CHAPTER 25

Sales Remedies

A contract for the sale of goods may require total performance at one time or part performance in stages, according to the agreement of the parties. At any stage, one of the parties may repudiate the contract, may become insolvent, or may breach the contract by failing to perform his obligations under it. In a sales contract, breach may consist of the seller's delivering defective goods, too few goods, the wrong goods, or no goods. The buyer may breach by not accepting conforming goods or by failing to pay for conforming goods that he has accepted. Breach may occur when the goods are in the possession of the seller, in the possession of a bailee, in transit to the buyer, or in the possession of the buyer.

Remedies, therefore, need to address not only the type of breach of contract but also the situation with respect to the goods. Consequently, the Uniform Commercial Code (UCC) provides distinct remedies for the seller and for the buyer, each specifically keyed to the factual situation.

In all events, the purpose of the Code is to put the aggrieved party in a position as good as the one he would have occupied, had the other party fully performed. To accomplish this purpose, the Code has provided that its remedies should be liberally administered. Moreover, damages do not have to be "calculable with mathematical precision": they need only be proved with "whatever definiteness and accuracy the facts permit, but no more." Comment 1 to Section 1–106. The purpose of remedies under the Code is compensation; therefore, punitive damages generally are not available.

Finally, the Code has rejected the doctrine of election of remedies, essentially providing that remedies for breach are cumulative in nature. Whether one remedy bars another depends entirely on the facts of the individual case.

CISG Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss that the party in breach foresaw or should have foreseen at the time of the conclusion of the contract as a possible consequence of the breach of contract. The aggrieved party must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

REMEDIES OF THE SELLER

A buyer's default in performing any of his contractual obligations deprives the seller of the rights for which he bargained. Such default may consist of any of the following acts: wrongfully rejecting the goods, wrongfully revoking acceptance of the goods, failing to make a payment due on or before delivery, or repudiating (indicating an intention not to perform) the contract in whole or in part. Section 2–703; Section 2A–523(1). The Code catalogs the seller's remedies for each of these defaults. Section 2–703. (Section 2A–523(1) contains a comparable set of remedies for the lessor.) These remedies allow the seller to—

1. withhold delivery of the goods;
2. stop delivery of the goods by a carrier or other bailee;
3. identify to the contract conforming goods not already identified;
4. resell the goods and recover damages;
5. recover damages for nonacceptance of the goods or repudiation of the contract;
6. recover the price;
7. recover incidental damages;
8. cancel the contract; and
9. reclaim the goods on the buyer's insolvency (Section 2–702).

Under Article 2A a lessor also may recover compensation for any loss of or damage to the lessor's residual interest in the goods caused by the lessee's default. Section 2A–532.

The first three and the ninth remedies indexed above are **goods-oriented**—that is, they relate to the seller's exercising control over the goods. The fourth through seventh remedies are money-oriented because they provide the seller with the opportunity to recover monetary damages. The eighth remedy is obligation-oriented because it allows the seller to avoid his obligation under the contract.

Moreover, if the seller delivers goods on credit and the buyer fails to pay the price when due, the seller's sole remedy, unless the buyer is insolvent, is to sue for the unpaid price. If, however, the buyer received the goods on credit while insolvent, the seller may be able to reclaim the goods. The Code defines **insolvency** to include both its equity meaning and its bankruptcy meaning. Section 1–201(23); Revised Section 1–201(b)(23). The **equity** meaning of insolvency is the inability of a person to pay his debts in the ordinary course of business or as they become due. The **bankruptcy** meaning of insolvency is that total liabilities exceed the total value of all assets.

As noted above, the Code's remedies are *cumulative*. Thus, by way of example, an aggrieved seller may (1) identify goods to the contract; *and* (2) withhold delivery; *and* (3) resell or recover damages for nonacceptance or recover the price; *and* (4) recover incidental damages; *and* (5) cancel the contract.

CISG If the buyer fails to perform any of her obligations under the contract or the CISG, the seller (1) may require the buyer to pay the price or (2) may fix an additional period of time of reasonable length for performance by the buyer of his obligations. Unless the seller has received notice from the buyer that she will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. Moreover, if the buyer's breach is fundamental or the buyer fails to perform within the additional time granted by the seller, the seller may avoid the contract. In addition to these remedies, the seller also has the right to damages.

TO WITHHOLD DELIVERY OF THE GOODS

A seller may withhold delivery of goods to a buyer who has wrongfully rejected or revoked acceptance of the goods, who has failed to make a payment due on or before delivery, or who has repudiated the contract. Section 2–703; Section 2A–523(1). This right is essentially that of a seller to withhold or discontinue performance of her side of the contract because of the buyer's breach.

Where the contract calls for installments, any breach of an installment that impairs the value of the *whole* contract will permit the seller to withhold the entire undelivered balance of the goods. In addition, upon discovery of the buyer's insolvency, the seller may refuse to deliver the goods except for cash, including payment for all goods previously delivered under the contract. Section 2–702. (Section 2A–525(1) is similar.)

TO STOP DELIVERY OF THE GOODS

An extension of the right to withhold delivery is the right of an aggrieved seller to stop the delivery of goods in transit to the buyer or in the possession of a bailee. A seller who discovers that the buyer is insolvent may stop *any* delivery. If the buyer is not insolvent but repudiates or otherwise breaches the contract, the seller may stop carload, truckload, planeload, or larger shipments. Section 2–705(1); Section 2A–526(1). To stop delivery, the seller must notify the carrier or other bailee soon enough for the bailee to prevent delivery of the goods. After this notification, the carrier or bailee must hold and deliver the goods according to the directions of the seller, who is liable to the carrier or bailee for any charges or damages incurred. If a negotiable document of title has been issued for the goods, the bailee need not obey a notification until the document is provided. Section 2–705(3).

The seller's right to stop delivery ceases when (1) the buyer receives the goods; (2) the bailee of the goods, except a carrier, acknowledges to the buyer that he holds them for the buyer; (3) the carrier acknowledges to the buyer that he holds them for the buyer by reshipment or as warehouseman; or (4) a negotiable document of title covering the goods is negotiated to the buyer. Section 2–705(2); Section 2A–526(2) is similar.

TO IDENTIFY GOODS TO THE CONTRACT

Upon a breach of the contract by the buyer, the seller may proceed to identify to the contract conforming goods in her possession or control that were not so identified at the time she learned of the breach. Section 2–704(1); Section 2A–524(1). This enables the seller to exercise the remedy of resale of goods (discussed below). Furthermore, the seller may resell any unfinished goods demonstrably intended to fulfill the particular contract. The seller may either complete the manufacture of unfinished goods and identify them to the contract or cease their manufacture and resell the unfinished goods for scrap or salvage value. Section 2–704(2); Section 2A–524(2). In so deciding, the seller must exercise reasonable commercial judgment to minimize her loss.

TO RESELL THE GOODS AND RECOVER DAMAGES

Under the same circumstances that permit the seller to withhold delivery of goods to the buyer (i.e., wrongful rejection or revocation, repudiation, or failure to make timely payment), the seller may resell the goods or the undelivered balance. If the resale is made in good faith and is commercially reasonable, the seller may recover from the buyer the

difference between the contract price and the resale price, plus any incidental damages (discussed below), minus expenses saved because of the buyer's breach. Section 2–706(1). For example, Floyd agrees to sell goods to Beverly for a contract price of $8,000 due on delivery. Beverly wrongfully rejects the goods and refuses to pay Floyd anything. Floyd resells the goods in strict compliance with the Code for $6,000, incurring incidental damages for sales commissions of $500 but saving $200 in transportation costs. Floyd would recover from Beverly the difference between the contract price ($8,000) and the resale price ($6,000), plus incidental damages ($500), minus expenses saved ($200), which equals $2,300.

In a lease, the comparable recovery is the **difference between the present values** of the **old rent** due under the original lease and the **new rent** due under the new lease. More specifically, the lessor may recover (1) the accrued and unpaid rent as of the date of commencement of the new lease; (2) the present value as of that date of total rent for the then remaining term of the original lease minus the present value, as of the same date, of the rent under the new lease applicable to a comparable time period; and (3) any incidental damages, less expenses saved because of the lessee's breach. Section 2A–527(2).

The resale may be a public or private sale, and the goods may be sold as a unit or in parcels. The goods resold must be identified as those related to the contract, but where an anticipatory repudiation has occurred, for example, the goods need be neither in existence nor identified to the contract before the buyer's breach. Section 2–706(2).

Where the resale is at a private sale, the seller must give the buyer reasonable notice of his intention to resell. Section 2–706(3). The seller or a broker may carry out a private sale by negotiations or solicitations. Where the resale is at a public sale (such as an auction), only identified goods can be sold, except where a recognized market exists for a public sale of future goods of the kind involved. The public sale must be made at a usual place or market for public sale, if one is reasonably available, and the seller must give the buyer reasonable notice of the time and place of the resale unless the goods are perishable or threaten to decline in value speedily. Prospective bidders must be given an opportunity for reasonable inspection of the goods before the sale. Moreover, the seller may be a purchaser of the goods at the public sale. Section 2–706(4). In choosing between a public and private sale, the seller must observe relevant trade practices and usages and take into account the character of the goods.

The seller is not accountable to the buyer for any profit made on any resale of the goods. Section 2–706(6); Section 2A–527(5). Moreover, a *bona fide* purchaser at a resale takes the goods free of any rights of the original buyer, even if the seller has failed to comply with one or more of the requirements of the Code in making the resale. Section 2–706(5); Section 2A–524(4).

Failure to act in good faith and in a commercially reasonable manner deprives the seller of this remedy and relegates him to the remedy of recovering damages for nonacceptance or repudiation (discussed below). Section 2–706, Comment 2; Section 2A–527(3).

CISG If the contract is avoided and the seller has resold the goods in a reasonable manner and within a reasonable time after avoidance, he may recover the difference between the contract price and the resale price. In addition, he may recover consequential damages.

TO RECOVER DAMAGES FOR NONACCEPTANCE OR REPUDIATION

In the event of the buyer's wrongful rejection or revocation, repudiation, or failure to make timely payment, the seller may recover damages from the buyer equal to the **difference between the unpaid contract price and the market price** at the time and place of tender of the goods, plus incidental damages, less expenses saved because of the buyer's breach. Section 2–708(1). This remedy is an alternative to the remedy of reselling the goods.

In a lease the comparable recovery is the **difference between the present values** of the **old rent due** under the original lease and the **market rent**. Section 2A–528(1).

For example, Joan in Seattle agrees to sell goods to Nelson in Chicago for $20,000 F.O.B. ("free on board") Chicago, with delivery by June 15. Nelson wrongfully rejects the goods. The market price would be ascertained as of June 15 in Chicago because F.O.B. Chicago is a destination contract in which the place of tender would be Chicago. The market price of the goods on June 15 in Chicago is $15,000. Joan, who incurred $1,000 in incidental expenses while saving $500 in expenses, would recover from Nelson the difference between the contract price ($20,000) and the market price ($15,000), plus incidental damages ($1,000), minus expenses saved ($500), which equals $5,500.

If the difference between the contract price and the market price will not place the seller in as good a position as performance would have, then the measure of damages is the **lost profit**; that is, the profit, including reasonable overhead, that the seller would have realized from full performance by the buyer, plus any incidental damages, less expenses saved because of the buyer's breach. Section 2–708(2). For example, Green, an automobile dealer, enters into a contract to sell a large, fuel-inefficient luxury car to Holland for $22,000. The price of gasoline increases 20 percent, and Holland repudiates. The market value of the car is still $22,000, but because Green cannot sell as many cars as he can obtain, his sales volume has decreased by one as a result

of Holland's breach. Therefore, Green would be permitted to recover the profits he lost on the sale to Holland (computed as the contract price minus what the car cost Green, plus an allocation of overhead), plus any incidental damages.

Article 2A has a comparable provision, except the profit is reduced to its present value as the lessor would have received it over the term of the lease. Section 2A–528(2).

CISG If the contract is avoided and the seller has not made a resale, she may recover the difference between the contract price and the current price at the time of avoidance and at the place where delivery of the goods should have been made. In addition, he may recover consequential damages.

◆ **SEE CASE 25-1**

TO RECOVER THE PRICE

The Code permits the seller to recover the price plus incidental damages in only three situations: (1) where the buyer has accepted the goods; (2) where conforming goods have been lost or damaged after the risk of loss has passed to the buyer; and (3) where the goods have been identified to the contract and there is no ready market available for their resale at a reasonable price. Section 2–709(1). For example, Kelly, in accordance with her agreement with Sally, prints ten thousand letterheads and envelopes with Sally's name and address on them. Sally wrongfully rejects the stationery, which Kelly is unable to resell at a reasonable price. Kelly is entitled to recover the price plus incidental damages from Sally.

Article 2A has a similar provision except that the lessor is entitled to (1) accrued and unpaid rent as of the date of the judgment; (2) the present value as of the judgment date of the rent for the then remaining lease term; and (3) incidental damages less expenses saved. Section 2A–529(1).

A seller who sues for the price must hold for the buyer any goods identified to the contract that are still in her control. Section 2–709(2); Section 2A–529(2). If resale becomes possible, the seller may resell the goods at any time prior to the collection of the judgment, and the net proceeds of such resale must be credited to the buyer. Payment of the judgment entitles the buyer to any goods not resold. Section 2–709(2). In a lease, payment of the judgment entitles the lessee to the use and possession of the goods for the remaining lease term. Section 2A–529(4).

CISG The seller may require the buyer to pay the price, take delivery or perform her other obligations, unless the seller has resorted to a remedy that is inconsistent with this requirement.

TO RECOVER INCIDENTAL DAMAGES

In addition to recovering damages for the difference between the contract price and the resale price, recovering damages for nonacceptance or repudiation, or recovering the price, the seller may in the same action recover her incidental damages in order to recoup expenses she reasonably incurred as a result of the buyer's breach. Section 2–710 defines a seller's **incidental damages** as follows:

> Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

Section 2A–530 has an analogous definition.

TO CANCEL THE CONTRACT

Where the buyer wrongfully rejects or revokes acceptance of the goods, fails to make a payment due on or before delivery, or repudiates the contract in whole or in part, the seller may cancel the contract with respect to the goods directly affected. If the breach is of an installment contract and it substantially impairs the whole contract, the seller may cancel the entire contract. Section 2–703(f); Section 2A–523(1)(a).

The Code defines **cancellation** as one party's putting an end to the contract by reason of a breach by the other. Section 2–106(4); Section 2A–103(1)(b). The obligation of the canceling party for any future performance under the contract is discharged, although she retains any remedy for breach of the whole contract or any unperformed balance. Section 2–720; Section 2A–505(1). Thus, if the seller has the right to cancel, she may recover damages for breach without having to tender any further performance.

CISG The seller may declare the contract avoided if (1) the buyer commits a fundamental breach, or (2) the buyer does not, within the additional period of time fixed by the seller, perform his obligation to pay the price or take delivery of the goods. Avoidance of the contract releases both parties from their obligations under it, subject to any damages that may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract. A party who has performed the contract either wholly or in part may claim restitution from the other party. If both parties are bound to make restitution, they must do so concurrently.

TO RECLAIM THE GOODS UPON THE BUYER'S INSOLVENCY

In addition to the right of an unpaid seller to withhold and stop delivery of the goods, he may reclaim them from an insolvent buyer by demand upon the buyer within ten days after the buyer has received the goods. Section 2–702(2). Where, however, the buyer has committed fraud by misrepresenting her solvency to the seller in writing within three months prior to delivery of the goods, the ten-day limitation does not apply.

The seller's right to reclaim the goods is subject to the rights of a buyer in the ordinary course of business or to the rights of any other good faith purchaser. Furthermore, upon reclaiming the goods from an insolvent buyer, the seller is excluded from all other remedies with respect to those goods. Section 2–702(3).

A lessor retains title to the goods and therefore has the right to recover possession of them upon default by the lessee. Section 2A–525(2).

◆ SEE FIGURE 25-1: **Remedies of the Seller**

REMEDIES OF THE BUYER

Basically, a seller may default in three different ways: he may repudiate, he may fail to deliver the goods, or he may deliver or tender goods that do not conform to the contract. Section 2–711; Section 2A–508. The Code provides remedies for each of these breaches. Some remedies are available for all three types; others are not. Moreover, the availability of some remedies depends on the buyer's actions. For example, if the seller tenders nonconforming goods, the buyer may reject or accept them. If the buyer rejects them, he can choose from a number of remedies. On the other hand, if the buyer accepts the nonconforming goods and does not justifiably revoke his acceptance, he limits himself to recovering damages.

Where the seller fails to make delivery or repudiates, or where the buyer rightfully rejects or justifiably revokes acceptance, the buyer may, with respect to any goods involved, or with respect to the whole if the breach goes to the whole contract, (1) cancel *and* (2) recover payments made. In addition, the buyer may (3) "cover" and obtain damages *or*

◆ **FIGURE 25-1: Remedies of the Seller**

	Seller's Remedies		
Buyer's Breach	**Obligation-oriented**	**Goods-oriented[1]**	**Money-oriented[2]**
Buyer wrongfully rejects goods	Cancel	• Withhold delivery of goods • Stop delivery of goods in transit • Identify conforming goods to the contract	• Resell and recover damages • Recover difference between unpaid contract and market prices *or* lost profits • Recover price
Buyer wrongfully revokes acceptance	Cancel	• Withhold delivery of goods • Stop delivery of goods in transit • Identify conforming goods to the contract	• Resell and recover damages • Recover difference between unpaid contract and market prices *or* lost profits • Recover price
Buyer fails to make payment	Cancel	• Withhold delivery of goods • Stop delivery of goods in transit • Identify conforming goods to the contract • Reclaim goods upon buyer's insolvency	• Resell and recover damages • Recover difference between unpaid contract and market prices *or* lost profits • Recover price
Buyer repudiates	Cancel	• Withhold delivery of goods • Stop delivery of goods in transit • Identify conforming goods to the contract	• Resell and recover damages • Recover difference between unpaid contract and market prices *or* lost profits • Recover price

[1] In a lease, the lessor has the right to recover possession of the goods upon default by the lessee.
[2] In a lease, the lessor's recovery of damages for future rent payments is reduced to their present value.

(4) recover damages for nondelivery. Where the seller fails to deliver or repudiates, the buyer, where appropriate, may also (5) recover identified goods if the seller is insolvent, *or* (6) replevy the goods, *or* (7) obtain specific performance. Moreover, upon rightful rejection or justifiable revocation of acceptance, the buyer (8) has a security interest in the goods. Where the buyer has accepted goods and notified the seller of their nonconformity, the buyer may (9) recover damages for breach of warranty. Finally, in addition to the remedies listed above, the buyer may, where appropriate, (10) recover incidental damages, and (11) recover consequential damages. Article 2A provides for essentially the same remedies for the lessee. Section 2A–508.

The first remedy cataloged above is **obligation-oriented**; the second through fourth and ninth through eleventh are **money-oriented**; and the fifth through eighth are **goods-oriented**.

The buyer may deduct from the price due any damages resulting from any breach of contract by the seller. The buyer must, however, give notice to the seller of her intention to withhold such damages from payment of the price due. Section 2–717; Section 2A–508(6).

CISG If the seller fails to perform any of his obligations under the contract or the CISG, the buyer (1) may require the seller to perform his contractual obligations or (2) may fix an additional period of time of reasonable length for performance by the seller of his obligations. Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. Moreover, if the seller's breach is fundamental or the seller fails to perform within the additional time granted by the buyer, the buyer may avoid the contract. In addition to these remedies, the buyer also has the right to damages. If the goods do not conform with the contract, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.

TO CANCEL THE CONTRACT

Where the seller fails to make delivery or repudiates the contract, or where the buyer rightfully rejects or justifiably revokes acceptance of goods tendered or delivered to him, the buyer may cancel the contract with respect to any goods involved; and if the breach by the seller concerns the whole contract, the buyer may cancel the entire contract. Section 2–711(1); Section 2A–508(1)(a). The buyer, who must give the seller notice of his cancellation, is excused from further performance or tender on his part. Section 2–106; Section 2A–505(1).

CISG The buyer may declare the contract avoided if (1) the seller commits a fundamental breach or (2) the seller does not deliver the goods within the additional period of time fixed by the buyer. Avoidance of the contract releases both parties from their obligations under it, subject to any damages that may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract. A party who has performed the contract either wholly or in part may claim restitution from the other party. If both parties are bound to make restitution, they must do so concurrently.

TO RECOVER PAYMENTS MADE

The buyer, upon the seller's breach, also may recover as much of the price as he has paid. Section 2–711(1). For example, Jonas and Sheila enter into a contract for a sale of goods for a contract price of $3,000, and Sheila, the buyer, has made a down payment of $600. Jonas delivers nonconforming goods to Sheila, who rightfully rejects them. Sheila may cancel the contract and recover the $600 plus whatever other damages she can prove. Under Article 2A, the lessee may recover so much of the rent and security as has been paid and is just under the circumstances. Section 2A–508(1)(b).

TO COVER

Upon the seller's breach, the buyer may protect himself by obtaining cover. Cover means that the buyer may in good faith and without unreasonable delay proceed to purchase needed goods or make a contract to purchase such goods in substitution for those due under the contract from the seller. Section 2–712(1). In a lease, the lessee may purchase or lease substitute goods. Section 2A–518(1).

Upon making a reasonable contract of cover, the buyer may recover from the seller the **difference between the cost of cover and the contract price**, plus any incidental and consequential damages (discussed below), less expenses saved because of the seller's breach. Section 2–712(2). For example, Doug, whose factory is in Oakland, agrees to sell goods to Velda, in Atlanta, for $22,000 F.O.B. Oakland. Doug fails to deliver, and Velda covers by purchasing substitute goods in Atlanta for $25,000, incurring $700 in sales commissions but suffering no other damages as a consequence of Doug's breach. Shipping costs from Oakland to Atlanta for the goods are $1,300. Velda would recover the difference between the cost of cover ($25,000) and the contract price ($22,000), plus incidental damages ($700 in sales commissions), plus consequential damages ($0 in this example), minus expenses saved ($1,300 in shipping costs that Velda

need not pay under the contract of cover), which equals $2,400.

In a lease, the comparable recovery is the **difference between the present values** of the **new rent** due under the new lease and the **old rent** due under the original lease. Section 2A–518(2).

The buyer is not required to obtain cover, and his failure to do so does not bar him from any other remedy the Code provides. Section 2–712(3); 2A–519(1). The buyer may not, however, recover consequential damages that he could have prevented by cover. Section 2–715(2)(a); Section 2A–520(2)(a).

CISG If the contract is avoided and the buyer has bought goods in replacement in a reasonable manner and within a reasonable time after avoidance, she may recover the difference between the contract price and the price paid in the substitute transaction. In addition, she may recover consequential damages.

◆ **SEE CASE 25-2**

TO RECOVER DAMAGES FOR NONDELIVERY OR REPUDIATION

If the seller repudiates the contract or fails to deliver the goods, or if the buyer rightfully rejects or justifiably revokes acceptance of the goods, the buyer is entitled to recover damages from the seller equal to the **difference between** the **market price** at the time when the buyer learned of the breach and the contract price, together with incidental and consequential damages, less expenses saved because of the seller's breach. Section 2–713(1). This remedy is a complete alternative to the remedy of cover and, as such, is available only to the extent the buyer has not covered. As previously indicated, the buyer who elects this remedy may not recover consequential damages that she could have avoided by cover.

In a lease, the comparable recovery is the **difference between** the **present values** of the **market rent** and the **old rent** due under the original lease. Section 2A–519(1).

The market price is to be determined either as of the place for tender or, in the event that the buyer has rightfully rejected the goods or has justifiably revoked his acceptance of them, as of the place of arrival. Section 2–713(2). For example, Janet, in Portland, agrees to sell goods to Laura, in Minneapolis, for $7,000 C.O.D. (collect on delivery), with delivery by November 15. Janet fails to deliver. As a consequence, Laura suffers incidental damages of $1,500 and consequential damages of $1,000. In the case of nondelivery or repudiation, market price is determined as of the place of tender. Because C.O.D. is a shipment contract, the place of tender would be the seller's city. Therefore, the market price must be the market price in Portland, the seller's city, on November 15, the date when Laura learned of the breach. At this time and place the market price is $8,000. Laura would recover the difference between the market price ($8,000) and the contract price ($7,000), plus incidental damages ($1,500), plus consequential damages ($1,000), minus expenses saved ($0 in this example), which equals $3,500.

In the example above, if Janet had instead delivered nonconforming goods that Laura rejected, then the market price would be determined at Laura's place of business in Minneapolis. If Janet had repudiated the contract on November 1 rather than November 15, then the market price would be determined as of November 1.

In a lease, market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival. Section 2A–519(2).

CISG If the contract is avoided and the buyer has not made a replacement purchase, he may recover the difference between the contract price and the current price at the time of avoidance and at the place where delivery of the goods should have been made. In addition, he may recover consequential damages.

TO RECOVER IDENTIFIED GOODS UPON THE SELLER'S INSOLVENCY

Where existing goods are identified to the contract of sale, the buyer acquires a *special property interest* in the goods. Section 2–501. This special property interest exists even though the goods are nonconforming, and the buyer therefore has the right to return or reject them. Either the buyer or the seller may identify the goods to the contract.

The Code gives the buyer a right, which does not exist at common law, to recover from an insolvent seller the goods in which the buyer has a special property interest and for which he has paid part or all of the price. This right exists where the seller, who is in possession or control of the goods, becomes insolvent within ten days after receiving the first installment of the price. To exercise it, the buyer must tender to the seller any unpaid portion of the price. If the special property interest exists by reason of an identification made by the buyer, he may recover the goods only if they conform to the contract for sale. Section 2–502; Section 2A–522.

TO SUE FOR REPLEVIN

Replevin is an action at law to recover from a defendant's possession specific goods that are being unlawfully withheld from the plaintiff. Where the seller has repudiated or breached the contract, the buyer may maintain against the

seller an action for replevin for goods that have been identified to the contract if the buyer after a reasonable effort is unable to effect cover for such goods. Section 2–716(3); Section 2A–521(3). Article 2 also provides the buyer with the right to replevin if the goods have been shipped under reservation of a security interest in the seller and satisfaction of this security interest has been made or tendered. Section 2–716(3).

TO SUE FOR SPECIFIC PERFORMANCE

Specific performance is an equitable remedy compelling the party in breach to perform the contract according to its terms. At common law, specific performance is available only if legal remedies are inadequate. For example, where the contract is for the purchase of a unique item, such as a work of art, a famous racehorse, or an heirloom, money damages may not be an adequate remedy. In such a case, a court of equity has the discretion to order the seller specifically to deliver to the buyer the goods described in the contract upon payment of the price.

The Code not only has continued the availability of specific performance but also has sought to encourage a more liberal attitude toward its use. Accordingly, it does not expressly require that the remedy at law be inadequate. Instead, the Code states that specific performance may be granted where "the goods are unique or in other proper circumstances." Section 2–716(1); Section 2A–521(1). As the Comment to Section 2–716 explains, the test of uniqueness under the Code must be made in view of the total situation that characterizes the contract.

CISG The buyer may require the seller to perform his contractual obligations. If the goods do not conform to the contract and the nonconformity constitutes a fundamental breach of contract, the buyer may require delivery of substitute goods. If the goods do not conform to the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. Nevertheless, a court is not bound to enter a judgment for specific performance unless a court would do so under its own law in respect of similar contracts of sale not governed by the CISG.

TO ENFORCE A SECURITY INTEREST IN THE GOODS

A buyer who has rightfully rejected or justifiably revoked acceptance of goods that remain in his possession or control has a security interest in these goods to the extent of any payment of the price that he has made and for any expenses he reasonably has incurred in their inspection, receipt, transportation, care, and custody. The buyer may hold such goods and resell them in the same manner as an aggrieved seller may resell goods. Section 2–711(3); Section 2A–508(5). In the event of resale the buyer is accountable to the seller for any amount of the net proceeds of the resale that exceeds the amount of his security interest. Section 2–706(6); Section 2A–527(5).

TO RECOVER DAMAGES FOR BREACH IN REGARD TO ACCEPTED GOODS

Where the buyer has accepted nonconforming goods and has timely notified the seller of the breach of contract, the buyer is entitled to recover from the seller the damages resulting in the ordinary course of events from the seller's breach, as determined in any reasonable manner. Section 2–714(1); Section 2A–519(3). Where appropriate, the buyer may also recover incidental and consequential damages. Section 2–714(3); Section 2A–519(3). Nonconformity includes breaches of warranty as well as any failure of the seller to perform according to her obligations under the contract. Thus, even if a seller cures a nonconforming tender, the buyer may recover under this section for any injury he suffered because the original tender was nonconforming.

In the event of breach of warranty, the measure of damages is the **difference** at the time and place of acceptance **between** the **value of the goods that have been accepted** and the **value** that the goods would have had if they had been **as warranted**, unless special circumstances show proximate damages of a different amount. Section 2–714(2). Article 2A has a comparable provision, except the recovery is for the **present value** of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term. Section 2A–519(4).

The contract price of the goods does not figure in this computation because the buyer is entitled to the benefit of his bargain, which is to receive goods that are as warranted. For example, Max agrees to sell goods to Stanley for $1,000. The value of the goods accepted is only $800; had they been as warranted, their value would have been $1,200. Stanley's damages for breach of warranty are $400, which he may deduct from any unpaid balance due on the purchase price upon notice to Max of his intention to do so. Section 2–717; Section 2A–508(6).

TO RECOVER INCIDENTAL DAMAGES

In addition to remedies such as covering, recovering damages for nondelivery or repudiation, or recovering damages for breach in regard to accepted goods, including breach of warranty, the buyer may recover **incidental damages**. A buyer's incidental damages provide reimbursement for the buyer who incurs reasonable expenses in handling rightfully rejected goods or in effecting cover. Section 2–715(1) of the Code defines the buyer's incidental damages as follows:

> Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

Article 2A has an analogous definition. Section 2A–520(1).

For example, the buyer of a racehorse who justifiably revokes acceptance because the horse does not conform to the contract will be allowed to recover as incidental damages the cost of caring for the horse from the date the horse was delivered until the buyer returns it to the seller.

TO RECOVER CONSEQUENTIAL DAMAGES

In many cases, the remedies discussed above will not fully compensate the aggrieved buyer for her losses. For example, nonconforming goods that are accepted may in some way damage or destroy the buyer's warehouse and its contents, or undelivered goods may have been the subject of a lucrative contract of resale, the profits from which are now lost. The Code responds to this problem by providing the buyer with the opportunity to recover **consequential damages** resulting from the seller's breach, including (1) any loss resulting from the buyer's requirements and needs of which the seller at the time of contracting had reason to know and which the buyer could not reasonably prevent by cover or otherwise; and (2) injury to person or property proximately resulting from any breach of warranty. Section 2–715(2); Section 2A–520(2).

With respect to the first type of consequential damages, *particular* needs of the buyer usually must be made known to the seller, whereas *general* needs usually need not be. In the case of a buyer who is in the business of reselling goods, resale is one requirement of which the seller has reason to know. For example, Supreme Machine Co., a manufacturer, contracts to sell Allied Sales, Inc., a dealer in used machinery, a used machine that Allied plans to resell. When Supreme repudiates and Allied is unable to obtain a similar machine elsewhere, Allied's damages include the net profit that it would have made on resale of the machine. A buyer may not, however, recover consequential damages he could have prevented by cover. Section 2–715(2); Section 2A–520(2)(a). For instance, Supreme Machine Co. contracts for $10,000 to sell Capitol Manufacturing Co. a used machine to be delivered at Capitol's factory by June 1. Supreme repudiates the contract on May 1. By reasonable efforts, Capitol could buy a similar machine from United Machinery, Inc., for $11,000 in time for a June 1 delivery. Capitol fails to do so, thereby losing a $5,000 profit that it would have made from the resale of the machine. Though Capitol can recover $1,000 from Supreme, its damages do not include the loss of the $5,000 profit.

An example of the second type of consequential damages would be the following: Federal Machine Co. sells a machine to Southern Manufacturing Co., warranting its suitability for Southern's purpose. The machine is not suitable for Southern's purpose, however, and causes $10,000 in damage to Southern's property and $15,000 in personal injuries. Southern can recover the $25,000 consequential damages in addition to any other loss suffered.

◆ **SEE FIGURE 25-2: Remedies of the Buyer**

CONTRACTUAL PROVISIONS AFFECTING REMEDIES

Within specified limits, the Code permits the parties to a sales contract to modify, exclude, or limit by agreement the remedies or damages that will be available for breach of that contract. Two basic types of contractual provisions affect remedies: (1) liquidation or limitation of damages, and (2) modification or limitation of remedy.

LIQUIDATION OR LIMITATION OF DAMAGES

The parties may provide for liquidated damages in their contract by specifying the amount or measure of damages that either party may recover in the event of a breach by the other. The amount of such damages must be reasonable in light of the anticipated or actual loss resulting from a breach, the difficulties of proof of loss, and the inconvenience or lack of feasibility of otherwise obtaining an adequate remedy. A contractual provision fixing unreasonably large liquidated damages is void as a penalty. Section 2–718(1). An unreasonably small amount, on the other hand, might be stricken on the grounds of unconscionability. Comment 1 to Section 2–718.

To illustrate, Sterling Cabinetry Company contracts to build and install shelves and cabinets for an office building being constructed by Baron Construction Company. The contract price is $120,000, and the contract provides that Sterling would be liable for $100 per day for every day's delay beyond the completion date specified in the contract. The stipulated sum of $100 per day is reasonable and commensurate with the anticipated loss. Therefore, it is enforceable as liquidated damages. If, instead, the sum stipulated had been $5,000 per day, it would be unreasonably large and therefore would be void as a penalty.

Section 2A–504(1) authorizes liquidated damages payable by either party for default, or any other act or omission. The amount of, or formula for, liquidated damages must be reasonable in light of the then anticipated harm caused by default or other act or omission. Section 2A–504(1).

◆ **FIGURE 25-2: Remedies of the Buyer**

	Buyer's Remedies		
Seller's Breach	**Obligation-oriented**	**Goods-oriented**	**Money-oriented***
Buyer rightfully rejects goods	Cancel	Have a security interest	• Recover payments made • Cover and recover damages • Recover damages for nondelivery
Buyer justifiably revokes acceptance	Cancel	Have a security interest	• Recover payments made • Cover and recover damages • Recover damages for nondelivery
Seller fails to deliver	Cancel	• Recover identified goods if seller is insolvent • Replevy goods • Obtain specific performance	• Recover payments made • Cover and recover damages • Recover damages for nondelivery
Seller repudiates	Cancel	• Recover identified goods if seller is insolvent • Replevy goods • Obtain specific performance	• Recover payments made • Cover and recover damages • Recover damages for nondelivery
Buyer accepts nonconforming goods			Recover damages for breach of warranty

* In a lease, the lessee's recovery of damages for future rent payments is reduced to their present value.

Where the seller justifiably withholds delivery of the goods because of the buyer's breach, and the buyer has made payments on the price, the buyer is entitled to restitution of the amount by which the sum of his payments exceeds the amount of liquidated damages to which the seller is entitled under the contract. In the absence of a provision for liquidated damages, the buyer may recover the difference between the amounts that he has paid on the price and 20 percent of the value of the total performance for which he is obligated under the contract, or $500, whichever is smaller. Section 2–718(2)(b). Article 2A has a comparable provision, except the $500 provision applies only to consumer leases. Section 2A–504(3)(b). The buyer's right to restitution is offset by the seller's right to recover other damages provided in the Code and by the value of any benefits the buyer has received by reason of the contract. Section 2–718(3); Section 2A–504(4).

Thus, if a buyer, after depositing $1,500 with the seller on a $10,000 contract for goods, breaches the contract and the seller withholds delivery, in the absence of a provision for liquidated damages and in the absence of the seller's establishing greater actual damages resulting from the breach, the buyer is entitled to restitution of $1,000 ($1,500 less $500). If the deposit were $250 on a $500 contract, the buyer would be entitled to $150 ($250 less $100, which is 20 percent of the price).

◆ **SEE CASE 25-3**

MODIFICATION OR LIMITATION OF REMEDY BY AGREEMENT

The contract between the seller and buyer may expressly provide for remedies in addition to or instead of those provided in the Code and may limit or change the measure of damages recoverable in the event of breach. Section 2–719(1); Section 2A–503(1). For instance, the contract may validly limit the buyer's remedy to a return of the goods and a refund of the price, or to the replacement of nonconforming goods or parts.

A contractual remedy is deemed optional, however, unless the parties expressly agree that it is to be exclusive of other remedies, in which event it becomes the sole remedy. Section 2–719(1)(b); Section 2A–503(2). Moreover, where circumstances cause an exclusive or limited remedy to fail in its essential purpose, the parties may resort to the remedies provided by the Code. Section 2–719(2); Section 2A–503(2).

The contract may expressly limit or exclude consequential damages unless such limitation or exclusion would be unconscionable. Limitation of consequential damages for personal injuries resulting from breach of warranty in the sale of consumer goods is *prima facie* unconscionable, whereas limitation of such damages for commercial loss is not. Section 2–719(3); Section 2A–503(3). For example, Ace Motors, Inc., sells a pickup truck to Brenda, a consumer. The contract of sale excludes liability for all consequential damages. The next day, the truck explodes, causing

Brenda serious personal injury. Brenda would recover for her personal injuries unless Ace could prove that the exclusion of consequential damages was not unconscionable.

◆ **SEE CASE 25-4**

STATUTE OF LIMITATIONS

Any action for breach of a sales contract must be begun within four years after the cause of action has accrued. Section 2–725(1); Section 2A–506(1). The parties may reduce the period of limitation to not less than one year. Section 2–725(1); Section 2A–506(1). In a sale, they may not, however, extend the period. Article 2A does not include this limitation.

A cause of action accrues when the breach occurs without regard to the injured party's knowledge of the breach. Section 2–725(2). A breach of warranty occurs upon tender of delivery, except where the warranty extends to future performance. In that event, the cause of action occurs when the breach is or should have been discovered. In a lease, a cause of action for default accrues when the act or omission is discovered or should have been discovered by the aggrieved party, or when the default occurs, whichever is later. Section 2A–506(2).

CHAPTER SUMMARY

REMEDIES OF THE SELLER

Buyer's Default the seller's remedies are triggered by the buyer's actions in wrongfully rejecting or revoking acceptance of the goods, in failing to make payment due on or before delivery, or in repudiating the contract

To Withhold Delivery

To Stop Delivery if the buyer is insolvent (one who is unable to pay his debts as they become due or one whose total liabilities exceed his total assets), the seller may stop any delivery; if the buyer repudiates or otherwise breaches, the seller may stop carload, truckload, planeload, or larger shipments

To Identify Goods

To Resell the Goods the seller may resell the goods concerned or the undelivered balance of the goods and recover the difference between the contract price and the resale price, together with any incidental damages, less expenses saved

- ***Type of Resale*** may be public or private
- ***Manner of Resale*** must be made in good faith and in a commercially reasonable manner

To Recover Damages for Nonacceptance or Repudiation

- ***Market Price Differential*** the seller may recover damages from the buyer measured by the difference between the unpaid contract price and the market price at the time and place of tender of the goods, plus incidental damages, less expenses saved
- ***Lost Profit*** in the alternative, the seller may recover the lost profit, including reasonable overhead, plus incidental damages, less expenses saved

To Recover the Price the seller may recover the price

- where the buyer has accepted the goods
- where the goods have been lost or damaged after the risk of loss has passed to the buyer
- where the goods have been identified to the contract and a ready market is not available for their resale

To Recover Incidental Damages incidental damages include any commercially reasonable charges, expenses, or commissions directly resulting from the breach

To Cancel the Contract

To Reclaim the Goods upon the Buyer's Insolvency an unpaid seller may reclaim goods from an insolvent buyer under certain circumstances

REMEDIES OF THE BUYER

Seller's Default the buyer's remedies arise in cases (1) in which the seller fails to make delivery or repudiates the contract or (2) in which the buyer rightfully rejects or justifiably revokes acceptance of goods tendered or delivered

To Cancel the Contract

To Recover Payments Made

To Cover the buyer may obtain cover by proceeding in good faith and without unreasonable delay to purchase substitute goods; the buyer may recover the difference between the cost of cover and the contract price, plus any incidental and consequential damages, less expenses saved

To Recover Damages for Nondelivery or Repudiation the buyer may recover the difference between the market price at the time the buyer learned of the breach and the contract price, together with any incidental and consequential damages, less expenses saved

To Recover Identified Goods on the Seller's Insolvency for which he has paid all or part of the price

To Sue for Replevin the buyer may recover goods identified to the contract if (1) the buyer is unable to obtain cover, or (2) the goods have been shipped under reservation of a security interest in the seller

To Sue for Specific Performance the buyer may obtain specific performance in cases in which the goods are unique or in other proper circumstances

To Enforce a Security Interest a buyer who has rightfully rejected or justifiably revoked acceptance of goods that remain in her possession has a security interest in these goods for any payments that she has made on their price and for any expenses she has reasonably incurred

To Recover Damages for Breach in Regard to Accepted Goods the buyer may recover damages resulting in the ordinary course of events from the seller's breach; in the case of breach of warranty, such recovery is the difference between the value the goods would have had if they had been as warranted and the value of the nonconforming goods that have been accepted

To Recover Incidental Damages the buyer may recover incidental damages, which include any commercially reasonable expenses connected with the delay or other breach

To Recover Consequential Damages the buyer may recover consequential damages resulting from the seller's breach, including (1) any loss resulting from the buyer's requirements and needs of which the seller at the time of contracting had reason to know and which the buyer could not reasonably prevent by cover or otherwise, and (2) injury to person or property proximately resulting from any breach of warranty

CONTRACTUAL PROVISIONS AFFECTING REMEDIES

Liquidation or Limitation of Damages the parties may specify the amount or measure of damages that may be recovered in the event of a breach if the amount is reasonable

Modification or Limitation of Remedy by Agreement the contract between the parties may expressly provide for remedies in addition to those in the Code, or it may limit or change the measure of damages recoverable for breach

CASES

CASE 25-1

Seller's Damages for Nonacceptance or Repudiation

KENCO HOMES, INC. v. WILLIAMS

Court of Appeals of Washington, Division Two, 1999
94 Wn.App. 219, 972 P.2d 125
http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=wa&vol=209071&invol=o01

Morgan, J.

Kenco Homes, Inc., sued Dale E. Williams and Debi A. Williams, husband and wife, for breaching a contract to purchase a mobile home. After a bench trial, the trial court ruled primarily for Williams. Kenco appealed, claiming the trial court used an incorrect measure of damages. We reverse.

Kenco buys mobile homes from the factory and sells them to the public. Sometimes, it contracts to sell a home that the factory has not yet built. It has "a virtually unlimited supply of product," * * *.

On September 27, 1994, Kenco and Williams signed a written contract whereby Kenco agreed to sell, and Williams agreed to buy, a mobile home that Kenco had not yet ordered from the factory. The contract called for a price of $39,400, with $500 down.

The contract contained two conditions pertinent here. According to the first, the contract would be enforceable only if Williams could obtain financing. According to the second, the contract would be enforceable only if Williams later approved a bid for site improvements. Financing was to cover the cost of the mobile home and the cost of the land on which the mobile home would be placed. The contract provided for damages. It stated, "I [Williams] understand that you [Kenco] shall have all the rights of a seller upon breach of contract under the Uniform Commercial Code, except the right to seek and collect 'liquidated damages' under Section 2–718." The contract provided for reasonable attorney's fees. * * * In early October, Williams accepted Kenco's bid for site improvements. As a result, the parties (a) formed a second contract and (b) fulfilled the first contract's site-improvement-approval condition. Also in early October, Williams received preliminary approval on the needed financing.

On or about October 12, Williams gave Kenco a $600 check so Kenco could order an appraisal of the land on which the mobile home would be located. Before Kenco could act, however, Williams stopped payment on the check and repudiated the entire transaction. His reason * * * was that he "had found a better deal elsewhere." When Williams repudiated, Kenco had not yet ordered the mobile home from the factory. After Williams repudiated, Kenco simply did not place the order. As a result, Kenco's only out-of-pocket expense was a minor amount of office overhead. On November 1, 1994, Kenco sued Williams for lost profits. After a bench trial, the superior court found that Williams had breached the contract; that Kenco was entitled to damages; and that Kenco had lost profits in the amount of $11,133 ($6,720 on the mobile home, and $4,413 on the site improvements). The court further found, however, that Kenco would be adequately compensated by retaining Williams' $500 down payment; that Williams was the prevailing party; and that Williams should receive reasonable attorney's fees in the amount of $1,800. Because Kenco had already received its $500, the court entered an $1,800 judgment for Williams, and Kenco filed this appeal. In this court, Williams does not contest the trial court's finding that he breached the contract. Thus, the only issues are (1) whether the superior court used the correct measure of damages, and (2) whether the superior court properly awarded attorneys' fees to Williams.

I

Under the Uniform Commercial Code (UCC), a nonbreaching seller may recover "damages for non-acceptance" from a breaching buyer. [UCC §2–703(e)] The measure of such damages is as follows:

> **(1)** * * * the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article ([UCC §] 2–710), but less expenses saved inconsequence of the buyer's breach.
>
> **(2)** If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article ([UCC §] 2–710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale. [UCC §] 2–708.

* * * [T]he statute's purpose is to put the nonbreaching seller in the position that he or she would have occupied if the

breaching buyer had fully performed (or, in alternative terms, to give the nonbreaching seller the benefit of his or her bargain). [UCC §] 1–106(1). A party claiming damages under subsection (2) bears the burden of showing that an award of damages under subsection (1) would be inadequate. [Citation.] In general, the adequacy of damages under subsection (1) depends on whether the nonbreaching seller has a readily available market on which he or she can resell the goods that the breaching buyer should have taken. [Citation.] When a buyer breaches before either side has begun to perform, the amount needed to give the seller the benefit of his or her bargain is the difference between the contract price and the seller's expected cost of performance. Using market price, this difference can, in turn, be subdivided into two smaller differences: (a) the difference between the contract price and the market price, and (b) the difference between the market price and the seller's expected cost of performance. So long as a nonbreaching seller can reasonably resell the breached goods on the open market, he or she can recover the difference between contract price and market price by invoking subsection (1), and the difference between market price and his or her expected cost of performance by reselling the breached goods on the open market. Thus, he or she is made whole by subsection (1), and subsection (1) damages should be deemed "adequate." But if a nonbreaching seller cannot reasonably resell the breached goods on the open market, he or she cannot recover, merely by invoking subsection (1), the difference between market price and his or her expected cost of performance. Hence, he or she is not made whole by subsection (1); subsection (1) damages are "inadequate to put the seller in as good a position as performance would have done;" and subsection (2) comes into play.

The cases illustrate at least three specific situations in which a nonbreaching seller cannot reasonably resell on the open market. In the first, the seller never comes into possession of the breached goods; although he or she plans to acquire such goods before the buyer's breach, he or she rightfully elects not to acquire them after the buyer's breach. [Citation.] In the second, the seller possesses some or all of the breached goods, but they are of such an odd or peculiar nature that the seller lacks a post-breach market on which to sell them; they are, for example, unfinished, obsolete, or highly specialized. [Citations.] In the third situation, the seller again possesses some or all of the breached goods, but because the market is already oversupplied with such goods (i.e., the available supply exceeds demand), he or she cannot resell the breached goods without displacing another sale. [Citations.] [Court's footnote: In passing, we observe that this lost volume situation can be described in several ways. Focusing on the breached unit, one can say that due to a market in which supply exceeds demand, the lost volume seller cannot resell the breached unit without sacrificing an additional sale. Focusing on the additional unit, one can say that but for the buyer's breach, the lost volume seller would have made an additional sale. Focusing on both units, one can say that but for the buyer's breach, the lost volume seller would have sold both units. Each statement is equivalent to the others.] Frequently, these sellers are labeled "jobber," "components seller," and "lost volume seller," respectively, [citation]; in our view, however, such labels confuse more than clarify.

* * * In this case, Kenco did not order the breached goods before Williams repudiated. After Williams repudiated, Kenco was not required to order the breached goods from the factory, [UCC §§2–703, 2–704(2)]; it rightfully elected not to do so; and it could not resell the breached goods on the open market. Here, then, "the measure of damages provided in subsection (1) is inadequate to put [Kenco] in as good a position as [Williams'] performance would have done;" [UCC §2-708] subsection (2) states the applicable measure of damages; and Kenco is entitled to its lost profit of $11,133.

II

The second issue is whether Kenco is entitled to reasonable attorneys' fees. The parties' contract provided that the prevailing party would be entitled to such fees. Kenco is the prevailing party. On remand, the trial court shall award Kenco reasonable attorneys' fees incurred at trial and on appeal.

Reversed with directions to enter an amended judgment awarding Kenco its lost profit of $11,133; reasonable attorneys' fees incurred at trial and on appeal; and any ancillary amounts required by law.

CASE 25-2

Buyer's Remedy of Cover

BIGELOW-SANFORD, INC. v. GUNNY CORP.

United States Court of Appeals, Fifth Circuit, Unit B, 1981
649 F.2d 1060

Kravitch, J.

[The plaintiff, Bigelow-Sanford, Inc., contracted with defendant Gunny Corp. for the purchase of 100,000 linear yards of jute at $0.64 per yard. Gunny delivered 22,228 linear yards in January 1979. The February and March deliveries required under the contract were not made, though 8 rolls (each roll containing 66.7 linear yards) were delivered in April. With 72,265 linear yards undelivered, Gunny told Bigelow-Sanford that no more would be delivered. In mid-March, Bigelow-Sanford turned to the jute spot market to replace the balance of the order at a price of $1.21 per linear yard. Since several other companies had also defaulted on their jute contracts with Bigelow-Sanford, the plaintiff purchased a total of 164,503 linear yards on the spot market. Plaintiff sues defendant to recover losses sustained as a result of the breach of contract.]

* * *

Gunny contends that appellee's [Bigelow-Sanford] alleged cover purchases should not have been used to measure damages in that they were not made in substitution for the contract purchases, were not made seasonably or in good faith and were not shown to be due to Gunny's breach. [W]e disagree. Again, we quote UCC §2–711 providing in part for cover damages where the seller fails to make delivery or repudiates the contract:

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
(b) recover damages for non-delivery as provided in this Article (2–713).

UCC §2–712 defines cover:

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (2–715), but less expenses saved in consequence of the seller's breach.
(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

In addition, the purchaser may recover under 2–713:

(1) Subject to the provisions of this Article with respect to proof of market price (2–723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (2–715), but less expenses saved in consequence of the seller's breach.
(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

Most importantly, "whether a plaintiff has made his cover purchases in a reasonable manner poses a classic jury issue." [Citation.] The district court thus acted properly in submitting the question of cover damages to the jury, which found that Gunny had breached, appellee had covered, and had done so in good faith without unreasonable delay by making reasonable purchases, and was therefore entitled to damages under §2–712. Gunny argues Bigelow is not entitled to such damages on the ground that it failed to make cover purchases without undue delay and that the jury should not have been permitted to average the cost of Bigelow's spot market purchases totalling 164,503 linear yards in order to arrive at the cost of cover for the 72,265 linear yards Gunny failed to deliver. Both arguments fail. Gunny notified Bigelow in February that no more jute would be forthcoming. Bigelow made its first spot market purchases in mid-March. Given that it is within the jury's province to decide the reasonableness of the manner in which cover purchases were made, we believe the jury could reasonably decide such purchases, made one month after the date the jury assigned to Gunny's breach, were made without undue delay. The same is true with respect to Gunny's second argument: Bigelow's spot market purchases were made to replace several vendors' shipments. Bigelow did not specifically allocate the spot market replacements to individual vendors' accounts, however, nor was there a requirement that they do so. The jury's method of averaging such costs

and assigning them to Gunny in proportion to the amount of jute if [sic] failed to deliver would, therefore, seem not only fair but well within the jury's permissible bounds.

Gunny also argues that the court erroneously charged the jury regarding damages under both §§2–712 and 2–713. We disagree. Whether Bigelow covered was a question of fact submitted to the jury. In the event that it had not, alternative damages were available to Bigelow under §2–713. [Citation.] The jury found that Bigelow had covered and awarded damages under §2–712; §2–713 then became irrelevant. Since either was applicable until that time, the court's charge as to both sections was not error.

* * *

[Judgment for Bigelow is affirmed.]

CASE 25-3

Liquidation of Damages

COASTAL LEASING CORPORATION v. T-BAR S CORPORATION

Court of Appeals of North Carolina, 1998
128 N.C.App. 379, 496 S.E.2d 795
http://www.aoc.state.nc.us/www/public/coa/opinions/1998/970382-1.htm

Walker, J.

Plaintiff entered into a lease agreement (lease) with defendant T-Bar S Corporation (T-Bar) in May of 1992, whereby plaintiff agreed to lease certain cash register equipment (equipment) to T-Bar. Under the lease, T-Bar agreed to monthly rental payments of $289.13 each for a total of 48 months. Defendants George and Sharon Talbott (appellants) were the officers of T-Bar and personally guaranteed payment of all amounts due under the lease.

After making 18 of the monthly payments, appellants and T-Bar defaulted on the lease in December of 1993. On 28 February 1994, plaintiff mailed a certified letter to appellants and T-Bar, return receipt requested, advising them that the lease was in default and, pursuant to the terms of the lease, plaintiff was accelerating the remaining payments due under the lease. They further advised appellants and T-Bar that if the entire amount due of $8,841.06 was not received within 7 days, plaintiff would seek to recover the balance due plus interest and reasonable attorneys' fees, as well as possession of the equipment. The record shows that appellants and T-Bar each received this letter on 1 March 1994.

On 10 March 1994, plaintiff mailed a certified letter and "Notice of Public Sale of Repossessed Leased Equipment" (notice of sale) to appellants and T-Bar at the same address, again return receipt requested. This letter advised appellants and T-Bar that plaintiff had taken possession of the equipment and was conducting a public sale pursuant to the terms of the lease. Although the date on the notice of sale stated that the sale was to be held on 23 March 1994, the sale was actually scheduled to be held on 25 March 1994. This letter and notice of sale were returned to plaintiffs "unclaimed" on 29 March 1994.

Plaintiffs conducted a public sale of the equipment on 25 March 1994 and no one appeared on behalf of appellants or T-Bar. There being no other bidders, plaintiff purchased the equipment at the sale for $2,000.00.

On 4 October 1994, plaintiff leased some of the same equipment to another company at a rate calculated to be $212.67 for 36 months. Plaintiff then filed this action on 6 October 1994 seeking to recover the balance due under the lease, minus the net proceeds from the 25 March 1994 public sale, plus interest and reasonable attorneys' fees. Appellants filed an answer and counterclaim on 27 July 1995. Plaintiff then filed a motion for summary judgment against appellants on 8 July 1996. * * *

After a hearing, the trial court entered summary judgment on 15 January 1997 in favor of plaintiff on its complaint and appellants' counterclaims and entered judgment against appellants for the sum of $7,223.56 plus interest and attorneys' fees of $1,083.54.

* * *

* * * Since both parties agree that the transaction at issue in this case is not a security interest, but rather is a lease, Article 2A controls.

* * *

In their appeal, appellants contend that the trial court erred by granting summary judgment in favor of plaintiff because there exists a genuine issue of material fact as to whether: (1) the liquidated damages clause contained in Paragraph 13 of the lease is reasonable in light of the then-anticipated harm caused by default; * * *.

As to appellants' first contention, the official commentary to Article 2A states that "in recognition of the diversity of the transactions to be governed [and] the sophistication of many of the parties to these transactions * * *, freedom of contract has been preserved." [UCC §] 2A–102 Official Comment. Also, under general contract principles, when the

parties to a transaction deal with each other at arms length and without the exercise by one of the parties of superior bargaining power, the parties will be bound by their agreement. [Citation.]

Article 2A recognizes that "[m]any leasing transactions are predicated on the parties' ability to agree to an appropriate amount of damages or formula for damages in the event of default or other act or omission." [UCC §] 2A–504 Official Comment. [UCC §] 2A–504 states, in pertinent part:

> (1) Damages payable by either party for default, or any other act or omission * * * may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then-anticipated harm caused by the default or other act or omission.

This liquidated damages provision is more flexible than that provided by its statutory analogue under Article 2, [UCC §] 2–718. The Article 2 liquidated damages section provides, in pertinent part:

> (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

[UCC §] 2–718(1). A review of these statutes reveals two major differences.

First, the drafters of Article 2A chose not to incorporate the two tests which are required by Article 2, i.e., the difficulties of proof of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. In fact, the official commentary to [UCC §] 2A–504 states that since "[t]he ability to liquidate damages is critical to modern leasing practice * * * [and] given the parties' freedom to contract at common law, the policy behind retaining these two additional requirements here was thought to be outweighed." [Citation.]

Secondly, the drafters of Article 2A recognized that in order to further promote freedom of contract, it was necessary to delete the last sentence of [UCC §] 2–718(1), which provided that unreasonably large liquidated damages provisions were void as a penalty. As such, the parties to a lease transaction are free to negotiate the amount of liquidated damages, restrained only by the rule of reasonableness.

"The basic test of the reasonableness of an agreement liquidating damages is whether the stipulated amount or amount produced by the stipulated formula represents a reasonable forecast of the probable loss." [Citation.] However, "no court should strike down a reasonable liquidated damage agreement based on foresight that has proved on hindsight to have contained an inaccurate estimation of the probable loss. * * *" [Citation.] And, "the fact that there is a difference between the actual loss, as determined at or about the time of the default, and the anticipated loss or stipulated amount or formula, as stipulated at the time the lease contract was entered into * * *," does not necessarily mean that the liquidated damage agreement is unreasonable. [Citation.] This is so because "[t]he value of a lessor's interest in leased equipment depends upon 'the physical condition of the equipment and the market conditions at that time.'" [Citation.] Further, in determining whether a liquidated damages clause is reasonable:

> [A] court should keep in mind that the clause was negotiated by the parties, who are familiar with the circumstances and practices with respect to the type of transaction involved, and the clause carries with it a consensual apportionment of the risks of the agreement that a court should be slow to overturn.

[Citation.]

In this case, Paragraph 13 of the lease (the liquidated damages clause) reads as follows:

> 13. REMEDIES If an event of default shall occur, Lessor may, at its option, at any time (a) declare the entire amount of unpaid rental for the balance of the term of this lease immediately due and payable, whereupon Lessee shall become obligated to pay to Lessor forthwith the total amount of the said rental for the balance of the said term, and (b) without demand or legal process, enter into the premises where the equipment may be found and take possession of and remove the Equipment, without liability for suit, action or other proceeding, and all rights of Lessee in the Equipment so removed shall terminate absolutely. Lessee hereby waives notice of, or hearing with respect to, such retaking. Lessor may at its option, use, ship, store, repair or lease all Equipment so removed and sell or otherwise dispose of any such Equipment at a private or public sale. In the event Lessor takes possession of the Equipment, Lessor shall give Lessee credit for any sums received by Lessor from the sale or rental of the Equipment after deduction of the expenses of sale or rental and Lessor's residual interest in the Equipment.
>
> * * * Lessor and Lessee acknowledge the difficulty in establishing a value for the unexpired lease term and owing to such difficulty agree that the provisions of this paragraph represent an agreed measure of damages and are not to be deemed a forfeiture or penalty. * * *
>
> * * *

After a careful review, we conclude the liquidated damages clause is a reasonable estimation of the then-anticipated

damages in the event of default because it protects plaintiff's expectation interest. The liquidated damages clause places plaintiff in the position it would have occupied had the lease been fully performed by allowing it to accelerate the balance of the lease payments and repossess the equipment. Therefore, since there is no evidence that plaintiff exercised a superior bargaining position in the negotiation of the liquidated damages clause, no genuine issue of material fact exists as to its reasonableness, and the trial court did not err by enforcing its provisions.

CASE 25-4

Limitation of Remedy by Agreement

BOC GROUP, INC. v. CHEVRON CHEMICAL COMPANY, LLC

Superior Court of New Jersey, Appellate Division, 2003
359 N.J.Super. 135, 819 A.2d 431, 50 U.C.C. Rep.Serv.2d 489
http://lawlibrary.rutgers.edu/courts/appellate/a0338-01.opn.html

Winkelstein, J.

Plaintiff contracted with defendant to deliver liquid nitrogen, primarily from its Michoud, Louisiana plant, to defendant's oil refinery production facility located in Belle Chase, Louisiana. Defendant uses liquid nitrogen to ensure the safe operation of its plant. Defendant claims that plaintiff repeatedly failed to timely deliver the liquid nitrogen, dropping the liquid nitrogen to dangerously low levels, compromising the safety of plant personnel. Although the contract provided that if plaintiff failed to deliver the liquid nitrogen as required defendant's sole remedy would be to purchase the product from another supplier and charge plaintiff for the additional expenses incurred, defendant did not do so, but instead terminated plaintiff's services.

Plaintiff sued defendant for breach of contract, and defendant counterclaimed. * * * The Law Division granted plaintiff's motion for partial summary judgment on liability, * * *. After a damages trial before a jury, plaintiff was awarded a judgment in the amount of $1,200,000.

Defendant appealed, * * *. We conclude that defendant's arguments are without merit. Accordingly, we affirm.

* * *

On October 1, 1991, the parties entered into a procurement contract, whereby plaintiff would supply defendant with "all [of defendant's] requirements" for bulk nitrogen. * * * The contract, * * *, was originally effective from October 1, 1991, to September 30, 1994, and was extended until August 31, 2000.

Defendant uses liquid nitrogen to "prevent fires and explosions within process equipment and systems and to assure instrumentation and control system reliability in critical process units." The nitrogen "protects plant personnel and the public from accidental toxic material discharges and prevents product contamination [from] oxygen * * * which would reduce product quality and performance." * * *

The contract was a "requirement" contract—deliveries were based on how much liquid nitrogen defendant had in its tanks. As a result, plaintiff typically made deliveries seven days a week, and sometimes several times a day.

Under the contract's terms, defendant's exclusive remedy if plaintiff failed to timely deliver the nitrogen was "cover damages."

* * *

When the nitrogen level fell below fifty percent of the total storage capacity, the operator of defendant's plant would inform plaintiff that the levels were depleting and check on the time for the next delivery. At a twenty-five-percent level of nitrogen, defendant considered the situation "critical," and at a ten-percent level defendant could no longer maintain normal operation of the plant.

Defendant claims that from August 1997 through June 1998 plaintiff made twenty-one late deliveries. A representative of defendant stated that on "many more than two times," because of its dissipating nitrogen levels, defendant's personnel would have to call plaintiff to find out when the next delivery would arrive. Plaintiff would usually promise delivery within four hours; however, the delivery would typically not arrive for as long as twelve hours. On May 19, 1998, defendant's nitrogen supply became so low that it had to connect its own nitrogen cylinders to the hot oil surge tank to maintain operation.

That same month, Steven Earle, defendant's operations supervisor, decided to terminate the contract with plaintiff and find another liquid nitrogen supplier. He testified that he opted to terminate the contract rather than seek cover damages because he could not find alternate suppliers to deliver the required nitrogen. He claimed other suppliers were hesitant "to come in and infringe on an existing contract. * * *" He did not know, however, which suppliers interpreted the contract that way. Although he believed that Air Products, a company that delivered nitrogen to defendant's other plants, as well as other chemicals to defendant's Belle Chase plant [the plant in question], "would have been one of them," Dennis H. Boushie, an Air Products

representative, testified otherwise. He said that in early 1998, when a representative of defendant told him of defendant's problems with low nitrogen inventory levels, he represented that Air Products "had the product" and could supply the product to defendant. Allen Jackson, defendant's purchasing manager, confirmed this conversation. Although no agreement materialized from the discussion, Air Products did cover defendant's liquid nitrogen supply on one occasion, in September 1998 during a hurricane.

Earle also acknowledged, however, that when he made his decision to terminate the contract in May 1998 he was not aware of the exclusive remedy provision in the contract. In fact, he had not read the contract. * * *

In July 1998, defendant advised plaintiff that because of its supply problems it intended to change suppliers. On July 15, 1998, plaintiff and defendant met to discuss plaintiff's performance under the contract. At the meeting, Earle asked plaintiff for a letter confirming that defendant could obtain nitrogen from a secondary supplier. Plaintiff agreed to do so, but never followed through.

On August 25, 1998, defendant wrote to plaintiff explaining that plaintiff's late deliveries jeopardized defendant's plant's operations. Enclosed with the letter was a proposed amendment to the contract, which essentially allowed defendant to obtain nitrogen from any supplier, not just plaintiff. The effect of the amendment would have been to terminate the contract.

Plaintiff agreed to maintain defendant's supply of liquid nitrogen at a forty-percent level, and plaintiff also offered to "provide and install [at defendant's plant] an additional 11,000 gallon vessel at no cost, to increase the present nitrogen storage from 22,000 to 33,000 gallons." Defendant declined the offer. Rather, in a September 1, 1998, letter, defendant said, "Effective October 1, 1998, Chevron's demand for liquid nitrogen from BOC will be terminated."

* * *

We * * * turn to the Law Division's entry of summary judgment on liability. The judge relied on the exclusive remedy language of the contract, limiting defendant's rights in the event plaintiff failed to deliver nitrogen at the times and in the quantities defendant required. The court found that defendant's sole remedy in the event of plaintiff's noncompliance with the contract was to purchase nitrogen from another supplier, and charge plaintiff for any additional expense defendant incurred by reason of plaintiff's untimely deliveries. The court concluded that defendant did not have the right to terminate the contract. We agree.

Under the Uniform Commercial Code (UCC) as adopted in New Jersey, parties to a contract may establish an exclusive remedy, which, if so labeled, "is the sole remedy" available to them under the terms of the contract. [UCC §] 2–719(1)(b). Yet, despite this exclusive remedy provision, "where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in [the UCC]." [UCC §] 2–719(2). The exclusive remedy provision is "'not concerned with arrangements which were oppressive at their inception, but rather with the application of an agreement to novel circumstances not contemplated by the parties.'" [Citations.] Although an arm's length contract between sophisticated commercial parties, such as in this case, should not be readily upset by a court, [citation], where a party is deprived of the substantial value of its bargain by reason of the exclusive remedy, the contract remedy will give way to the general remedy provisions of the UCC. [Citation.]

Issues concerning a contract's exclusive remedy often arise in the context of a breach of warranty. For example, when a product becomes defective, the breach of warranty provision may limit the seller's obligation to repair or replace defective equipment. [Citations.] In these types of cases—where the seller has limited the warranty to the repair or replacement of a defective part or product—before the exclusive remedy is considered to have failed in its essential purpose, the seller must be given an opportunity to repair or replace the product. [Citations.]

A remedy may also fail of its essential purpose if, "after numerous attempts to repair," the product does not operate free of defects. [Citations.]

Failure of an exclusive remedy may also come about if the buyer is required to perform an act that cannot be done, such as where a warranty calls for defective parts to be delivered to its plant, but the parts were destroyed, [citation]; or repair or replacement take an unreasonable time to complete, [citations]; or circumstances "prevent the agreed remedy from yielding its purported and expected relief." [Citation.]

When deciding whether an exclusive remedy has failed of its essential purpose, a court must examine "the facts and circumstances surrounding the contract, the nature of the basic obligations of the party, the nature of the goods involved, the uniqueness or experimental nature of the items, the general availability of the items, and the good faith and reasonableness of the provision." [Citation.] Whether an exclusive remedy fails in its essential purpose is a question of fact. [Citations.]

Here, the exclusive remedy provision of the contract limited defendant's rights in the event of plaintiff's breach. Defendant's "exclusive remedy" for the "unexcused failure on the part of [plaintiff] to deliver product to [defendant]," was defendant's right to recover from plaintiff the difference between defendant's cost to purchase nitrogen from another supplier and the price defendant would have paid plaintiff for the nitrogen under the terms of the contract. Defendant did not exercise this right because it claims it was unable to purchase nitrogen from other suppliers; therefore, defendant argues, the remedy failed in its essential purpose and may

not be enforced. The proofs do not, however, support defendant's argument.

Earle testified that he believed other suppliers would not sell defendant liquid nitrogen because they did not want to "infringe" on defendant's contract with plaintiff. However, Earle was unable to point to any occasion when defendant made such a request, or to any supplier who ever turned down defendant's request. Although Earle believed Air Products may have been one of the suppliers who would not sell product to defendant, that testimony was contradicted by the testimony of Jackson and Boushie, each of whom indicated that Air Products was prepared to supply liquid nitrogen to Chevron; and, in fact, did supply liquid nitrogen to Chevron in September 1998.

Defendant's position, that the exclusive remedy failed, is further belied by Earle's testimony that at the time he decided to terminate the contract with plaintiff—May 1998—he was not even aware of the exclusive remedy provision of the contract. The clear inference being that if he did not know what the contract required if plaintiff breached, there was no reason for him to invoke the contract's exclusive remedy.

We agree with the motion judge that a rational factfinder could not find that the exclusive remedy failed in its essential purpose. On the only occasion defendant actually tried to purchase nitrogen from another supplier, it was successful. The facts paint a clear picture—defendant did not give the exclusive remedy an opportunity to work before terminating the contract. It made no attempt to purchase liquid nitrogen from other suppliers when plaintiff was delinquent in its deliveries. Instead, Earle canceled the contract despite the contract's exclusive remedy, which did not include termination.

Both plaintiff and defendant are sophisticated business entities, freely entering into a contract which limited defendant's remedies. We find no reason why the parties should not be held to the terms of their bargain. * * *

Defendant argues that the trial court did not entertain its claim that plaintiff's repeated lateness in delivering the nitrogen was tantamount to a breach of installments, impairing the value of the contract as a whole, giving defendant the right to cancel the contract. Under [UCC §] 2–612(1), an "installment contract" is a contract in which the goods are delivered in "separate lots to be separately accepted." Whenever a nonconformity or a default with respect to one or more of the installments "substantially impairs the value of the whole contract[,] there is a breach of the whole," [UCC §] 2–612(3), and the nondefaulting party may cancel the contract. [UCC §] 2–711(1). However, an "aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments." [UCC §] 2–612(3).

Defendant points to twenty-one occasions where plaintiff was late delivering the nitrogen. Yet, defendant continued to accept delivery, without "seasonably" notifying plaintiff of its decision to cancel the contract. In fact, it was not until well after the twenty-one allegedly late deliveries that defendant told plaintiff of its intention to cancel the contract. Even after notifying plaintiff of the problems, and meeting with plaintiff in July 1998, defendant continued to accept nitrogen from plaintiff. In other words, even if plaintiff's late deliveries were deemed to substantially impair the contract, by continuing to accept the deliveries, defendant reinstated the contract. Its argument that plaintiff's repeated late deliveries permitted cancellation is therefore without merit.

* * *

Affirmed.

QUESTIONS

1. Identify and discuss the goods-oriented remedies of the seller and the buyer.
2. Identify and discuss the obligation-oriented remedies of the seller and the buyer.
3. Identify and discuss the money-oriented damages of the seller and the buyer.
4. Identify and discuss the "specific performance" remedies of the seller and the buyer.
5. Describe the basic types of contractual provisions affecting remedies and the limitations that the Code imposes upon these provisions.

PROBLEMS

1. Mae contracted to sell one thousand bushels of wheat to Lloyd at $5.00 per bushel. Just before Mae was to deliver the wheat, Lloyd notified her that he would not receive or accept the wheat. Mae sold the wheat for $4.60 per bushel, the market price, and later sued Lloyd for the difference of $400. Lloyd claims he was not notified by Mae of the resale and, hence, is not liable. Is Lloyd correct? Why?

2. On December 15, Judy wrote a letter to David stating that she would sell to David all of the mine-run coal that David might wish to buy during the next calendar year for use at David's factory, delivered at the factory at a price of $30 per ton. David immediately replied by letter to Judy, stating that he accepted the offer, that he would purchase all of his mine-run coal from Judy, and that he would need two hundred tons of coal during the first week in January. During the months of January, February, and March, Judy delivered to David a total of seven hundred tons of coal, for all of which David made payment to Judy at the rate of $30 per ton. On April 10, David ordered two hundred tons of mine-run coal from Judy, who replied to David on April 11 that she could not supply David with any more coal except at a price of $38 per ton delivered. David thereafter purchased elsewhere at the market price, namely $38 per ton, all of his factory's requirements of mine-run coal for the remainder of the year, amounting to a total of two thousand tons of coal. Can David now recover damages from Judy at the rate of $8 per ton for the coal thus purchased, amounting to $16,000?

3. On January 10, Betty, of Emanon, Missouri, visited the showrooms of the Forte Piano Company in St. Louis and selected a piano. A sales memorandum of the transaction signed both by Betty and by the salesperson of the Forte Piano Company read as follows: "Sold to Betty one new Andover piano, factory number 46832, price $3,300, to be shipped to the buyer at Emanon, Missouri, freight prepaid, before February 1. Prior to shipment, seller will stain the case a darker color in accordance with buyer's directions and will make the tone more brilliant." On January 15, Betty repudiated the contract by letter to the Forte Piano Company. The company subsequently stained the case, made the tone more brilliant, and offered to ship the piano to Betty on January 26. Betty persisted in her refusal to accept the piano. The Forte Piano Company sued Betty to recover the contract price. To what remedy, if any, is Forte entitled?

4. Sims contracted in writing to sell Blake one hundred electric motors at a price of $100 each, freight prepaid to Blake's warehouse. By the contract of sale, Sims expressly warranted that each motor would develop twenty-five-brake horsepower. The contract provided that the motors would be delivered in lots of twenty-five per week beginning January 2, and that Blake should pay for each lot of twenty-five motors as delivered, but that Blake was to have right of inspection upon delivery. Immediately upon delivery of the first lot of twenty-five motors on January 2, Blake forwarded Sims a check for $2,500, but upon testing each of the twenty-five motors Blake determined that none would develop more than fifteen-brake horsepower. State all of the remedies under the Uniform Commercial Code available to Blake.

5. Henry and Mary entered into a written contract whereby Henry agreed to sell and Mary agreed to buy a certain automobile for $8,500. Henry drove the car to Mary's residence and properly parked it on the street in front of her house, where he tendered it to Mary and requested payment of the price. Mary refused to take the car or pay the price. Henry informed Mary that he would hold her to the contract; but before Henry had time to enter the car and drive it away, a fire truck, answering a fire alarm and traveling at a high speed, crashed into the car and demolished it. Henry brings an action against Mary to recover the price of the car. Who is entitled to judgment? Would the result differ if Henry were a dealer in automobiles?

6. James sells and delivers to Gerald on June 1 certain goods and receives from Gerald at the time of delivery Gerald's check in the amount of $9,000 for the goods. The following day, Gerald is petitioned into bankruptcy, and the check is dishonored by Gerald's bank. On June 5, James serves notice upon Gerald and the trustee in bankruptcy that he reclaims the goods. The trustee is in possession of the goods and refuses to deliver them to James. What are the rights of the parties?

7. The ABC Company, located in Chicago, contracted to sell a carload of television sets to Dodd in St. Louis, Missouri, on sixty days' credit. ABC Company shipped the carload to Dodd. Upon arrival of the car at St. Louis, Dodd paid the freight charges and reshipped the car to Hines of Little Rock, Arkansas, to whom he had previously contracted to sell the television sets. While the car was in transit to Little Rock, Dodd went bankrupt. ABC Company was informed of this at once and immediately telephoned XYZ Railroad Company to withhold delivery of the television sets. What should the XYZ Railroad Company do?

8. Robert in Chicago entered into a contract to sell certain machines to Terry in New York. The machines were to be manufactured by Robert and shipped F.O.B. Chicago not later than March 25. On March 24, when Robert is about to ship the machines, he receives a letter from Terry wrongfully repudiating the contract. The machines cannot readily be resold for a reasonable price because they are a special kind used only in Terry's manufacturing processes. Robert sues Terry to recover the agreed price of the machines. What are the rights of the parties?

9. Calvin purchased a log home construction kit manufactured by Boone Homes, Inc., from an authorized Boone dealer. The sales contract stated that Boone would repair or replace defective materials and that this was the exclusive remedy available against Boone. The dealer assembled the house, which was defective in several respects. The knotholes in the logs caused the walls and ceiling to leak. A support beam was too small and therefore cracked, causing the floor to crack also. These defects could not be completely cured by repair. Should Calvin prevail in a lawsuit against Boone for breach of warranty to recover damages for the loss in value?

10. Margaret contracted to buy a particular model Rolls-Royce from Paragon Motors, Inc. Only one hundred of these models are built each year. She paid a $3,000 deposit on the car, but Paragon sold the car to Gluck. What remedy, if any, does Margaret have against Paragon?

11. Technical Textile agreed by written contract to manufacture and sell 20,000 pounds of yarn to Jagger Brothers at a price of $2.15 per pound. After Technical had manufactured, delivered, and been paid for 3,723 pounds of yarn, Jagger Brothers by letter informed Technical that it was repudiating the contract and that it would refuse any further yarn deliveries. On August 12, the date of the letter, the market price of yarn was $1.90 per pound. The remaining 16,277 pounds were never manufactured. Technical sued Jagger Brothers for breach of contract. To what damages, if any, is Technical entitled? Explain.

12. Sherman Burrus, a job printer, purchased a printing press from the Itek Corporation for a price of $7,006.08. Before making

the purchase, Burrus was assured by an Itek salesperson, Mr. Nessel, that the press was appropriate for the type of printing Burrus was doing. Burrus encountered problems in operating the press almost continuously from the time he received it. Burrus, his employees, and Itek representatives spent many hours in an unsuccessful attempt to get the press to operate properly. Burrus requested that the press be replaced, but Itek refused. Burrus then brought an action against Itek for (1) damages for breach of the implied warranty of merchantability and (2) consequential damages for losses resulting from the press's defective operation. Burrus was able to prove that the actual value of the press was $1,167 and, because of the defective press, that his output decreased and he sustained a great loss of paper. Itek contends that consequential damages are not recoverable in this case since Burrus elected to keep the press and continued to use it. How much should Burrus recover in damages for breach of warranty? Is he entitled to consequential damages?

13. A farmer made a contract in April to sell to a grain dealer forty thousand bushels of corn to be delivered in October. On June 3, the farmer unequivocally informed the grain dealer that he was not going to plant any corn, that he would not fulfill the contract, and that, if the buyer had commitments to resell the corn, he should make other arrangements. The grain dealer waited in vain until October for performance of the repudiated contract. Then he bought corn at a greatly increased price on the market in order to fulfill commitments to his purchasers. To what damages, if any, is the grain dealer entitled? Explain.

14. Through information provided by S-2 Yachts, Inc., the plaintiff, Barr located a yacht to his liking at the Crow's Nest marina and yacht sales company. When Barr asked the price, he was told that, although the yacht normally sold for $102,000, Crow's Nest was willing to sell this particular one for only $80,000 to make room for a new model from the manufacturer, S-2 Yachts, Inc. Barr was assured that the yacht in question came with full manufacturer's warranties. Barr asked if the yacht was new and if anything was wrong with it. Crow's Nest told him that nothing was wrong with the yacht and that there were only twenty hours of use on the engines.

Once the yacht had been delivered and Barr had taken it for a test run, he noticed several problems associated with saltwater damage, such as rusted screws, a rusted stove, and faulty electrical wiring. Barr was assured that Crow's Nest would pay for these repairs. However, as was later discovered, the yacht was in such a damaged condition that Barr experienced great personal hazard the two times that he used the boat. Examination by a marine expert revealed clearly that the boat had been sunk in saltwater prior to Barr's purchase. The engines were severely damaged, and there was significant structural and equipment damage as well. According to the expert, not only was the yacht not new, it was worth at most only one-half of the new value of $102,000. What should Barr be able to recover from S-2 Yachts and Crow's Nest?

15. Lee Oldsmobile sells Rolls-Royce automobiles. Mrs. Kaiden sent Lee a $25,000 deposit on a 2001 Rolls-Royce with a purchase price of $145,500. Although Lee informed Mrs. Kaiden that the car would be delivered in November, the order form did not indicate the delivery date and contained a disclaimer for delay or failure to deliver due to circumstances beyond the dealer's control. On November 21, Mrs. Kaiden purchased another car from another dealer and canceled her car from Lee. When Lee attempted to deliver a Rolls-Royce to Mrs. Kaiden on November 29, Mrs. Kaiden refused to accept delivery. Lee later sold the car for $140,495. Mrs. Kaiden sued Lee for her $25,000 deposit plus interest. Lee counterclaims, based on the terms of the contract, for liquidated damages of $25,000 (the amount of the deposit) as a result of Mrs. Kaiden's breach of contract. What are the rights of the parties?

16. Servebest contracted to sell Emessee two hundred thousand pounds of 50 percent lean beef trimmings for $105,000. Upon a substantial fall in the market price, Emessee refused to pay the contract price and informed Servebest that the contract was canceled. Servebest sues Emessee for breach of contract, including (a) damages for the difference between the contract price and the resale price of the trimmings, and (b) incidental damages. Decision?

17. Mrs. French was the highest bidder on eight antique guns at an auction held by Sotheby & Company. Mrs. French made a down payment on the guns but subsequently refused to accept the guns and refused to pay the remaining balance of $24,886.27 owed on them. Is Sotheby's entitled to collect the price of the guns from Mrs. French?

18. Teledyne Industries, Inc., entered into a contract with Teradyne, Inc., to purchase a T–347A transistor test system for the list and fair market price of $98,400 less a discount of $984. After the system was packed for shipment, Teledyne canceled the order, offering to purchase a Field Effects Transistor System for $65,000. Teradyne refused the offer and sold the T–347A to another purchaser pursuant to an order that was on hand prior to the cancellation. Can Teradyne recover from Teledyne for lost profits resulting from the breach of contract? Explain.

19. Wilson Trading Corp. agreed to sell David Ferguson a specified quantity of yarn for use in making sweaters. The written contract provided that notice of defects, to be effective, had to be received by Wilson before knitting or within ten days of receipt of the yarn. When the knitted sweaters were washed, the color of the yarn "shaded" (i.e., variations in color from piece to piece appeared). David Ferguson immediately notified Wilson of the problem and refused to pay for the yarn, claiming that the defect made the sweaters unmarketable. Wilson brought suit against Ferguson for the contract price. What result?

20. Daniel Martin and John Duke contracted with J&S Distributors, Inc., to purchase a KIS Magnum Speed printer for $17,000. The parties agreed that Martin and Duke would send one half of the money as a deposit and would pay the balance upon delivery. When the machine arrived five days late, Martin and Duke refused to accept it stating that they had purchased a substitute machine elsewhere. Martin and Duke requested the return of their deposit but J&S refused. Martin and Duke sued Jeff Sheffer and J&S for breach of contract, fraud, breach of good faith, and unfair and deceptive trade practices. The defendants counterclaimed for full performance of the contract pursuant to a clause in the contract, which provides the following:

> In the event of non-payment of the balance of the purchase price reflected herein on due date and in the manner

recorded or on such extended date which may be caused by late delivery on the part of [the seller], the Customer shall be liable for:

(1) immediate payment of the full balance recorded herein; and
(2) payment of interest at the rate of 12% per annum calculated on the balance due, when due, together with any attorney's fees, collection charges and other necessary expenses incurred by [the seller].

What are the rights of the parties?

21. Bishop Logging Company is a large, family-owned logging contractor formed in the low country of South Carolina. Bishop Logging has traditionally harvested pine timber. However, Bishop Logging began investigating the feasibility of a fully mechanized hardwood swamp logging operation when its main customer, Stone Container Corporation, decided to expand hardwood production. In anticipating an increased demand for hardwood in conjunction with the operation of a new paper machine, Stone Container requested that Bishop Logging harvest and supply hardwood for processing at its mill. In South Carolina, most suitable hardwood is located deep in the swamplands. Because of the high accident risk in the swamp, Bishop Logging did not want to harvest hardwood by the conventional method of manual felling of trees. Because Bishop Logging had already been successful in its totally mechanized pine logging operation, it began a search for improved methods of hardwood swamp logging centered on mechanizing the process in order to reduce labor, minimize personal injury and insurance costs, and improve efficiency and productivity. Bishop Logging ultimately purchased several pieces of John Deere equipment to make up the system. The gross sales price of the machinery was $608,899. All the equipment came with a written John Deere "New Equipment Warranty," whereby John Deere agreed only to repair or replace the equipment during the warranty period and did not warrant the suitability of the equipment. In the "New Equipment Warranty," John Deere expressly provided the following: (a) John Deere would repair or replace parts that were defective in material or workmanship; (b) a disclaimer of any express warranties or implied warranties of merchantability or fitness for a particular purpose; (c) an exclusion of all incidental or consequential damages; and (d) no authority for the dealer to make any representations, promises, modifications, or limitations of John Deere's written warranty. Hoping to sell more equipment if the Bishop Logging system was successful, however, John Deere agreed to assume part of the risk of the new enterprise by extending its standard equipment warranties notwithstanding the unusual use and modifications to the equipment. Soon after being placed in operation in the swamp, the machinery began to experience numerous mechanical problems. John Deere made more than $110,000 in warranty repairs on the equipment. However, Bishop Logging contended the swamp logging system failed to operate as represented by John Deere and, as a result, it suffered a substantial financial loss. What, if any, remedies is Bishop entitled to receive? Explain.