

# The Uniform Commercial Code

Understanding basic features of the "UCC":  
its background, scope and application;  
comparison with other law

## The Uniform Commercial Code

- The Uniform Commercial Code or "UCC" covers many aspects of commercial law in the United States
- However, it is not the exclusive law which deals with business and financial matters
- Other laws address subjects like bankruptcy, consumer protection, intellectual property, securities regulation, and taxation
- In an introductory contract law course, we will focus primarily on Article 2 of the UCC which covers "transactions in goods"
- Article 1 also will be studied, which covers definitions and other matters of general applicability

## The Uniform Commercial Code

- **IMPORTANT:** The UCC is state law and not federal law
- The Model version of the UCC which you have in your supplement and which is available online at LII (the legal information institute at Cornell Law School) IS NOT THE LAW ANYWHERE—it is a model form prepared by the Uniform Law Commission and the American Law Institute
- To become the law in some state, the state legislature of a state must adopt the Model UCC and enact it into a law signed by the governor of the state
- States often make changes to the Model UCC when it is enacted into law—numbering changes, modifications, additions and deletions

## The Uniform Commercial Code

- When working on an actual legal problem, you must consult an actual version of the UCC as enacted in a particular state—and NEVER the Model version
- Nevertheless, the UCC is mostly uniform throughout the United States—and thus the Model version is suitable for teaching purposes
- When tested on a multi-state bar exam, the instructions will advise you to assume the Model UCC is in force
- On the state law portion of a bar exam, you will need to know the differences between the Model UCC and the state law version
- Differences between the Model UCC and a state enactment are fertile ground for testing on the state specific portions of the bar

## The Uniform Commercial Code

- The course website has links to the Model UCC, as well as to the laws in Florida, Nebraska and New York
- A link to Nebraska laws is included because Nebraska publishes comments and annotations to their version of the UCC (which includes the official annotations)
- The LII does not have the rights to publish the annotations—and neither Florida nor New York do so
- We often will look at the actual state versions of the UCC to note differences with the Model UCC and one another

## The Uniform Commercial Code

- As a general matter, Article 2 of the UCC covers "sales" of goods and not services or sales of non-goods (such as real estate)
- The matter of coverage, however, is less than clear because the scope provision of Article 2 claims to cover "transactions" in goods
- The term "transactions" is capable of a broader interpretation than mere "sales"—even though many provisions of Article 2 use language which indicates coverage of sales
- In a former time, courts had extended the coverage of Article 2 to leases of goods (though now Article 2A covers leases of goods)
- Currently, in most jurisdictions, courts have extended Article 2 to cover licenses of computer software (a license not being a sale)

## Uniform Commercial Code-introduction

- § 2-102. Scope: Certain Security and Other Transactions Excluded From This Article.

Unless the context otherwise requires, this Article applies to transactions in **goods**; it does not apply to any transaction which although in the form of an unconditional **contract** to sell or **present sale** is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating **sales** to consumers, farmers or other specified classes of **buyers**.

### Uniform Commercial Code-introduction

- § 2-105. Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit".

(1) "**Goods**" means all 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. "**Goods**" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "**future**" goods. A purported **present sale** of future goods or of any interest therein operates as a **contract** to sell.

(3) There may be a **sale** of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the **seller's** interest in the bulk be sold to the **buyer** who then becomes an owner in common.

(5) "**Lot**" means a parcel or a single article which is the subject matter of a separate **sale** or delivery, whether or not it is sufficient to perform the **contract**.

(6) "**Commercial unit**" means such a unit of **goods** as by commercial usage is a single whole for purposes of **sale** and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

## The Uniform Commercial Code

- Courts generally have found that computer software is a "good"
- However, the reasoning is far from clear. Some reach this conclusion, it seems, because the computer software has been embedded in a physical medium, like a CD-ROM, or is included in a product like a laptop computer.
- "Off-the-shelf" computer programs (even if downloaded from the internet) may seem like the purchase of a good to a consumer
- However, if a party contracts for a custom computer program, some courts have found this custom product to be a contract for a service rather than a transaction to purchase a good
- This, of course, is odd given that the UCC covers custom goods

## The Uniform Commercial Code

- You can safely say that the primary focus of Article 2 is on **sales** of goods transactions (with possible application to other types of transactions, such as licenses, by analogy)
- Ambiguity over the scope of Article 2 is not limited to concerns over transaction types
- The definition of the term "goods" itself can be ambiguous—it seems to require a movable thing per the definition of "goods"
- Is computer software a movable thing? Or an intangible?
- What about services provided by utilities—such as gas, water or electricity?

### Uniform Commercial Code-introduction

- § 2-107. Goods to Be Severed From Realty: Recording.

(1) A **contract** for the **sale** of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of **goods** within this Article if they are to be severed by the **seller**, but until severance a purported **present sale** thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A **contract** for the **sale** apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of **goods** within this Article whether the subject matter is to be severed by the **buyer** or by the **seller** even though it forms part of the realty at the time of contracting, and the parties can by identification effect a **present sale** before severance. . . .

## The Uniform Commercial Code

- A similar classification problem exists for electricity—as detailed in your handout
- The classification matters BECAUSE the legal rules that apply to sales of goods transactions under the UCC often differ from the common law legal rules that apply to contracts more generally
- The difference in a legal rule can be outcome determinative—if the UCC applies, then Party A wins; if the common law (or other applicable law) applies, then Party B wins
- The scope of the definition of "goods" has tough issues BUT it also has well settled rules which you need to learn (are crops "goods"; when is money a "good"; are stock certificates "goods"?)
- And real estate related property has its own special rules

## The Uniform Commercial Code

- Applicability of Article 2 is further clouded because, in the real world, many transactions are “mixed” or “hybrid” transactions
- A mixed or hybrid transaction is one which includes both a sale of goods and the provision of a service, or the sale of goods and non-goods, or a sale of some goods and the lease of other property, etc
- Unfortunately, the UCC does not have a section which tells the court or the parties how to handle a mixed or hybrid transaction
- Courts have filled in the gap in the statute by formulating tests: the most commonly used test is the “predominate factor” test
- If a sale of goods is the “predominate factor” in the deal—apply Article 2 say most courts

## The Uniform Commercial Code

- Movable goods is another hallmark of a contract for goods rather than services (though courts **say** this, consider whether this factor really makes any sense—as the UCC definition of goods refers to “movable”)
- The question whether a contract is predominantly for goods or services is generally one of fact
- When there is no genuine issue of material fact concerning the contract’s provisions, however, a court may determine the issue as a matter of law (For example, one contract may specifically allocate the purchase price to different elements in the agreement whereas another contract may have a single price unallocated among the different components—requiring a fact inquiry to disaggregate)

## The Uniform Commercial Code

- The key scope questions for Article 2 are: what transactions are covered (i.e. sale or more); what is a good; how to handle a mixed or hybrid transaction
- By amendment, some states have defined certain transactions to not constitute “sales”—e.g. Florida/blood transfusions & organ transplants [s. 672.316](#)—to avoid application of the UCC
- Also, because the UCC can differ from state to state, we have the choice of law problem of which version of the UCC to apply—for example Florida or New York (suppose a Florida buyer and a New York seller)
- Further, foreign law may govern some sale of goods transactions

## The Uniform Commercial Code

- The predominate factor test is supposed to be a balancing type test in which the court considers various features of a deal
- No single feature is supposed to be determinative—it is not simply a question of determining whether, for example, the price allocated to goods in the contract is 51% of the total price
- First, the language of the contract itself provides insight into whether the parties believed the goods or services were the more important element of their agreement.
- Courts also examine the manner in which the transaction was billed; when the contract price does not include the cost of services, or the charge for goods exceeds that for services, the contract is more likely to be for goods.

## The Uniform Commercial Code

- The predominate factor test is the majority rule used in the United States to determine the application of Article 2 in a mixed or hybrid transaction
- The predominate factor test is the rule followed in Florida—see e.g. [Allied Shelving & Equipment, Inc. v. National Deli, LLC](#)—and New York
- The other main court formulated test is the “gravamen test” which looks to whether the dispute relates to the goods (such as a breach of warranty claim) or to a service component (such as a maintenance agreement to repair goods following the purchase)
- The gravamen test is the minority rule probably because it does not answer the applicable law question when the dispute involves a matter affecting the entire contract (for example, statute of frauds)

## The Uniform Commercial Code

- Also, because the UCC can differ from state to state, we have the choice of law problem of which version of the UCC to apply—for example Florida or New York (suppose a Florida buyer and a New York seller)
- Without an choice-of-law provision a court must resort to conflict-of-law analysis to determine whether New York or Florida substantive law applies. New York “looks to the ‘center of gravity’ of a contract to determine choice of law.”<sup>11</sup> *Forest Park Pictures*, 683 F.3d at 433 (citing *In re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 226, 613 N.E.2d 936, 939, 597 N.Y.S.2d 904, 907 (1993) ). “Under this approach, courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties.” *Brink’s Ltd. v. S. African Airways*, 93 F.3d 1022, 1030–31 (2d Cir. 1996). But “[t]he place of contracting and place of performance are given the greatest weight.” *Forest Park Pictures*, 683 F.3d at 433.

## The Uniform Commercial Code

- The CISG may apply to a sale of goods transaction between persons located in different countries
- It both parties to a contract are located in separate countries which have each signed the CISG, then the CISG will apply to the transaction if the parties have not chosen another law to govern their transaction (and the transaction is covered by the CISG)
- It both parties to a contract are located in separate countries one of which has signed the CISG, then the CISG will apply to the transaction if the parties have not chosen another law to govern their transaction (and the transaction is covered by the CISG) IF the rules of private international law would choose the law of the signatory country to govern the transaction (subject to one relevant exception)

## The Uniform Commercial Code

- Note that the CISG excludes most consumer type transactions from its coverage [making it essentially limited to merchant transactions]
- **This is a big difference from the UCC**
- The UCC applies to transactions between merchants, between a merchant and a consumer and between two consumers (think of a garage sale) [I.E. the UCC is not limited to merchant transactions]
- However, the UCC may apply a modified rule if a merchant is involved in a transaction or if a transaction is between merchants
- You might also note that Article 2 of the CISG specifically excludes electricity from its scope (unlike the UCC which relies on case law to decide the issue)

## The Uniform Commercial Code

- The United States has signed the CISG but has taken an important exception known as an Article 95 exception
- What this means is that, if the rules of private international law would specify that the law of the United States should govern a transaction, then the UCC will apply to the transaction (i.e. the particular version of the UCC adopted by a state whose law is applicable)
- This rule differs from the choice of law rule adopted by most signatory countries to the CISG—in an international sale of goods transaction the default rule is to apply the CISG when the law of a signatory country applies to the transaction
- Thus, the UCC plays a larger role in international transactions than might first appear when a party is located in the United States

## The Uniform Commercial Code

- Article 2 of the CISG excludes certain transactions from its coverage:
 

“This Convention does not apply to sales:

  - (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
  - (b) by auction;
  - (c) on execution or otherwise by authority of law;
  - (d) of stocks, shares, investment securities, negotiable instruments or money;
  - (e) of ships, vessels, hovercraft or aircraft;
  - (f) of electricity.”

## The Uniform Commercial Code

- You should compare the scope of coverage of the UCC with the scope of coverage of the CISG
- There are a number of similarities—such as the exclusion for sales of securities
- There are important differences: such as the UCC covering consumer transactions and the CISG largely excluding them
- The CISG addresses some points not covered by the UCC (electricity; hybrid transactions)
- Anytime you have a sale of goods contract between a party located in the United States and a party located in another country, you need to consider whether the UCC, the CISG or another law applies to the transaction

## The Uniform Commercial Code

- If parties to a sale of goods transaction want to choose the UCC to apply to an international sale of goods transaction they may do so by including a choice of law clause in the contract
- The choice of law clause should say something like: “This contract shall be governed by the laws of the State of New York (and not the CISG)”
- Case law has held that, to exclude application of the CISG so that the UCC will apply, a clause must specifically exclude application of the CISG [**NOT GOOD**: “This contract shall be governed by New York law”]
- The reasoning is that the law of a state includes US federal law due to the supremacy clause so that a mere reference to state law is insufficient to indicate that the state’s version of the UCC applies

## The Uniform Commercial Code

- Though it is beyond the scope of our course, students should be aware that contracts for the sale of goods and services with the United States are subject to specific federal laws and regulations and not the UCC [See [Government Contracts](#) at LII (Cornell Law School); [Federal Government Contract Overview](#) at FindLaw (Thomson Reuters)]
- Similar state laws might displace the UCC for contracts between a seller of goods and services to a State government or subdivision [In Florida, see e.g. Title XIX, Public Business, ch. 279-290 (particularly those relating to procurement of personal property and services, [Fla. stat. 287](#))]
- The UCC may apply to a contract between a general contractor and a sub contractor

## The Uniform Commercial Code

### Summary

- Applies to both merchant and consumer transactions (though certain provisions may differ if a merchant is involved)
- As the UCC is state law, variations may exist among the states
- Generally, parties have the ability to choose the UCC of a particular state to apply to a transaction (otherwise a court will decide which version of the UCC applies)
- Other law (such as the CISG) may apply if one of the parties is located in a foreign jurisdiction
- Contracts with the US Government (and states and their subdivisions) are not, or may not, be subject to the UCC

## The Uniform Commercial Code

So . . .

What is special about statutes?

- Statutes may be enacted with immediate application
- Statutes may be crafted to address new or changing circumstances
- Statutes may change the default rules that apply to contracting activity pursuant to the common law
- Statutes may contain very specific terms, leaving little room for judicial interpretation, OR statutes may contain general terms leaving open the possibility of judicial development
- In the U.S., state statutes may vary from state to state, creating inconsistent results or interpretations

## The Uniform Commercial Code

### Summary

- Is the transaction type covered? A **sale** versus a **lease or gift** (with, perhaps, certain licenses of software covered via court decisions)—and the possibility that certain transactions are defined not to be “sales”—such as blood and organs.
- Is the property type covered? Movable **personal property** versus **real estate or intangibles**—a “good” as defined (with certain hard questions, such as computer software, electricity, etc., and exclusions—money, stock certificates)
- In a **mixed transaction**, is the **predominate factor** a sale of goods or something else?

## The Uniform Commercial Code

So . . .

What is special about “goods”?

- A transaction in goods is subject to special contract law rules
- Those rules are created by statute and not the common law
- In a U.S. transaction, the statute covering a contract for the sale of goods is the Uniform Commercial Code (as enacted by a particular state)
- For a transaction involving a person in the U.S. and a person in a foreign country, the CISG may apply
- The CISG is a treaty which has the force of a federal statute (NB: federal law takes priority over state law via the Supremacy Clause)

## The Uniform Commercial Code

So . . .

Why is there no definitive answer as to whether electricity is a good?

- In the UCC, the failure to address the status of electricity as a good is probably an oversight that experience has revealed as an issue
- This omission has led to inconsistent results in the states
- There is little benefit associated with this confusion—that is to say, judge made gap filing does not seem to provide a benefit
- The model UCC was initially drafted prior to the CISG: note that the CISG specifically addresses the case of electricity.

## The Uniform Commercial Code

So . . .

Why does it matter if electricity is a good?

- It matters whether electricity is a good because some of the contracting rules specified in the UCC differ from those contracting rules found in the common law
- A different contracting rule can lead to a different outcome: If UCC rule X applies, Party A wins; If Common Law rule Y applies, Party B wins
- Examples of potential differences include: the statute of frauds, the statute of limitations, the parol evidence rule, and the necessity of consideration to support an amendment