I. **UCC Article 2**: Article 2 applies to both *sales of goods* and *contracts for the sale of goods*. § 2-102.

A. **Basic Terminology**

1. **“Sale”**: “[T]he passing of title from the seller to the buyer for a price.” § 2-106(1).

2. **“Goods”**: “[A]ll things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action”; as well as, *inter alia*, “unborn young of animals,” “growing crops,” and “things attached to realty as described in” § 2-107. § 2-105(1).

3. **“Contract for sale”** includes both a present sale “in exchange for future payment” “and a contract to sell goods at a future time” in exchange for present or future payment. § 2-106(1).

   a. **“Contract”**: “[T]he total legal obligation which results from the parties’ agreement as affected by this Act and any other applicable rules of law.” §§ R1-201(b)(12) & 1-201(11).

   b. **“Agreement”**: “[T]he bargain of the parties *in fact* as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance ....” §§ R1-201(b)(3) & 1-201(3).

   c. **“Course of Performance”**: A sequence of conduct between the parties to a particular transaction where (1) the agreement involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the first party’s performance, *accepts or acquiesces in it* without objection.” §§ R1-303(a) & 2-208.

   d. **“Course of Dealing”**: A sequence of prior conduct between the parties “establishing a common basis of understanding for interpreting their expressions and other conduct” with regard to the present transaction. §§ R1-303(b) & 1-205.
e. “Usage of Trade”: A “practice or method of dealing having such regularity of observance in a place, vocation, or trade so as to justify an expectation that it will be observed with respect to the transaction in question.” §§ R1-303(c) & 1-205(2).

B. “Mixed” Contracts

1. **Basic Issue**: Article 2 provides no clear direction on how to deal with “mixed” contracts – that is, contracts which provide for

   a. goods and *services* (e.g., a contract to build and maintain a custom-made computer system),

   b. goods and *other forms of personal property* (e.g., a contract to sell the inventory and accounts of a going business concern), or

   c. goods and *real property* (e.g., a contract to sell a mobile home and the lot on which is sits).

2. **Basic Approaches**: Courts generally apply one of two tests:

   a. **“Predominant Purpose” Test**: What was the predominant purpose of the underlying transaction; that is, what was the Plaintiff most interested in buying?

      i. **If goods**, then Article 2 *applies to the whole transaction* (including the service part of it).

      ii. **If non-goods**, then Article 2 *does not apply to any part of the transaction*.

   b. **“Gravamen of the Action” Test**: What part of the underlying transaction gives rise to the Plaintiff’s complaint?

      i. **If goods**, then Article 2 *applies to the complaint*, even if the predominant purpose of the transaction was to sell or buy non-goods.

      ii. **If non-goods**, then Article 2 *does not apply to the complaint*, even if the predominant purpose of the transaction was to sell or buy goods.

   c. **Obvious Problem**: If we use the *gravamen* test, and more than one complaint arises as a result of the transaction, we might apply Article 2 to one complaint but not the other.
C. Special Case: “Merchants”

1. § 2-104(1): A “merchant” is a person who
   a. *deals* in goods of the kind or
   b. otherwise by his occupation *holds himself out* as having knowledge or skill peculiar to the practices or goods involved in the transaction or
   c. to whom such knowledge or skill may be attributed by his *employment of an agent or broker or other intermediary* who by his occupation holds himself out as having such knowledge or skill

   ♦ In any particular transaction, the buyer, the seller, or both may be a merchant.

2. Consequences of Being a Merchant (see § 2-104 cmt. 2)
   a. Contrary to popular misconception, being a merchant or not being a merchant *has nothing to do with whether Article 2 applies to a particular transaction*.
   b. Being a merchant does, however, subject a party to an Article transaction to certain rules that do not apply to non-merchants, including
      i. “Merchant” rules regarding general business practices, such as answering the mail (§ 2-201(2)), giving firm offers (§ 2-205), and the like, as well as the duty of good faith and fair dealing (§ R1-304; § 1-203 & 2-103(1)(b)), and the like, apply to “almost every person in business.”
      ii. “Merchant” warranties (§ 2-314) apply only to merchants who “deal in goods of the kind.”
II. **UCC Article 2A:** Article 2A governs “[a]ny transaction, regardless of form, that creates a lease.” § 2A-102.

A. **Basic Issues**

1. **“Lease”:** “[A] transfer of the right to possession and use of goods for ... consideration”; but not a sale, sale on approval, return, or security interest. § 2A-103(1)(j).

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Lessor (lender)  ↓
↑               ↓
lease          goods & financing
↑               ↓
↑               ↓
Lessee (borrower)
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2. The major distinction between a sale and a lease:
   a. If you buy something, you **own** it – even though you may still owe money on the item.
   b. If you lease something, the original owner is **still** the owner. The lessee has the right to use, but not to the ownership rights.

3. §§ R1-203 & 1-201(37): Whether a transaction is a “true lease” or a “disguised sale” is determined, in part, by
   a. whether the **lessee can terminate** her obligations under the lease;
   b. whether the lease term is for the **full “economic life”** of the good(s) – that is to say, at the end of the lease, the good(s) will have little or no market value; and
   c. whether the agreement gives the “lessee” an **option to purchase** the leased good(s) at the end of the lease term for **little or no additional consideration**; and

   ♦ **Revised § 1-203,** while resolving some of the structural problems of current § 1-201(37), leaves the substantive law unchanged.

4. **Economic Realities Test:** Considers the likelihood, at the time the transaction is entered into, that the lessor will receive the goods back when the goods still have meaningful economic life. If there is a reasonable likelihood the lessor will retain some residual interest in the goods, the transaction is probably a true lease. If not, the transaction is a disguised sale intended for security.
B. Types of Leases Identified in Article 2A

1. "Consumer Lease": a lease made by someone in the business of leasing to an individual for the individual’s personal use. § 2A-103(1)(e).
   - The UCC does not condition “consumer lease” status on the amount of the lease. However, some jurisdictions have imposed “caps” so that, for instance, a lease of a Ferrari will not be treated as a “consumer lease” because it would likely exceed the maximum of lease payments.

2. "Finance Lease": Subject to the conditions imposed by § 2A-103(1)(g)(iii), any lease made by a lessor who
   a. does not select, manufacture, or supply the goods; and
   b. acquires from a third party, in connection with the lease, title or the right to possess and use.

   ![Diagram of lease transaction]

   OR

   ![Diagram of lease transaction]

C. Effect of Other Laws

1. Article 9 does not apply to leases because the lessor is not a lender and the lessee does not have the legal right to encumber the lessor’s property.

2. Leases subject to Article 2A may also be subject to state certificate of title laws and consumer protection laws; and, where there is an apparent conflict between Article 2A and a state’s certificate of title and/or consumer protection laws, the latter “trump” Article 2A except that Sections 2A-105, 2A-304(3), and 2A-305(3) “trump” any other statute.
III. The U.N. Convention on Contracts for the International Sale of Goods (CISG)

A. General Rule: The CISG governs contracts for the sale of goods between a resident of the U.S. and a resident of another signatory country.

♦ As of January 1, 2006, the United States and 65 other countries had acceded, accepted, approved, ratified, or succeeded to the CISG: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Korea, Kyrgyzstan, Latvia, Lesotho, Liberia (effective Oct. 1, 2006), Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation, St. Vincent & Grenadines, Serbia & Montenegro, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, Uruguay, Uzbekistan, and Zambia.

B. Exceptions: The CISG does not apply to a contract for the sale of goods if

1. the foreign buyer or seller’s place of business or “habitual residence” is in a country that has not ratified the CISG, Arts. 1(1)(a) & 10(b);

2. even though the foreign buyer or seller’s place of business or habitual residence is in a country that has ratified the CISG, the buyer or seller neither knew nor had reason to know that it was dealing with a party whose place of business or habitual residence was in a foreign country, Art. 1(2);

3. the buyer is purchasing the goods for personal, family, or household use, unless the seller neither knew nor had reason to know at any time prior to or at the conclusion of the contract of the buyer’s intended use, Art. 2(a);

4. the sale is otherwise excluded by Art. 2(b)-(f);

5. the buyer of specially-manufactured goods undertakes to supply the seller with “a substantial part of the materials necessary” to manufacture the goods, Art. 3(1); or

6. the preponderant part of the seller’s obligations consists of providing labor or other services, Art. 3(2).

C. Freedom of Contract

1. Parties to a contract that would otherwise be governed by the CISG may contractually agree not to be governed by it in part or in whole, Art. 6, subject to certain limitations set forth in Article 12.
2. By the same token, parties to a contract that would otherwise not be governed by the CISG may contractually agree to be governed by it in part or in whole, except to the extent that the CISG may conflict with some inalienable domestic law provision.

D. **Resolving Conflicts Between the CISG and the UCC**: The CISG “trumps” the UCC in cases where the CISG applies.

E. **Resolving Conflicts Between Domestic and non-CISG Foreign Law**: While this is a potentially sticky issue, given that a handful of the U.S.’s major trading partners have not ratified the CISG, in the absence of some specific foreign law, we will err on the side of oversimplifying and apply the UCC or common law, whichever is appropriate.

IV. **The Uniform Electronic Transactions Act (UETA)**

A. **Basic Scope**: UETA applies to “electronic records and electronic signatures relating to a transaction” governed, *inter alia*, by common law and UCC Article 2. UETA § 3(a) & (b)(2).

♦ UETA does not specifically indicate whether it applies to contracts governed by the CISG. However, § 3(a) provides that, unless excluded by § 3(b), UETA applies to all transactions, and contracts governed by the CISG are not among the classes of contracts expressly excluded by § 3(b). In any event, because the CISG does not have a statute of frauds, UETA’s application may be more a matter of academic, rather than practical, interest.

B. **“Opting In”**: UETA only applies to transactions “between parties each of which has agreed to conduct transactions by electronic means.” UETA § 5(b).

♦ Whether the parties agree to transact electronically “is determined from the context and surrounding circumstances, including the parties’ conduct.” UETA § 5(b).

♦ Thus, for example, if S faxed her offer to B, and B e-mailed his acceptance to S, the parties will be deemed to have agreed to conduct their transaction by electronic means. *See* UETA §§ 2(5) & 5 cmt. 4.

C. **Procedure vs. Substance**: Unlike common law, UCC Article 2, or the CISG, UETA is not intended to be a comprehensive body of law governing electronic transactions. Rather, it is intended to facilitate electronic transacting across most substantive bodies of law. *See* UETA § 3(d).
D. Those states that have not enacted UETA – and, perhaps, those contracts otherwise governed by the law of a state that has enacted UETA but in which both parties have not consented to transact electronically – are subject to the federal Electronic Signatures in Global and National Commerce Act (“E-SIGN”), which has much the same effect as UETA.


V. The Uniform Computer Information Transactions Act (UCITA)

A. General Rule: Applies to “computer information transactions.” § 103(a).

1. “Computer information transaction” means “an agreement … to create, modify, transfer, or license computer information …” § 102(a)(11).

2. “Computer information” means “information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer … includ[ing] a copy of the information and any documentation or packaging associated with the copy.” § 102(a)(10).

3. “Computer” means “an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.” § 102(a)(9).

B. UCITA does not apply to, inter alia,

1. transactions governed by any part of the UCC other than Articles 1, 2, 2A & 9 (and yields to Article 9 in the case of conflict, § 103(c) & (d)(8); or

2. transactions in which the provision of information in the form of computer information is completely gratuitous and incidental and does not affect either party’s motivations for entering into the transaction, § 103(d)(6).

C. Mixed Contracts

1. General Rule - Goods: “If a transaction includes computer information and goods,” UCITA “applies to the part of the transaction involving computer information ….” § 103(b)(1).

2. Exceptions - Imbedded Program: “However, if a copy of a computer program is contained in or sold or leased as part of a good,” UCITA “applies to the copy and the computer program only if

   a. the goods are a computer or computer peripheral; or
b. giving the buyer or lessee of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type sold or leased.” § 103(b)(1)(A)-(B).

3. General Rule - Non-Goods: UCITA “applies to the entire transaction if the computer information … is the primary subject matter, but otherwise applies only to the part of the transaction involving computer information ….” § 103(b)(2).

D. Status of UCITA: As of January 1, 2006, only Virginia and Maryland had adopted UCITA, while Iowa, North Carolina, Vermont, and West Virginia had enacted so-called “bomb shelter” or “shield” statutes designed to prevent UCITA from applying to their citizens. At its August 2003 annual meeting, the National Conference of Commissioners on Uniform State Law (“NCCUSL”) voted to withdraw its support of UCITA – ending the only effective advocacy program for further adoptions.