

TENDER OF DELIVERY

- **Tender of Delivery** requires that the seller:
 - (1) have and hold **conforming goods** at the disposal of the buyer, and
 - (2) give the buyer **reasonable notice** to enable the buyer to take delivery.

- Unless the parties have agreed otherwise:
 - (1) the goods must be tendered for delivery at a **reasonable hour** and kept available for a **reasonable period of time** for the buyer to take possession; and
 - (2) all goods called for by the contract must be tendered in a **single delivery**, unless the circumstances are such that either party can rightfully request delivery in lots.

DELIVERY: NON-CARRIER CONTRACTS

- **Non-Carrier Contract:** Where the contract does not designate the place of delivery for the goods:
 - (1) if the buyer is to pick them up from the seller, the place of delivery is the **seller's place of business** or residence, if the seller has no regular place of business; or
 - (2) if a bailee is holding the goods, the place of delivery is the **location of the goods**.

DELIVERY: CARRIER CONTRACTS

- **Shipment Contract:** Unless otherwise agreed, the seller must:

- (1) deliver the goods to a **carrier**;
- (2) make a **contract**, reasonable according to the nature of the goods and their value, **for transport** of the goods;
- (3) obtain and promptly deliver to the buyer any **documents of title** necessary for the buyer to take possession of the goods from the carrier; and
- (4) **promptly notify** the buyer that shipment has been made.

- **Destination Contracts:** Unless otherwise agreed, the seller must:

- (1) deliver the goods to the buyer at the **destination** specified;
- (2) the goods must be tendered at a **reasonable hour**, and;
- (3) the goods must be held at the buyer's disposal for a **reasonable period**.

PERFECT TENDER: EXCEPTIONS - PART I

- **Perfect Tender Rule:** If the goods delivered or the tender of delivery fail *in any respect* to conform with the terms of the contract, the buyer has the right to (i) **accept** the goods, (ii) **reject** the entire shipment, or (iii) **accept** part and **reject** part.

- **Exceptions to the Perfect Tender Rule**
 - **Agreement of the Parties:** Exceptions can be agreed to by the parties in their contract.

 - **Right to Cure:** When any tender of delivery is rejected because of nonconforming goods, and the time for performance has not yet expired, the seller can:
 - (i) **notify the buyer** of the seller's intention to cure and then

 - (ii) **repair, adjust, or replace** the nonconforming goods within the time for performance specified in the contract.

PERFECT TENDER: EXCEPTIONS - PART II

- **Substitution of Carriers:** When the agreed upon manner of delivery proves impracticable or unavailable, *through no fault of either party*,
 - (i) the seller may, at his or her own expense, use a **commercially reasonable** substitute,
 - (ii) the use of which will constitute **sufficient tender**.

- **Installment Contract:** Where a contract requires or authorizes delivery in two or more separate lots, to be accepted and paid for separately,
 - (i) the buyer may reject tender only if the nonconformity **substantially impairs the value of the installment** and **cannot be cured**;
 - (ii) the entire installment contract is breached only when one or more nonconforming installments **substantially impairs** the value of the **entire contract**; and
 - (iii) if the buyer **subsequently accepts** a non-conforming installment without notifying the seller of cancellation, the contract is reinstated.

PERFECT TENDER: EXCEPTIONS - PART III

- **Commercial Impracticability:** When occurrences, unforeseen by either party at the time the contract was made (e.g., a change in applicable law, destruction of goods), make performance commercially impracticable,
 - (i) the rule of perfect tender **no longer applies**, and
 - (ii) delay in delivery or nondelivery in whole or in part is **not a breach** of contract, provided that
 - (iii) the seller **notify** the buyer as soon as practicable of the delay or nondelivery; but
 - (iv) in the event that the seller is able to at least partially perform, the seller is obligated to
 - (a) **allocate**, in a fair and reasonable manner, any remaining production and deliveries among those to whom it is contractually obligated to deliver the goods, and
 - (b) **notify** the buyer of the allocation, which the buyer is free to **accept or reject**.

PAYMENT AND ACCEPTANCE

- **Payment Term:** When goods are sold on credit, the buyer's obligation to pay is conditioned on the credit terms provided in the contract, not when the goods are delivered.

- **Method of Payment:** Payment can be made by any means specified by the parties, or by **any reasonable means** if the parties do not specify a method of payment. If the seller insists on cash when a buyer tenders a check or credit card, the seller must give the buyer **reasonable time** to obtain cash.

- **Acceptance:** A buyer can manifest assent to, or accept, the delivered goods by:
 - (1) **expressly accepting** the shipment by words or by conduct;
 - (2) **failing to reject** the goods with a **reasonable period of time** after having had the opportunity to inspect the goods; or
 - (3) in the case of a sale of goods, acting in any manner **inconsistent with the seller's ownership**.

RIGHT OF INSPECTION

- **Right of Inspection:** The U.C.C. requires that the buyer be given an opportunity to inspect the identified goods as a **condition precedent** to the seller's or lessor's right to enforce payment under the contract.
- Unless otherwise agreed, inspection can take place at **any reasonable place and time** and in **any reasonable manner**, in light of the customs of the trade, past practices of the parties, and the like.
- The **buyer bears the cost** of inspection.
- **C.O.D. Shipments:** If the seller ships the goods to the buyer *cash on delivery* ("C.O.D.") without the buyer's agreement to do so, the buyer may rightfully **reject** the goods as **nonconforming**, since C.O.D. shipment does not permit the buyer to inspect prior to making payment.

SELLER'S REMEDIES - PART I

- **Goods in the Seller's Possession:** If the buyer breaches the contract before the goods have been delivered to the buyer, lessee, or carrier, the seller may:
 - (1) **Cancel and Sue:** As long as the seller notifies the buyer, the seller may cancel the contract and sue the buyer for breach of contract;
 - (2) **Withhold Delivery:** If a buyer has wrongfully rejected or revoked acceptance, failed to make proper and timely payment, or repudiated all or part of the contract, the seller can withhold delivery;
 - (3) **Insist on Cash Payment:** If the buyer becomes insolvent, the seller can refuse further delivery unless the buyer pays in cash;
 - (4) **Resell or Dispose:** The seller can resell or otherwise dispose of the goods, retaining any profit over the contract price or hold the buyer liable for any deficiency, plus any *incidental damages*;
- Note: Any resale or disposal must be done in a **commercially reasonable manner** to maximize the value obtained for the goods.

SELLER'S REMEDIES - PART II

■ Goods in the Seller's Possession (cont'd)

(5) **Recover Purchase Price or Lease Payments Due:**

An unpaid seller can sue to recover the purchase price or payments due, plus incidental damages, if the seller is unable to resell or otherwise dispose of the goods in a commercially reasonable manner;

(6) **Recover Damages:** If the buyer repudiates a contract or wrongfully refuses to accept conforming goods, the seller can sue to recover as damages:

(a) the **difference between the contract price and the fair market price of the goods** (at the time and place of tender), plus incidental damages, or

(b) the seller's **lost profits**, including a reasonable allowance for overhead and other expenses, if option "(a)" will not place the seller in the same position he or she would have been in had the buyer performed.

SELLER'S REMEDIES - PART III

- **Goods in Transit:** If the seller has delivered the goods to a carrier or bailee, but the buyer has not yet received them, the seller may:
 - (1) if the buyer is insolvent, stop the carrier or bailee from delivering the goods to the buyer; or
 - (2) if the buyer has breached the contract but is not insolvent, stop the carrier or bailee from delivering the goods only if the quantity shipped is at least a carload, truckload, planeload, or a larger shipment.
- In order to stop delivery, the seller must **timely notify** the carrier or bailee. The seller will bear any costs of holding or returning goods in transit.
- The seller's right to stop delivery expires if:
 - (i) the buyer obtains possession of the goods;
 - (ii) the carrier or bailee acknowledges the buyer/lessee's right to possession; or
 - (iii) the buyer possesses the document(s) of title.

SELLER'S REMEDIES - PART IV

- **Goods in the Buyer's Possession:** When the buyer breaches a contract after receiving the goods, the seller may:
 - (1) **Recover the Price or Payments Due:** If the buyer refuses to pay for the goods received, the seller may sue for the purchase price or payments due, plus incidental damages; or
 - (2) **Reclaim the Goods:** If the buyer is insolvent the seller may recover any goods sold on credit:
 - (a) **within 10 days** of the buyer's receipt; or
 - (b) **at any time** if the buyer **misrepresented his or her solvency** in writing within 3 months prior to the delivery of the goods.
- However, if the seller elects to reclaim, he or she will be barred from seeking any other remedy, such as incidental damages.

BUYER'S REMEDIES - PART I

- **Seller Refuses to Deliver:** If the seller refuses to deliver the goods to the buyer, the buyer may:
 - (1) **Cancel the Contract:** Upon notice of cancellation, the buyer is relieved of any further obligations under the contract, but retains all rights against the seller;
 - (2) **Recover the Goods:** If a buyer has made partial or full payment for identified goods in the possession of an insolvent seller, the buyer can recover the goods by tendering to the seller any remaining balance of the contract price;
 - (3) **Obtain Specific Performance:** When the goods are unique and any legal remedy will be inadequate, the buyer can require the seller to perform the contract exactly by tendering the identified goods to the buyer;
 - (4) **Right to Cover:** The buyer may, in good faith and without unreasonable delay, purchase or lease substitute goods from another seller and recover from the seller any difference between the contract price and the price of the replacement goods, plus any incidental and consequential damages, less any costs saved by the breach;

BUYER'S REMEDIES - PART II

■ Seller Refuses to Deliver (cont'd)

- (5) **Right to Replevin:** If the buyer can show that he or she is unable, after a reasonable effort, to obtain cover for the contract goods, the buyer may *replevy* (i.e., take or demand possession of) goods subject to the contract if the seller has repudiated or breached the contract;
- (6) **Recover Damages:** If the seller repudiates a contract or wrongfully refuses to deliver conforming goods, the buyer can sue to recover the **difference between the contract price and the fair market price of the goods** (at the time that the buyer learned of the breach), plus **incidental** and **consequential damages**, less any costs saved.

BUYER'S REMEDIES - PART III

- **Seller Delivers Nonconforming Goods:** When the seller delivers nonconforming goods, the buyer may:

(1) **Reject the Goods:** If either the goods or the tender of the goods fails to conform to the contract **in any respect**, the buyer may reject the goods or, if some of the goods conform, the buyer may retain the conforming goods and reject the rest;

- Any rejection must:

- (i) be made within a **reasonable period of time**,
- (ii) **designate defects** that should have been apparent on reasonable inspection, and
- (iii) provide the seller with **reasonable notice**.

BUYER'S REMEDIES - PART IV

■ Seller Delivers Nonconforming Goods(cont'd)

- (2) **Revoke Acceptance:** On reasonable notice to the seller, and within a reasonable period of time after the buyer discovers or should have discovered the grounds for revocation, the buyer may revoke his or her acceptance of a lot or a commercial unit if the buyer:
- (a) accepted the goods on the reasonable assumption that any nonconformity would be cured and it has not been cured within a reasonable time; or
 - (b) did not discover the nonconformity prior to acceptance, either because it was not apparent or because assurances from the seller kept the buyer from inspecting the goods.
- (3) **Recover Damages for Accepted Goods:** A buyer who accepts nonconforming goods may keep the goods and, after reasonable notice to the seller of the defects in the goods and/or the manner of tender, sue for the **difference between the value of the goods as accepted and their value as promised** in the contract.

LIMITATIONS ON REMEDIES

- **Statute of Limitations:** An action for breach of contract under the U.C.C. must be **commenced** within **four years** after the injured party knew or should have known of the breach.
- The parties may contractually agree to **reduce** this period to **not less than one year**, but may not extend it beyond four years.
- A buyer who accepts nonconforming goods must notify the breaching party of the breach within a **reasonable time** to permit the breaching party to cure; the buyer's failure to do so will **bar** any claim for breach.
- **Contractual Limitations on Remedies:** The parties may contractually agree to expand or limit the remedies provided by the U.C.C. The parties may also limit or exclude **consequential** damages as long as the limitation or exclusion is not **unconscionable**, given the relative bargaining strength of the parties.