

# Chapter 1

## Introduction to the Sale of Goods

### 1-1 INTRODUCTION: SCOPE OF UCC ARTICLE 2

#### 1-1:1 Sale of Goods

The UCC Article 2<sup>1</sup> applies to the sale of goods. The statutory language states that Article 2 governs “transactions in goods.”<sup>2</sup> The UCC does not define “transactions,” but “sale” is described as the passing of title from the seller to the buyer for a price.<sup>3</sup> While use of the word “transactions” suggests a broader reach than just sales, it was termed prior to the adoption of Article 2A which covers the leasing of goods.<sup>4</sup>

In practice, Article 2 does not actually cover all “transactions” involving goods, nor does it apply to all aspects of a transaction governed by Article 2. For example, in addition to Article 2A<sup>5</sup> which covers lease agreements, Article 7<sup>6</sup> covers the storage and transport

<sup>1</sup> N.J.S.A. 12A:1-101 et seq.

<sup>2</sup> N.J.S.A. 12A:2-102; see *Custom Communications Engineering, Inc. v. E.F. Johnson Co.*, 269 N.J. Super. 531, 540 (App. Div. 1993) (noting that the term “transactions in goods” is broad and “on its face would seem to cover an agreement that has as its purpose the ongoing transfer of title to goods between the parties.”).

<sup>3</sup> N.J.S.A. 12A:2-106(1).

<sup>4</sup> Prior to the adoption of UCC Article 2A, courts wrestled with discerning whether Article 2 applied to lease transactions; see *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So.2d 851 (1986) (Interpreting the UCC adopted by Mississippi).

<sup>5</sup> N.J.S.A. 12A:2A-101 et seq.

<sup>6</sup> N.J.S.A. 12A:7-101 et seq.

of goods, and Article 9<sup>7</sup> covers security interests. Moreover, Article 2 does not “impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.”<sup>8</sup> For example, the UCC does not displace the certificate of title statute covering motor vehicles.<sup>9</sup> But when Article 2 does apply, the specific aspects of the sales transaction covered include contract formation and construction; rights of third parties; in addition to performance obligations, breach, remedies and warranties.

### 1-1:2 Goods

The UCC defines “goods” as “all things...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... [UCC Article 8]...and things in action. ‘Goods’ also includes the unborn young of animals and growing crops and other identified things attached to realty...”<sup>10</sup> The definition of goods is linked to the concept of “movability,” but includes crops intended for sale.<sup>11</sup> Goods must be both existing and identified before an interest in them can be passed, otherwise they are future goods.<sup>12</sup> The category of goods does not include real estate or investment securities.<sup>13</sup>

The “movability” standard covers items that are *tangible*. According to one scholarly summation, Article 2 excludes contracts: “whose subject matter focuses on intangibles, information, and intellectual property rights.”<sup>14</sup> What about the status of transactions involving the sale and licensing of computer software? Courts in other jurisdictions have applied various criteria to determine if and when Article 2 applies to computer software transactions.<sup>15</sup>

<sup>7</sup> N.J.S.A. 12A:9-101 et seq.; Note that there are certain provisions in Article 2 interact with the security interest provisions of Article 9. See N.J.S.A. §§ 12A:2-401, 12A:2-505, 12A:2-707 and 2-711(3).

<sup>8</sup> N.J.S.A. 12A:2-102.

<sup>9</sup> See N.J.S.A. 39:10-6.

<sup>10</sup> N.J.S.A. 12A:2-105(1).

<sup>11</sup> N.J.S.A. 12A:2-105, Uniform Commercial Code Comment 1.

<sup>12</sup> N.J.S.A. 12A:2-105(2).

<sup>13</sup> N.J.S.A. 12A:2-105; See also *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 675 (3d Cir. 1991) (Discussing the UCC adopted by Pennsylvania).

<sup>14</sup> See Holly K. Towle; “Enough Already: It is Time to Acknowledge That UCC Article 2 Does Not Apply to Software and Other Information”; 52 Tex. L. Rev. 531, 545 (2011).

<sup>15</sup> See White & Summers; *Uniform Commercial Code*; § 2-1, at 25-26 (6th ed) (“... some courts have classified an ordinary mass market software sale as such a transaction in

Interpreting the UCC adopted by Pennsylvania, the Third Circuit found that the Article 2 does apply to customized software because Article 2 provides for “specially manufactured goods.”<sup>16</sup> In an unpublished decision, the New Jersey Appellate Division recognized that “most jurisdictions treat computer software development and sales not as a service but as goods subject to the UCC, both for the sake of uniformity and clarity of the law and because software is on discs and is a tangible and moveable item rather than an intangible idea.”<sup>17</sup>

### 1-1:3 Goods to be Severed From Realty

Article 2 generally does not apply to real estate.<sup>18</sup> However, the UCC provides that a contract for the sale of “a structure [i.e., building]<sup>19</sup> or its materials to be removed from realty is a contract for the sale of goods within...[Article 2]...if they are to be severed by the *seller*...”<sup>20</sup> Similarly, the sale of minerals, oil and gas not yet extracted is only a contract for the sale of goods if the

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goods...where the purchaser is not a mass market consumer, some courts have looked to a second criterion and have held that entirely new software made from scratch (i.e. “concept to realization”) does not fall under the purview of Article 2, and distinguished this result from other cases in which the sales were of preexisting software with custom modifications or upgrades...a third criterion...[applies]...the logic used in some ‘hybrid’ cases and finding that the contract called for the software developer’s ‘contribution of knowledge and expertise to the design and development of a product that included a software component.’ Applying the predominant purpose test, the court found that the ‘software... provided...at best was incidental to the predominant purpose of those agreements.’... A fourth criterion is the manner of payment. An upfront or single [as opposed to installment] payment is an indication of a sale of a good according to several courts.”), citing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996); *Data Processing Servs. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314 (Ind. Ct. App. 1986), *overruled as stated in Van Prooyen Builders, Inc. v. Lambert*, 2009 Ind. App. Lexis 1057 (Ind. Ct. App. 1986) *True N. Composites, L.L.C. v. Trinity Indus.*, 65 Fed. Appx. 266 (Fed. Cir. 2003); *Pearl Invs., LLC v. Standard I/O, Inc.*, 257 F. Supp. 2d 326 (D.Me. 2003); *Multi-Tech Sys. v. Floreat, Inc.*, 47 UCC 2d 924 (D. Minn. 2002); *Arlington Electrical Constr. v. Schindler Elevator Corp.*, 1992 WL 43112 at \*7 (Ohio Ct. App. 1992); *Advent Sys. Ltd. v. Unisys, Corp.*, 925 F.2d 670 (3d Cir. 1991); *Softman Prods. Co., LLC v. Adobe Sys.*, 171 F. Supp. 2d 1075 (C.D. Cal. 2001); *Smart Online, Inc. v. Opensite Technologies, Inc.*, 2003 NCBC 5, 51 UCC 2d 47 (N.C. Super. Ct. 2003); *Dealer Mgmt. Sys. v. Design Auto. Group, Inc.*, 355 Ill. App. 3d 416 (2005), *rehearing den.* 2005 Ill. App. Lexis 151 (2005).

<sup>16</sup> *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991).

<sup>17</sup> *Youngtech, Inc. v. Beijing Book Co., Inc.*, 2006 N.J. Super. Unpub. LEXIS 1443, at \*12 (App. Div. 2006).

<sup>18</sup> N.J.S.A. 12A:2-105(1) (emphasis added).

<sup>19</sup> “Structure” is “Any construction, production, or piece of work artificially built up or composed of parts purposefully joined together...a building is a structure.” Bryan A. Garner (Editor in Chief); *Black’s Law Dictionary* at 1559 (9th ed).

<sup>20</sup> N.J.S.A. 12A:2-107(1).

substance is to be severed by the seller.<sup>21</sup> Otherwise, when an item is part of the realty, any transfer of interest is governed under real property law. Only if the item is to be removed from the real estate by the seller does the UCC apply.

Consequently, while at common law a contract to sell and deliver a house was a contract for the sale of goods, the UCC changes that rule when the structure is to be severed by the buyer rather than the seller.<sup>22</sup> This issue sometimes arises in the context of determining which statute of frauds applies, the UCC<sup>23</sup> or the statute applicable to real estate<sup>24</sup> transactions.<sup>25</sup> For example, other jurisdictions have found that an oral contract for the buyer to enter upon land and dismantle a “structure” was controlled by UCC § 2-107 and thus barred by the real estate statute of frauds.<sup>26</sup>

<sup>21</sup> N.J.S.A. 12A:2-107(1).

<sup>22</sup> See Williston & Lord, *A Treatise on the Law of Contracts* § 26:13 (4th ed 1999).

<sup>23</sup> N.J.S.A. 12A:2-201.

<sup>24</sup> A statutory definition of “real property” (real estate) is found at N.J.S.A. 54:4-1, dealing with taxation, describing it as “all land and improvements thereon and includes personal property affixed to the real property or an appurtenance thereto, unless: a. 1) the personal property so affixed can be removed or severed without material injury to the real property; 2) the personal property so affixed can be removed or severed without material injury to the personal property itself; and 3) the personal property so affixed is not ordinarily intended to be affixed permanently to real property; or b. the personal property so affixed is machinery, apparatus, or equipment used or held for use in business and is neither a structure nor machinery, apparatus, or equipment the primary purpose of which is to enable a structure to support, shelter, contain, enclose or house persons or property. For purposes of this subsection, real property shall include pipe racks, and piping and electrical wiring up to the point of connections with the machinery, apparatus, or equipment of a production process...”

<sup>25</sup> See N.J.S.A. 25:1-11.

<sup>26</sup> See *Baker v. Jim Walter Homes, Inc.*, 438 F. Supp. 2d 649, 651-652 (W.D. Va. 2006), citing *Rosen v. Hummel*, 47 A.D.2d 782 (App. Div. 1975) (holding that oral contract for buyer to enter on land and dismantle and carry off a ‘structure’ was controlled by § 2-107 and barred by the real estate statute of frauds); see also *Pardoe & Graham Real Estate, Inc. v. Schulz Homes Corp.*, 259 Va. 398 (2000) (finding that an oral contract for a commission on the sale of a custom home to be built on a lot already owned by the home buyer was not covered by the real estate statute of frauds, since the home had not yet been built it could not be considered “real estate”); *Denton v. Clove Valley Rod & Gun Club, Inc.*, 95 A.D.2d 844 (App. Div. 1983) (holding that oral contract for buyer to purchase and remove historical home from land was governed by UCC § 2-107(1) and barred by real estate statute of frauds); *State Highway & Transp. Comm’r v. Edwards Co.*, 220 Va. 90 (1979) (holding that intention of party making the annexation is the prime consideration in determining whether personal property has become realty, which intent may be inferred from the nature of the property, its purpose, and the mode of annexation); *Condon Bros., Inc. v. Simpson Timber Co.*, 92 Wn. App. 275, 281-82 (Wash. 1998) (holding that dictionary definition of the word “structure” as “something constructed or built” governs in applying UCC § 2-107(1)).

In addition, a sale of growing crops or timber to be cut is a sale of goods under the UCC regardless of whether the buyer or seller severs them.<sup>27</sup> Moreover, a contract for the sale of “things attached to realty and capable of severance without material harm” is deemed a contract for the sale of goods regardless of who severs them.<sup>28</sup> This provision essentially covers fixtures, even though that word is not directly used due to the “diverse definitions” of the term.<sup>29</sup>

## 1-2 UCC AND THE COMMON LAW

### 1-2:1 Common Law Supplements the UCC

Unless displaced by a specific statutory provision, the common law supplements the UCC.<sup>30</sup> This means that the UCC preempts the common law only when there is an inconsistency between the two. Accordingly, there may be instances where both the UCC and the common law apply, or where the UCC controls. Under New Jersey law, legislative intent to change the common law must be clearly and plainly expressed.<sup>31</sup>

Remedies under the UCC are cumulative rather than exclusive, and a claimant may pursue any and all applicable damages<sup>32</sup>. Further, unless explicitly displaced, the UCC does not negate any valid common law or other statutory claim. The Code expressly preserves claims premised upon “principles of law and equity, including the law of merchant and the law relative to capacity to

<sup>27</sup> N.J.S.A. 12A:2-107(2).

<sup>28</sup> N.J.S.A. 12A:2-107(2); *see also Amusement Supply Co. v. Kaybe Amusement Co.*, 128 N.J.L. 98 (N.J. Super. Ct. 1942) (Pre-Code decision decided under former § 46:31-14 (now § 12A:2-107) where a former movie theater tenant bought equipment for the operation of a movie projector without paying for it, it was found that replevin of the equipment would not materially injure the freehold, as to the building owner and subsequent tenant because the equipment was replaceable); *Uttinger v. Koopman*, 46 N.J. Super. 443 (App. Div. 1957) (Pre-code decision decided under former § 46:31-14 (now § 12A:2-107), a restaurant owner was sued for replevin of property and it was found that a conditional sales contract was void once property became fixtures).

<sup>29</sup> *See* N.J.S.A. 12A:2-107, Uniform Commercial Code Comment 2.

<sup>30</sup> N.J.S.A. 12A:1-103(b); *MRL Development I, LLC v. Whitecap Investment Corp.*, 2016 U.S. App. Lexis 8987 \*8-10 (3d Cir. 2016) (Interpreting the UCC as adopted by the Virgin Islands).

<sup>31</sup> *See Demos v. Lyons*, 151 N.J. Super. 489, 499 (Law Div. 1977), citing *Fivehouse v. Passiac Valley Water Comm'n*, 127 N.J. Super. 451, 456 (App. Div.), *cert. denied*, 65 N.J. 565 (1974).

<sup>32</sup> N.J.S.A. 12A:2-703, Uniform Commercial Code Comment 1.

contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause...”<sup>33</sup>

Similarly, New Jersey courts have held that the UCC does not preempt or exclude other statutory remedies such as the Consumer Fraud Act.<sup>34</sup> A claim under the CFA may result in treble damages and attorney fees. In addition, a commercial buyer of goods may seek punitive damages for fraud.<sup>35</sup> However, remedies for contractual breach are generally limited to economic loss, and claims more applicable to tort principles such as negligence are unavailable under the UCC.<sup>36</sup>

## 1-2:2 Differences Between the UCC and Common Law

It is important to determine whether the UCC or the common law governs a contractual dispute. For example, the common law would apply to a contract that predominantly covers services, as opposed to the sale of goods. But where the contract is for the sale of goods, the UCC contains several important distinctions worth highlighting that displace the common law:

### A) Mirror Image Rule

Under the common law, a contract isn't created unless there is agreement on all terms and conditions. Any difference between an offer and acceptance is treated as a counter-offer. This is known

<sup>33</sup> N.J.S.A. 12A:1-103(b); *see also* N.J.S.A. 12A:2-721.

<sup>34</sup> *Coastal Group, Inc. v. Dryvit Systems, Inc. and Tech 21 Panel Systems, Inc.*, 274 N.J. Super. 171, 178-79 (App. Div. 1994), *appeal granted by, in part, remanded by* 147 N.J. 574 (1997), citing *Delgozzo v. Kenny*, 266 N.J. Super. 169, 183 (App. Div. 1993); *but see also D'Ercole Sales v. Fruehauf Corp.*, 206 N.J. Super. 11 (App. Div. 1985) (Finding that a breach of warranty under the UCC is not a *per se* violation of the Consumer Fraud Act).

<sup>35</sup> *Perth Amboy Iron Works, Inc. v. American Home Assurance Co.*, 226 N.J. Super. 200, 227 (App. Div. 1988), *aff'd o.b.*, 118 N.J. 249 (1990).

<sup>36</sup> *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 579 (1985) (... “[a] seller’s duty reflects a policy choice that economic losses inflicted by a seller of goods are better resolved under principles of contract law. In that context, economic interests traditionally have not been entitled to protection against mere negligence.”), *superseded in statute as stated in Agrolabs, Inc. v. Innovative Molding, Inc.*, 2014 U.S. Dist. Lexis 97260, \*8-9 (D.N.J. 2014) (“...the New Jersey Legislature codified the Spring Motors ruling by adopting the Product Liability Act.”); *see also Travelers Indem. Co. v. Dammann & Co.*, 594 F.3d 238, 248 (3d Cir. 2010) (Our courts “have consistently held that contract law is better suited [than tort law] to resolve disputes between parties where a plaintiff alleges direct and consequential losses that were within the contemplation of sophisticated business entities with equal bargaining power and that could have been the subject of their negotiations”).

as the “mirror image” rule. In contrast, the UCC provides that a definite expression of acceptance or written confirmation sent within a reasonable time operates as acceptance even though it contains additional terms to or differences from those offered or agreed upon.<sup>37</sup>

### **B) UCC Gap Fillers**

To be enforceable, a contract must generally contain sufficiently definite terms so that the performance owed by each party is ascertained with reasonable certainty.<sup>38</sup> However, the UCC provides that even if one or more material terms are omitted from a contract, it will not fail for indefiniteness if: a) the parties intended to enter an agreement; and b) there is a reasonable basis for providing an appropriate remedy.<sup>39</sup>

Where silent, the UCC provides terms needed for determining price, delivery, payment, duration, and exclusivity. The UCC contains other guarantees and obligations that usually aren’t specified in a contract. This includes Warranty of Title, Warranty of Merchantability, Fitness for a Particular Purpose, and the Implied Covenant of Good Faith and Fair Dealing. In addition, course of performance, course of dealing or trade usage may supply or modify certain contractual terms. Contractual remedies are also spelled out in the UCC.

### **C) Statute of Frauds**

In general, contracts may be entered into orally. However, the UCC contains a statute of frauds provision requiring that certain contracts for goods priced at \$500 or more be in writing.<sup>40</sup> The common law does not contain any statute of frauds requirements.

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<sup>37</sup> N.J.S.A. 12A:2-207(1).

<sup>38</sup> *Savarese v. Pyrene MFG. Co.*, 9 N.J. 595, 599 (1952).

<sup>39</sup> N.J.S.A. 12A:2-204(3).

<sup>40</sup> N.J.S.A. 12A:2-201(1); *see also Huyler Paper Stock Co. v. Information Supplies Corp.*, 117 N.J. Super. 353, 360 (Law Div. 1971) (Noting that the UCC statute of frauds only applies to the sale of goods and not services).



### D) Statute of Limitations

Any action for breach of contract under the UCC must be commenced within *four* years after the accrual of the cause of action.<sup>41</sup> In contrast, a common law contract claim must be commenced within *six* years after accrual.<sup>42</sup>

## 1-3 DETERMINING WHICH LAW APPLIES: GOODS OR SERVICES

Determining if UCC or the common law governs a contractual dispute typically turns upon whether the contract is for the sale of goods or services. Obviously, when the contract is entirely for the sale of goods, the UCC applies. If the contract is strictly for services the UCC does not apply.<sup>43</sup> This may be obvious in most cases. New Jersey courts have also recognized that restaurant food<sup>44</sup> and the development and sale of computer software<sup>45</sup> are goods, not services, covered by the UCC. However, less clear is when a “mixed contract” provides a measure of both goods and services where one is incidental to the other.

### 1-3:1 Mixed Contract: Which Transaction Predominates?

The most common situation with a mixed contract arises when installation services are provided in connection with goods. For example, the installation of a water heater in a bathroom likely falls under the UCC.<sup>46</sup> On the other hand, with certain transactions

<sup>41</sup> N.J.S.A. 12A:2-725(1).

<sup>42</sup> See *Custom Communications Engineering, Inc. v. E.F. Johnson Co.*, 269 N.J. Super. 531, 537 (App. Div. 1993); *Docteroff v. Barra Corp. of America, Inc.*, 282 N.J. Super. 230 (App. Div. 1995).

<sup>43</sup> *Gentile v. MacGregor Manufacturing Co.*, 201 N.J. Super. 612, 617 (Law Div. 1985) (no need to expand the UCC “to cover pure service transactions within the scope of sale.”).

<sup>44</sup> See *Koster v. Scotch Associates*, 273 N.J. Super. 102 (Law Div. 1993).

<sup>45</sup> *Youngtech, Inc. v. Beijing Book Co, Inc.*, 2006 N.J. Super. Unpub. LEXIS 1443, at \*12-13 (App. Div. 2006).

<sup>46</sup> See *Meyers v. Henderson Construction Co.*, 147 N.J. Super. 77, 79 (Law Div. 1977) (“The Federal District Court using New Jersey law, has held that this definition [of ‘goods’] is to be construed broadly. Not all courts have given the word ‘goods’ such a broad construction, however, and the changes of Sales Act terminology made by [UCC] subsection 2-105 of the Code appear designed to overturn the cases handed down in other states which seem unnecessarily restrictive. Most of these cases involve situations in which the seller not only sells goods but agrees to install them. Where the installation aspect of the transaction dominates, many courts have held that the transaction does not involve ‘goods’



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the “service element may so dominate the subject matter...as to bring it outside U.C.C. coverage.”<sup>47</sup> For example, the painting of a house.

The analysis is fact sensitive and depends upon whether the contract is for the sale of goods plus incidental services, or one for services plus the incidental providing of materials and labor.<sup>48</sup> The UCC applies “if the sales aspect predominates and is inapplicable if the service aspect predominates.”<sup>49</sup> Discerning the predominant nature of the contract is a question of fact, and courts have found it “helpful to look at the language and circumstances surrounding the contract...[and] the interrelationship of the goods and services to be provided; whether one is incidental to the other as well as the intrinsic worth of the goods being provided.”<sup>50</sup> One New Jersey court examined whether the service component of the contract was intended to foster the contract’s dominant purpose.<sup>51</sup>

Despite the UCC’s broad definition of “goods,” New Jersey courts are not always quick to term a contract as one for goods where installation services are involved. For example, one court found the installation of a roof to be a service contract where the purchase of roofing materials was incidental to the installation.<sup>52</sup> Similarly, courts have found the UCC inapplicable

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but ‘work and labor’. Since the ‘things’ involved in these cases are movable, the [UCC] Code would treat them as ‘goods’”), quoting New Jersey Study Comment 1.

<sup>47</sup> *Meyers v. Henderson Construction Co.*, 147 N.J. Super. 77, 81 (Law Div. 1977).

<sup>48</sup> *Quality Guaranteed Roofing, Inc. v. Hoffmann-La Roche, Inc.*, 302 N.J. Super. 163, 166 (App. Div. 1997), citing *Meyers v. Henderson Contr. Co.*, 147 N.J. Super. 77, 79 (Law Div. 1977); *Tele-Radio Systems Ltd. v. DeForest Electronics, Inc.*, 92 F.R.D. 371, 373-74 (D.N.J. 1981) (Where the “sale of goods is incidental to the basic purpose of the contract, the general [six year] statute of limitations on contracts will apply rather than the UCC statute of limitations...”).

<sup>49</sup> *Custom Communications Eng’g, Inc. v. E.F. Johnson Co.*, 269 N.J. Super. 531, 537 (App. Div. 1993); *Docteroff v. Barra Corp. of Am.*, 282 N.J. Super. 230, 240 (App. Div. 1995); *ESPJ Construction Corp. v. Tony Schiavone*, 2008 N.J. Super. Unpub. LEXIS 964, at \*11 (App. Div. 2008).

<sup>50</sup> *Quality Guaranteed Roofing, Inc. v. Hoffmann-La Roche, Inc.*, 302 N.J. Super. 163, 166-67 (App. Div. 1997), quoting *Conopco, Inc. v. McCreadie*, 826 F. Supp. 855, 868 (D.N.J. 1993), *aff’d*, 40 F.3d 1239 (3d Cir. 1994).

<sup>51</sup> *Quality Guaranteed Roofing, Inc. v. Hoffman-La Roche, Inc.*, 302 N.J. Super. 163, 167 (App. Div. 1997), discussing *Custom Communications Eng’g, Inc. v. E.F. Johnson Co.*, 269 N.J. Super. 531, 537 (App. Div. 1993).

<sup>52</sup> *Quality Guaranteed Roofing, Inc. v. Hoffmann-La Roche, Inc.*, 302 N.J. Super. 163 (App. Div. 1997); but compare *Docteroff v. Barra Corp. of America*, 282 N.J. Super. 230 (App. Div. 1995) (Holding that the UCC four year statute of limitations was applicable where a roof leak was in need of repair pursuant to a five year warranty; finding that the

where a contract is primarily for the services of a builder and the supply of stones is incidental to the construction of residential premises.<sup>53</sup> It has been held that the pouring and setting of concrete is a service transaction since concrete is not a “movable item for sale.”<sup>54</sup> In contrast, where the predominant purpose of the contract is for the procurement of items such as overhead doors, the installation services have been found incidental to the purchase of the goods.<sup>55</sup>

### 1-3:2 Dealerships and Distributors

New Jersey has adopted the majority rule that dealerships and distributors are to be treated as sellers of goods under the UCC.<sup>56</sup> This generally refers to a distribution chain where a distributor, typically a wholesaler, supplies goods to a dealership who sells to the public. While many distributorship agreements involve more than the sale of goods, the sales aspect predominates. For example, where a radio equipment manufacturer enters into a mobile agreement granting the dealer the right to sell *and* service their products, the UCC applies.<sup>57</sup>

## 1-4 UCC STANDARDS APPLICABLE TO MERCHANTS

### 1-4:1 Defining “Merchant”

The UCC imposes standards that are applicable to merchants and certain transactions “between merchants”. The UCC defines “merchant” as a “person who deals in goods of the kind or otherwise by his occupation *holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction* or to whom such knowledge or skill may be attributed by his

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guarantee to repair such defects was incidental to the initial sale and installation of the roof).

<sup>53</sup>. *Diiorio v. Structural Stone & Brick Co., Inc.*, 368 N.J. Super. 134 (App. Div. 2004).

<sup>54</sup>. *ESPJ Construction Corp. v. Tony Schiavone*, 2008 N.J. Super. Unpub. LEXIS 964 (App. Div. 2008).

<sup>55</sup>. *See Meyers v. Henderson Construction Co.*, 147 N.J. Super. 77 (Law Div. 1997).

<sup>56</sup>. *Custom Communications Engineering, Inc. v. E.F. Johnson Co.*, 269 N.J. Super. 531, 539 (App. Div. 1993).

<sup>57</sup>. *Custom Communications Engineering, Inc. v. E.F. Johnson Co.*, 269 N.J. Super. 531 (App. Div. 1993).

employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.”<sup>58</sup> (Emphasis added).

This definition is meant to include professional buyers and sellers.<sup>59</sup> However, the term “merchant” is not limited to the “dictionary meaning” of a buyer or seller, rather, the test is “whether a person is so experienced and knowledgeable under the circumstances that he should be charged with the more substantial burden imposed upon a merchant.”<sup>60</sup> This means that a “merchant” is a person who either deals in goods of a particular kind or otherwise holds themselves out as having knowledge or skill particular to the practices or goods involved in the transaction.<sup>61</sup>

### 1-4:2 Merchant’s Firm Offer

The Firm Offer Rule limits the ability of a merchant to withdraw an offer. This rule applies when: 1) there has been an offer, 2) by a merchant, 3) to buy or sell goods, 4) in a signed writing, 5) which provides assurance that the offer will be held open.<sup>62</sup> The purpose of this rule is to give effect to the deliberate intention of a merchant to make a firm offer binding.<sup>63</sup>

A firm offer remains irrevocably open for either a stated period or reasonable time. But the period of irrevocability may not exceed three months.<sup>64</sup> A firm offer is not revocable for lack of consideration.

### 1-4:3 Additional Terms

If an offer and acceptance takes place in a commercial context *between* merchants, additional terms expressed in either confirmation or acceptance are regarded as proposals to the

<sup>58</sup> N.J.S.A. 12A:2-104(1).

<sup>59</sup> *Allen v. Nicole, Inc.*, 172 N.J. Super. 442, 445 (Law Div. 1980); N.J.S.A. 12A:2-104, Uniform Commercial Code Comments.

<sup>60</sup> *Sea Harvest, Inc. v. Rig & Crane Equipment Corp.*, 181 N.J. Super. 41, 48 (Ch. Div. 1981), citing 1 *Anderson, Uniform Commercial Code*, 283, § 2-201:50 and 219-22, § 2-104:4-2 and 2-104:7 (2d ed 1970).

<sup>61</sup> See *R.F. Cunningham & Co. Inc., v. Driscoll*, 7 Misc. 3d 234, 235 (City Ct. 2005) (Interpreting UCC 2-104, adopted by New York, finding that a farmer with experience selling grain products was a “merchant”).

<sup>62</sup> N.J.S.A. 12A:2-205.

<sup>63</sup> N.J.S.A. 12A:2-205 Uniform Commercial Code Comment 2.

<sup>64</sup> N.J.S.A. 12A:2-205.

contract.<sup>65</sup> Such terms become part of the contract unless: 1) the offer expressly limits acceptance to the terms of the offer; or 2) the terms materially alter the agreement; or 3) notification of objection is provided within a reasonable time.<sup>66</sup>

#### 1-4:4 Statute of Frauds

When a transaction for the sale of goods is *between* merchants, there is a limited exception to the statute of frauds. This exception allows a writing not signed by the party against whom enforcement is sought to satisfy the statute. In order for this exception to apply there must be: 1) a writing in confirmation of the contract; 2) sufficient against the sender; 3) sent within a reasonable time; 4) the receiving party must have reason to know of its contents; and 5) no written notice of objection must have been sent within ten days after receipt.<sup>67</sup>

#### 1-4:5 Rightful Rejection

A buyer may rightfully reject goods that don't conform to the contract. However, in a transaction between merchants, a rightful rejection is ineffective where the seller demands a complete written account of all defects that the buyer fails to provide.<sup>68</sup>

#### 1-4:6 Implied Warranty of Merchantability

Implied warranties arise by operation of law based upon the relationship between the parties. The implied warranty of merchantability requires that the product sold must be reasonably fit for the ordinary purpose for which it is "manufactured and sold."<sup>69</sup> Unless excluded or modified, a merchantability warranty is implied whenever the seller is a merchant for the goods of that kind.<sup>70</sup> However, a seller who is not a merchant may still be bound by an express warranty for any representations or statements made concerning the goods.<sup>71</sup> Any disclaimer of the

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<sup>65</sup> N.J.S.A. 12A:2-207(2).

<sup>66</sup> N.J.S.A. 12A:2-207(2).

<sup>67</sup> N.J.S.A. 12A:2-201(2).

<sup>68</sup> N.J.S.A. 12A:2-605(1)(b).

<sup>69</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 370 (1960).

<sup>70</sup> N.J.S.A. 12A:2-314.

<sup>71</sup> N.J.S.A. 12A:2-314, Uniform Commercial Code Comment 4.

implied warranty of merchantability must expressly mention “merchantability” and, if in writing, be conspicuous.<sup>72</sup>

## 1-5 UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS

While the UCC covers domestic transactions, the United Nations Convention on the International Sale of Goods (“CISG”) governs international contracts for the sale of goods between parties residing in different signatory countries. Both parties must be located in countries that have signed the convention.<sup>73</sup> Any intent of the parties to “opt-out” of the CISG must be expressly stated.<sup>74</sup> The United States ratified the convention in 1986, which became effective in 1988.<sup>75</sup> Approximately 86 countries have ratified the CISG, which includes most of Latin America, the European Union, China, Japan, and Canada.<sup>76</sup>

The CISG contains several important distinctions from the UCC. First, as a treaty it is subject to federal, not state, jurisdiction. This means that “unlike causes of action brought under Art. 2 of the UCC, claims under the CISG do not require complete diversity of citizenship and more than \$75,000 to be in controversy to open federal courthouse doors.”<sup>77</sup> Second, the CISG contains neither a

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<sup>72</sup> N.J.S.A. 12A:2-316(2); The UCC notes that the warranty of merchantability receives special consideration because it is “so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.” N.J.S.A. 12A:2-314, Uniform Commercial Code Comment 11.

<sup>73</sup> See United Nations Convention on Contracts for the International Sale of Goods 1980, Arts 1(1) and 1(2).

<sup>74</sup> United Nations Convention on Contracts for the International Sale of Goods 1980, Arts 92-97.

<sup>75</sup> See UNCITRAL Secretariat official records, available at [http://www.unitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.unitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

<sup>76</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

<sup>77</sup> Christopher C. Kokoruda; “The UN Convention on Contracts for the International Sale of Goods-It’s Not Your Father’s Uniform Commercial Code”; *The Florida Bar Journal*, Vol. 85, No. 6 (June, 2011).

statute of frauds<sup>78</sup> nor a parol evidence rule.<sup>79</sup> Finally, in contrast to the “perfect tender” rule found in the UCC,<sup>80</sup> a contract under the CISG is only avoidable when a party commits a “fundamental breach” of the agreement.<sup>81</sup>

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<sup>78</sup>. Christopher C. Kokoruda; “The UN Convention on Contracts for the international Sale of Goods-It’s Not Your Father’s Uniform Commercial Code”; *The Florida Bar Journal*, Vol. 85, No. 6 (June, 2011), citing *Fercus, S.R.L. v. Palazzo*, 2000 WL 1118925, \*4 (S.D.N.Y. 2000) (explaining that an agreement need not be evidenced by a writing under the CISG); *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*, 2009 WL 818618, \*5 (S.D. Ohio 2009) (Noting that Art. 11 of the CISG provides that agreements may be “proved by any means, including witnesses”).

<sup>79</sup>. United Nations Convention on Contracts for the International Sale of Goods 1980; Art. 8(3) (When interpreting a contract, courts are allowed to consider “all relevant circumstances of the case including the negotiations...”)

<sup>80</sup>. N.J.S.A. 12A:2-601.

<sup>81</sup>. See United Nations Convention on Contracts for the International Sale of Goods 1980 (“CISG”); Article 25 (“A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person in the same kind of circumstances would not have foreseen such a result.”); see also CISG Article 46(2) (“If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.”); CISG Article 49(1)(a) (“The buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of the contract.”); CISG Article 51(2) (“The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.”); CISG Article 64(1)(a) (“The seller may declare the contract avoided if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract.”); CISG Article 70 (“If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.”); CISG Article 72(1) (“If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.”); CISG Article 73(1) (“In the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided with respect to the installment.”).