

## Question MEE 6 – February 2022 – Selected Answer 1

### 1. Whether there is a contract enforceable by buyer against Seller arising from the January 9 agreement.

The Uniform Commercial Code (UCC) governs contracts for the sale of goods. A good is movable tangible personal property. Here, the UCC governs because this contract is for the sale of goods. Silk is a good because it is movable tangible property.

A contract requires an offer, acceptance of that offer, and consideration.

Here, there was likely an offer and acceptance because Buyer and Seller agreed that Buyer would buy 10,000 yards of silk from Seller on February 1 at a price of \$10 per yard. There is consideration because there was a bargained-for exchange of legal value of 10,000 yards of silk from Seller in exchange for \$10 per yard from Buyer.

While a contract can be created without a writing, the Statute of Frauds (SOF) requires certain types of contracts to be in writing to be enforceable. The SOF requires that contracts for the sale of goods worth \$500 or more must be evidenced by a writing to be enforceable. Here, this was a sale of goods worth more than \$500 because it was for 10,000 yards of silk at \$10 a yard which equals \$100,000. Thus, there must have been a writing to be enforceable.

There is an exception to the writing requirement under the UCC known as the merchant's confirmatory memo. This requires: (1) that both parties be merchants, (2) there to be a writing that accurately reflects the agreement between the parties, and (3) requires that the writer sign the memo. Additionally, the memo can be enforced against the recipient if the recipient received the memo and did not object to the terms within 10 days of receipt. A merchant is someone who deals in the kind of goods that are the subject matter of the contract.

Here, both Buyer and Seller are *merchants* because Buyer manufactures scarves from various fabrics and Seller is a fabric importer. This contract is about the matters in which they both do business because they both are in the fabric business and this contract is about fabric (silk).

There is a writing by one merchant to the other merchant, because Buyer sent a *signed, written* memo to Seller reflecting terms of the oral agreement they made on the phone on January 9th.

Additionally, Buyer sent the memo to Seller on January 10th, who received the memo two days later on January 12th. Seller read and received the memo, placed it into its files, and did not respond to it in any way. Thus, by not responding at all, Seller made

no objection to the memo by January 22 (or within 10 days). Seller did not object or respond to the memo at all. Thus, the court will find that Seller adopted the memo and the memo can be used against to enforce the contract.

Thus, there is a contract enforceable by Buyer against Seller arising from the January 9 agreement because of the Buyer's confirmatory memo that was adopted by Seller.

**2. If there is an enforceable contract by Buyer against Seller arising from the January 9 agreement, whether the contract requires Seller to deliver the silk to the Buyer's place of business.**

Generally, when a contract is silent as to delivery, the UCC requires that a buyer must arrange for delivery of the goods. However, under the UCC when a contract is silent but there are several *prior dealings* between the parties, the prior dealings will control. Here, there were over 250 purchases by Buyer from Seller during the last six years and in all of these earlier transactions, Seller delivered the silk to Buyer at no extra charge. Thus, because the contract was silent as to delivery, the court will look to Buyer and Seller's prior dealings.

Thus, Seller *was required under the contract to deliver* the silk to Buyer's place of business (at no extra charge).

**3. If there is an enforceable contract by Buyer against Seller arising from the January 9 agreement, that required Seller to deliver the silk to Buyer, and that Buyer suffered no incidental or consequential damages, whether Buyer is entitled to damages of \$20k based on Buyer's purchase of the substitute silk.**

When a seller fails to perform on time or refuses to perfectly perform, a buyer must cover. This means that the buyer must attempt, in good faith, to purchase comparable goods from another seller. When a buyer properly covers, the seller must pay the buyer damages incurred from obtaining such cover. In these circumstances, damages are equal to cover price minus original contract price.

Here, Buyer covered by buying 10,000 yards of silk of identical quality from Dealer for \$12 per yard including delivery to buyer. Here, this was a proper cover because Buyer waited for Seller not to perform (Seller's performance was due Feb 1 and Buyer did not cover until Feb 4), he bought identical quality silk, and it was a good-faith and commercially reasonable purchase. The cover price was \$12 per yard and the contract price between Buyer and Seller was for \$10 per yard. Thus, the difference is \$2 per yard for 10,000 yards which equals \$20k. If there were incidental or consequential damages, Buyer would be entitled to those as well.

Thus, *Buyer is entitled to damages of \$20k* because that is the difference between the contract price and the cover price.

### Question MEE 6 – February 2022 – Selected Answer 2

**1. Although Buyer and Seller's oral agreement did not create an enforceable contract because it did not conform to the Statute of Frauds, Buyer's confirmatory memo following the oral agreement and Seller's lack of objection to the memo effected an enforceable contract by Buyer against Seller.**

The first issue is whether an enforceable contract was created.

The UCC governs contracts for the sale of goods and the common law governs contracts for the rendering of services (and for sale of goods if the UCC is silent on an issue). Here, the contract at issue is regarding the sale of silk so the UCC will govern.

An enforceable contract requires mutual assent (offer and acceptance) supported by valuable consideration, and no defense to formation or enforcement. An offer is a manifestation of intent to contract by one party with definite or reasonably certain terms that is communicated to an identified offeree. Under the UCC, only the quantity term is essential. Acceptance is a manifestation of assent to the terms of the contract that indicates a willingness to be bound. Adequate consideration requires a bargained-for exchange between the parties, such that the promisee suffers a legal detriment in exchange for the promisor's promise. Under the UCC, a contract for the sale of goods that cost \$500 or more must be in writing pursuant to the Statute of Frauds - that is, it must state the parties and subject matter, a quantity term, and be in writing signed by the party to be charged.

Here, Buyer and Seller agreed in a telephone call that Buyer would buy 10,000 yards of silk from Seller on February 1, at a price of \$10 per yard. The requirements for a valid contract are present - Buyer and Seller had mutual assent (an offer that was accepted), consideration at \$10 per yard, and delivery was set for February 1 for 10,000 yards of silk. However, the contract was made by phone and not in writing so is in violation of the Statute of Frauds. Since the contract was for a sale of goods over \$500, the violation of the Statute of Frauds presents a defense to formation.

The second issue is whether the contract falls under a UCC exception to the Statute of Frauds.

The UCC requires sale of goods contracts for over \$500 to be in writing, but has two exceptions for this rule: (1) partial performance and (2) if both parties are merchants and one party sends a merchant's confirmatory memo to the other party and the other party fails to object within a reasonable time (10 days). A merchant is a party that regularly deals in the goods at issue or puts herself forward as having particular knowledge of the goods at issue. For a contract to be valid despite lacking a writing under the Statute of Frauds, a merchant's confirmatory memo must re-state the terms that the parties previously agreed to orally so that the recipient would reasonably expect the note and know what it pertained to, must be signed by the party sending the note (or on the merchant's letterhead), and the receiving party must not object to the terms within 10 days.

Here, there is no partial performance because the goods were not delivered and the Buyer did not pay yet. However, the Buyer did send a signed note to Seller the morning after their January 9 phone call stating "I'm glad that we were able to reach agreement... for the 10,000 yards of silk I'm buying from you." Both Buyer and Seller are merchants who have dealt with one another before and deal regularly with silk (Buyer manufactures scarves and Seller sells silk). The note was signed by Buyer, sent the morning after the call so Seller reasonably should have known what the note was regarding, and Seller never objected to the memo. Thus, this signed note is a merchant's confirmatory memo that created an enforceable contract under the UCC between Buyer and Seller.

## **2. Does the contract require Seller to deliver the silk to Buyer's place of business?**

Under the parol evidence rule (PER), extrinsic evidence that contradicts the final written agreement will not be admitted. For the PER to apply, a writing must be an integration, or a final agreement between two parties. The UCC presumes all integrations are partial integrations and allows extrinsic evidence that comports with the included terms but not evidence that contradicts it. If there is ambiguity, the UCC will allow the introduction of evidence to show parties' course of performance (past transactions under the same contract between the same parties), course of dealing (not the contract at issue, but evidence of past contracts between the same parties), or trade usage (common practices in the industry). Course of performance evidence is the most persuasive, then course of dealing, and then trade usage. Where a contract is still ambiguous, the UCC will gap-fill its own terms.

Here, Buyer can show that in their past course of dealing over the last six years where Buyer has made over 250 purchases of silk, that in each of the earlier transactions,

Seller delivered the silk to Buyer at no extra charge. This would be strong evidence that, although the contract was silent on delivery, had the term been included, it likely would have required Seller to deliver the silk to Buyer. Moreover, if the court did not accept this evidence as conclusion, the UCC would further support Buyer's claim that Seller was required to deliver the silk because the UCC's gap-filling term requires Seller to make delivery.

Thus, the contract did require Seller to deliver the silk to Buyer's place of business.

### **3. Damages**

The UCC has the perfect tender rule, so any nonconforming tender of goods (unless an installment contract) is a breach of contract that gives rise to damages. Contract damages are not punitive, but are designed to compensate the nonbreaching party for any losses and to put that party in the position they would be in had they received full conforming performance. Under the UCC, where the seller breaches and retains the goods, damages will be awarded to the buyer in the form of cost of cover (for a substitute good) plus any consequential or incidental damages.

Here, the original contract was for 10,000 yards at a total of \$100,000. Buyer's substitute contract she entered into was for 10,000 yards at a total of \$120,000. Accordingly, Buyer lost \$20,000 due to the breach. The facts show that Buyer's cover for substitute goods was made in good faith and was commercially reasonable and Buyer did not suffer any consequential or incidental damages. Thus, the \$20,000 would amount to the expectation damages, putting Buyer in the position she would be in if Seller had not breached the contract and had Buyer not been forced to go to another seller of silk.

Thus, Buyer is entitled to \$20,000 of damages from Seller.

### **Question MEE 6 – February 2022 – Selected Answer 3**

1. An enforceable contract by Buyer against seller was formed arising from the January 9th agreement. The issue is whether the signed letter sent to the seller by buyer will overcome a statute of frauds defense.

First, since this is a sale of goods, article 2 of the UCC will control. Goods are generally defined as any tangible movable item at the time of contract performance. Since buyer was buying silk, a movable item, this was clearly a sale of goods.

Normally under the UCC the statute of frauds dictates that if a contract is over 500 dollars, it must be in writing and signed by the party against whom one is seeking enforcement. Here, the agreement on January 9th was oral and not signed. Additionally, it was for a price of 10,000 dollars. Thus, it would not satisfy the statute of frauds.

However, the UCC contains an important exception to the statute of frauds that applies here. If a contract is between merchants, and the one merchant sends a signed memo or letter reaffirming an oral contract, and the memo or letter is not responded to with a rejection within a reasonable amount of time usually 10 days, the contract will be considered enforceable despite it being oral. However, it will only be enforceable up to the amount of goods specified by the writing.

Here, both parties are merchants of silk. Merchants are someone that regularly deals in a kind of good, by virtue of their profession, hold themselves out as having special knowledge of the good.

The Seller here sells silk in bulk regularly. This is enough for him to be a merchant. The buyer here is also a merchant, because he mass manufactures scarves including those made out of silk.

Here, while there was no formal written contract, the buyer did send a signed note reaffirming the contract stating that he was "glad that we were able to reach an agreement on the deal for the 10,000 yards of silk im buying from you." This note was signed and also specified the amount of goods int he contract, 10,000 yards of silk. Thus, if Seller failed to respond to this note rejecting that a contract had been formed within 10 days, the contract will have been enforceable against him. Here, the Seller read the letter and simply never responded. Over 20 days passed from the day the letter was sent on January 11th to the time of performance on February 4th. Due to the Sellers lack of response, the note will make the contract enforceable up to 10,000 yards of silk. Thus, an enforceable contract was formed arising from the January 9th conversation.

Note that it does not matter that the note leaves out important things like the price or the date of performance. Under the UCC, a court has wide powers to fill in terms of a contract left out if they find that an enforceable contract was created.

2. The Seller most likely does have to deliver to the Buyer's place of business. The issue is whether a history of prior performances will allow the court to infer a term.

In this case, the contract was oral and the note making it enforceable did not specify where the silk was to be delivered. This means that the contract is silent on where the goods should be delivered. When a contract is silent, the UCC allows a court to fill in reasonable terms. When doing so, the court will consider a few factors. One factor

that they would look at is if there is a history of similar contracts between the parties, and if so, what terms did those contracts include. This is also known as the course of dealings between the parties. Here, there is a prior history of contracts. The buyer and Seller have made over 250 contracts over the last 6 years for similar purchases of silk. In all of these contracts, the Seller always delivered the silk to the buyer's place of business at no extra charge. Based on this extensive and long history of prior contracts between the parties, the court would almost certainly infer that they also meant this contract to include the term that the Seller would deliver the silk at no extra charge to the Buyer's place of business. Thus, the contract will require Seller to deliver the silk to the buyer's place of business.

3. The Buyer is entitled to 20,000 dollars based on his substitute purchase of silk. The issue is what a party is entitled to in the event the other party breaches the contract.

Whenever a party breaches a contract, the non-breaching party is entitled to expectation damages. Expectation damages are intended to put the non-breaching party in the place they would have been had the contract been fully performed. A common measure of expectation damages is the difference between the contract price for goods and the cost of buying a replacement for the undelivered goods, or cover. However, it is important to note that when a non-breaching party purchases cover, he must act in a good faith and commercially reasonable way. He does not necessarily have to find the best price, but he must make a good faith effort in finding a good price. This is the non-breaching party's duty to mitigate damages.

Here, the Seller never delivered the 10,000 yards of silk he was supposed to in breach of contract. Once the Buyer realized there was a breach, he was entitled to seek cover for the breach. The Buyer went out and bought 10,000 yards of silk at 12 dollars a yard. This was 2 dollars a yard more than the contract price amounting to a 20,000 dollar difference. It is important to note that when the buyer made this cover purchase, the facts also tell us that he did so acting in good faith and commercially reasonably. Thus, he did not fail to mitigate his damages.

Consequently, the buyer is entitled to the 20,000 dollar difference between the contract and his cover purchase as his expectation damages.