

Understanding Sales, Leases, and Licenses in a Global Perspective

Understanding Sales, Leases, and Licenses in a Global Perspective

Michael L. Rustad

THOMAS F. LAMBERT JR. CHAIR IN TORT LAW
CO-DIRECTOR OF THE INTELLECTUAL PROPERTY LAW CONCENTRATION
SUFFOLK UNIVERSITY LAW SCHOOL

CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2008
Michael L. Rustad
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Rustad, Michael.

Understanding sales, leases, and licenses in a global perspective / By Michael L. Rustad.

p. cm.

Includes bibliographical references and index.

ISBN 13: 978-1-59460-097-5 ISBN 10: 1-59460-097-X (alk. paper)

1. Export sales contracts. 2. Sales. 3. Leases. 4. Licenses. 5. Export sales contracts--United States. 6. Sales--United States. 7. Leases--United States. 8. Licenses--United States. I. Title.

K1031.R87 2007
346.07'2--dc22

2007023454

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Table of Contents

Table of Cases	xxi
Preface	xxv
Acknowledgments	xxxii
About the Author	xxxiii

Part One

Domestic vs. International Sales of Goods

Chapter 1 Introduction to Sales Law: UCC Article 2 vs. CISG	3
Part I: Overview of UCC Article 2	5
Sec. A: Sources of U.S. Contract Law	5
A.1: Federal Statutory Sources of Contract Law	6
A.2: Structure of UCC Article 2	7
Sec. B: UCC Article 2's Legal Realism	9
Sec. C: The Comprehensiveness of the UCC	11
Sec. D: Supplemental Gap Fillers	13
Sec. E: Parties' Choice of Law Clauses	16
Sec. F: Preemptive Federal & State Law	17
Sec. G: Definitions & Preliminary Concepts	18
Sec. H: Sales Masquerading in the Clothing of Leases	19
H.1: Leases vs. Disguised Sales	19
H.2: Tests for Security Interests Governed by UCC Article 9	20
Sec. I: Introduction to Secured Transactions	20
I.1: Scope of UCC Article 9	20
I.2: UCC Article 9 Attachment	21
I.3: UCC Article 9's Concept of Perfection	22
I.4: UCC Article 9 Priority Rules	25
I.5: UCC Article 9 Remedies	25
Sec. J: Liberal Sales Contract Rules	31
Sec. K: The Implied Obligation of Good Faith	32
Part II. Overview of the CISG	33
Sec. A: Harmonizing Diverse Legal Systems	33
Sec. B: CISG Jurisdiction	34
Sec. C: International Norms	35
Sec. D: CISG & <i>Lex Mercatoria</i>	35
Sec. E: Map of CISG	36
Sec. F: CISG Gap Fillers	37
Sec. G: The Concept of Reasonableness	39
Sec. H: CISG's Jurisprudence Based on Internationality	41
Sec. I: The Methodology of Standards	44

<i>Problem Set: Chapter One</i>	45
1.1: Choice of Law	45
1.2: CISG Article 4	45
1.3: What Law Applies When Only One Country Is a Signatory?	46
1.4: CISG Article 6 Opt Out	46
1.5: Sphere of Application of CISG	46
1.6: CISG as Default International Sales Law	46
Summary	47
Chapter 2 The Sphere of Application: UCC Article 2 vs. CISG	51
Sec. A: What's In & What's Out	51
A.1: Transactions in Goods Defined	52
Sec. B: What's Outside of UCC Article 2?	53
B.1: Choses in Action	53
B.2: Professional Services	53
B.3: Assignments & Delegations	54
Assignment & Delegation Clause	55
B.4: Bailments Are Sales	55
B.5: Security Interests Are Not Sales	56
B.6: Leases Are Not Sales	56
B.7: Construction Contracts	57
Sec. C: Extending UCC Article 2 Concepts to Non-Sales	58
Sec. D: Services & Non-Code Law	59
Sec. E: UCC Article 2's Tests for Legal Hybrids	60
E.1: Preponderant Test for Hybrids	61
E.2: Gravamen Test for Hybrids	61
Sec. F: The Concept of Merchants	63
F.1 Merchant Rules in Contract Formation	63
F.2: Special Treatment Merchant Rules	64
F.3: General Merchant Rules	64
Part II: CISG's Sphere of Application	65
Sec. A: CISG's Business-to-Business Rules	65
A.1: Parties Opt Out Rights	65
A.2: CISG Article 1	65
Sec. B: CISG Goods Defined	67
Sec. C: CISG's Sphere of Application	67
C.1: CISG & Multiple Places of Business	67
C.2: CISG Article 1(b) & Private International Law	68
Sec. D: Exclusions from CISG	69
D.1: Consumer Goods	69
D.2: Personal Injury Cases	70
D.3: Ships, Boats & Vessels	71
D.4: Substantial Materials Supplied by Buyer	71
D.5: CISG Rule Where No Knowledge of Consumer Transaction	71
D.6: Undisclosed Principals	71
D.7: Commercial Paper & Investment Securities	72
Sec E: Mixed Sales & Services	72
Sec. F: CISG's Preponderant Part Test	73
F.1: Sales on Execution or by Law	74
F.2: The Sale of Electricity	74

F.3: Real Estate	75
Sec. G: CISG's Sphere of Application	75
Sec. H: CISG's Concept of Good Faith	75
<i>Problem Set: Chapter Two</i>	77
2.1: Electricity & Scope of UCC Article 2	77
2.2: Software Licensing & UCC Article 2	77
2.3: Personal Services & UCC Article 2	78
2.4: Agricultural Services & UCC Article 2	78
2.5: Computer Chips & UCC Article 2	78
2.6A: Special Manufacturing of Drapery	78
2.6B: Scope of CISG	78
2.7: Scope of UCC Article 2	78
2.8: Merchant Rule	78
2.9: CISG's Sphere of Application	79
2.10: Scope of CISG	79
2.11: Multiple Places of Business	79
2.12: Determining Place of Business	79
2.13: Contract Formation Rules, Opt Out	79
2.14: CISG's Sphere of Application	79
2.15: CISG's Sphere of Application Where Buyer Supplies Materials	79
2.16: CISG's Test for Legal Hybrids vs. UCC Article 2	79
2.17: Application of CISG	79
Summary	84
Chapter 3 Contract Formation: UCC Article 2 vs. CISG	87
Part I: UCC Article 2's Formation Rules	88
Sec. A: Offers, Acceptance & Consideration	89
A.1: Common Law Offers & Acceptance	89
A.2: UCC Article 2 Contract Formation	91
A.3: Effectiveness of an Offer: UCC vs. CISG	92
A.4: Mailbox Rule for Accepting Offers	92
A.5: Option Contracts	93
A.6: UCC Article 2 Contract Formation	94
A.7: Liberal Contract Formation	95
A.8: Common Law Acceptances	96
Sec. B: UCC Article 2's Statute of Frauds	96
B.1: Merchants Must Read Their Mail Exception	97
B.2: Specially Manufactured Goods Exception	97
B.3: Exception for Performance or Payment	97
B.4: Exception for Performance or Payment Made	98
B.5: Admission As Exception to the Statute of Frauds	98
Sec. C: UCC Article 2's Parol Evidence Rule	99
C.1: Parol Evidence Rule Exceptions	101
C.2: Parol Evidence Rule Does Not Exclude Supplemental Terms	102
C.3: Parol Evidence Rule & Additional Terms	103
Sec. D: UCC Article 2's Battle of the Forms	103
D.1: Abolition of the Mirror Image Rule	104
D.2: Conditioning Acceptance, UCC § 2-207(1)	105
D.3: Choosing Between Additional or Different Terms	107
D.4: The Non-Merchants' Mere Proposal Rule	108

D.5: The Merchants’ “Automatic Inclusion” Rule	108
D.6: UCC § 2-207(3) Knockout Rule	108
Part II: CISG’s Formation Rules	109
Sec. A: CISG Offers	109
A.1: Proposal to One or More Specific Persons	110
A.2: Effectiveness of a CISG Offer & Withdrawal of an Offer	111
A.3: Receipt Theory Not the Mailbox Rule	111
A.4: Revocability of Offers: CISG Article 16 vs. UCC § 2-205	111
A.5: Offeror is the Master of the Offer	112
A.6: CISG Article 16 vs. Firm Offers	112
Sec. B: A Closer Look at CISG Contract Formation	113
Sec. C: Modification of CISG Sales Contracts	113
Sec. D: CISG Gap Fillers	115
Sec. E: CISG Recognizes No Writing Requirement	115
Sec. F: No Parol Evidence Rule under CISG	116
Sec. G: CISG’s Battle of the Forms Rule	116
G.1: Immaterial Modifications Are Admissible	117
G.2: Material Modifications Are Automatically Excluded	117
G.3: No Equivalent to UCC § 2-207(3) in CISG Article 19	117
<i>Problem Set: Chapter Three</i>	119
3.1: Common Law Offers	119
3.2: Parol Evidence Rule	119
3.3: The Parol Evidence <i>Redux</i>	119
3.4: Battle of the Forms	120
3.5: UCC § 2-207 Battle of the Forms	120
3.6: Battle of the Forms, UCC § 2-207	120
3.7: CISG & the Price Term	121
3.8: CISG Article 19	121
3.9: Rules of Construction: UCC Article 2	121
Summary	126
Chapter 4 Warranties: Domestic vs. International Sales Law	137
Part I: UCC Article 2 Warranties	138
Sec. A: Overview	138
A.1: UCC Article 2 Title Warranties	138
A.2: Title, Creditors & Good Faith Purchaser	140
A.3: Entrusting Goods to Merchants	141
A.4: Remedies for Breach of Title or Infringement	143
Sec. B: Performance Warranties: UCC Article 2	144
B.1: The Methodology for Creating Express Warranties	145
B.2: Disclaiming Express Warranties	146
Sec. C: Express Warranties	147
C.1: Creating Express Warranties	148
C.2: The Methodology for Creating Express Warranties	149
C.3: Disclaiming Express Warranties	149
Sec. D: Implied Warranty of Merchantability	149
D.1: Pass Without Objection in the Trade	150
D.2: Fair, Average Quality	150
D.3: Fitness for the Ordinary Purpose	151
D.4: Runs Within Variation Permitted in the Agreement	152

D.5: Adequately Contained	152
D.6: Conforms to Promises on Container or Label	152
Sec. E: Fitness for a Particular Purpose	153
Sec. F: Damages for Breach of Warranty	154
Sec. G: Taking Warranties Away: Limitations & Disclaimers	154
G.1: Disclaiming or Limiting Warranties of Title	154
G.2: Disclaiming or Limiting Warranties of Performance	155
G.3: Disclaiming the Warranty of Merchantability	156
G.4: Disclaiming the Warranty of Fitness for a Particular Purpose	156
G.5: “As Is” Disclaimers	156
G.6: Other Methods of Disclaiming or Reducing Warranty Liability	157
G.7: Disclaimers by Inspection	158
Sec. H: State Consumer Law Restricting Disclaimers	159
Sec. I: Limitations on Remedies That Impact Warranties	159
Sec. J: The Federal Consumer Warranty Act	160
J.1: Magnuson-Moss’s Disclosure Requirements	161
J.2: Pre-Sale Availability of Written Warranty Terms	161
J.3: Prohibition of Complete Disclaimers of Implied Warranties	162
J.4: FTC Warranty Regulations	162
J.5: Magnuson-Moss Requirements for Written Warranties	162
J.6: Who’s Protected?	163
J.7: Who Must Comply with the Magnuson-Moss Act?	163
J.8: Warranty Labeling Requirements	163
J.9: The Disclaiming of Implied Warranties	164
J.10: Limitations on Disclaiming Warranties	164
J.11: Remedies for Violations of Magnuson-Moss Act	165
J.12: FTC’s Rule against Tie-ins	165
Federal Statutes Impacting Contracts	171
Part II: CISG Functional Equivalents to Warranties	172
Key CISG Warranty Equivalents	173
Sec. A: CISG & Freedom from Third-Party Claims	173
A.1: Copyright Infringement by Sellers	174
A.2: Trademark Infringement by Sellers	175
A.3: Patent or Industrial Property Infringement by Sellers	175
A.4: CISG Defenses to Third-Party Infringement Claims	175
Sec. B: CISG’s Functional Equivalents to Warranties	177
B.1: CISG’s Equivalent of Express Warranties	178
B.2: CISG’s Equivalent of Merchantability	180
Sec. C: CISG’s Equivalent of a Fitness for a Particular Purpose	181
Part III. Product Liability for Defective Goods	182
Sec. A: Breach of Warranty As a Theory of Product Liability	182
Sec. B. The Dalkon Shield Mass Product Disaster	182
B.1: Strict Product Liability & the Dalkon Shield	185
B.2: Negligent Failure to Design the Dalkon Shield	186
B.3: Negligent Failure to Warn	186
B.4: Misrepresentations, §402B	187
B.5: Tort of Fraudulent Misrepresentation	187
B.6: Fraudulent Concealment	188
B.7: Breach of Express Warranties	188

B.8: Breach of Implied Warranties: Merchantability & Fitness	188
B.9: Civil Conspiracy in a Products Case	189
Sec. C: Product Liability As Multiple Causes	189
Sec. D: Product Defect As a Predicate for Product Liability	189
D.1: Manufacturing Defects	190
D.2: The Consumer Expectation Test	191
D.3: The Risk Utility Test for Design Defects, Restatement (Third)	192
D.4: Failure to Warn	192
Sec. E: Theories of Product Liability	194
E.1: Strict Product Liability	194
E.2: Negligence-Based Product Liability	195
E.3: Express Warranty, § 2-313	196
E.4: Implied Warranty of Merchantability, § 2-314	197
E.5: Implied Warranty of Fitness for a Particular Purpose, UCC § 2-315	197
E.6: Liability for Rest. 2d Torts, § 402B	198
Sec. F: Defenses in Breach of Warranty Product Liability Cases	199
F.1: Notice of Breach	199
F.2: Privity of Contract	199
F.3: Vertical Privity Is a Common Law Doctrine	200
F.5: Horizontal Privity	200
[1] Alternative A to § 2-318	201
[2] Alternative B to § 2-318	201
[3] Alternative C to § 2-318	201
Sec. G: The Death of Privity	201
Sec. H: Statutes of Limitation & Repose	202
Sec. I: The Economic Loss Rule	203
Sec. J: Methods of Disclaimers or Limitations	203
Sec. K: Unconscionability	203
Sec. L: CISG Does Not Apply to Product Liability	205
Sec. M: The European Union Directive Adopts Strict Product Liability	206
M.1: European Product Liability Directive	207
M.2: The General Product Safety Directive	208
Selected Articles from the European Community's Product Liability Directive	209
<i>Problem Set: Chapter Four</i>	210
4.1: Separating True Express Warranties from Seller's Talk	210
4.2: Express & Implied Warranties As Theories of Product Liability	210
4.3: Merchantability & UCC Article 2	211
4.4: Warranties & Disclaimers of Warranties	211
4.5: Drafting Warranty Limitations	211
4.6: UCC § 2-302 Unconscionability & Warranty Limitations	211
4.7: UCC § 2-315 Warranty of Fitness & Beyond	211
4.8: Presale Injuries & UCC Article 2 Warranties	212
4.9: CISG Article 35 Functional Equivalent of UCC Article 2 Warranties	212
4.10: CISG's Equivalent of Implied Warranty of Merchantability	212
4.11: Buyer's Notice Requirement in International Sales Transaction	212
Summary	216

CISG's Equivalent to Express Warranties	218
CISG's Equivalent to Implied Warranty of Merchantability	219
CISG's Equivalent to Fitness for a Particular Purpose	219
UCC Warranties As Product Liability	219
Chapter 5 Gap Fillers: UCC Article 2 vs. CISG	221
Part I: UCC Article 2 Gap Fillers	221
Sec. A: Overview	221
Sec. B: UCC Gap Fillers	222
Sec. C: The Code's Methodology for Default Terms	223
C.1: Gap Filler for the Price	224
C.2: Time for Payment	224
C.3: Requirements, Output & Exclusive Dealings Contracts	224
Sec. D: Delivery in Single Lots	225
D.1: Seller's Place of Delivery	226
D.2: Time for Delivery, Reasonable Time	226
D.3: Open Time for Payment of Running of Credit	226
D.4: Options & Cooperation	227
Sec. E: The Concepts & Methods of Unconscionability	227
Part II: CISG's Gap Filler	231
Sec. A: General CISG Gap Fillers	232
Sec. B: Seller's Obligations As Gap Fillers	232
B.1: CISG Gap Fillers for Delivery	233
B.2: CISG's Default for Shipping Arrangements	234
Sec. C: CISG Does Not Address Validity or Unconscionability	235
<i>Problem Set: Chapter Five</i>	235
5.1: Requirements Contracts	235
5.2: Indefinite Sales Contracts	235
5.3: Performance of a Sales Contract	236
5.4: UCC Article 2 Gap Fillers	236
5.5: Unconscionability	236
5.6: Output Contracts	237
5.7: CISG Gap Fillers	237
5.8: CISG & Place of Delivery	237
5.9: Open Price Term in Offer	237
5.10: Gap Filler for Place of Delivery	238
5.11: Requirements Contracts	238
Summary	242
Chapter 6 Risk of Loss: UCC Article 2 vs. CISG	243
Part I: UCC Article 2's Risk of Loss Regime	243
Sec. A: Risk of Loss in Domestic Sales	244
A.1: Risk of Loss in Carrier-Type Contracts	244
A.2: Shipment Contract Is the Default	245
A.3: Risk of Loss for Destination Contracts	245
A.4: Risk of Loss Where Goods Are Not Moved	245
A.5: UCC § 2-509(3), Non-Carrier & Non-Bailment Situations	246
A.6: Merchant Residuary Rule	246
A.7: Non-Merchant Residuary Rule	247
A.8: Parties May Forge Their Own Risk of Loss Rules	247

Sec. B: Risk of Loss in the Event of Breach, UCC § 2-510	247
Sec. C: Seller's Tender of Delivery	248
C.1: UCC Article 2's Concept of Identification	248
Sec. D: Carrier-Type Contracts & Risk of Loss	249
D.1: FOB Type Contracts	250
D.2: FOB & FAS Shipment Terms	250
D.3: Destination Contract, UCC § 2-509(1)(a)	250
D.4: CIF & C & F Terms	251
D.5: Delivery "Ex-Ship"	251
Part II: CISG's Risk of Loss	251
Sec. A: CISG's Risk of Loss Regime	251
A.1: Risk of Loss & Payment Obligation of Buyer	252
A.2: Risk of Loss for Carriage-Type Contracts	252
A.3: Risk of Loss for Non-Carrier Cases	252
Sec. B: International Chamber of Commerce: INCOTERMS	253
<i>Problem Set: Chapter Six</i>	255
6.1: Identification & Risk of Loss	255
6.2: UCC Article 2 Risk of Loss Rules	255
6.3: Notice Requirement for Shipments	255
6.4: Risk of Loss	255
6.5: Revocation of Acceptance & Risk of Loss	255
6.6: Risk of Loss & Destination Contracts	256
6.7: CISG & Risk of Loss	256
6.8: CISG, Risk of Loss & INCOTERMS	256
6.9: UCC Shipment Terms	257
6.10: INCOTERMS & Risk of Loss	257
6.11: Risk of Loss & INCOTERMS	257
6.12: Risk of Loss & FAS Contracts	257
Summary	260
Chapter 7 Excuses in Domestic & International Sales Contracts	261
Part I: UCC Article 2 Excuses	261
Sec. A: Excuses under the Common Law of Contract	261
Sec. B: UCC Article 2 Excuses	263
B.1: Four Code Excuse Sections	263
Part II: Excuses in International Sales Contracts	270
Sec. A: Exemption from Liability	270
A.1: Impediment Caused by Third Party's Failure	270
A.2: Temporary Impediment	270
A.3: Notice of Impediment	270
A.4: Article 79's Impediment beyond Party's Control Test	271
<i>Problem Set: Chapter Seven</i>	273
7.1: Excuses in UCC Article 2 & CISG	273
7.2: Failure of Berthing	273
7.3: Commercial Impracticability	273
7.4: Excuse & Adequate Assurance of Performance	273
7.5: CISG Article 79 & the Bad Vine Wax	274
Summary	276
Chapter 8 Performance Issues in Domestic & International Sales	279

Part I: UCC Article 2 Performance Standards	279
Sec. A: UCC's Concept of Good Faith	279
Sec. B: Delivery & Tender of Goods	280
Sec. C: Acceptance or Rejection of Goods	281
C.1: UCC Article 2 Inspection Rights	282
C.2: Perfect Tender Rule	283
C.3: Limits to Perfect Tender Rule	284
C.4: Adequate Assurance of Performance	284
Sec. D: UCC Article 2's Concept of the Cure	285
D.1: Seller's Right to Cure in Single Delivery Contracts	286
D.2: Seller's Right to Cure in Installment-Type Contracts	286
D.3: Right to Cure after Revocation of Acceptance	286
D.4: Limitations on Right to Cure	286
Sec. E: The Concept of Acceptance in Sales Law	287
Sec. F: UCC Article 2's Concepts of Rejection & Revocation	288
F.1: When Right of Rejection Arises	288
F.2: Buyer's Options When Exercising Right of Rejection	288
F.3: Buyer's Duty to Give Notice of Breach	289
F.4: Duties of the Rejecting or Avoiding Buyer	290
F.5: Special Rule for Merchant Buyers	290
F.6: Methodology for Buyer's Rejection	291
F.7: Acceptance	292
Sec. G: Vouching in Notice	293
Sec. H: UCC Article 2's Concept of the Cure	293
Sec. I: Assurance & Suspension of Performance	295
Sec. J: Revocation of Acceptance	299
Sec. K: Installment Contracts	299
Part II: CISG Performance Standards	300
Sec. A: Delivery of Goods & <i>Nachfrist</i>	301
A.1: Shipment Contract is the CISG Default	302
A.2: Rule for Non-Carriage Contracts	302
A.3: Residual Rule	303
A.4: CISG's Concept of Tender	303
A.5: Seller's Delivery Obligation	303
CISG Article 31	303
Sec. B: CISG's Acceptance	304
Sec. C: Fundamental Breach	304
Sec. D: Avoidance	305
CISG Article 49	305
CISG Article 64	306
D.1: Avoidance Defined	306
D.2: Non-Avoidance	306
Sec. E: CISG & Installment Contracts	307
Sec. F: <i>Nachfrist</i> Period	307
Sec. G: Avoidance Rights	308
Sec. H: The Avoidance Rights of Buyers	310
H.1: Avoidance in Installment Contracts	311
H.2: Grounds for Avoidance	311
H.3: Impact of Avoidance for Risk of Loss	311

H.4: The Impact of Breach on Avoidance	311
Sec. I: Rights of Non-Avoiding Buyers	312
I.1: The Right to Substitute Goods	312
I.2: Reduction in Price	312
I.3: Specific Performance	312
Sec. J: The Concept of Rejection vs. CISG Avoidance	313
Sec. K: CISG's Right to Cure	313
Sec. L: The Concept of Avoidance under CISG	314
Sec. M: CISG's Inspection Rights	315
Sec. N: The Concept of Avoidance under CISG	315
Sec. O: CISG's Concept of the Installment Contract	315
Sec. P: Suspension & Assurance of Performance	316
<i>Problem Set: Chapter Eight</i>	317
8.1: Seller's Right to Cure	317
8.2: Right to Cure	317
8.3: Right of Revocation	317
8.4: Limits to the Cure	317
8.5: Limits to the Revocation of Acceptance	318
8.6: Tender of Goods under UCC Article 2	318
8.7: UCC Article 2's Performance Sections	318
8.8: Revocation & Shaken Faith	318
8.9: Limits to Cure	318
8.10: Right of Revocation of Acceptance	319
8.11: Right of Rejection	319
8.12: Performance Problems	319
8.13: Installment Sales Contracts	320
8.14: UCC Article 2 Nonconforming Performance	320
8.15: Limits to Limitations on Remedies	320
8.16: CISG's Fundamental Breach, Avoidance & Remedies	321
8.17: CISG Performance, Cure	321
8.18: Refused Cure under CISG	321
8.19: CISG Performance Problems	321
8.20: CISG Fundamental Breach	322
8.21: CISG Fundamental Breach & the Cure	322
8.22: CISG & Offer of Cure	322
8.23: CISG Performance	322
Summary	333
Chapter 9 Seller's Remedies: UCC Article 2 vs. CISG	337
Part I: UCC Article 2 Seller's Remedies	337
Sec. A: Contractually Based Seller's Remedies	338
A.1: UCC Article 2 Liquidated Damages	338
A.2: Deposits	338
A.3: Contractual Limitations of Remedies	339
Sec. B: Triggers to Seller's Remedies	343
B.1: Anticipatory Repudiation	343
B.2: Retraction of Anticipatory Repudiation	344
Sec. C: The UCC Article 2 Seller's Part 7 Remedies	345
C.1: Keeping or Retaining Goods	345
C.2: Resale Remedy, UCC § 2-706	347

C.3: Market Price Formula, UCC § 2-708	348
C.4: Lost Profits	348
C.5: Action for the Price, UCC § 2-709	349
C.6: Seller's Other Options	349
Part II: CISG Remedies	350
Sec. A: Overview of CISG's Seller's Remedies	350
A.1: CISG Reclamation Rights for Non-Breaching Sellers	353
A.2: CISG's Resale Rights for Sellers	354
UCC vs. CISG	355
A.3: Contract Minus Market Damages	356
<i>Problem Set: Chapter Nine</i>	356
9.1: UCC Article 2 Action for the Price & CISG	356
9.2: Resale Remedy of Seller	357
9.3: Seller's Remedy of Resale: Article 2 vs. CISG	357
9.4: Seller's Right to Price	357
9.5: Action for the Price	357
9.6: Seller's Resale Remedy: UCC Article 2 vs. CISG	357
9.7: UCC § 2-718 Down Payment Rule	358
9.8: Seller's Offset Rule, UCC § 2-718(3)	358
9.9: Lost Volume Seller, UCC § 2-708(2)	358
9.10: CISG Seller's Remedies	358
9.11: CISG Seller's Remedies	358
Summary	362
Chapter 10 Buyer's Remedies: UCC Article 2 vs. CISG	365
Part I: Article 2 Buyer's Remedies	365
Sec. A: Roadmap of Buyer's Remedies	366
A.1: UCC Article 2 Remedies	366
A.2: Triggers for Buyer's Remedies	366
Sec. B: Specific Buyer's Remedies	367
B.1: Buyer's Limited Reclamation Rights	367
B.2: Liquidated Damage Clauses	367
B.3: The Down Payment Rule of UCC § 2-718(2)	368
B.4: Failure of Essential Purpose: UCC § 2-719(2)	368
Sec. C: Cover: Most Favored Buyer Remedy	369
Sec. D: Buyer's Market Damages for Non-Delivery	372
D.1: Damages for Accepted Goods, UCC § 2-714	373
D.2: Deduction of Damages from the Price	375
Sec. E: Incidental Damages	375
Sec. F: Consequential Damages	375
F.1: Reason to Know Test	376
F.2: Proof of Lost Profits	377
F.3: Personal Injuries, UCC § 2-715(2)	378
Sec. G: Specific Performance	378
G.1: UCC § 2-716	378
Sec. H: Replevin: That Other Equitable Remedy	379
Sec. I: Tort-Like Defenses to Breach of Warranty	380
Sec. J: Notice of Breach	380
J.1: Privity	380
J.2: Statute of Limitations to File Claim	381

J.3: Proximate Cause Requirement	381
J.4: Economic Loss Doctrine	381
Sec. K: Right to Adequate Assurance of Performance	382
Part II: CISG's Buyer's Remedies	382
Sec. A: Overview of CISG's Buyer's Remedies	384
A.1: Keeping the International Sales Contract on the Tracks	384
A.2: Buyer's Right of Avoidance	385
Sec. B: Buyer's Right to Damages	386
B.1: CISG Damages	387
Sec. C: Buyer's Right to Specific Performance	389
Sec. D: Buyer's Right to Suspend Performance	390
Sec. E: Anticipatory Avoidance	390
Sec. F: Buyer's Remedies for Partial Performance	390
Sec. G: Mitigation & Consequential Damages	390
Sec. H: Duties of Rejecting Buyers	391
<i>Problem Set: Chapter Ten</i>	391
10.1: Seller's Anticipatory Repudiation & Cover	391
10.2: Buyer's Damages for Breach of Warranty Damages	391
10.3: Specific Performance	392
10.4: Buyer's Cover Remedy	392
10.5: Buyer's Right to Return of Down Payment	392
10.6: Return of Deposit	392
10.7: Enforceability of Remedy Limitations under UCC Article 2 & CISG	392
Summary	397

Part Two

The Concepts & Methods of Leases & Licenses

Chapter 11 The Leases of Goods	403
Part I: United States Law of Leases of Goods: UCC Article 2A	404
Sec. A: Updating UCC Article 2A for the Internet	405
Sec. B: Overview of UCC Article 2A	407
Sec. C: Types of Leases	409
C.1: Sales Masquerading As Leases	410
C.2: Why True vs. False Leases Matter	411
C.3: Finance Leases	414
C.4: Consumer Leases	418
C.5: Simple Leases	421
Sec. D: Creation of UCC Article 2A Lease	422
D.1: Offer & Acceptance	422
D.2: Firm Offers in Lease Agreements	422
D.3: Article 2A's Statute of Frauds	422
D.4: Article 2A's Parol Evidence Rule	423
D.5: Battle of the Forms	424
D.6: Modification of Leases	424
Sec. E: Warranties in Lease Agreements	424
E.1: Warranty against Interference & Infringement	424
E.2: UCC Article 2A's Express Warranties	425
E.3: Implied Warranty of Merchantability	426

E.4: Implied Warranty of Fitness for a Particular Purpose	426
E.5: Disclaiming Warranties against Interference & Infringement	426
E.6: Special Rules for Warranties for Finance Leases	427
Sec. F: Cumulation & Conflict of Warranties	427
Sec. G: Third-Party Beneficiaries of Lease Warranties	428
G.1: Alternative A Jurisdictions	428
G.2: Alternative B Jurisdictions	428
G.3: Alternative C Jurisdictions	428
Sec. H: Unconscionability in Lease Agreements	429
Sec. I: Risk of Loss, Title & Delivery Terms	429
I.1: Risk of Loss in Absence of Breach	429
I.2: Risk of Loss in Event of Breach	430
Sec. J: Performance of Leases	430
J.1: Acceptance	431
J.2: Installment Performance Standard for Leases	431
J.3: Rejection of Leased Goods	431
J.4: Cure by Lessor	432
J.5: Revocation of Acceptance	432
Sec. K: Excuses in Lease Agreements	432
Sec. L: Default by Lessor & Lessee	432
L.1: Overview of Lessor's Remedies	434
Sec. M: A Closer Examination of Lessor's Remedies	436
M.1: Action for Rent	437
M.2: Entering into a New Lease	437
Sec. N: Lessee's Remedies	437
N.1: Cancellation	438
N.2: Recovery of the Rent & Security Which Has Been Paid	438
N.3: Cover & Recovery of Damages	439
N.4: Lessee's Damages	439
Statutory Provision: Lessee's Measure of Damages	439
2A-519. Lessee's Damages for Non-delivery, Repudiation, Default & Breach of Warranty in Regard to Accepted Goods	439
N.5: Lessee's Incidental & Consequential Damages	441
Sec. O: Lessee's Right to Specific Performance	442
Sec. P: Fixtures & Accession	442
Sec. Q: Third-Party Rights with Lease Transactions	442
Part II: Cross-Border Leases of Goods	443
Sec. A: Choice of Law & Forum	443
Sec. B: Business Issues	443
<i>Problem Set: Chapter Eleven</i>	444
11.1: True vs. False Lease	444
11.2: Risk of Loss in Finance Leases	444
11.3: Consumer Leases	444
11.4: Choice of Law in a Business-to-Business Lease	444
11.5: Risk of Loss in Leases	444
11.6: Risk of Loss & Destination-Type Lease Contract	445
11.7: Finance Lease, Personal Injury & Warranty Damages	445
11.8: Breach of Warranty Actions against the Suppliers	445
Summary	448

Part Three
The Concepts & Methods of Licenses

Chapter 12 The Licensing of Information	453
Part I: Domestic Licensing Transfers	456
Sec. A: Licensing to Transfer Information	456
A.1: Sidestepping the First Sale Doctrine of Copyright Law	457
A.2: Granting Clause	458
A.3: Choice of Law & Forum Clauses	458
A.4: Term for Payment	459
A.5: Scope of Licensing Agreement & Number of Users	459
A.6: Different Media	459
A.7: Licensee's Right to Updates	460
A.8: Termination Clause	460
A.9: Breach & Termination	461
A.10: Mass-Market License Agreements	461
Sec. B: The Uniform Computer Information Transactions Act (UCITA)	464
B.1: Introduction to UCITA	464
B.2: The Purposes of UCITA	469
Gap Filler Rules	469
Formation Rules	470
Sphere of Application, Preliminary Concerns, Mandatory Rules	470
B.3: Scope of UCITA	471
B.4: UCITA Definitions	471
B.5: Electronic Data Interchange	471
B.6: Exclusions from UCITA	472
B.7: Hybrid or Mixed Transactions	474
B.8: UCITA's Choice of Law Principles	475
B.9: Federal Preemption of UCITA	475
B.10: Online Contract Formation Rules	476
B.11: Enforceability of Mass-Market License Agreements	477
B.12: Access Contracts	478
B.13: Statute of Frauds in License Agreements	479
B.14: Warranties of Authority & Quality	479
B.15: UCITA's Canons of Contract Construction	485
B.16: Modification of the License Agreement	487
B.17: UCITA's Gap Fillers	487
B.18: Transfer of Interests & Rights	487
B.19: UCITA's Performance Standards	488
B.20: Mass-Market Performance Standards	488
B.21: Risk of Loss & Excuses in License Transactions	489
B.22: Assignment & Anti-Assignment	489
B.23: Breach of the License Agreement	490
B.24: UCITA's Remedies for Licensors & Licensees	492
Sec. C: International Licensing of Information	495
C.1: International Licensing Issues	495
C.2: International E-Commerce Rules	495
C.3: Licensing & Choice of Law in the European Community	496
C.4: Licensing of Software under UCC Article 2	500

C.5: Software Licensing under CISG	501
Sec. D: International Considerations in Licensing	503
D.1: Forum Selection Clauses in Consumer Contracts	504
D.2: Jurisdiction, Choice of Law & Forum	505
D.3: Rome II's Convention on Choice of Law for Torts	506
Sec. E: Substantive Law Issues in Cross-Border License Agreements	507
Sec. F: Cross-Border Licensing Concepts & Methods	507
Sec. G: ALI's Principles of the Law of Software Contracts	508
Sec. H: Towards Cross-Border Licensing Rules	508
<i>Problem Set: Chapter Twelve</i>	510
12.1: SSL's Computer Contract	510
12.2: Enforceability of Clickwrap Agreements under UCITA	510
12.3: European Cross-Border Jurisdiction, Choice of Law, Choice of Forum	510
12.4: SSL's Terms of Services Agreement	511
12.5: Scope of UCITA	512
12.6: Attribution Process	512
12.7: UCITA & Releases	512
I. European Cross-Border Jurisdictional Issues	514
II. European Choice of Law	515
III. Enforceability of Online Contracts	516
Summary	518
Index	521

Table of Cases

International Courts & Arbitral Tribunals

- Australia, Queensland (*Downs Investments v. Perwaja Steel*) 54A1. Germany 30 August 2000 Oberlandesgericht [Appellate Court], 354
- Austria 10 November 1994 Supreme Court (*Chinchilla furs case*) cite as: <http://cisgw3.law.pace.edu/cases/941110a3.html>, 125
- Austria 1 July 1994 Appellate Court Innsbruck (*Garden flowers case*) <http://cisgw3.law.pace.edu/cases/940701a3.html>, 179
- France 17 February 2000 Appellate Court Rouen (*Socit Ma, R.A.S. v. S.A. T, Diffusion*) <http://cisgw3.law.pace.edu/cases/000217f1.html>, 176
- France 6 April 1995 Appellate Court Paris (*Thyssen v. Maaden*) <http://cisgw3.law.pace.edu/cases/950406f1.html>, 179
- France 22 February 1995 Appellate Court Grenoble (*BRI Production "Bonaventure" v. Pan African Export*) <http://cisgw3.law.pace.edu/cases/950222f1.html>, 362
- Germany 14 May 1993 District Court Aachen (*Electronic hearing aid case*) <http://cisgw3.law.pace.edu/cases/930514g1.html>, 234
- Germany 23 May 1995 Appellate Court Frankfurt (*Shoes case*) Cite as: <http://cisgw3.law.pace.edu/cases/950523g1.html>, 125
- Germany 29 November 1995 District Court Koblenz (*Acrylic blankets case*) <http://cisgw3.law.pace.edu/cases/951129g1.html>, 332
- Germany 13 April 2000 Lower Court Duisburg (*Pizza cartons case*) <http://cisgw3.law.pace.edu/cases/000413g1.html>, 259
- Netherlands 15 October 2002 Netherlands Arbitration Institute, Case No. 2319 (*Condensate crude oil mix case*) <http://cisgw3.law.pace.edu/cases/021015n1.html>, 233
- Switzerland, *Bezirksgericht der Saane (Zivilgericht)* [District Court] Switzerland 20 February 1997, District Court Saane (*Spirits Case*), 68
- United Kingdom, *Taylor v. Caldwell*, 122 Eng. Rep. 309 (KB. 1863), 261
- United Kingdom, *Krell v. Henry*, 1903 WL 12966, 2 KB 740 (CA 1903) , 262-263
- United Kingdom, *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854), 376, 438

U.S. Federal Courts

- Ajax Tool Works v. Can Eng Manufacturing* LEXIS 1306; 2003 Westlaw 223187 (N.D. Ill., Jan 30, 2003), 47
- AKA Distributing Co. v. Whirlpool Corp.*, 137 F.3d1083 (8th Cir. 1998), 59
- AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167 (7th Cir.1976), 298
- Archer Daniels Midland Co. v. Brunswick Cty.*, 2005 U.S. App. LEXIS 4314 (4th Cir., Mar. 15, 2005), 51
- Bende v. Crown Recreational, Inc.*, 548 F. Supp. 1018 (E.D. N.Y. 1982), 268, 269

- Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974), 57
- Brattleboro Auto Sales, Inc. v. Subaru of New England, Inc.*, 633 F.2d 649 (2d Cir. 1980), 59
- Carl Beasley Ford, Inc v Burroughs Corp.*, 361 F Supp 325 (ED Pa, 1973), 287
- Delchi v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995), 180, 300-301
- Delhomme Indus., Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049, 1058 (5th Cir. 1982), 328
- Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972), 122
- East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986), 203, 381-382
- Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975), 269-270
- Enron Power Marketing v. Nevada Power Co.*, 55 UCC Rep. Servs. (Callaghan) 31 (S.D. N. Y. 2004), 296
- ePlus Group, Inc. v. Panoramic Communic. LLC*, 2003 U.S. Dist. LEXIS 4657 (S.D. N.Y., March 31, 2003), 441
- Ferndale Labs., Inc. v. Schwartz Pharm., Inc.*, 2005 U.S. App. LEXIS 784 (6th Cir., Jan. 13, 2005), 54
- Filanto v. Chilewich*, 984 F.2d 58 (2d Cir. 1993), 113
- Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D. N.Y. 1960), 14
- Garwood Packaging Inc. v. Allen & Co.*, 378 F.3d 978 (7th Cir. 2004), 94
- Group, Ltd. v. Bostek, Inc.*, 942 F. Supp. 716 (D. Mass. 1996), 375
- Hill v. Gateway 2000. Inc.* 105 F. 3d 1147 (7th Cir. 1997), 239
- Illinois Power Co. v. Figgie Int'l Inc.*, 1989 U.S. Dist. LEXIS 13983 (N.D. Ill., Nov. 17, 1989), 52
- In re Brooks Shoe Mfg. Co., Inc.* 21 B.R. 604 (E.D. Pa. 1982), 327
- In re Dana Corp.*, 2007 Bankr LEXIS 1466 (Bankr. S.D. N.Y., April 19, 2007), 345
- In re Empire Pac. Indus. Inc.*, 71 B.R. 500 (Bankr. Ct. Ore. 1987), 47
- In re Parker*, 2006 Bankr. LEXIS 2250 (D.S.C., Sept. 14, 2006), 57
- In re Pillotex*, 349 F.3d 711 (3rd Cir. 2003), 31
- InterFah, Ltd. v. Valiant Industrier, AS*, 1999 U.S. App. LEXIS 18188 (10th Cir., Aug. 3, 1999), 42
- Itel Containers Int'l Corp. v. Huddlston*, 507 U.S. 60 (1993), 443
- ITT Corp v. LTX Corp.*, 926 F.2d 1258 (1st Cir. 1991), 158
- Jacobellis v. Ohio*, 378 U.S. 184 (1964), 227
- Kansas City Trailer Sales v. Holiday Rambler Corp.*, 1994 U.S. Dist. LEXIS 1698 (W.D. Mo. 1994), 59
- Koch Hydrocarbon v. MDU Resources Group*, 988 F.2d 1529 (8th Cir. 1993), 222
- Laapeari, Administrator v. Sears, Roebuck*, 787 F.2d 726 (1st Cir. 1986), 193-194
- MCC-Marble v. Ceramica Nuova d'Agostino SPA.*, 144 F.3d 1384 (11th Cir.1998), 115
- Milam v. Toyota Motor Corp.*, 2006 WL 1669251 (Cal. Super., June 6, 2006), 192
- Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB*, 23 F. Supp.2d 915 (N.D. Ill. 1998), 122
- Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 295 (3rd Cir. 1961), 198
- ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir., 1996), 240
- Raw Materials Inc. v. Manfred Forberich GmbH*, 2004 WL 1535839 (U.S. Dist. Ct., N.D. Ill., July 7, 2004), 272
- Rheinberg-Kellerei GmbH v. Vineyard Wine Co.*, 281 S.E.2d 425 (N.C. App. 1981), 258
- Rosetti v. Busch Entn't Corp.*, 87 F. Supp.2d 415 (E.D. Pa. 2000), 51
- Southern States Coop v. Townsend Grain & Feed Co.*, 163 B.R. 709 (D. Del. 1994), 199
- St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, 2002

- WL 465312 (S.D. N.Y. 2002), 254-255, 259
- Standard Bent Glass Corp. v. Glassrobots Oy.*, 333 F.3d 440 (3rd Cir. 2003), 47
- Standard Structural Steel v. Bethlehem Steel*, 597 F. Supp. 164 (D. Conn. 1984), 158
- Teradyne, Inc. v. Teledyne Indus., Inc.*, 676 F.2d 865, 868 (1st Cir. 1982), 349
- Transatlantic Financing Corp. v. United States.*, 363 F.2d 312 (D.C. Cir. 1966), 265
- Ulsinor Industeel v. Leeco Steel Prods.*, 209 F. Supp.2d 880 (N.D. Ill. 2002), 39, 46
- United Stars Indus. v. Plastech Engineered Prods.*, 2007 U.S. Dist. LEXIS 40958 (W.D. Wisc. June 5, 2007), 349
- Valero Mktg. & Supply Co. v. Greeni Oy.*, 2006 U.S. Dist. LEXIS 16620 (D.N.J. 2006), 271
- Vezel, S.A. S.A. De C. v. H.P. Schmid*, 1994 U.S. App. LEXIS 1571 (9th Cir. 1994), 274
- Vitex Mfg. Corp., Ltd. v. Carbitex] Corp.* [377 F.2d 795 (3d Cir. 1967), 348-349
- Waldinger Corp. v. CRS Group Engineers, Inc.*, 775 F.2d 781 (7th Cir.1985), 267
- Waters v. Massey-Ferguson, Inc.*, 775 F.2d 587 (4th Cir. 1985), 369
- Waukesha Foundry Inc. v. Industrial Engineering, Inc.*, 91 F.3d 1002 (7th Cir. 1996), 106
- Wilson v. Scampoli*, 228 A.2d 848 (D.C. Ct. App. 1967), 285-286
- Zapata Hermanos Sucesores, S.A., v. Hearthside Baking Co., Inc.*, 313 F.2d 385 (7th Cir. 2002), 3-4.
- State Courts**
- Anthony Pools v. Sheehan*, 455 A.2d 434 (Md. App. 1983), 62
- Apgar v. Lederle Laboratories*, 588 A.2d 380 (N.J. 1991), 202
- Asante Techn. Inc. v. PMC-Sierra, Inc.*, 164 F. Supp.2d 1142 (N.D. Cal. 2001), 16
- Baxter v. Ford Motor Co.*, 12 P.2d 409 (Wash. 1932), 198
- Borrer v. MarineMax of Ohio, Inc.*, 2005 WL 25654346 (Ohio Common Pleas 2005), 294-295
- Brown v. Farm Fire & Casualty Co.*, 831 P.2d 1122 (Wash. Ct. App. 1992), 246
- Cook v. Downing*, 891 P.2d 611 (Okla. 1994), 44, 54
- Datronc Equipment Income Fund v. Healey Ford-Lincoln Mercury, Inc.*, 1997 WL 135510 (Conn. Super., Mar. 5, 1997), 417
- Fertico Belgium S.A. v. Phosphate Chemicals Export Assoc.*, 70 N.Y.2d 76 (N.Y. 1987), 371
- Garfield v. Furniture Fair-Hanover*, 274 A.2d 325 (N.J. 1971), 82
- General Motors Corp. v. Johnston*, 592 So. 2d 1054 (Ala. 1992), 80
- Graybar Elec. Co. v. Shook*, 195 S.E.2d 514 (N.C. 1973), 248
- Hopkins v. Dow-Corning*, 33 F.3d 1116 (9th Cir. 1994), 196
- Interior Elevator Co. v. Limmeroth*, 565 P.2d 1074 (Or. 1977), 372
- Jacquot v. Wm. Filene's Sons Co.*, 337 Mass. 312, 49 N.E.2d 635 (1958), 196
- MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), 199-200
- Maxwell v. Fidelity Financial Services Inc.*, 184 Ariz. 82, 907 P.2d 51 (1995), 204
- McCarty v. E.J. Korvette, Inc.*, 347 A.2d 353 (Md. 1973), 205
- McClure v. Rego Co., Case, No.* 321280(Sacramento Cty. Calif., 1989), 194
- M.A. Mortenson v. Timberlinie Software Corp.*, 140 Wn. 2d 568, 998 P.2d 305 (Wash. 2000), 229-30
- Mieske v. Bartell Drug Co.*, 593 P.2d 1308 (Wash. 1979), 55
- Milau Assoc. Inc. v. North Ave. Develop. Corp.*, 42 N.Y.2d 482, 398 N.Y.S.2d 482 (1977), 57
- Overland Bond & Investment Corp. v. Howard*, 292 N.E.2d 168 (Ill. 1st Dist. 1972), 328

- Ragus Co. v. City of Chicago*, N.E.2d 999
(Ill. Ct. App. 1993), 14
- Ramirez v. Autosport*, 440 A.2d 1345 (N.J.
1982), 294
- Richardson v. Darwin D. Mast*, 540
N.W.2d 488 (Neb. 1997), 325
- Romano v. Manor Care, Inc.*, 861 So.2d 59
(Fla. Ct. App. 2003), 58
- Sanders v. International Soc’y for Perfor-
mance Improvement*, 740 A.2d 34, 36
(D.C. 1999), 141
- Selland Pontiac-GMC, Inc. v. King*, 384
N.W.2d 490 (Minn. App. 1986), 267
- Siemen v. Alden*, 34 Ill.3d 961, 341 N.E.2d
713 (1975), 82
- Siemens Credit Corp. V. Newland*, 905 F.
Supp. 757 (N.D. Cal. 1994), 447
- Todd Heller, Inc. v. Indiana Department of
Transportation*, 819 N.E.2d 140 (Ind.
Ct. App. 2004), 102
- Varco-Pruden, Inc. v. Hampshire Constr.
Co.*, 50 Cal. App.3d 654, 123 Cal.
Rptr. 606 (1st Dist. 1975), 57
- Williams v. Lowenthal*, 134 Cal. App. 179,
184 (Cal. Ct. App. 1932), 196
- Williams v. Walker-Thomas Furniture Co.*,
350 F.2d 445 (D.C. Cir. 1965), 227
- Wilson Trading Corp. v. David Ferguson,
Ltd.*, 23 N.Y.2d 398, 297 N.Y.S.2d
108, 112 (1968), 330
- Ytthro Corp. v. X-Ray Marketing Ass’n, Inc.*,
559 A.2 3 (N.J. Super. 1999), 139
- Zabriskie Chevrolet, Inc. v. Smith*, 240
A.2d 195 (1968), 287
- Zicari v. Joseph Harris Co.*, 33 A.D.2d 17,
304 N.Y.S.2d 918 (1969), 158

Preface

When I answered that I came from far away,
The policeman at the roadblock snapped, “Where’s that?”
He’d only half heard what I said and thought
It was the name of some place up the country.
And now it is—both where I have been living
And Where I left—a distance still to go
Like starlight that is light-years on the go
From far away and takes light-years arriving.

Seamus Heaney¹

Recently, I received a letter from a former student who is currently an associate in a large Boston law firm thanking me for including the Convention for the International Sale of Goods (CISG) in my Sales and Leases course at Suffolk University Law School. He described how he recently handled two international sales cases centering on CISG practices and was grateful for being able to spot these issues. Forewarned is forearmed. All business lawyers in the new millennium need a basic understanding of international contract law to serve their client’s interests.

This book is a product of research that I conducted while teaching international contract law and international sales law at Suffolk University Law School in Boston and in its summer program at the University of Lund in Sweden from 2000 to 2006. I learned a great deal from Patrik Lindskoug and Ulf Maunsbach of the University of Lund Law School. During the summer of 2005, I taught international contract law in Mexico City on the campus of *Escuela Libre de Derecho (ELD)* in a five-week program sponsored by the University of San Diego’s Institute on International and Comparative Law.² In the summer of 2007, I taught U.S. Commercial and Contract Law at Eötvös Lorand University in Budapest, Hungary, as part of Suffolk’s LL.M Program for international business lawyers. This book is the result of my experience teaching and researching international contract law as well as my other work with business lawyers and academics in Europe and Mexico.

Most law students are preparing for legal careers that require an understanding of international contract law as well as domestic or national law. Business attorneys practicing in the twenty-first century need a good understanding of the potential applicability of the CISG if a contract for the sale of goods involves a party in another nation. In-

1. Seamus Heaney, Poem, *The New Yorker* (Dec. 26, 1994), at 88.

2. San Diego’s summer program is an intensive, five-week study abroad program based in Mexico City at Escuela Libre de Derecho (ELD). Stephen Zamora and his co-authors describe the free-standing ELD as “one of Mexico’s most respected law schools.” STEPHEN ZAMORA, JOSÉ RAMÓN COSSÍO, LEONEL PEREZNIETO, JOSÉ ROLDÁN-XOPA, DAVID LOPEZ, *MEXICAN LAW* (2004).

creasingly, law schools are coming to the realization that the sale of goods is multi-hemispheric, as the sun never sets on a global marketplace. Worldwide Internet business-to-business transactions alone reached \$6 trillion in 2005.³ The study of CISG is already central to the law school curriculum throughout Europe. All students at the University of Lund in Sweden take a required course on CISG, as do students at many other law schools around the globe. Increasingly, United States law schools are realizing the importance of teaching their students about international commercial law.

This book uses practical examples and explanations to compare and contrast Uniform Commercial Code (UCC) Article 2 with CISG but also covers the leases of goods, the licenses of information, and procedural and localization issues in international contracts. This book is appropriate for a course in international contract law, sales and leases, or comparative commercial law. This book illustrates domestic and international commercial law in action through the hypothetical activities of an import/export company, Suffolk Sales and Leasing (SSL). SSL not only sells goods but also has a leasing division, licenses software, and renders consultation services throughout Europe. SSL has a subsidiary in Lund, Sweden, called “Lundia,” which directs sales, leases, and licenses to many countries of the European Community. Europe has been chosen for cross-border comparisons because many international contract principles apply to the 27 members of the European Community:

Europe is a prize market, easier to access than ever before. Too many U.S. exporters, especially small and medium sized enterprises, avoid it because the technical requirements for entry seem too complicated, too difficult, or too expensive. U.S. manufacturers who have successfully accessed the European market know that the time to understand the European system is well worth the effort. The European Union alone is filled with affluent consumers, approximately 370 million of them. But the European market is a large area that comprises not only the 15 countries that presently make up the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom), but also the three countries that complete the European Economic Area (EEA) (Iceland, Liechtenstein, and Norway, i.e., EFTA countries except Switzerland). In addition, there are approximately 11 other Central and Eastern European countries, such as the Czech Republic and Poland, which are candidates for future membership in the European Union. These countries are rapidly adopting European Union laws, standards, conformity assessment procedures.⁴

SSL is a 24/7 company and its website is the instrumentality for selling or leasing goods and licensing software. The use of the hypothetical teaches practical as well as doctrinal principles of domestic and international contact law. The SSL hypothetical is a pedagogical device to teach students that they can best understand international contract law in context through comparisons of the domestic and international commercial law. The take away point from the SSL hypothetical used throughout the book is this importance of preventive law in a sophisticated commercial law practice.

3. Gartner Group, *Worldwide Business-to-Business Internet Commerce to Reach \$8.5 Trillion in 2005*, at <http://www4.gartner.com/5abpit/prssroom> (last visited June 8, 2007).

4. National Institute of Standards, *A Guide to EU Standards and Conformity Assessment: Introduction to Europe: A Single Market*. NIST SP 951 <http://ts.nist.gov/Standards/Global/pg1.cfm> (last visited Dec. 26, 2006) .

I: UCC Article 2 vs. CISG

A contract is any promise, if when broken, will give the non-breaching party a remedy at law. UCC Article 2 governs B2C contracts for the sale of goods as well as business-to-business (B2B) sales contracts. The most common type of contract is when a seller agrees to sell goods and the buyer agrees to pay money. Suppose a consumer purchased a power pack from Suffolk Sales & Lease's (SSL) website. The consumer buyer was contractually bound by the rules of the SSL auction. As the highest bidder in the online auction, the consumer promised to pay the agreed price for the power pack. UCC Article 2 governed the eBay contract. The sale of the power pack transfers absolute title to personal property in exchange for the price. If a commercial party purchased hundreds of powerpacks from another entity in a foreign country, the operative law would likely be the Convention for the International Sale of Goods (CISG).

II: Leases & Licenses: Domestic vs. International

The primary emphasis of this book compares UCC Article 2 and CISG, though there will also be coverage of leases and the licensing of information in Part II. UCC Article 2A governing the lease of goods shares much common ground with Article 2. UCC Article 2A updates and tailors rules developed for the sale of goods to leases.

This book also examines UCC Article 2A on leases of goods. The American Law Institute and the National Conference of Commissioners of Uniform State Law (NC-CUSL) approved UCC Article 2A for consideration by state legislatures in 1987. The majority of states adopted UCC Article 2A within a few years, and the new Article was last amended in 2003. The emphasis will be on how UCC Article 2A rules for scope, formation, warranties, risk of loss, performance, and remedies compare with UCC Article 2. "UCC Article 2A-Leases govern over \$260 billion a year in lease transactions, accounting for roughly one-third of all capital investment each year in the United States."⁵ Prior to the widespread adoption of UCC Article 2A, courts applied UCC Article 2 by analogy. UCC Article 2A imports many of the concepts and methods of UCC Article 2; however, there are important differences.

UCC Article 2A, for example, has an expanded definition of unconscionability, defines special rules for consumers, and articulates different warranty rules for finance leases.⁶ UCC Article 2 follows the American rule when it comes to attorneys' fees whereas UCC Article 2A, for example, provides for the recovery of attorneys fees for lease contracts found to be unconscionable. Part II of this book examines the concepts and methods of UCC Article 2A and the law of licensing with a discussion of cross-border international issues.

5. Edwin E. Huddleson, "Leasing is Distinctive" at <http://preview.pdesigner.com/huddleson/Articles.jsp> (last visited June 7, 2007).

6. A consumer transaction" means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes. This definition first devised by the Federal Trade Commission is the definition used in thousands of federal and state statutes and regulations. See, e.g., M.G.L.A. ch. 93A (Massachusetts unfair and deceptive trade practices act). This definition is consistent with the European Union definition of consumer being someone outside his or her

Part I covers the latest developments in domestic and international sales. Chapter 1 of Part II addresses domestic and international leases whereas the focus of Chapter 2 of Part II is on the licensing of software and other digital information. This chapter is unique because of its emphasis on practice pointers in addition to an international approach, which is of immense practical value. Here, the international materials are less comprehensive because to date, there is no international convention covering leases of personal property so Article 2A is the most relevant template. Similarly, there is little by way of international codification of the licensing of software. Since licensing is the chief method of transferring value in the new global economy, it is important to learn about how to transfer rights in software and other intangibles.

Chapter Two of Part II covers the Uniform Computer Information Transaction Act (UCITA) in detail and uses UCITA as the template for licensing software and information-based assets. Many of the concepts and methods of the UCITA model statute reflect best practices in the business community, but the statute has been adopted in only two states, Maryland and Virginia. Nevertheless, UCITA is a useful template to structure software licenses and other transfers of information for domestic as well as cross-border transactions. Part II includes a brief discussion of the problems of cross-border leases and licenses, because United States law is so dominant when it comes to leases and licenses. As a practical matter, domestic and international transactions converge when it comes to leases and licenses.

Each chapter features *Practice Problems* that help students and attorneys alike to identify and solve commercial law conundrums. The practice problems and the examples and explanations feature model answers, which will help the student master the concepts of domestic and international sales, leases, and licenses through self-study. I am writing this book during a period in which both UCC Articles 2 and 2A are under revision. In 2003, the American Law Institute (ALI) and the National Conference of Commissioners on State Law (NCCUSL) promulgated revisions to Article 2. To date, no state has adopted the revisions and it is unlikely that any jurisdiction will adopt the revisions in its present form. State legislators have the final say about whether Revised Article 2 will be adopted and if so, under what conditions. UCC Articles are frequently adopted with scores of non-uniform amendments. The Uniform Commercial Code, as a result, is less uniform than its name suggests. As I write this book, Revised Article 2 is dead on arrival, a casualty of the politics of law reform. Many of the revised Article 2 provisions offered substantive improvements in the law making it more adaptable to e-commerce. Special interests pledging to block adoption of the revised Article 2 at the state legislature level have consigned the draft to the ashbin of commercial jurisprudence. The draft is a significant law reform project that tailors UCC Article 2 rules drafted in the 1940s and early 1950s to the age of the Internet.

Furthermore, there is brief mention of the revisions to UCC Article 2 and 2A but the overwhelming emphasis is on current United States and international contract law, not the future path of the law. Twenty-nine states have enacted Revised UCC Article 1 as of July 1, 2007. Proposed changes will be mentioned where relevant but the focus will be on the law of sales and leases currently in effect in most states. Individual instructors may select particular subjects with which they wish to cover, in the order of their choosing from the parts of the book. This book is dedicated to the law student of the new

trade or profession used in countless directives. See, e.g. Brussels Regulation on Judgments & Enforcement of Judgments in Civil and Commercial Matters (2003).

millennium who needs to understand the role of sales, leases, and licenses in a global world economy.

Michael L. Rustad
Boston, Massachusetts, and South Burlington, Vermont

Acknowledgments

I am indebted to the University of San Diego Mexico City Summer Program and Suffolk University Law School's Summer Program at the University of Lund for inspiring my interest in international contract law. In the summer of 2007, I benefitted from discussions with my business lawyer students in Budapest, Hungary. I co-taught a course in international contracts with Patrik Lindskoug⁷ and Ulf Maunsbach⁸ at the University of Lund in 2006 and a course in international sales law in 2004 in Suffolk University Law School's summer program in Sweden. In 2000 and 2002, we taught an Internet Law class which compared and contrasted United States law with European Union provisions. Patrick and Ulf taught me the European perspective on matters of jurisdiction, choice of law, and problems of cross-border contracts. Professor Ann Lousin of the John Marshall Law School generously shared her teaching materials on Article 2 of the UCC. My Suffolk University Law School colleagues Herbert Lemelman and Jeffrey Wittenberg generously provided me with statutory materials on international contract law. Professor Lemelman taught me many insightful comparisons between the UCC, CISG, Principles of European Contract Law, and UNIDROIT's Principles of International Commercial Law. I would also like to thank Stephen Hicks Professor of Law and Director of Graduate Law Program at Suffolk as well as Bernie Ortwein and Russ Murphy, Directors of the Sweden program.

My research assistants at Suffolk University Law School, especially Daryl Abbas, George Atasanov, Danielle Bouvier, Nicole Chiesa, David Coughlin, Adela Cufe, Steven Cohen, Suzanne Dawley, Michelle Dhanda, Shannon Downey, Ellen Garnett, As'ad Hamid, Adam LaFrance, John Martin, Joann Nguyen, Karla Ota, Zachary Piccolimini, Jason Peterson, Ana Sa, and Jo-Na Williams made significant contributions to this work. Nicole Chiesa has provided excellent research and editorial assistance in the summers of 2006 and 2007. Shannon Downey's help has been extraordinary. Her research and editorial suggestions have contributed enormously to this work. Adam LaFrance provided critical research on CISG remedies and helped me organize cases and materials for the work as a whole. Nicole Chiesa edited the manuscript, performed research, and corrected page proofs in the summers of 2006 and 2007.

7. Professor Patrik Lindskoug's 2004 dissertation was a study of jurisdiction and choice of law in e-commerce transactions, *See* Lindskoug, Patrik (1965), Department of Law 1 October 2004, Carolinasalen, kungshuset, Lundagård, Lund http://theses.lub.lu.se/postgrad/search.tkl?field_query1=pubid&query1=law_40&recordformat=display (last visited June 7, 2007).

8. Professor Ulf Maunsbach's 2005 dissertation was a close examination of cross-border trademark infringement. *See* Maunsbach, Ulf: Svensk domstols behörighet vid gränsöverskridande varumärkestvister—särskilt om Internetrelaterade intrång/ (Swedish Jurisdiction in Cases on Cross-border Trademark Infringements—With Special Regard to Internet Related Actions), 2005, Lund University, Department of Law http://theses.lub.lu.se/postgrad/search.tkl?field_query1=key-words&query1=Private%20international%20 (last visited June 7, 2007).

Brian Elworthy, a second-year law student at the Georgetown Law Center also served as a research assistant in the summer of 2006. Elynn Lo, a former JD-MBA student of mine, who lived in ten different countries and traveled to more than twenty countries, provided valuable editorial, research assistance, and insights from her experience in international and business law. Ronald B. Kaplan, Esquire, provided me with editorial assistance at the galley stage. Also, I want to thank Keith Sipe, Karen Clayton, and Linda Lacy at Carolina Academic Press for their steadfast commitment to this work. My wife, Chryss J. Knowles, also deserves thanks for her editorial suggestions. Finally, I would like to acknowledge the contribution made by our daughter, Erica Knowles Rustad, a 2006 graduate of the University of Miami and a second-year law student at Fordham University Law School. Erica's fresh perspective and critical eye improved and enriched my work.

About the Author

Michael L. Rustad, Ph.D., J.D., LL.M is the Thomas F. Lambert Jr. Professor of Law and Co-Director of the Intellectual Property Law Concentration at Suffolk University Law School. The graduating seniors elected him to receive the Cornelius Moynihan Award for Teacher of the Year three times in the past decade. He also received the Thomas McMahon Award for faculty dedication to students in 1999. He has taught international contracts law and comparative commercial law at universities in Sweden, Mexico, and Hungary. Prior to joining the Suffolk University Law School faculty, he was an associate with Foley, Hoag in Boston. He clerked for the late William E. Doyle of the Tenth Circuit U.S. Court of Appeals in Denver. His numerous law review articles and chapters have been cited by the U.S. Supreme Court and U.S. federal district and appellate courts as well as state supreme courts. He has testified before both Houses of Congress on the topic of tort reform. He has been interviewed by *NBC Dateline*, the *Wall Street Journal*, *The Economist*, *The New York Times*, and numerous other national publications. He is a nationally known consumer law advocate and debated John Stossel, Anchor of 20/20 on the topic: *Trial Lawyers & Tort Law: Citizen Protectors or Legal Pariahs?* in 2004. In 2005, he debated Dr. John Nelson, President of the American Medical Association on the BBC Radio Program *Law in Action*. Professor Rustad's most recent books include [1] *Everyday Consumer Law* (Paradigm Publishers, 2007); [2] *Tort Law: Cases, Problems, Perspectives* (Lexis/Nexis 2007) (with Thomas Galligan et al.); [3] *In Defense of Tort Law* (NYU Press 2002) (with Thomas H. Koenig); [4] *E-Business Legal Handbook* (Aspen Law & Business) (with Cyrus Daftary); and [5] *The Concepts of Sales, Leases and Licenses* (Carolina Academic Press, 1999). He is an elected member of the American Law Institute and is in the Member Consultative Groups of the *Restatement of the Law, Third: Torts: Liability for Physical and Emotional Harm and Principles of Software Contracts*. Professor Rustad was elected to the Executive Committee of the Torts and Insurance Compensation Section of the American Association of Law Schools. He was on the Legal Issues Team for the World Summit on the Information Society.