

Question 2.

excellent answer

The first question is whether there is a choice of law and which one applies in the absence of any agreement.

Under 1-301(a), when a transaction bears an appropriate relation to this state and also to another state, or nation the parties may agree that the law either of this state or of such other state or nation may govern their rights and duties. In the absence of any agreement, sub (b) states that the UCC applies to transaction bearing an appropriate relation to this state. In this case, the seller resides in New York while the buyer resides in California and they did not agree on whether the NY law would govern or whether CA law would govern the transaction. In this case, the transaction has an appropriate relation to CA because the buyer resides in CA and since Basil is the person going to be bringing an action, the court would likely apply the CA version of the UCC to the dispute.

The next question is whether the UCC apply?

Article 2 applies to transaction in goods- 2-201. Under 2-105, goods are defined as all things (including specially manufactured goods) which are movable at the time of identification to the contract of sale. Here, the contract is for the sale of guitar, which is a movable item and it also was existing and identified at the time the contract was made.

Was a contract formed?

Under 2-204, a contract for sale may be made in any manner sufficient to show *agreement* including conduct by both parties which recognizes the existence of such a contract. Contract can be made by offer and acceptance and conduct which recognize the existence of a contract. 2-206(b) deals with acceptance where the goods are to be shipped. Under 2-206(1) (b), an offer to buy for prompt or current shipment can be accepted (i) by prompt promise to ship or (ii) by the prompt or current shipment of conforming or non conforming goods.

In this case, there was both offer and acceptance. Basil who is in California ordered the vintage guitar online and paid for it. He also paid for the shipping, thereby inviting acceptance by shipment by Sam.

Sam who resides in New York accepted this offer by prompt shipment when he shipped the guitar the same day by handing it over to the air cargo at his local airport for shipment. The order and shipment shows that there was an agreement between Basil and Sam to form a contract.

Is the contract enforceable?

The first argument Basil can make to avoid the contract is that it is unenforceable. Under 2-201(1), contracts for sale of goods worth \$500 and above must be in writing in order to be enforceable. Under the 2003 amendment, the amount is \$5000. The contract in this case is for the sale of guitar worth \$8000. Therefore, under both the 2001 and 2003 version, the contract has to be in writing in order to be enforceable. The writing required to satisfy the statute of fraud requirement under 2-201(1) is writing sufficient to indicate that a contract for sale has been formed between the parties. The writing must be signed by the party against whom it is sought to be enforced and then there must be a quantity term.

Several writings could be used to satisfy the statute of fraud requirement.

The statute of fraud seems to be satisfied here because there are writings by both Sam and Basil. Several writings could be used to satisfy the statute of fraud. The order that Basil placed contains the quantity of guitar ordered. His credit information is also contained on the order and that may satisfy the signature requirement. There is also an email by Sam stating that the guitar has been shipped. This email contains his signature.

"record"

Even if 2-201(1) was not met, under 2-201(3) (c), a contract which fails to satisfy 2-201(1) but is valid in other respects is enforceable with respect to goods for which payment has been made and accepted. In this case, Basil had paid for the guitar which was accepted by Sam.

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The next question is whether the risk of loss had passed to Basil at the time of the loss.

Since there is an enforceable contract, to recover his money from Sam, Basil has to show that the risk of loss had not passed to him at the time of the destruction of the guitar in the crash. Basil could argue that the risk of loss did not pass to him because the tender was non conforming under 2-504 or that the tender failed to conform to the contract as to give him a right to reject the guitar under 2-510(1).

Under 2-509(4), the parties to the contract can determine when the risk of loss shall by agreement.

However, in the absence of any contrary agreement of the parties, the default rule of 2-509 will apply. ✓

Here, although the parties did not agree on when the risk of loss would pass, they used the term F.O.B. in their agreement. F.O.B. term is an express term which carries the same consequences as under 2-509(1).

The term designates when the risk of loss passes. Under 2-319, unless the parties otherwise agree, F.O.B. means free on board at a named place, even though used only in connection with a stated price and when used the seller must comply with 2-504. The parties in this case used the term in connection with a stated price- "\$8000 F.O.B.". They did not specify any place, i.e. whether it is F.O.B. New York, which is a shipment contract, or F.O.B. California, which would be a destination contract. Basil can therefore argue that since the contract is silent as to whether it is a shipment or destination contract, that 2-509(3), which is regarded as a catchall exception should apply. Under 2-509(3) in any case not a shipment or destination contract that the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant. He can argue that Sam is a merchant. Under 2-104, a merchant is a person who deals in goods of the kind or who by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. Basil can argue that Sam by his occupation as a Tele player holds himself out as having knowledge peculiar to the guitar and as such is a merchant. If this argument is accepted by the court, then the risk remained on Sam until receipt of the guitar by Basil which is now impossible because the guitar was destroyed in the crash. Therefore, his money would be refunded. ✓

However, Sam can counter this by arguing that the shipment contract is presumed under code in the absence of any agreement between the parties. Under comment 5, 2-503, the shipment contract is regarded as the normal one, and the destination contract the variant type. Under this comment, the seller is not obligated to deliver at a named destination and bear the risk of loss until arrival unless he has specifically agreed to do so or the commercial understanding of the terms used by the parties contemplates such delivery. In this case, the agreement between Basil and Sam does not specify destination contract, so Sam would argue that shipment contract is presumed. Under a shipment contract as provided in 2-509(1), the risk of loss passes to the buyer when the goods are duly delivered to the ✓

carrier. Basil would then have to argue that Sam did not fulfill the tender obligations required for a shipment contract under 2-504 and that this gives him a right to reject under 2-510(1). Under 2-510(1), where a tender or delivery of goods fails to conform to the contract as to give a right of rejection, the risk of their loss remains on the seller until cure or acceptance. The right to rejection is a very low threshold and as such, buyer can invoke this section whenever the seller makes a nonconforming tender or delivery. Comment 1 to 2-510 specifies that seller by his individual action cannot shift the risk of loss to the buyer unless his actions conforms with all the conditions resting on him under the contract. Under 2-601, a buyer may reject if the goods or tender of delivery fails in any way to conform to the contract. Under a shipment contract, the seller's obligations to fulfill tender as provided under 2-504 are to (a) put the goods in the possession of a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; (b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to take possession and (c) promptly notify the buyer of the shipment. ✓

Basil can therefore argue that the guitar shipped by Sam is defective. It is doubtful whether this argument would be accepted because it would be hard for him to prove that the guitar is defective. There is nothing in the facts that indicates a defective guitar was shipped. If however Basil is able to prove that the guitar was defective, the defect precludes the risk of loss from passing to Basil at the time Sam gave the guitar to the cargo carrier and as such, Basil can get his money back unless Sam can cure by shipping him another vintage guitar. Good

Basil can also argue that Sam did not make a reasonable contract under the circumstances for the delivery of the guitar. He could argue that Sam should have instructed the air cargo on the particular airline that should be used to transport the guitar. We need more information about the reputation of the airline to see if they have had crashes in the past or similar incidents. ✓

Basil can also argue that the tender is non conforming because Sam failed to deliver or tender documents necessary to enable him to take possession of the guitar. However, additional information is needed as to whether such shipments require documents to enable the buyer to take delivery of them. If the court finds

any of these arguments under 2-510(1) and 2-504 as giving Basil a right of rejection, then Basil would have his money returned to him unless Sam can cure by delivering another vintage guitar to him. Basil's chances of recovering his money is slight considering that a shipment contract is presumed under article 2 in the absence of any agreement between the parties of a destination contract. Therefore, the risk of loss passed to Basil at the time when Sam delivered the guitar to the air cargo handler and made a contract with him to transport the guitar to the airport nearest to basil's home. The Oakland International airport is the closest to basil's home in Petaluma, which Sam can argue is reasonable under the circumstances. Sam also sent Basil an e-mail notifying him of the shipment thereby satisfying the notice requirement of the tender. Failure to notify Basil would have given Basil a ground for rejection since a material loss ensued but here, Sam fulfilled the notice obligation. Basil's chances of recovering his money is only dependent on whether the guitar sent is defective if that can be discovered and proven or if the court finds that the contract made by Sam was unreasonable, for which we need additional information as to the reputation of the airline, or if the shipment is the type that requires documents to enable the buyer to take delivery of them. In that case, the tender is non conforming because the facts do not show that Sam sent any documents, in which case the risk of loss did not pass.