of breach by the other party, or that prescribe what actions the innocent party may or must take in order to be entitled to recover from the nonperforming party. Examples:

   a. **Duty of Good Faith**, §§ R1-304; 1-203 & 2-103(1)(b);
   
   b. **Exclusive Dealing and Duty of Best Efforts**, § 2-306;
   
   c. **Acceptance, Rejection, and Revocation of Acceptance**, §§ 2-601 to -608 & 2A-509 to -517;
   
   d. **Adequate Assurances of Performance in Due Course**, §§ 2-609 & 2A-401;
   
   e. **Anticipatory Repudiation**, §§ 2-610 to -611 & 2A-402 to -403;
   
   f. **Performance and Breach of Installment Contracts**, § 2-612;
   
   g. **Destruction/Deterioration of Goods**, § 2-613;
   
   h. **Substituted Performance**, §§ 2-614 & 2A-404; and
   

6. **Remedial Rules**: Rules articulating (and allocating) the consequences of nonperformance by one party to a sales or lease contract.

   a. **Seller’s Remedies**, §§ 2-702 to -710;
   
   b. **Buyer’s Remedies**, §§ 2-711 to -717;
   
   c. **Lessor’s Remedies**, §§ 2A-523 to -530
   
7. **Rules of Disclaimer**: Rules describing how parties can contract “around” the foregoing default rules. Examples:

   a. **§§ R1-302 & 1-102(3)**: All provisions of the UCC other than those requiring good faith, diligence, reasonableness (including, *inter alia*, the prohibition on unconscionability), and due care are subject to variation by agreement between the parties unless a provision specifically states otherwise.
   
   b. **§§ 2-316 & 2A-214**: Exclusion/ modification of implied warranties.
   
   c. **§§ 2-718 & 2A-504**: Liquidated damages.
   
   d. **§§ 2-719 & 2A-503**: Other contractual limitations on remedies.

D. **What Effects Do These Types of Rules Have?**

1. **Formation**: Bringing buyers/lessees and sellers/lessors together and enabling them to create legally enforceable transfers of ownership/use.

2. **Validation**: Memorializing the agreement between the buyer/lessee and the seller/lessor both to provide notice to the rest of the world and in the event of a subsequent dispute between the parties.

3. **Gap-Filling**: Providing standard terms that govern the transfer of ownership/use unless the buyer/lessee and seller/lessor chose to modify, replace, or disclaim the standard terms.

   ♦ Extra-UCC “gap fillers” can be found in:

   ♦ applicable common law;
   
   ♦ specific state or federal statutes; and
   
   ♦ industry-standard form contracts.

4. **Interpretation**: Providing standardized and predictable rules for construing and interpreting sales and lease contracts, both to facilitate proper performance by the parties and to resolve disputes that arise in the case of alleged non- or malperformance.

5. **Performance**: Facilitating the transfer of ownership/use.

6. **Enforcement**: Providing means to enforce sales and lease agreements and to remedy the breach of those agreements.

7. **Disclaimer**: Providing parties the maximum freedom of contract while also providing, at a minimum, good faith and fair dealing.
E. **Why Do We Regulate Sales and Leases?**

1. **Order:** “Rules specifying *how* to ‘make it legal’ are fundamental. *Without them, private ordering under law could not exist.*”

2. **Predictability**
   a. **Of the Rules Themselves:** Rules must be “clear, definite, accessible, and ascertainable, in advance of deals.”
   b. **Of the Outcome of Their Application:** Standardized rules are useless unless they are applied in a standard manner by the courts.
   c. **Of Their Use in Day-to-Day Business:** Once standardized, the rules can be embodied in the forms that businesses use to conduct sales and leasing transactions.

3. **Preventing and Resolving Disputes:** Predictable rules
   a. **guide parties** as they contemplate and enter into transactions;
   b. **facilitate counseling** of parties, both in anticipation of a transaction and in response to some perceived failure in the transaction;
   c. **enable parties to settle** their differences without resort to courts; and, if all else fails, and
   d. **guide courts** in resolving those disputes the parties are unable to resolve themselves.

4. **Protecting Those Who “Cannot Protect Themselves”**
   a. **Parties With Inferior Bargaining Power:** It has been suggested that the “core task” of commercial law is “to stake out the necessary minimum area of protection for parties whose bargaining power is inferior.” Examples:
      ♦ **Duty of Good Faith**; and
   b. **Third Parties:** Many commercial transactions “impinge directly or indirectly on the interests of third parties not privy to the transaction at hand.”
II. Sources of Sales and Lease Law

A. Uniform Commercial Code (UCC) – primarily Articles 1, 2 & 2A, though Articles 5 & 7 occasionally come into play;


C. Uniform Electronic Transactions Act (UETA) – supplements UCC Articles 1, 2 & 2A (and, perhaps, the CISG) when the parties to a sales or lease contract have consented to deal with one another through electronic means;

D. Electronic Signatures in Global and National Commerce Act (E-SIGN) – supplements UCC Articles 1, 2 & 2A (and, perhaps, the CISG), whether or not the parties to a sales or lease contract have consented to deal with one another through electronic means, unless preempted by UETA or other state statute, regulation, or rule of law satisfying 15 U.S.C. § 7002(a)(2).

E. The Role of Common Law


   ♦ Whether sales of non-goods personal property are governed by UCC Article 1 or by common law depends on which version of Article 1 applies.

2. Roles of the Common Law in “UCC Disputes”

   a. Definitional Aid: In cases where the UCC is merely codifying existing law, common law can help define terms that the UCC has left undefined (e.g., “breach,” “offer,” “possession”).

   b. Explicit Supplement: Some UCC sections and Official Comments explicitly state that the provision in question is not intended to affect some related common-law doctrine (e.g., § 2-318 cmt. 3: “Alternative A is neutral and is not intended to enlarge or restrict the developing case law” regarding third party warranties).

   c. Implicit Supplement: Except where they are clearly superseded by the UCC, “the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.” §§ R1-103(b) & 1-103.
III. The UCC in a Nutshell

A. Article 1: General Provisions – Governs all transactions in personal property, unless displaced by a more specific provision in the UCC.

1. Scope
   a. Pre-revised Article 1
      i. governed all sales of (and, arguably, all transactions in) personal property not otherwise governed by another Article of the Code; and
      ii. supplemented the specific rules of the other Articles for those transactions governed by another Article.
   b. Revised Article 1 only does the latter. § R1-102.

2. Purpose and Construction
   a. Construction: Parties and courts should construe and apply the UCC “to promote its underlying purposes and policies.” §§ R1-103(a) & 1-102(1).
   b. Purposes and Policies: The UCC is intended to
      i. simplify, clarify, and modernize commercial law, §§ R1-103(a)(1) & 1-102(2)(a);
      ii. permit the continued expansion of commercial practices through custom, usage, and agreement of the parties, §§ R1-103(a)(2) & 1-303; 1-102(2)(b) & 1-205; and
      iii. make uniform the law among the various jurisdictions covered by the Code, §§ R1-103(a)(3) & 1-102(2)(c).
   c. Remedies: Courts shall “liberally administer” UCC remedies to
      i. put the aggrieved party in as good a position as if the other party had fully performed; provided that
      ii. a court may not aware consequential, special, or exemplary damages, unless specifically provided for by the parties’ contract, a specific UCC provision, or other rule of law. §§ R1-305 & 1-106(1).
2. **Freedom of Contract**
   a. **Power to Vary:** Parties may vary the UCC’s provisions, as they apply to a particular transaction, except that
      i. parties **may not disclaim** their obligations of **good faith, diligence, reasonableness, and care; but**
      ii. they **may agree** to the **standards by which their performance of those obligations is judged,** as long as the agreed standards are **not manifestly unreasonable.** §§ R1-302 & 1-102(3).
   b. **Contractual Choice of Law:** Parties are free to choose the law of a particular jurisdiction to govern their transactions and any disputes arising out of it, as long as the chosen state bears a reasonable relationship to the transaction. § 1-105.
      ♦ § R1-301 purports to eliminate the requirement that the chosen state bear any relation to the parties or the transaction. However, each of the 14 states that has enacted Revised Article 1 to date has rejected § R1-301 and retained § 1-105.
   c. **Waiver:** An aggrieved party may discharge any claim or right arising out of an alleged breach, in whole or in part, without consideration, by a signed writing/authenticated record. §§ R1-306 & 1-107.

3. **Duty of Good Faith and Fair Dealing:** “Every contract or duty within [the UCC] imposes an obligation of good faith in its performance or enforcement.” §§ R1-304 & 1-203.
   a. § 1-201(19): “Good faith” means “honesty in fact in the conduct or transaction concerned.”
   b. § 2-103(1)(b): “‘Good faith’ **in the case of a merchant** means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”
   c. § R1-201(b)(20) eliminates the distinction between merchants and non-merchants, defining “good faith” in all transactions governed by, **inter alia,** Article 2 as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”
4. **Reservation of Rights**: “A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party [ostensibly not in accord with the terms of or the party’s understanding of the original agreement] does not thereby prejudice the rights reserved. Such words as ‘without prejudice,’ ‘under protest’ or the like are sufficient.” §§ R1-308(a) & 1-207(1).

B. **Article 2: Sales** – Governs contracts for the immediate and future sale of goods.

C. **Article 2A: Leases** – Governs contracts for the lease of goods.

D. **Article 3: Commercial Paper** – Deals with the negotiability, negotiation, rights and liabilities of parties to, and the enforcement and discharge of commercial paper, including drafts, checks, certificates of deposit, and promissory notes, except for those instruments specifically governed by Article 5, 7, or 8.

E. **Article 4: Bank Deposits and Collections** – Deals with checks and other demand instruments that are drawn on a bank and collected through the banking system.

F. **Article 4A: Funds Transfers** – Deals with commercial payment orders directing the transfer of funds from one bank account to another, except where either the transferor or transferee is a consumer.

G. **Article 5: Letters of Credit** – Deals with transactions in which a bank issues a letter to a seller providing that the bank will, under certain conditions, honor drafts drawn by the seller on the buyer’s account for payment of the purchase price owed by the buyer.

H. **Article 6: Bulk Sales** – Deals with, e.g., the sale of a business’ entire stock or inventory.

   ♦ Article 6 has been repealed from the “Official” UCC. Some states still have it on the books, others have repealed it as well.

I. **Article 7: Documents of Title** – Governs transactions involving a warehouse receipt or a bill of lading, according to the terms of which goods are entrusted to a bailee for storage or delivery.

J. **Article 8: Investment Securities** – Largely irrelevant, in light of superseding federal and state securities regulations, this Article deals with the negotiability of certain bonds, stocks and other securities, and the rights and liabilities of transferors and transferees.

K. **Article 9: Secured Transactions** – Governs the creation, perfection, priority, and enforcement of security interests in personal property.