Chapter 11

**Sales and Lease Contracts**

Answers to Learning Objectives/

Learning Objectives Check Questions

at the Beginning and the End of the Chapter

**Note that your students can find the answers to the even-numbered *Learning Objectives Check* questions in Appendix E at the end of the text. We repeat these answers here as a convenience to you.**

**1A.** ***If a contract involves both goods and services, does the UCC apply?*** It depends on the predominant-factor test. If a court decides that a mixed contract is primarily a goods contract, *any* dispute, even a dispute over the services portion, will be decided under the UCC. If a court decides that a mixed contract is primarily a services contract, then the UCC will *not* apply.

**2A.** ***In a sales contract, if an offeree includes additional or different terms in an acceptance, will a contract result? If so, what happens to these terms?*** Under the Uniform Commercial Code, a contract can be formed even if the offeree’s acceptance includes additional or different terms. If one of the parties is a nonmerchant, the contract does not include the additional terms. If both parties are merchants, the additional terms automatically become part of the contract unless one of the following occurs:

**1.** The original offer expressly limits acceptance to the terms of the offer.

**2.** The new or changed terms materially alter the contract.

**3.** The offeror objects to the new or changed terms within a reasonable period of time.

(If the additional terms expressly require the offeror’s assent, the offeree’s response is not an acceptance, but a counteroffer.) Under some circumstances, a court might strike the additional terms.

**3A.** ***What exceptions to the writing requirements of the Statute of Frauds are provided in Article 2 and Article 2A of the UCC?*** An oral contract is enforceable if it is for (1) goods that are specially manufac­tured for a particular buyer or specially manufactured or obtained for a par­ticu­lar lessee, (2) the goods are not suitable for resale or lease to others in the ordi­nary course of the seller’s or lessor’s business, and (3) the seller or lessor has substantially started to make the goods or has committed to the manufac­ture or procurement of the goods. An oral contract for a sale or lease of goods is en­forceable if the party against whom enforcement of a contract is sought ad­mits in pleadings, testimony, or other court proceedings that a contract was made (but it is limited to the quantity of goods admitted). An oral contract for a sale or lease of goods is enforceable if payment has been made and accepted or goods have been received and accepted.

**4A.** ***If the parties to a contract do not expressly agree when the risk passes and the goods are to be delivered without movement by the seller, when does risk pass?*** If the seller holds the goods and is a merchant, the risk of loss passes to the buyer when the buyer takes physical possession of the goods. If the seller holds the goods and is not a merchant, the risk of loss passes to the buyer on tender of delivery. When a bailee is holding the goods, the risk of loss passes to the buyer when (1) the buyer receives a negotiable docu­ment of title for the goods, (2) the bailee acknowledges the buyer’s right to pos­sess the goods, or (3) the buyer receives a nonnegotiable document of title and has had a reasonable time to present the document to the bailee and demand the goods.

**5A.** ***What law governs contracts for the international sale of goods?*** The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) governs international sales contracts between firms or individu­als located in different countries if the countries of the parties have ratified the CISG (and the parties have not agreed that some other law will govern their contract).

Answer to Critical Thinking Question

**in the Feature**

**Adapting the Law to the Online Environment—Critical Thinking**

***Some argue that if online retailers are required to collect and pay sales taxes in jurisdictions in which they have no physical presence, they have no democratic way to fight high taxes in those places. Is this an instance of taxation without representation? Discuss.*** If federal law requires all online retailers to collect and pay sales taxes even where they have no physical presence, then it essentially is a system of taxation without representation. Some argue that it is antithetical to our federal system, also, which promotes competition among our states for the best economic policies. When a customer buys a product in a store, the cashier does not ask for the customer’s home address. A federal law would hold online sellers to an entirely different standard. Web sites would have to add taxes to a sale based on the shipping destination of the product, which may be neither where the seller nor the buyer resides.

Answers to Critical Thinking Questions

**in the Cases**

**Case 11.1—What If the Facts Were Different?**

***Suppose that Blasini had made no payments under the contract for the sale of the Attic’s assets. How should that circumstance affect the disbursement of the insurance proceeds?*** Clearly, the analysis of who is entitled to the insurance proceeds for the damage to the Attic’s assets in the fire does not end with the determination that Blasini was the owner of those goods. Among the parties with an interest in the goods—the buyer, the seller, and any third parties, such as a lender of the price on the contract—the insurance proceeds should be disbursed according to whom suffered a financial loss due to the damage of the goods in the fire.

If Blasini made no payments on the contract for the sale of the property, the party who would have suffered the greatest financial loss would most likely be the seller.

**Case 11.2—Critical Thinking—Legal Consideration**

***What is Mahendra’s best argument that the forum-selection clause was, in fact, binding on National? Discuss.*** One of Mahendra’s best arguments that the forum-selection clause was binding on National is that UCC 2–207 applies only when additional terms are *added* to an expression of acceptance or a written confirmation of an offer. In this case, the forum-selection clause was included on all of the invoices and “memorandums” that were sent to National. And because there was no contract between the parties until National accepted the diamonds, its retention of the goods created the contract under the terms on the invoices and memorandums, which of course included the forum-selection clause.

**Case 11.3—Critical Thinking—Legal Consideration**

***Why would the seller’s knowledge of the buyers’ limited resources sup­port a find­ing of unconscionability?*** It may be that the court viewed the sell­ers’ knowledge of the buyers’ limited resources as evidence that the defendant’s ap­proach to the transac­tion was knowingly exploitative and overreaching.

Answers to Questions in the Reviewing Feature

at the End of the Chapter

**1A.** ***Scope***

The issue in this question is whether the predominant feature of the contract in the problem is goods or services. Most goods require some related serv­ice—their design, assembly, installation, or manufacture— but the effort and expertise to make a good does not mean that the buyer is buying the service in­stead of the good. The focus is on the buyer’s objective. Does the buyer want a good or a service? To fall under the UCC, the service must be incidental to the buyer’s purpose. In this problem, a court would most likely conclude that the service CCG is providing (customizing software) is incidental to Holcomb’s goal (acquiring an operational Web site).

**2A.** ***Merchant status***

Under the UCC, a merchant is a person who deals in goods of the kind involved in the sales contract. A merchant for one type of goods is not necessarily a mer­chant for another type. Here, the goods in the contract between Holcomb and CCG consist of a Web site, for which Holcomb might not be considered a mer­chant because his business is adult entertainment (arguably a service), not technology.

**3A.** ***Valid contract***

It appears that the parties in this problem have a valid contract under the UCC. The essential terms—price, payment, delivery, duration, and quan­tity—are not left open, but are set out in a signed writing.

**4A.** ***Oral agreement***

This oral agreement would not be enforceable, because its amount would bring it within the Statute of Frauds, which requires that to be enforceable, a con­tract for a sale of goods priced at $500 or more must be in writing and signed by the party against whom enforcement is sought.

Answer to Debate This Question in the Reviewing Feature

at the End of the Chapter

***The UCC should require the same degree of definiteness of terms, especially with respect to price and quantity, as contract law does.*** Contract law requires definiteness sufficient for the parties to ascertain the contract’s essential terms when it is accepted.  The UCC, in its quest to encourage more commerce, went overboard by removing this definiteness requirement.  In so doing, the UCC opened up too many possibilities for fraud and unethical behavior on the part of one of the parties to a sales contract.  Simply requiring that the parties’ actions show an intent to enter into a contract seems like an awfully weak standard.

The UCC was created to make sure that parties to sales agreements carried out those agreements.  The UCC creates a sales contracting environment that promotes exchange rather than one that encourages parties to find ways to back out of sales agreements.  Sometimes, parties to a sales contract truly wish to reach an agreement but do not specify certain elements to the sales contract.  That does not necessarily mean that they weren’t serious about entering into the agreement.

Answers to Issue Spotters

at the End of the Chapter

**1A.** ***E-Design, Inc., orders 150 computer desks. Fav-O-Rite Supplies, Inc., ships 150 printer stands. Is this an acceptance of the offer or a counteroffer? If it is an acceptance, is it a breach of the contract? What if Fav-O-Rite told E-Design it was sending the printer stands as “an accommodation”?*** A shipment of nonconforming goods consti­tutes an acceptance and a breach, unless the seller seasonably notifies the buyer that the nonconform­ing shipment does not constitute an acceptance and is offered only as an accommodation. Thus, since there was no notification in this problem, the shipment was both an accep­tance and a breach.

**2A.** ***Truck Parts, Inc. (TPI), often sells supplies to United Fix-It Company (UFC), which services trucks. Over the phone, they negotiate for the sale of eighty-four sets of tires. TPI sends a letter to UFC detailing the terms and two weeks later ships the tires. Is there an enforceable contract between them? Why or why not?*** Yes. In a transaction between mer­chants, the re­quirement of a writing is satisfied if one of them sends to the other a signed written confirmation that indi­cates the terms of the agree­ment, and the merchant receiving it has reason to know of its contents. If the merchant who receives the confirmation does not object in writing within ten days after re­ceipt, the writing will be en­forceable against him or her even though he or she has not signed anything.

Answers to Questions and Case Problems

**at the End of the Chapter**

**Business Scenarios and Case Problems**

**11-1A. *Additional terms***

The answer falls under UCC 2–207. Bailey is incorrect in claiming that the mod­ifica­tion of carriers is sufficient reason to claim an acceptance was not made. The law states that if the offeree (Bailey) makes a definite expression of accep­tance, a contract is formed even if the terms of acceptance modify the terms of the offer. Therefore, when Bailey re­plied, “I accept your offer,” an ac­ceptance was made even though the acceptance carried with it a modification. Bailey’s second contention is probably correct. Between mer­chants, the addi­tional or modified terms become a part of the contract unless they mate­rially al­ter the contract or one party objects to the modifications within a reasonable time after receiving notice of them. Three weeks after Strike received the accep­tance with the modification, she had still not notified Bailey of her objection to the modifica­tion. Therefore, unless the change of truck lines is a material al­teration (involving cost or availability, for example), the terms of shipment by Yellow Express have become a part of the contract, and Strike is in breach in us­ing Dependable. The concept of good faith, however, permeates the entire UCC. Thus, it should not make a difference if the shirts come by an unauthorized means of transportation as long as (a) they arrive within a reasonable time, (b) they strictly con­form to the contract terms, and (c) it is ob­vious that both parties intended the contract.

**11–2A . Spotlight on Goods and Services—*The Statute of Frauds***

Yes. The contract was valid because the UCC’s Statute of Frauds did not apply. Although the contract involved the provision of goods (food) and services (entertainment and accommodations), the holiday resort package was an overall experience, with the predominant part of the contract delivering services. Therefore, under the predominant-factor test, the contract was primarily for the sale of services and was not governed by the UCC. The food was merely secondary to the holiday event, and the Statute of Frauds did not apply.

**11–3A. Business Case Problem with Sample Answer—*Passage of title***

Altieri held title to the car that she was driving at the time of the accident in which Godfrey was injured. Once goods exist and are identified, title can be determined. Under the UCC, any explicit understanding between the buyer and the seller determines when title passes. If there is no such agreement, title passes to the buyer at the time and place that the seller physically delivers the goods.

In lease contracts, title to the goods is retained by the lessor-owner of the goods. The UCC’s provisions relating to passage to title do not apply to leased goods. Here, Altieri originally leased the car from G.E. Capital Auto Lease, Inc., but by the time of the accident she had bought it. Even though she had not fully paid for the car or completed the transfer-of-title paperwork, she owned it. Title to the car passed to Altieri when she bought it and took delivery of it. Thus, Altieri, not G.E., was the owner of the car at the time of the accident.

In the actual case on which this problem is based, the court concluded that G.E. was not the owner of the vehicle when Godfrey was injured.

**11–4A. *Additional terms***

No. Under the common law, variations in terms between the offer and the offeree’s acceptance violate the mirror image rule, which requires that the terms of an acceptance exactly mirror the terms of the offer. The UCC dispenses with this rule. Under the UCC, a contract is formed if the offeree makes a definite expression of acceptance even though the terms of the acceptance modify or add to the terms of the offer. When both parties to the contract are merchants, the additional terms become part of their contract unless (1) the original offer expressly required acceptance of its terms, (2) the new or changed terms materially alter the contract, or (3) the offeror rejects the new or changed terms within a reasonable time.

In this problem, the UCC applies because the transactions involve sales of goods. The original offer stated, “By signing below, you agree to the terms.” This statement could be construed to expressly require acceptance of the terms to make the offer a binding contract (exception no. 1 above). The contract stated that JMAM was to receive credit for any rejected merchandise. Nothing indicated that the merchandise would be returned to BSI. Baracsi, BSI’s owner (the offeree), signed JMAM’s (the offeror’s) letter in the appropriate location. This indicated BSI’s agreement to the terms. Thus, BSI made a definite expression of acceptance. The practice of the parties—for six years rejected items were not returned—further supports the conclusion that their contract did not contemplate the return of those items. The “PS” could be interpreted as materially altering the contract (exception no. 2 above).

In the actual case on which this problem is based, the court dismissed BSI’s complaint.

**11–5A . *Goods held by the seller or lessor***

Singletary suffers the loss. If goods are in the possession of a seller or lessor, and the seller or lessor is not required to ship or to deliver them on their sale to a buyer, then a document of title is not usually used. If the seller or lessor is a merchant, the risk of loss passes to the buyer or lessee when he or she takes physical possession of the goods.

In the facts of this problem, Singletary was the owner of the manufactured home when it was destroyed by fire. The risk of loss passed to Singletary (the buyer) from the merchant seller (Andy’s Mobile Home and Land Sales) on Singletary’s acceptance and receipt of the goods. Because of the “as is where is” clause, Singletary obtained possession and control over the home at the same time as the parties’ contract. The risk of loss then fell squarely on Singletary.

In the actual case on which this problem is based, the court concluded that Singletary bore the loss, on the reasoning stated above.

**11–6A. *The Statute of Frauds***

Yes, Gardner and B&C Shavings had a contract enforceable under the Statute of Frauds. The Statute of Frauds applies to contracts for the sales of goods for more than $500. Those contracts must be in writing to be enforceable. A writing satisfies the Statute of Frauds as long as it indicates that the parties intended to form a contract and is signed by the party against whom enforcement is sought. An oral contract for the sale of goods priced at $500 or more will be enforceable despite the absence of a writing if goods are specially manufactured for a particular buyer, are not suitable for resale to others in the ordinary course of the seller's business, and the seller has substantially started to manufacture the goods.

In this problem, Gardner agreed to buy a special-order shaving mill from B&C for $86,200, which is clearly more than $500. Thus, the Statute of Frauds applied. B&C agreed to make and deliver the product according to Gardner’s specifications, and faxed an invoice to Gardner reflecting the purchase price, with a 30-percent down payment and the “balance due before shipment.” The faxed invoice did not contain all of the provisions of the deal—for example, and important to the circumstances in this case, after finishing the mill B&C wrote Gardner a letter telling him to “pay the balance due or you will lose the down payment.” But the order could be enforceable as a contract under the specially-made-goods exception (B&C specially made the mill for Gardner according to his specifications) provided it is not suitable for resale to others without further modifications.

In the actual case on which this problem is based, B&C filed a suit in an Arkansas state court against Gardner to recover the rest of the price. On Gardner’s appeal from a judgment in B&C’s favor, a state intermediate appellate court affirmed.

**11–7A. *Risk of loss***

UPS Supply Chain Solutions, Inc., Worldwide Dedicated Services, Inc., (WDS), and International Management Services Co. (IMSCO)—which acted as the carrier transporting the shipment of pharmaceuticals for Ethicon, Inc., the seller—were jointly liable for the loss. In a destination contract, the risk of loss passes to the buyer when the goods are tendered at the specified destination [UCC 2–509(1)(b)].

In this problem, Ethicon contracted with UPS to transport pharmaceuticals. Under a contract with UPS’s subsidiary, WDS, the drivers were provided by IMSCO. During a shipment from Ethicon’s facility in Texas to buyers “F.O.B. Tennessee,” one of the trucks collided with a concrete barrier and caught fire, damaging the goods. The “F.O.B.” term indicated that the contract with the buyer was a destination contract, with the risk of loss to pass to the buyer only when the goods were tendered in Tennessee. Thus, at the time of the collision, the risk remained with the seller, on whose behalf UPS, WDS, and IMSCO were acting. Nothing in the problem indicates that the cause of the collision could be attributed to Ethicon, and so its carriers are ultimately liable.

In the actual case on which this problem is based, Ethicon’s insurer filed a suit in a federal district court against UPS and the others. The court held that under a contractual limitation-of-liability clause, UPS and WDS were liable for only $250,000 in damages. But IMSCO’s liability was not restricted because its contract with WDS did not include a limitation-of-liability clause. IMSCO was thus liable for an additional $500,000. The U.S Court of Appeals for the Second Circuit affirmed.

**11–8A. *Goods and services combined***

A court applies common law principles to a dispute over contract that involves both goods and services when the court finds the services to be the dominant feature of the agreement. An appellate court, or any court, would rule that the UCC should be applied instead of the common law when the court finds the goods to be the dominant aspect of the deal. In either situation, the applicable law covers both the goods and services parts of the contract.

In this problem, because the court applied common law contract principles to rule in National’s favor on both parties’ claims, the court must have concluded that the services part of the contract was the dominant aspect.

In the actual case on which this problem is based, a state intermediate appellate court affirmed the lower court’s ruling in National’s favor. The appellate court recognized that the contract was a hybrid involving goods ands services and reasoned that the lower court must have determined the services portion of the agreement to be the dominant factor. But the parties did not provide a trial transcript or a copy of the contract, so the appellate court could only affirm the lower court’s order.

**11–9A. A Question of Ethics—*Statute of Frauds***

**1.** Under the UCC’s Statute of Frauds, a contract for a sale of goods priced at $500 or more must be in writing. A writing is sufficient if it indicates a contract between the parties and is signed by the party against whom en­forcement is sought. A contract is not enforceable beyond the quantity of goods stated in the writing. Among other exceptions to these requirements, a con­tract will be enforceable to the extent that the buyer has received or accepted the goods. This can occur when, for example, a buyer does any act inconsistent with the seller's ownership of those goods. This is the “partial performance” exception.

In this case, the court awarded Fox $41,262.32 in damages, and Craftsmen appealed to a state intermediate appellate court, which affirmed the lower court’s decision. The appellate court concluded, “Partial performance .  .  . occurred when Craftsmen entered [Fox’s] showroom, modified displays, and removed portions of the displays to Craftsmen's showroom. These actions were inconsistent with ownership of the assets by [Fox].” Craftsmen argued that this conclusion “improperly mixed the ‘use of the premises’ with the ‘sale of goods.’ ” The court acknowledged that. Craftsmen significantly altered the premises, which consisted of real property and not goods subject to the UCC, but emphasized what Craftsmen did to, and with, the displays. “These acts were completely inconsistent with ownership of the displays by Fox. .  .  . Consequently, the record contains ample evidence of partial performance or ac­ceptance of the goods.”

**2.** In Craftsmen’s appeal from the judgment against it, an Ohio state intermediate appellate court disagreed with Craftsmen’s contention that the “predominant factor” of its agreement with Fox was a lease for the Hussongs’ building. The court found nothing to indicate that the parties intended to enter into a contract for a lease. “In fact, none of the writings even mention a lease agreement.” Besides, the “predominant factor” test concerns whether a con­tract for a sale of goods and services should fall under the UCC because it is primarily a contract for a sale of goods. The court said, “This would not be an issue in the present case, since the agreed-upon terms were for the sale of goods. In any event, there was no agreement for a lease.”

Of course, it can be fair to hold a party to a contract to buy a business’s assets when a lease of the premises on which the assets are located cannot be negotiated favorably for the buyer. Unless the execution of a lease is a condi­tion of the parties’ agreement, it would most likely be unfair to hold that the agreement was not enforceable on this basis. The UCC provides that a contract will not fail for indefiniteness if one or more of the terms are left open, but there must be a reasonably certain basis on which a court can grant a remedy. In this case, Fox and Craftsmen did not discuss Fox’s lease with the Hussongs, nor did they indicate in their writings that a lease was a condition of their deal. Even if they had discussed a lease, its introduction as a term of their contract might have been barred under the parol evidence rule. Thus, there was no ba­sis on which to include it as a term of their contract.

**Critical Thinking and Writing Assignments**

**11–10A. Business Law Critical Thinking Group Assignment**

**1.** Parol evidence is admissible to explain the terms of this contract. The exceptions that could apply to allow for the admission of outside evidence are those for usage of trade, course of dealing, and course of performance. Under the UCC, the meaning of an agreement is interpreted in light of commercial practices and other surrounding circumstances. Thus, in interpreting a commercial agreement, a court will assume that the usage of trade and course of dealing between the parties was considered when the contract was formed. Also, the conduct that occurs under an agreement—the course of performance—is the best indication of what the parties meant.

**2.** In the facts of this problem, the trade usage at the time of the contract indicated that “market size” referred to fish of one-pound live weight. This was the standard for the course of performance between the parties over the first three years of the contract.

**3.** To avoid the possibility that a court will interpret contract terms in accordance with trade usage or custom, the parties to a commercial contract can include in the writing all of the terms to which they agreed. And the terms of the written contract should be as clear and unambiguous as possible.