

# CONTRACTS AND SALES



# MBE Strategies for Contracts and Sales

## 1. Introductory tips.

- Contracts and Sales can be a challenging subject for students to master because of the various topics and sub-topics within this subject. **Memorizing the nuances of the law** is critical to answering Contracts and Sales MBE questions correctly. So, if you are struggling to answer questions correctly, rather than increasing the quantity of questions you answer each day, increase the time you spend memorizing and actively reviewing your outline.
- If you are having trouble mastering Contracts and Sales, consider **making your own charts and diagrams** for concepts you struggle with. Many students feel much more in control of the material after they make and memorize their own Contracts and Sales charts and diagrams.
- If an MBE question **quotes the language of a contract**, it means that the language is important to answering the question. Pay attention to the quoted language!
- If an answer choice **asks you to make a judgment you are not qualified to make**, the answer choice cannot be correct. For example, an **incorrect answer choice** for a question regarding UCC § 2-207 may say that a shipping term “**materially alters**” the contract. Even though this question is using the language of UCC § 2-207, this answer choice is probably incorrect because it **requires you to make a determination you are not qualified to make**—whether the term “materially alters” the contract. This is a determination for the court to make and the fact pattern usually does not provide enough facts for you to make that determination.

**MBE TIP: If a question appears to require you to make a judgment call, look for the word “if.” For example, an answer choice that says, “The shipping term will not be a part of the contract because it materially alters the contract,” is not as good as an answer choice that says, “The shipping term will not be a part of the contract if it materially alters the contract.” The word “if” recognizes that soon-to-be lawyers are not expected to know if a shipping term materially alters a contract.**

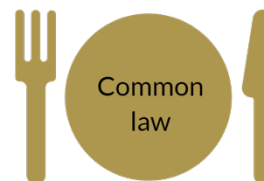
## 2. Performance obligations under common law are different from those under the UCC.

### Common law performance obligations

Common law applies to **contracts that do not fall under Article 2 of the Uniform Commercial Code (UCC)**. For purposes of the bar exam, common law most commonly applies to contracts dealing with **services**, although common law also applies to all other non-goods contracts, such as real estate, insurance, and employment.

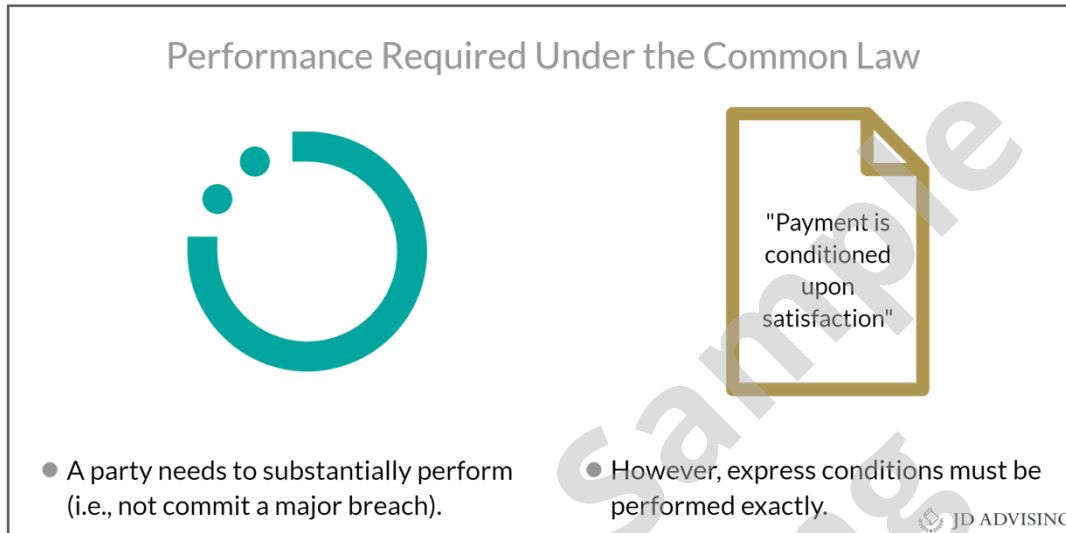
#### Article 2 of UCC versus Common Law, Example:

The UCC would apply to Ks arising out of buying food at a store. Common law would apply to Ks arising out of ordering food at a restaurant.





Under common law **substantial performance** is required in order for the other party's duty to arise. Thus, if there is a **minor breach** by one party, the other party must still perform his duty (but may also sue for breach of contract or deduct damages for the breach). An exception to this rule is if the contract contains an **express condition** that requires **exact performance**.



### Problem

A homeowner and a cleaning company entered into an agreement whereby the cleaning company agreed to clean the homeowner's house over the course of a weekend. The contract detailed a long list of specific tasks that the cleaning company would undertake. One of the tasks that the cleaning company agreed to undertake was dusting the tops of the chandeliers and replacing broken light bulbs. Nevertheless, the cleaning company neglected to replace two broken light bulbs in the living room. After two full days of cleaning, the cleaning company asked for full payment from the homeowner.

What are the obligations of the homeowner?

- (A) The homeowner is not obligated to pay anything to the cleaning company because the cleaning company breached an express condition of the contract.
- (B) The homeowner is not obligated to pay the contract price to the cleaning company; rather, the homeowner must only pay the reasonable value of the work completed.
- (C) The homeowner is obligated to pay the full contract price to the cleaning company because the cleaning company substantially performed its duties.
- (D) The homeowner is obligated to pay the cleaning company but may deduct the damages for the minor breach from the total amount it pays the cleaning company.

**(D) is the correct answer.** The homeowner must pay the cleaning company pursuant to the contract because the cleaning company *substantially performed* under the contract. The cleaning company breached the contract, but its breach was *minor*. Thus, the homeowner must perform and may simply deduct the damages for the minor breach.

**(A) is incorrect** because although the cleaning company breached the contract; it was a minor breach. There would be an extreme injustice if the cleaning company was not paid anything.



**(B) is incorrect** because the court will look to the contract. There is no reason to find an alternative noncontractual theory here, as the parties had a contract.

**(C) is incorrect** because the homeowner may deduct damages for the minor breach.

## UCC performance obligations

Article 2 of the Uniform Commercial Code (UCC) applies to **contracts that deal with transactions in goods**. Goods are **tangible objects** that are **moveable** at the time of identification to the contract for sale.

Note that some contracts are **hybrid contracts** that include both a sale of goods (governed by the UCC) as well as a service (governed by common law). To determine which law to apply to a hybrid contract, courts will use the **predominant purpose test** and apply the law that corresponds to the main purpose of the contract.

For example, if a person goes to an appliance store to purchase a new refrigerator, the contract may include delivery and installation of the refrigerator. In this situation, the contract includes **the sale of goods (the refrigerator)** and **services (delivery and installation)**. Which law applies? Using the **predominant purpose test**, a court will likely find that the **main purpose of this contract** was the **purchase of the refrigerator** and not the delivery and installation. Thus, **Article 2 of the UCC applies**.

## Perfect-tender rule

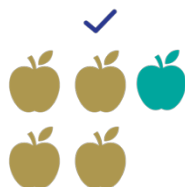
Under the UCC, the seller must deliver **perfect goods** to the seller. The perfect-tender rule says that if the buyer receives anything other than exactly what he ordered, he can **reject the goods**. For example, if you order a **black** coat and receive a **blue** coat instead, you can reject the blue coat under the perfect-tender rule.

If the contract is for more than one item, the buyer has **three options** if the seller does not tender perfect goods: the buyer may (1) **reject all** the items, (2) **accept all** the items, or **accept any commercial units and reject the rest**.

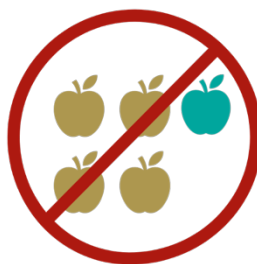
### A Buyer's Options if Goods Fail to Conform to the Contract, Example:

P ordered five golden apples and received four golden apples and one turquoise one. He can . . .

Accept all



Reject all



Accept comm'l units






For example, if you order 100 **blue** bicycles and receive 99 **blue** bicycles and 1 **red** bicycle, you have **three options**. First, you can **reject all 100 bicycles**. Second, you can **accept all 100 bicycles**. Third, you can **reject the 1 red bicycle** and **accept the rest of the bicycles**.

### [Seller's right to cure](#)


Sometimes when the seller does not deliver perfect goods, the seller may have the right to **"cure" or fix the problem with the goods**. Under the UCC, there are **two situations** where the seller may cure. The first is if the **seller still has time to perform under the contract**. For example, if the bicycles in the example above were due to arrive by **June 1** and the seller shipped them early so that they arrived on **May 1**, there is still time for the seller to ship the remaining blue bicycle and cure his mistake. The second is if the seller had **reasonable grounds to believe that the buyer would accept the non-perfect goods**. For example, if the red bicycle that the seller shipped was a **deluxe model** that sold for **\$200 more than a blue bicycle**, the seller might have **reasonably believed** that the seller would accept the wrong color bicycle that was a better bicycle for the same price as the blue bicycles.

Seller's Right to Cure

When a seller does not deliver perfect goods, the seller can cure if:



- There is still time to perform under the contract, or



- The seller had reasonable grounds to believe that the improper tender would be acceptable, with or without a money allowance.

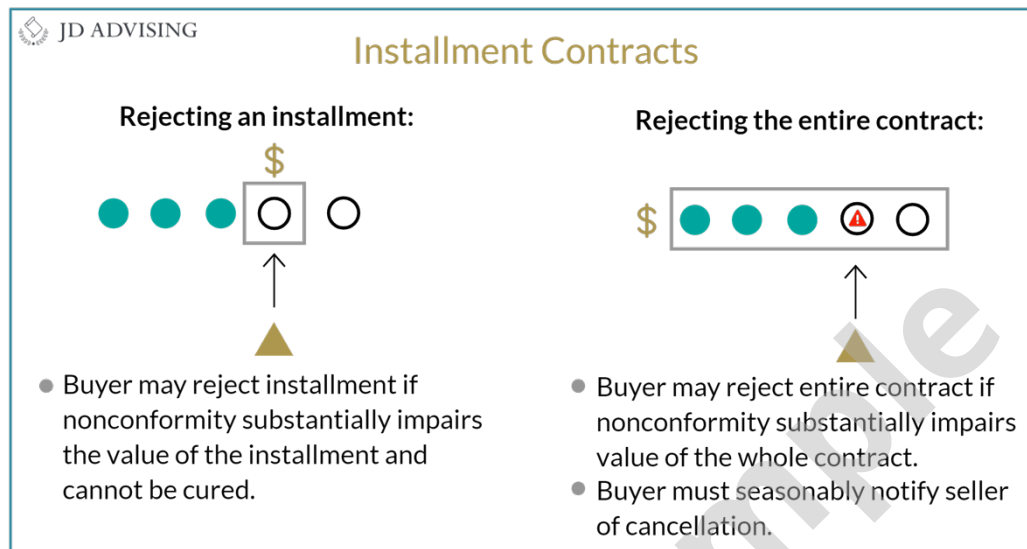
Note: there are other rules that apply to installment contracts

### [Exception for installment contracts](#)

An **installment contract** is one that requires or authorizes the delivery of goods in **separate lots** to be **separately accepted**. Pursuant to the contract, the goods are delivered to the buyer in separate shipments or "installments" instead of being delivered all at once. The perfect-tender rule does not apply to installment contracts.

The buyer can **reject a single installment** only if the **nonconformity substantially impairs** the value of **that installment** (not the whole contract) and **cannot be cured**. The buyer must **seasonably notify** the seller of cancellation.

The buyer can reject **the entire installment contract** only if the **nonconformity substantially impairs** the value of the **whole contract**.



Under the UCC, the standard for rejecting goods under an installment contract is ***much higher*** than the standard for non-installment contracts—the perfect-tender rule—because courts want to encourage the parties to the contract (usually businesses) to continue their commercial relationship.

For example, imagine that a dairy farmer enters into a contract with a grocery store for 50 gallons of 2% milk. The farmer inadvertently ships 48 gallons of 2% milk and 2 gallons of whole milk to the grocery store. Here, this is **not an installment contract**, and the delivered goods were not perfect, so the **perfect-tender rule** applies. The grocery store can (1) **accept all 50 gallons**, (2) **reject all 50 gallons**, or (3) **reject the 2 gallons of whole milk** (the defective commercial units).

However, suppose that the contract was an **installment contract**. Imagine that the grocery store agreed to buy 50 gallons of milk **every other week for six months**. This is an installment contract because the goods are not all being shipped at once. If the grocery store receives 48 gallons of 2% milk and 2 gallons of whole milk, can the grocery store reject all 50 gallons? No, because the nonconformity can be cured. The farmer could simply say, “I’m sorry, I’ll ship the 2 gallons of 2% milk right away.” Also, there is a good argument that shipping two gallons of whole milk does not substantially impair the value of that installment.

### 3. Revocation of acceptance of goods differs from revocation of an offer and has a much higher standard than rejection of goods.

#### Revocation of acceptance versus revocation of an offer

Revocation of acceptance can be a confusing concept for students. First, it is important to recognize the **difference** between **revocation** of an **acceptance of goods** and **revocation** of an **offer**. Although these two things are quite different from each other and occur in different stages of the contract process, because they both involve revocation, most students find some clarification helpful.

#### Revocation of an offer

Revocation of an offer occurs **early** in the contract process, before the contract has even been formed. In general, an offeror may revoke an offer **before the offeree accepts the offer**. There are some exceptions to this general rule. For example, a **firm offer by a merchant** that is in a **signed**



**writing** may not be revoked for a **stated time or a reasonable time, neither of which can exceed three months**. Additionally, an **option contract** (a promise to keep the offer open that is supported by consideration) **may not be revoked**. Also, if the offeree has **begun performance on a unilateral contract** (this is another type of option contract), the offeror must allow the offeree a **reasonable time to complete performance**. Further, an offeror may not revoke an offer if there has been reasonably foreseeable detrimental reliance on the offer by the offeree.

### Revocation—Exceptions

(Exceptions to general rule that offer may be revoked prior to acceptance)

Mnemonic = FOUR

|   |  |  |   |
|---|--|--|---|
| <b>Firm offer under Article 2:</b><br><i>An offer in a signed writing for the sale of goods by merchant that gives assurance that it will be held open cannot be revoked. If no stated time, a reasonable time will be implied. Either way, it cannot be over three months.</i> | <b>Option K:</b><br><i>a promise plus consideration.</i> | <b>Beginning performance on unilateral K ("option K"):</b><br><i>an offer may not be revoked and must be held open for a reasonable time if the offeree has begun performance on a unilateral K.</i> | <b>Reasonably foreseeable substantial reliance on offer:</b><br><i>An offer may not be revoked if there has been reasonably foreseeable detrimental reliance on the offer by the offeree. Note: this almost always comes up in a bidding situation.</i> |
|---|--|--|---|

### Revocation of acceptance

Revocation of acceptance occurs **much later** in the contract process, after the contract has been formed and after at least one of the parties has performed.

Remember that under the UCC perfect-tender rule, for contracts that are not installment contracts, a buyer can **reject goods** if they are **not perfect**. However, what if the buyer **already accepted** the goods and **only then** realized that the goods are **defective**? The buyer can **no longer reject the goods** once they have accepted them. However, the buyer may be able to **revoke their acceptance** of the goods.

If the buyer has already accepted the goods and wants to revoke their acceptance of them, **the perfect-tender rule does not apply!** The buyer must show much more than simply that the goods are not perfect!

In the following situations, the buyer can **revoke his acceptance** of the goods:

- the nonconformity **substantially impairs the value to the buyer**;
- the buyer accepted the goods because he had a **reasonable belief that the nonconformity would be cured** (and it was not) **or** the buyer **did not discover the nonconformity** because the nonconformity was **difficult to discover** or because of the **seller's assurances**;
- the buyer revokes his acceptance within a **reasonable time** after he discovers or should have discovered the nonconformity; and
- before any substantial change in condition** of the goods which is not caused by their own defect.

## Revocation of Acceptance of Goods

If a buyer accepts goods, he can no longer reject them.

BUT

A buyer may revoke acceptance when:



1. The nonconformity substantially impairs the value to him; *and*



2. He accepted because he had a reasonable belief that the nonconformity would be cured; *or*



He did not discover the nonconformity because it was difficult to discover or due to the seller's assurances; *and*



3. He revokes within a reasonable time after discovering the nonconformity; *and*



4. He revokes before any substantial change in condition of the goods that is not caused by their own defect.

For example, suppose you buy **skis** on sale **during the summer**. The skis claim to be adjustable to fit a variety of ski boot sizes. You try on the skis with your boots in the store and the skis seems to work fine. However, when you go skiing **during the winter**—six months later—you notice that your ski boots are constantly disconnecting from the skis. Can you **reject** the goods? No. It is too late to reject the goods, as **you have already accepted them** and had them for six months. So, even though the tender was not perfect, the **perfect-tender rule would not apply**.

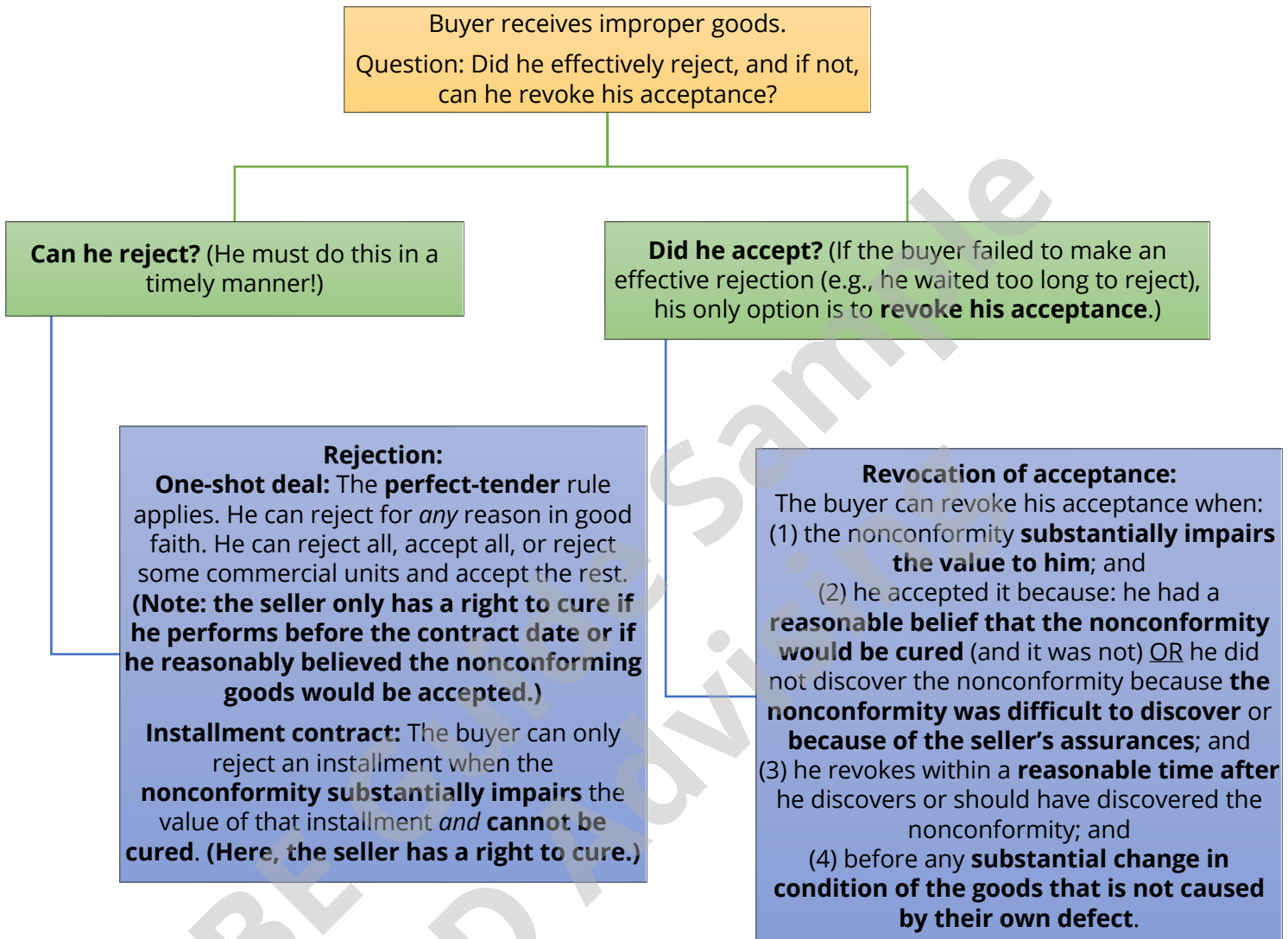
However, you likely could **revoke your acceptance** if the nonconformity **substantially impairs** the value to you (i.e., you could not use the skis), you did not discover the nonconformity because it was **difficult to discover** (i.e., you had **wait until winter to go skiing** to discover the problem and you **bought the skis in the summer**), and you revoked **within a reasonable time** after going skiing and before a **substantial change** in condition of the goods not caused by their own defect (i.e., you **did not otherwise damage the skis** before revoking your acceptance).

### Summary of performance obligations

- At **common law**, if one **substantially performs** her duties under the contract, then the other party must perform. (The **exception** to this rule is if there is an **express condition** that requires exact performance.)
- Under the **UCC**, the seller must provide **perfect tender** to the buyer unless an exception applies (e.g., an **installment contract**). If a buyer receives imperfect goods in a non-installment contract, the buyer may **accept** or **reject** those goods. If the buyer rejects the goods, the seller has a **right to cure** only if (1) there is time for performance left or (2) if the seller reasonably believed the imperfect goods would be accepted. If the buyer accepts the goods, he can no longer reject them. However, he still may be able to **revoke** his acceptance.



Below is a chart that summarizes rejection and revocation of goods.



Problem

One winter, a man purchases swimming goggles from a nearby dive shop. The man does not use the swimming goggles until a couple of months later when the weather gets warmer. Upon using the swimming goggles, he discovers that there is a defect in the lens that causes water to flood the goggles, rendering the goggles effectively useless. The next day, the man brings the goggles back to the store and demands his money back.

The man's best argument to receive his money back is:

- (A) The swimming goggles are defective, so he is rejecting them.
- (B) The swimming goggles are defective, so he is revoking his acceptance of them.
- (C) The store breached the implied warranty of fitness for a particular purpose.
- (D) The harm suffered by the man was a foreseeable result of the store's negligence.