

## PARALEGAL CHECKLIST

### Sale of Goods Under Article 2 of the Uniform Commercial Code

#### *Step One. Establishing the Method of Dispute Resolution, Selecting the Venue, and Determining the Applicable Law Under Article 2 of the Uniform Commercial Code*

1. Check the contract for clauses concerning the method of dispute resolution, venue, and choice of law. Return to the common law and Chapter 1 for method of dispute resolution and venue.
2. If the transaction involves several states, determine which state's law applies.
  - a. If the contract states which state's law is applicable, does the designated state have a reasonable relation to the transaction? UCC § 1-301(a).
  - b. If the contract does not state which state's law is applicable, does the transaction bear an appropriate relation to the venue state? UCC § 1-301(b).
3. Determine whether UCC Article 2 or the common law governs the transaction.
  - a. Does the transaction involve a sale of goods? UCC §§ 2-102, 2-105(1).
  - b. If the transaction involves both a sale of goods and a service, apply the "predominant factor" test.
4. If the transaction appears to be a lease, check whether it really is a lease or whether it is a sale of goods and a security interest in the goods. UCC § 1-203.
  - a. Do the facts fit within any of the "bright line" tests? UCC §§ 1-203(b), (d), (e).
  - b. If not, return the general rule. UCC §§ 1-203(a), (c).

#### *Step Two. Contract Formation—The Impact of Article 2 on Offer, Post-Offer/Pre-Acceptance, and Acceptance*

1. Offer

Article 2 leaves most questions of offer to the common law.
2. Events between Offer and Acceptance

Has the offer been revoked by the offeror, rejected by the offeree, lapsed, or been affected by the death or incapacity of either the offeror or the offeree?

  - a. With the exception of the "firm offer," Article 2 leaves issues involving revocation, rejection, and death or incapacity to the common law.
  - b. Article 2 leaves most issues of lapse to the common law. If acceptance can be implied from performance, has the offeror received notice that performance has begun so that lapse will not occur? UCC § 2-206(2).
  - c. An option contract will negate the offeror's power to revoke and the offeree's power to reject, prevent lapse, and impact the effect of death or incapacity.
    - 1) If the issue involves the general rules of option contract, revert to the common law.
    - 2) If the seller or the buyer makes a written assurance (without consideration) that his or her offer will remain open for a period of time and qualifies as a merchant under the practices of UCC § 2-205, check whether the assurance qualifies as a firm offer.
3. Acceptance
  - a. Check whether acceptance is manifested by a promise or by performance. If performance, does the conduct imply the promise? UCC § 2-204(1).
  - b. Three scenarios are addressed in Article 2 and deviate from the common law's mirror image rule.
    - 1) Does the attempted written acceptance not mirror the written offer? UCC § 2-207(1). If the bargained-for terms mirror, a contract is formed.
    - 2) After a contract has been formed, does one party send a written memorandum that does not mirror the contract or do both parties send written memoranda that do not mirror each other? UCC § 2-207(1). If the bargained-for terms mirror, a contract is formed.
    - 3) If the writings of the parties do not establish a contract (bargained-for terms do not mirror), do the parties by their conduct recognize the existence of a contract? UCC § 2-207(3). The contract consists of those terms in the writing that mirror supplemented by the Code's gap fillers.

#### *Step Three. Contract Enforceability Under Article 2*

1. Most enforceability issues are left to the common law with the exception of unconscionability and Statute of Frauds.
2. Unconscionability

The unconscionability issue may be raised by either party or by the judge and, if raised, the court must hold a hearing on that issue. UCC § 2-302.

  - a. Is the contract or a clause unconscionable under the definition "absence of meaningful choice on the part of one party with the other party taking advantage of this absence by imposing unreasonably favorable terms"? The definition of unconscionability is common law.
  - b. If unconscionable, the remedies are limited by the Code. UCC § 2-302(1).
3. Statute of Frauds
  - a. If the contract is for the sale of goods and the price is \$500 or more, the contract must be in writing. UCC § 2-201(1).
  - b. Does the writing meet the following three requirements?
    - 1) Does the writing indicate a contract for sale has been made?
    - 2) Does the writing include a quantity?
    - 3) Has the writing been signed by the party against whom enforcement is sought? UCC § 2-201(1).
  - c. If a writing is required and either does not exist or does not meet all three requirements, check the exceptions.
    - 1) Has a written confirmation been received? UCC § 2-201(2).
    - 2) Are the goods specially manufactured? UCC § 2-201(3)(a).
    - 3) Has the party against whom enforcement is sought made an admission of contract in court or in court documents? UCC § 2-201(3)(b).

- 4) Have the goods been delivered and accepted or has payment been made and accepted? UCC § 2-201(3)(c).
- 5) If none of the above applies, does your state permit reliance to circumvent the Statute of Frauds?

*Step Four. The Plaintiff's Allegation That the Defendant Breached the Contract Under Article 2*

When the contract is limited to sale of goods, the contracting parties are buyer and seller and the plaintiff's allegation of the defendant's breach will be divided buyer versus seller and seller versus buyer. Step Four focuses the dispute so only the relevant issues are evaluated.

1. Buyer versus Seller—Buyer alleges that seller has breached its obligation to transfer and deliver the goods in accordance with the contract. UCC § 2-301.
  - a. Breach by anticipatory repudiation.
    - 1) Did seller breach by giving notice of nonperformance? Will the nonperformance “substantially impair the value of the contract” to buyer? UCC § 2-610.
    - 2) If seller's repudiation was unclear, did buyer have reasonable grounds for insecurity? If so, did buyer demand in writing adequate assurance of seller's due performance? UCC § 2-609(1).
  - b. Breach by nonperformance.
 

Did seller fail to deliver the goods? UCC §§ 2-301, 2-711(1).
  - c. Breach when the delivery was nonconforming or the goods failed to comply with a warranty.
    - 1) The delivery was nonconforming.
 

Determine the contract's delivery terms that relate to this issue.

      - a) Consider UCC § 2-207, the common law if UCC § 2-207 is inapplicable, and the parol evidence rule.
      - b) Consider course of performance, course of dealing, and usage of trade.
      - c) Consider the gap fillers in Article 2.
    - 2) The goods failed to conform to a warranty.
      - a) Determine the warranties that relate to this issue.
        - (1) Consider express warranties. UCC § 2-313.
        - (2) Consider implied warranties of merchantability. UCC §§ 2-314(1), (2).
        - (3) Consider implied warranties from course of dealing and usage of trade. UCC § 2-314(3).
        - (4) Consider an implied warranty of fitness for a particular purpose. UCC § 2-315.
      - b) Were any of the warranties modified or excluded?
2. Seller versus Buyer—Seller alleges that buyer has breached its obligation to accept the goods or to pay in accordance with the contract. UCC § 2-301.
  - a. Breach by anticipatory repudiation.
    - 1) Did buyer give notice or could notice be implied that the goods would not be delivered?
    - 2) If no notice, did the facts rise to the level of “reasonable grounds for insecurity” so buyer was required to give seller written demand for adequate assurance of due performance? Did buyer make this written demand?
    - 3) Did this repudiation rise to the level of “substantial impairment” and so was it a breach by anticipatory repudiation? UCC § 2-610.
  - b. Breaching by nonperformance.
 

Did buyer fail to pay for the goods in accordance with the contract? UCC §§ 2-511(1), 2-607(1).
  - c. Breach by nonconforming performance.
    - 1) Did buyer wrongfully reject the goods? UCC §§ 2-601, 2-612.
    - 2) Did buyer give seller the appropriate time to cure? UCC § 2-508.
    - 3) Did buyer wrongfully revoke acceptance of the goods? UCC § 2-608.

*Step Five. The Defendant's Response to the Plaintiff's Allegation of Breach*

1. Buyer versus Seller—Buyer has alleged that seller has breached its obligation to transfer and deliver the goods. Seller may now consider responding “no breach, compliance,” “no breach, excuse,” “no breach, justification,” or “no breach, duty terminated.”
  - a. No breach, compliance.
    - 1) Could seller assert that its performance is progressing in accordance with the contract? Seller need only discredit buyer's meaning. Seller need not prove its meaning by a preponderance of the evidence.
    - 2) Could seller assert that its performance is progressing in accordance with the contract if the term buyer wants included in the contract is not included? UCC §§ 2-202, 2-207(2), (3).
    - 3) Could seller assert that performance is progressing in accordance with the contract if a term seller wants included in the contract is included? UCC §§ 2-202, 2-207(2), (3).
  - b. No breach, excuse.
 

Is seller's performance commercially impracticable due to an unforeseen external event that was not allocated by contract or custom so as to be excused? UCC § 2-615.
  - c. No breach, justification.
 

Was seller's nondelivery of the goods justified by buyer's failure to pay in accordance with the contract? UCC §§ 2-607(1), 2-703(a), (b), 2-705.
  - d. No breach, duty discharged.
 

Seller may respond with one of the following:

    - 1) Buyer waived seller's contractual duty. UCC §§ 1-306, 2-209(5).
    - 2) Buyer and seller modified the contract. UCC §§ 2-209(1)–(4).
    - 3) Buyer and seller rescinded the contract. UCC §§ 2-209(1)–(4).
    - 4) Buyer and seller entered into an accord and satisfaction thereby changing and fulfilling seller's performance. UCC § 3-311.
    - 5) A delegatee may have performed seller's duty. UCC § 2-201.
    - 6) Buyer's rights were assigned to a third party so seller is no longer obligated to buyer. UCC § 2-210.
    - 7) Buyer may not enforce the contract in court due to the running of the statute of limitations. UCC § 2-725.
2. Seller versus Buyer—Seller has alleged that buyer has breached its obligation to accept the goods or to pay in accordance with the contract. Buyer may now consider responding “no breach, compliance,” “no breach, excuse,” “no breach, justification,” or “no breach, duty termi-

nated.”

- a. No breach, compliance.
  - 1) Could buyer assert that performance is progressing in accordance with the contract? Buyer need only discredit seller’s meaning. Buyer need not prove its meaning by a preponderance of the evidence.
  - 2) Could buyer assert that performance is progressing in accordance with the contract if the term seller wants included in the contract is not included? UCC §§ 2-202, 2-207(2), (3).
  - 3) Could buyer assert that performance is progressing in accordance with the contract if a term buyer wants included in the contract is included? UCC §§ 2-202, 2-207(2), (3).
- b. No breach, excuse.

Because UCC § 2-615 only refers to seller, buyer’s excuse response will be found in the common law.
- c. No breach, justification.
  - 1) Justification for rejecting a delivery.

Buyer’s justification response will depend on whether one delivery or multiple deliveries were required.

    - a) Single delivery.

If only one delivery was required, buyer may reject a nonconforming delivery when the delivery fails to conform in any respect and cannot be cured. UCC §§ 2-601, 2-508.
    - b) Multiple deliveries.
      - (1) If more than one delivery is required, buyer may reject a nonconforming installment if the nonconformity substantially impairs the value of the installment, the installment could not be cured, and the nonconformity substantially impairs the value of the whole contract. UCC §§ 2-612(2), (3), 2-508.
      - (2) If more than one delivery is required, buyer may reject a nonconforming installment if the nonconformity substantially impairs the value of the installment, the nonconformity cannot be cured, the nonconformity does not substantially impair the value of the whole contract, and seller does not give adequate assurance of its cure. Cure could be by monetary adjustment. UCC §§ 2-612(2), (3).
  - 2) Justification for failure to pay.

Buyer has a duty to pay for the goods accepted. UCC § 2-507(1). Buyer may, however, deduct damages from the price without being in breach. UCC § 2-717.
- d. No breach, duty discharged.

Buyer may respond with one of the following:

  - 1) Seller waived buyer’s contractual duty. UCC §§ 1-306, 2-209(5).
  - 2) Buyer and seller modified the contract. UCC §§ 2-209(1)–(4).
  - 3) Buyer and seller rescinded the contract. UCC §§ 2-209(1)–(4).
  - 4) Buyer and seller entered into an accord and satisfaction thereby changing and fulfilling buyer’s performance. UCC § 3-311.
  - 5) A delegatee may have performed buyer’s duty. UCC § 2-210.
  - 6) Seller’s rights were assigned to a third party so buyer is no longer obligated to seller. UCC § 2-210.
  - 7) Seller may not enforce the contract in court due to the running of the statute of limitations. UCC § 2-725.

### *Step Six. The Plaintiff’s Remedies for the Defendant’s Breach*

Article 2 divides the plaintiff’s remedies into seller’s remedies and buyer’s remedies.

#### 1. Seller’s remedies for buyer’s breach.

The checklist for seller’s remedies is found in UCC § 2-703.

- a. Check cancellation because seller’s executory obligations are discharged but buyer’s are not. UCC § 2-703.
  - b. Check seller’s right to identify goods to the contract and to scrap or salvage. UCC §§ 2-703(c), 2-704.
  - c. Check seller’s expectation damages based on resale price. UCC §§ 2-703(d), 2-706.
  - d. Check seller’s expectation damages based on market price. UCC §§ 2-703(e), 2-708(1). Note that even though the goods have been resold, seller could opt for the market price rather than the resale price.
  - e. Check seller’s expectation damages based on lost volume sales. UCC §§ 2-703(e), 2-708(2). This formula only applies if the market price formula produces an inadequate result.
  - f. Check seller’s expectation damages when buyer fails to pay the price. UCC §§ 2-703(f), 2-709.
- #### 2. Buyer’s remedies for seller’s breach.
- The checklist for buyer’s remedies is UCC § 2-711 if seller still has the goods and UCC § 2-714 if buyer has accepted the goods.
- a. Check buyer’s expectation damages based on cover price. UCC §§ 2-711(1), 2-712.
  - b. Check buyer’s expectation damages based on market price. UCC §§ 2-711(1), 2-713.
  - c. Check buyer’s right to specific performance or replevin. UCC §§ 2-711(2)(b), 2-716.
  - d. If the goods have been accepted, check buyer’s expectation damages based on nonconformity.
    - 1) Check the general rule for goods not accepted. UCC § 2-714(1).
    - 2) Check the specific rule for breach of warranty. UCC § 2-714(2).
- #### 3. If the contract has a provision that specifies the damages in the event of breach, check whether the provision is a liquidated damages provision or a penalty. UCC § 2-718(2).

### *Third-Party Beneficiaries, Assignees, and Delegates*

#### 1. Third-party beneficiaries.

- a. Article 2 only applies to horizontal third-party beneficiaries. UCC § 2-318. Vertical third-party beneficiaries are left to state legislatures and courts.
- b. Consult your state’s version of UCC § 2-318 to determine whether your legislature has enacted Alternative A, B, or C, or its own version.
- c. Check what is required to modify or exclude a warranty. UCC § 2-316.

#### 2. Assignees and delegates.

Check whether your problem involves an assignment or a delegation. If it does, consult UCC § 2-210 and the common law.