

## UCC ARTICLE 2: SCOPE

- UCC Article 2 governs **sales**, and contracts for the sale, of **goods**, pursuant to which a *seller* transfers to a *buyer*
  - (1) **title** (ownership) to
  - (2) **goods**, including
    - (a) growing **crops** and **timber** to be harvested,
    - (b) *fixtures* that can be removed without harming the real property to which they are attached, and
    - (c) oil, gas, and other **minerals** beneath and **structures** attached to realty, if the seller removes them,
  - (3) in **exchange for money** or other value.
- Article 2 governs only **tangible personal property**, which
  - has **inherent physical value** and
  - can be **moved from place to place**.
- Article 2 does not govern contracts for **services**, **real property**, or *intangible* personal property (e.g., intellectual property, stocks and bonds).

## “MIXED” CONTRACTS

- A large number of disputes involving goods also involve services or property not within Article 2’s scope. In most such cases, courts decide whether to apply Article 2 using the *predominant-factor* test, which hinges on the buyer’s primary purpose for buying the goods and non-goods.
  - If the buyer’s primary purpose was to acquire the **goods**, then Article 2 **applies to the whole transaction** (including the non-goods part of it).
  - If the buyer’s primary purpose was to acquire the **non-goods**, then Article 2 **does not apply to any part of the transaction**.
  - A minority of courts will apply the *gravamen of the action* test, which hinges on what part of the underlying transaction gives rise to the dispute.
    - If the buyer is complaining about the **goods**, Article 2 **applies to the dispute** (even if her predominant purpose was to buy non-goods).
    - If the buyer is complaining about the **non-goods**, Article 2 **does not apply to the dispute** (even if her predominant purpose was to buy goods).

# MERCHANTS

- **Merchant:** A person who
  - (1) **regularly deals in goods of the kind** involved in the sales or lease contract,
  - (2) holds herself out as having **unique knowledge and skill**, or
  - (3) **employs a merchant** as a broker, agent, or other intermediary.
  
- **No Effect on Article 2's Applicability:** Whether a party is a merchant does not, contrary to what many students, lawyers, and even a few judges think, determine whether UCC Article 2 governs a transaction.
  
- **Special Rules for Merchants:** Article 2 includes a number of provisions that apply only to merchants or hold merchants to a stricter standard of conduct than non-merchants (*e.g.*, the merchant's firm offer rule).

## UCC ARTICLE 2A: SCOPE

- UCC Article 2A governs transactions in which
  - (1) a *lessor*
  - (2) transfers to a *lessee*
  - (3) the **rights to temporarily possess and use** goods
  - (4) in exchange for the lessee paying **rent** or providing other value.

# TYPES OF LEASES

- **Consumer Lease:** A lease involving
  - (1) a lessor who **regularly engages** in the business of leasing or selling goods,
  - (2) a lessee who leases the goods primarily for **personal, family, or household use**, and
  - (3) total lease payments **less than a statutory cap**.
  
- **Finance Lease:** A special leasing arrangement involving:
  - (1) a *supplier* of the leased goods,
  - (2) a *finance lessor*, who buys or leases the goods from the supplier, and then leases them to
  - (3) the *finance lessee*, who pays the finance lessor to use the goods.
  
- **“Come Hell or High Water ...”:** The finance lessee’s obligation to pay the finance lessor is generally unaffected by whether the supplier’s goods satisfy any relevant warranty or otherwise conform to the lessee’s requirements.

## OFFER: OPEN TERMS - PT. I

- **Definiteness:** Common law requires the parties to agree to all essential terms before a contract is formed. By contrast, a sale or lease contract is sufficiently definite, **even if one or more terms remain open**, provided that
  - (1) the parties **intended to be bound**, and
  - (2) there is a reasonably certain **basis for a remedy**.
- **Open Price Term:** As a general rule, if the parties have not agreed on a price, the court will determine a **reasonable price at the time of delivery**. However,
  - if one of the parties is permitted to set the price, she must do so in *good faith*; or
  - if the parties have not agreed on the price **due to the fault of one of the parties**, the party not at fault can treat the contract as **canceled** or fix a **reasonable price**.

## OFFER: OPEN TERMS - PT. II

- **Open Payment Term:** If the parties do not specify otherwise, payment is due **at the time and the place that the buyer receives the goods**. Moreover,
  - the buyer can tender payment using **any commercially acceptable means**; however
  - if the seller demands payment in cash, the buyer must be given a **reasonable time** to obtain it.
  
- **Open Delivery Term:** If the parties do not specify
  - the **place of delivery**, the buyer will take delivery **at the seller's place of business**, or (if none exists) at the seller's residence; or
  - the **time of delivery**, the seller will deliver within a **reasonable** period of time.
  
- **Open Duration Term:** If a contract does not indicate how long the parties are to deal with one another, **either party** may terminate with **reasonable notification**.

## OFFER: OPEN TERMS - PT. III

- **Shipping Arrangements:** If a contract requires that the seller ship the goods to the buyer, but does not specify how, the **seller** may, in good faith, make commercially reasonable shipping arrangements.
- **Assorted Goods:** If a contract fails to specify what mixture of assorted goods is to be delivered, the **buyer** may specify the assortment.
- **Open Quantity Term:** Failing to specify the quantity the parties agree to buy and sell is fatal at common law. However, the UCC recognizes two exceptions:
  - (1) a *requirements contract*, whereby the buyer agrees to purchase and the seller agrees to sell **all or up to a stated amount** of what the buyer **needs or requires**; and
  - (2) an *output contract*, whereby the seller agrees to sell **all or up to a stated amount** of what the seller **produces**.
- The UCC imposes a **good faith requirement** on requirements and output contracts, such that the actual quantity purchased or sold **cannot be unreasonably disproportionate to normal or comparable requirements or output**.



## MERCHANT'S FIRM OFFER

- Common law allows an offeror to revoke her offer at any time before the offeree accepts it unless the offeree pays separate consideration – creating an *option contract* – for the offeror's irrevocable promise to keep the offer open for a stated period of time.
- The UCC creates a second exception: A **written, signed offer** by a **merchant** to sell or lease goods is **irrevocable**, without the separate consideration required to create an option, for
  - (1) a **stated period** of time, or
  - (2) if no period is stated, a **reasonable period** of time, but
  - (3) in any event, **no more than three (3) months**.

# ACCEPTANCE

- If an offeror does not specify a method, an offeree may accept by **any method** that is **reasonable** under the circumstances.
- **Accepting an Offer to Buy Goods:** A seller may accept an offer to buy goods for current or prompt delivery by:
  - (1) a **promise** to ship to the buyer, or
  - (2) **shipment of *conforming goods*** (*i.e.*, goods that fit the buyer's description) to the buyer.
    - A seller who chooses to accept by shipping must notify the buyer to keep the buyer from revoking its offer prior to receiving the goods.
    - A prompt shipment of ***nonconforming*** goods constitutes both an acceptance and a breach by the seller, unless the seller **notifies** the buyer that the nonconforming goods are an ***accommodation***, not an acceptance.
- **Communicating Acceptance:** Unless the terms of the offer provide otherwise, an offeree's failure to communicate its acceptance to the offeror within a reasonable time allows the offeror to treat the offer as having lapsed.

## ACCEPTANCE WITH VARIED TERMS

- **No “Mirror Image” Rule:** The UCC dispenses with the common-law requirement that the acceptance’s terms precisely match those of the offer and finds a contract if the offeree indicates a **definite acceptance** of the offer, *even if the acceptance includes additional or different terms.*
  
- If any party is a **nonmerchant**, the contract is formed according to the terms of the original offer, and any additional or different terms in the acceptance are ineffective unless the offeror separately agrees to them.
  
- If both parties are **merchants**, any additional or different terms in the acceptance become part of the contract unless (1) the offer **expressly limits** acceptance to the offer’s terms, (2) the acceptance’s varied terms **materially alter** the contract, or (3) the **offeror timely objects** to the acceptance’s varied terms.
  
- **Counteroffer:** A purported acceptance that is **conditional** on the offeror’s agreement to the additional or different terms is not an acceptance but a counteroffer.
  
- **Acceptance by Performance:** If the parties’ writings fail to form an agreement, but the parties **act** as if they have a contract, their contract will consist of the terms on which their writings agreed plus any necessary “gap fillers.”

# UCC STATUTES OF FRAUDS

- The UCC will not enforce a contract for
  - (1) the **sale** of goods for **\$500 or more** or
  - (2) the **lease** of goods for which scheduled lease payments (excluding renewal option fees) total **\$1,000 or more**unless it is **evidenced by a writing** (or other record).
  
- The writing (or other record) must
  - (1) indicate the parties' **intent** to agree;
  - (2) be **signed** (or otherwise adopted with the intent to authenticate) by the party against whom enforcement is sought; and
  - (3)(a) in the case of a contract for sale, state the **quantity** of goods to be sold, or
    - (b) in the case of a lease contract, state the **lease term** and reasonably **describe** the goods leased.

## UCC STATUTES OF FRAUDS: EXCEPTIONS

- **Merchant's Written Confirmation:** If a contract for the sale of goods is between two merchants, a written confirmation signed and sent by one merchant and sufficient to enforce the contract against the sending merchant is also sufficient to enforce the contract against the receiving merchant unless she objects in writing within 10 days of receiving the confirmation.
- **Specially Manufactured Goods:** An oral contract is enforceable if it is for (1) goods that are specially manufactured or obtained for the buyer/lessee, (2) not suitable for sale or lease to others in the seller's/lessor's ordinary course of business, and (3) the seller/lessor has substantially started to manufacture or otherwise obtain the goods.
- **Judicial Admission:** An oral contract is enforceable if the party against whom enforcement is sought admits its existence in pleadings, testimony, or other court proceedings, but only to the extent of the quantity of goods so admitted.
- **Partial Performance:** An oral contract is enforceable if (1) the buyer has made and the seller has accepted **payment** for the goods, or (2) the buyer/lessee has received and accepted the goods – but, only to the extent of the quantity paid for or accepted, respectively.

## PAROL EVIDENCE AND THE UCC

- **Parol Evidence Rule:** If the parties to a contract set forth its terms in a writing intended to be the final expression of their agreement, the terms of the writing cannot be *contradicted* by evidence of any prior agreement or contemporaneous oral agreement. However, the written terms may be *explained or supplemented* by evidence of:
  - **Course of Performance:** The conduct of the parties to the agreement under **this agreement**.
  - **Course of Dealing:** **Prior conduct** between the parties to the contract that establishes a common basis for their understanding.
  - **Usage of Trade:** Any **term, practice, or method of dealing** having such regularity of observance in a place, vocation, or trade that it is reasonably expected to be observed by the transaction in question.
  - **Consistent Additional Terms:** If the written contract does not constitute the final and complete (a.k.a. “exclusive”) agreement of the parties, terms that do not contradict and which help explain the writing, but are not such that the parties would have necessarily included them in the writing had they agreed.

## HIERARCHY OF TERMS

- The express terms of the writing, the parties' course of performance and course of dealing, relevant usages of trade, and any consistent additional terms are to be construed together when they do not contradict one another. However, should a conflict arise, the UCC provides the following order of priority among conflicting terms:
  - **express terms** take priority over
  - **course of performance**, which takes priority over
  - **course of dealing**, which takes priority over
  - any relevant **usage of trade**, which takes priority over
  - any **consistent additional terms**, which take priority over
  - any default term **implied by law** (a.k.a. "gap filler").

# UNCONSCIONABILITY

- An **unconscionable** contract is one that is so unfair and one-sided that enforcing it would be unreasonable.
- The UCC permits a court to evaluate any contract or contractual provision and, if the court determines it was unconscionable *at the time it was made*, the court may
  - (1) **refuse to enforce** the contract *in its entirety*,
  - (2) **sever** the unconscionable clause and enforce the remainder of the contract, or
  - (3) enforce the unconscionable clause only if its **effect** is not unconscionable.



# INTERNATIONAL SALES CONTRACTS

- The 1980 U.N. Convention on Contracts for the International Sale of Goods (“CISG”) governs international sales contracts between firms or persons located in different countries as long as:
  - (1) the **countries** in which the parties to the contract are located **have ratified** the CISG;
  - (2) each party to the contract **knows or has reason to know** that the other party’s place of business is in another country;
  - (3) the parties to the contract **have not otherwise agreed** that some other law will govern their contract;
  - (4) the contract is **not** for the sale of **consumer goods** (*i.e.*, goods intended primarily for personal, family, or household use); and
  - (5) the contract is **not** primarily for the provision of **services**, other than those services necessarily a part of specially manufacturing one or more goods.

## IMPORTANT DIFFERENCES BETWEEN THE CISG AND THE UCC

- **Qualified “Mirror Image” Rule:** The CISG provides, subject to certain exceptions, that any purported acceptance containing terms that **materially alter** those in the offer is a counteroffer, rather than an acceptance. Otherwise, additional or different terms in the acceptance do not keep it from being treated as an acceptance.
- **Necessity of a Price Term:** In the absence of a fixed price or agreed provisions allowing the price to be unequivocally determined, no contract exists under the CISG.
- **Irrevocable Offers:** The CISG permits an offeror to simply state orally that the offer is irrevocable. Moreover, the CISG deems an offer to be irrevocable if the offeree *reasonably relies* on it being so.
- **Oral Agreements:** CISG Article 11 dispenses with both the statute of frauds and the parol evidence rule and allows a court to enforce a contract for the sale of goods based solely on oral terms and oral testimony.
- **Time of Formation:** A contract is formed under the CISG at the time of the acceptance’s receipt by the offeror – *i.e.*, the CISG does not recognize a “mailbox rule.”

## SPECIAL PROVISIONS IN INTERNATIONAL SALES CONTRACTS

- **Choice of Language Clause:** Designates the official language by which the contract will be interpreted in the event of a disagreement as to meaning or effect.
  
- **Choice of Forum Clause:** Designates which country has jurisdiction over any contractual dispute.
  
- **Choice of Law Clause:** Designates which country's law will be applied to resolve any contractual dispute.
  
- ***Force Majeure* Clause:** Excuses a party from liability for nonperformance due to circumstances beyond the non-performing party's control.