

## Scope of the UCC

### § 2-102. Scope; Certain Security and Other Transactions Excluded from This Article.

- Unless the context otherwise requires, this Article applies to **transactions in goods**; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.
  - o Article 2 applies to sales of **goods**
  - o Transactions here isn't a limiting phrase
  - o **BUT** → Doesn't mean all goods! There needs to be a sale/contract for sale (2-106)

### § 2-105. Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit".

- (1) **"Goods"** means all things (including specially manufactured goods) which are **movable at the time of identification to the contract** for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).
  - o Goods are things that are **moveable** at the time of identification of the contract for sale
    - **NOT:** Sale of a house isn't a transaction in goods because it isn't moveable
- (2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are **"future" goods**. A purported present sale of future goods or of any interest therein operates as a contract to sell.
  - o **Future goods:** Goods include things that don't yet exist.
  - o **ASK:** Would it be moveable if it were to be made? **Yes** → It's a "good"
- (3) There may be a sale of a part interest in existing identified goods.
- (4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.
- (5) **"Lot"** means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.
- (6) **"Commercial unit"** means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

### § 2-106. Definitions: "Contract"; "Agreement"; "Contract for sale"; "Sale"; "Present sale"; "Conforming" to Contract; "Termination"; "Cancellation".

- (1) In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. **"Contract for sale"** includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2-401). A "present sale" means a sale which is accomplished by the making of the contract.
  - o Article 2 doesn't require an actual sale to take place. A contract for sale of goods or future goods is enough.
  - o What is a **sale**? Passing of title from seller to buyer. **NOTE:** we don't need a sale for purposes of Article 2
- (2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.
- (3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.
- (4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

### § 2-401. Passing of Title; Reservation for Security; Limited Application of This Section.

- Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to

such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:

- (1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.
- (2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading
  - (a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but
  - (b) if the contract requires delivery at destination, title passes on tender there.
- (3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,
  - (a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or
  - (b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.
- (4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such reversion occurs by operation of law and is not a "sale".

#### **§ 2-501. Insurable Interest in Goods; Manner of Identification of Goods.**

- (1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs
  - (a) when the contract is made if it is for the sale of goods already existing and identified;
  - (b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;
  - (c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.
- (2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.
- (3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

#### **§ 2-610. Anticipatory Repudiation.**

- When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may
  - (a) for a commercially reasonable time await performance by the repudiating party; or
  - (b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
  - (c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

# Scope and Applicability of the CISG

## Article 1

- (1) *This Convention applies (three situations) (1) to contracts of **sale of goods** between parties whose places of business are in **different States***
  - o CISG applies if the parties are different states and those states are the **contracting states**.
  - o **Place of business** → How we internationally define it
  - o **NOT**: place of incorporation
  - o If two German companies contract and the goods ship internationally it doesn't matter. We haven't satisfied the CISG definition of internationality.
  - o No definition for "**sale of goods**" but **Article 2** provides more information of what a sale isn't.
  - o **Article 30** – A seller is required to deliver the goods, so commentators say that the goods need to be **deliverable** which implies that a good is something that is **moveable**.
  - o (a) (2) *when the States are Contracting States; OR*
    - The actual states making the contract
  - o (b) (3) *when the rules of private international law lead to the application of the law of a **Contracting State***
    - (i.e.) CISG applies if we have parties whose places of business are different states, and if conflict of law rules of a forum says apply law of X and X is a contracting state.
    - **Contracting States** → Parties that have signed on: <https://iicl.law.pace.edu/cisg/page/cisg-list-contracting-states>
      - States can be contracting states with **reservations** essentially, they don't recognize the validity of a certain situation. See: **Article 95** → creates a reservation for **Article (1)(b)**
    - **Hypo**: French seller and UK buyer (companies). Assume the forum is in France. If that choice of law rule says apply the law of the place where the goods are to be delivered (here, that's the UK and the UK isn't a contracting state.)
- (2) *The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.*
- (3) *Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention*

## Article 2 - This Convention does **not apply to sales**:

- **NOT**: Consumer contracts, auctions, stocks, securities, ships, planes, electricity.
- (a) *of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;*
- (b) *by auction;*
- (c) *on execution or otherwise by authority of law;*
- (d) *of stocks, shares, investment securities, negotiable instruments or money;*
- (e) *of ships, vessels, hovercraft or aircraft;*
- (f) *of electricity.*

## Article 3

- **NOT**: Certain mixed transactions. (1) *Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a **substantial part** of the materials necessary for such manufacture or production.*
  - o **Substantial part**: It's unclear what this means. Possible interpretations include both qualitative and quantitative measure: value, importance to the functionality of the final product.
    - **German Case 1999**:
  - o **Policy**: This is one area where multiple language of CISG gets us in trouble because substantial means different things in different languages. One of the problems of uniformity is the accessibility in one country of cases decided on CISG in another country. Even if you could get a hold, maybe they might not be translated into English. Translations become extremely important. Translations that we look at may not be accurate translations.
- **NOT**: Services to goods. (2) *This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.*

- If the contract involves goods, but what the purported seller is doing under the contract is preponderantly providing **services** such as labor, so even though the **end result is a transfer of good**, that transaction is about services.
- “**Preponderance**” – 1999 German case comes down on the side of value. The services provided were relatively minor in value.

**Article 4** - *This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:*

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

**Article 5** - *This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.*

**Article 6** - *The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.*

- Embodies the CISG’s commitment to the principle of freedom of contract.
- If parties to a contract don’t want to have it be governed by the CISG, it allows parties to opt out (derogate from)
- **Hypo:** X and Y are both non-contracting states and Z (forum state) says it’s going to apply Z’s law according to their domestic choice of law rule and Z is a contracting state.
- **How do we know a party has opted out?**
  - **Asante:** Seller says Canada law applies (including CISG), but buyer says California law applies (which includes UCC and federal law).
    - **Rule:** You need to be very clear when opting out of the CISG. Just by writing that they want Canadian or American law to apply isn’t enough to opt-out.

**Article 10** - *For the purposes of this Convention: Multiple places of business*

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
  - To determine “**place of business**,” look at which has **the closest relationship to the contract** and performance (at any point in the contract)
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

**Article 95** **Reservation** - *Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.*

- China, U.S., Singapore, etc.
- **Article (1)(b)** *when the rules of private international law lead to the application of the law of a Contracting State*
- **Policy:** We’re trying to create an international and uniform scheme and we want to get as many nations to sign on. The price of that is to introduce an element of non-uniformity.
- **Hypo:** X is in contracting state with Article 95 reservation. Y is in a non-contracting state. Dispute is heard in X.
  - **1(1)(a)** doesn’t apply, **1(1)(b)** doesn’t apply because of the reservation, so we apply X’s domestic laws.
- **Hypo:** Same, but dispute is heard in Z country.
  - “**It**” → What does it refer to? **Two possibilities:**
    - **Forum State** – Here, the forum state hasn’t taken the reservation so under **(1)(1)(b)** CISG applies. If “it” refers to the forum state, then we would be applying CISG even though X has taken the reservation.
    - **Reservation State** – But, if it refers to the reservation state, whose law is selected by the forum, then that country is not subject to CISG so we apply that state’s domestic law.
      - **CG:** Literal reading of the words says apply the laws of the contracting state, which X is, and the fact that they have a reservation is of no consequence. Also, drafters made this carve out.

**Article 96** - *A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance,*

*or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.*

## Formation of the Contract under the UCC

## Formation of the Contract under CISG

## “Indefinite” Terms

## Statute of Frauds

## Parol Evidence, Trade Usage, and Interpretation

## Unconscionability

## Inspection, Rejection, Cure, Revocation I

## Inspection, Rejection, Cure, Revocation II

## Inspection, Avoidance, Cure under the CISG

## Warranties

### Introduction: Allocating the Risk of Quality

- I. **Comparative advantage, not culpability** - Warranties allocate losses to merchant sellers because they have a comparative advantage as against their buyers at reducing or insuring against a risk of **nonconformity** in the goods sold.
- II. **Breach of warranty** → requires buyer to show causal relationship between the breach and the injury suffered.
- III. **UCC: warranties of quality and warranties of title**
  - A. Quality: Express warranties; Implied warranties of fitness for a particular purpose; Warranties of merchantability
  - B. Title: Guarantee that seller had rights to the good that it purported to have when the goods were sold.
- IV. When do they arise?
  - A. (1) Once the good was accepted
    - i. **2-607**: imposes on B an obligation to pay for the goods so that the warranty claim becomes a means by which the buyer can recoup some part of the price that is owed or that has been paid
    - ii. B bears burden of proving any breach once acceptance has occurred
  - B. (2) B can contend that the nonconformity in the good gives rise to the right of rejection + constitutes a breach of warranty that also gives rise to a claim in damages

### Warranties under the UCC

- I. **Express Warranties**: Solution to the problems of asymmetric information between sellers and buyers
  - A. **Purpose**: Encourage sellers to convey correct information and to encourage buyers to rely on that information, it is necessary to hold the seller responsible for the accuracy of the information they provide.
  - B. **Who can make a warranty?** Seller – assumes through express warranty the risk that the description or attribution of characteristics or quality is wrong.
    - i. Does not flow from any particular characteristic that the seller possesses
  - C. **How is the warranty created?**
    - i. **2-313(1)**: the below must be the “**basis of the bargain**” – substance of the warranty in each case is that the goods will conform to the affirmation, promise, description, sample, or model.

- ii. **Basis of the bargain:** The term at issue must be sufficiently within the knowledge of the seller, or reasonably believed to be within the knowledge of the seller, that the buyer can reasonably deduce that it has no need for further investigation.
    1. **NOTE:** No need for buyer to rely explicitly on seller's statement for express warranty.
    2. **Rogath v. Siebenmann** (2d. Cir.): **Disclosure rule:** "basis of bargain" requires no more than reliance on the express warranty as being part of the bargain between the parties. The existence of an EW depended not on "whether the buyer believe in the truth of the warranted information, but whether he believed he was purchasing the seller's promise as to its truth."
      - a. **Scenario 1:** If seller disclosed facts that made representations in the contract untrue, then the buyer "waived the breach"
      - b. **Scenario 2:** A buyer who learned of the misrepresentations from other sources, however, could still bring the warranty action, since the price of the goods included insurance that the representations were true.
  - iii. **Test:** Whether the statement is one that reveals the kinds of information that can reasonably be thought to have been within the knowledge of the sellers.
    1. Does the statement by the seller discourage the buyer from making an independent inquiry?
    2. Is the statement verifiable?
    3. No words of warranty or guarantee need to be used
    4. Language that fall outside warranties: **vacuous statements** "this is the best treadmill on the market today"
      - a. Personal opinions, statements that are inherently subjective may fall outside "affirmation of fact"
      - b. Opinions do not purport to respond authoritatively to the buyer's desire for additional information.
- D. Advertising and Warranty – To what extent to advertisements give rise to warranties?
- i. Most courts → Recognize that there are circumstances in which mass advertising can create warranties.
    1. **Cipollone** (3d Cir): Court limited the basis of the bargain to those representations of which the buyer had knowledge by virtue of hearing, reading, seeing or otherwise being aware of the contents.
      - a. Presumption of "basis of the bargain" is created when the buyer has this knowledge.
        - i. Rebuttable: clear and affirmative proof that the buyer knew of the falsity of the representation
  - ii. What if the buyer can't recall the bombardment of advertisement?
    1. They can't recall all ads that influence their purchase decision.
    2. **American Tobacco** (Texas): Rejected an express warranty claim that cigarette manufacturer has made explicit warranties re: absence of health risks. Court said that there needed to be reliance (at odds with most courts) and there wasn't any here.
      - a. What does reliance look like? Court found it sufficient that the P remembered seeing ads for cigarettes other than D's, he began smoking b/c friend smoked, and he switched based on taste.
    3. Decision to buy is complex (many factors) that even the buyer has difficulty disaggregating.
    4. **Broad Approach for "Basis of the bargain:"** Seller who makes statements to the public through mass ads shouldn't be able to avoid warranty liability to purchasers who didn't see or recall seeing promotional literature.
      - a. **Con: Logical leap:** Too much with respect to buyers who demonstrably didn't rely on the advertisement. Recovery for breach of warranty requires not only (1) showing that the warranty was breached, but also (2) causal relationship b/w breach and injury
- E. Post-Bargain Warranties
- i. **Official Comment 7 to 2-212** → Language used after the closing of a deal can constitute a warranty.
    1. Focus on seller's assertions of superior knowledge, combined with the buyer's reliance on that knowledge, provides the basis for extending warranty protection to post-sale statements.

2. Hypo: Buyer of used cars agrees to all terms but subsequently asks whether the tires are in good condition. Seller assures they are but the car is shortly thereafter damaged b/c of one of the tires. Buyer's question indicated reliance. Seller's statement indicates enough knowledge to foreclose subsequent investigation. Therefore, enough for warranty. **Timing doesn't matter.**
- CLASS: Once seller makes a statement, the seller has incorporated that price of the warranty into the **PRICE OF THE GOOD**. Strong argument to be made that that characteristic was the basis of the bargain even for the ignorant buyer because the buyer PAID for that characteristic.
  - **For any buyer the price or value of that characteristic is part of the basis of the bargain.**

## II. Implied Warranty of Fitness for a Particular Purpose

### A. Who can make the warranty?

- i. **2-315**: Warranty for a particular purpose is implied as a matter of law
  1. Seller doesn't need to make a statement or commit an act in order to trigger the warranty
  2. Rationale: the seller has lulled the buyer into stopping any search for the optimal good
  3. When does it arise? **When seller holds himself out as being capable of making a recommendation**
    - a. The seller has special knowledge about what will satisfy the buyer's needs
    - b. The seller knows that the buyer is relying on the seller's skill or judgment to select suitable goods.
  4. **NOT REQUIRED**: that the seller be a merchant with respect to the goods at issue
  5. **Policy**: Induces sellers who are aware they are being relied on only to make recommendations within their area of expertise and thus not falsely lull buyers into a sense of security

### B. How is the warranty created?

- i. Created by the seller's selection or furnishing of goods suitable to the buyer's needs where the seller satisfies the criteria:
  1. The seller has special knowledge about what will satisfy the buyer's needs
  2. The seller knows that the buyer is relying on the seller's skill or judgment to select suitable goods.
- ii. Seller knew that buyer had a particular purpose in mind and that he was relying on his judgment to select a proper good.
- iii. What constitutes a "**particular purpose**" for a good? Difficult.
  1. **Official Comment 2 to 2-315** – particular purpose vs. ordinary purpose
    - a. Specific use that is peculiar to the buyer's circumstances, as opposed to uses which are customarily made of the goods (see: warranty of merchantability)
    - b. Limited to those cases in which the buyer has an idiosyncratic use for the good
    - c. An atypical use need not be a purpose that transforms the good from its ordinary use into an entirely different use (ex. Computer with specific memory to run a program requested by the buyer)

## III. Implied Warranty of Merchantability

### A. Who can make the warranty?

- i. Most general warranty of quality
- ii. **Exists only if** the seller is a merchant with respect to the goods of the kind. (a repeat player)
- iii. Seller is likely to come into contact with the range of similar goods on a more frequent basis than the buyer. As a result, the seller is likely to have substantial information about the goods not readily available to the buyer.
- iv. **Policy**: Addresses the information asymmetry and induces the seller to share information, implicitly or explicitly, with the buyer. Transforms the warrantor into a conduit for insuring the good.
  1. When the buyer of a defective good appears, the seller will be able to provide compensation with the "insurance premium" collected from all buyers.
  2. Each buyer knows that if it is the unfortunate purchaser of the goods that is defective, it will shift the loss to the seller.
- v. Similar to strict liability
  1. No need for the merchant to have knowledge of the defect's existence or personal knowledge of the facts that trigger the warranty (like breakdown rates for the goods)

- vi. Reminder: To be a merchant, it isn't necessary that the seller actually have the skills and practices associated with one who commonly sells the goods in question.
- vii. **Test for merchantability:** Looks towards the acceptance of the product in the industry or the expectations of the buyer based on what passes without objection in the trade.
  - 1. Same evidence that shows a product is unreasonable dangerous also shows that the good is not merchantable.

B. How is the warranty created?

i. **2-314** Implied Warranty: Merchantability; Usage of Trade.

- 1. *(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.*
- 2. *(2) Goods to be merchantable must be at least such as*
  - a. *(a) pass without objection in the trade under the contract description; and*
  - b. *(b) in the case of fungible goods, are of fair average quality within the description; and*
  - c. *(c) are fit for the ordinary purposes for which such goods are used; and*
  - d. *(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and*
  - e. *(e) are adequately contained, packaged, and labeled as the agreement may require; and*
  - f. *(f) conform to the promise or affirmations of fact made on the container or label if any.*
- 3. *(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.*

- ii. Made without any words being spoken by anyone or acts being committed other than the act of selling the good.
- iii. Inheres in the sale of goods by a merchant seller and may arise from course of dealing or usage of trade.
- iv. Insurance function of the warranty requires simply that the merchant be able to pass the costs of breakdown along to customers, and that objective implies only that the seller is in a better position than the buyer to know breakdown rates and costs, not the specific needs of the particular customer.
- v. If **not merchant** of the defective goods, then **no warranty**.
  - 1. Example: Seller of used cars doesn't make an implied warranty of merchantability with respect to the car because the seller is not a merchant with respect to the goods and can't be expected to have the knowledge that underlies the warranty.
- vi. **Merchantable good:** A good that is for the ordinary purposes for which the good is used.
  - 1. May mean more than simply that the good contains all ingredients and characteristics of the good in question. It also needs to operate like the average and unobjectionable good within the contract description.
- vii. **Does not apply to...**
  - 1. **Idiosyncratic** uses made by the purchaser
  - 2. Characteristics of a good that are **inherent** to it and therefore don't preclude its passing under the contract description (example: knives being sharp; this can cause injury, but its presence doesn't exclude the good within which they are found from the category of "**fair average quality**")
    - a. **Reasonable expectations test:** Existence of characteristics that are "naturally" found in the goods of the contract description do not breach the warranty of merchantability
- viii. When content of buyer's claim rests on **information commonly available** (makes it more complicated)
  - 1. If we perceive the warranty as a risk shifting device based on the seller's superior information, the exclusion of characteristics within common knowledge seems reasonable.
  - 2. **What constitutes common knowledge?** Hard to verify, especially if information about the characteristic grew incrementally over a significant period of time.
  - 3. **American Tobacco Co** (Texas): P started smoking in 1952 & died 34 years later b/c lung cancer. Sued cigarette manufacturer.

- a. 1<sup>st</sup> claim: Court rejected P's claim that company had breached implied warranty by marketing product that wasn't safe and was addictive.
  - i. No breach → No expectation arises with respect to cigarettes when they are purchased b/c their inherent health hazards are common knowledge.
  - ii. Standard of Knowledge: The one that existed during the P's latter years of smoking.
- b. 2<sup>nd</sup> claim: Addiction (once the P began smoking, he would have difficulty stopping, notwithstanding knowledge of health risks.)
  - i. Standard of Knowledge: Court said it had to be tested by reference to the state of common knowledge in 1952.
  - ii. Court concluded that company hadn't conclusively established that the danger of nicotine addiction was commonly known at the time.
- c. **Note:** This conclusion highlights the difficult issues inherent in any inquiry into common knowledge as it is entirely unclear what has to be known and who has to know it.
- ix. **Additional Hurdle:** After a buyer shows that the good purchased from the merchant is not fit for its ordinary purpose, he must show causal relationship between the breach of warranty and the injury.
  - 1. Even when there is evidence of a causal link between breach and injury, courts will allow evidence of supervening causes to insulate sellers from liability.
  - 2. Purchaser's own actions may break the causal chain between defect and injury.

#### IV. Disclaiming Warranties:

- A. Should warranties be disclaimable? There may be cases in which the seller does not occupy a superior position to accomplish these objectives:
  - i. (1) seller is in superior position to avoid materialization of loss
  - ii. (2) seller is in superior position to insure against it
  - iii. (3) seller is in a superior position to act as a conduit in passing along the costs of insurance or injury
- B. There may be cases in which the buyer prefers to accept risks rather than to pay for shifting them to the seller
  - i. Ex: A buyer who anticipates expected breakdown costs of less than \$10 would prefer to pay P for the good and abandon its warranty claim against the seller in the event the effect materializes.
  - ii. **Three situations in which the buyer would fall into this category: (+ 1)**
    - 1. (1) Buyer might have an idiosyncratic use for the good that substantially reduces the risk the defect will materialize for cause of injury
      - a. Ex: buy an expensive car just to display it as art
    - 2. (2) Buyer may use the good for its ordinary purpose, but may take above average care in the use of the good
      - a. Warranty is based on the average level of care and thus may be priced higher than my expected breakdown costs
    - 3. (3) Buyer may simply prefer risk (buyer finds this purchase a risky situation that is attractive)
    - 4. (4) Neither the buyer nor the seller occupies a superior position to achieve the objectives of warranty
      - a. Ex: Buyer may understand that it is purchasing an experimental good or an untested prototype.
      - b. Harder to cast the seller as one with superior knowledge about breakdown rates and costs.
- C. **For all above reasons** → UCC permits sellers who would otherwise make warranties to disclaim them
- D. **Arguments against disclaimability of warranties:** These factors suggest that we are likely to confront occasional inefficiencies whether we permit or prohibit warranty disclaimers. (empirical issue that is addressable: what results in greater inefficiency?)
  - i. (1) Disclaimers may be written in language difficult to discover or decipher
  - ii. (2) Some buyers prefer warranties to no warranties, but their preference might not be enough to be worth incurring the cost of negotiating around a disclaimer
  - iii. (3) Some buyers may simply be unable to deal with the expected loss calculation and thus determine whether it is worth negotiating around the disclaimer.

1. If the buyer is unaware of the relevant data it will be unable to determine whether to accept the disclaimer.
- E. Disclaiming warranties under 2-316
- i. § 2-316. *Exclusion or Modification of Warranties.* (basic framework for disclaiming warranties) Plenty of room for **judicial interpretation**.
  - ii. (1) *Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.*
  - iii. Concerns the practice of sellers simultaneously making statements that sound like express warranties and excluding or limiting those warranties.
  - iv. **Problem arises:** when seller allegedly makes express representations that are inconsistent with the form language of the contract.
    1. Ex: seller who orally states that carpet is insured for a year and then subsequently tries to avoid warranty liability by pointing to a clause that disclaimed express warranties.
  - v. **Rule:** Words of warranty & negation of warranty should be construed whenever reasonable as consistent.
    1. When consistency is unreasonable → words of negation are inoperative.
  - vi. **Parol evidence:** Sellers are presumably protected against false allegations of words of express warranty by this rule. Any contradictory language would be admissible only if the sales agreement was not intended as the final expression of the parties' agreement.
    1. When does the problem arise? **Seller's agent**
      - a. Where a seller's agent makes statements of warranty that the seller hasn't authorized and that the seller tries to negate through written contract with the buyer.
      - b. BUT → Seller is in better position to control its agents vs. buyer
    2. **Courts that disfavor warranty disclaimers** → Have found an arsenal of weapons to invalidate sellers' efforts to give warranty with one hand and take it away with another.
      - a. **First approach:** Have simply and boldly opined that the rule has no effect where a prior oral express warranty is contradicted by an explicit disclaimer.
      - b. **Second approach:** Admitted testimony of the oral warranty under the guise of determining whether the written contract containing the disclaimer was intended as the final expression of the agreement.
      - c. **Third approach:** Court may find that the writing was not intended as the final agreement and point to the absence of a merger clause or by finding that the seller made post-contract statements that aren't governed by the disclaimer.
      - d. **Fourth approach:** Court may find that the expressions of the seller amount to fraud or otherwise invalidate the contract as a whole.
  - vii. (2) *Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."* **Restrictions on the disclaimer of implied warranty**
    1. **Merchantability:** Requires that any exclusion or modification of the implied warranty of merchantability specifically mention the "merchantability" term
      - a. Clause that says "no guarantee" → not enough
      - b. Must be **conspicuous** = so written that a reasonable person against whom it is to operate ought to have noticed it.
        - i. Will be in **larger or different typeface** or **different color**
    2. **Particular Purpose:** Must be both (1) **in writing** and (2) **conspicuous**.
      - a. BUT: the term "fitness" doesn't need to be included.
  - viii. (3) *Notwithstanding subsection (2)*

1. *(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and*
  2. *(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and*
  3. *(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.*
- ix. This provision appears to take away a lot of the protection in subsection (2)
- x. **CAVEAT:** Permits a seller to exclude all warranties with language such as "**as is**" or "**with all faults**" or other language from which a reasonable buyer would infer that no warranties are intended. **But subject to certain conditions** →
1. **(1) Language** must make **plain** that there is no implied warranty
  2. **(2)** Effectiveness of these less rigorous forms of exclusion can be negated if "**the circumstances indicate otherwise**"
    - a. Ex: Court can find that the presence of a consumer buyer indicates that the meaning of "with all faults" would not be understood as readily as the same phrase in a commercial context.
  3. **(3)** No warranty exists where the underlying assumption for the warranty – the superior knowledge of the seller – does not apply.
    - a. Ex: a buyer who fully examines a sample or model or refuses to do so when examination would have revealed defects, no warranty exists with respect to those defects that the buyer should or would have discovered.
      - i. Assumption is that inspecting buyer has much more info about the quality of the good than the seller
      - ii. BUT → doesn't mean that seller can impose on an unsuspecting buyer the duty to inspect and to bear risks of defects that the buyer didn't detect.
        1. Inspection obligation is ONLY TRIGGERED where the buyer's investigation will place her level of knowledge on par with the seller's
- xi. Implied warranties can be excluded in **course of dealing, course of performance, or usage of trade**.
1. We would expect exclusions to arise in these repeat circumstances ONLY IF the buyers in such situations are systematically well informed about the rate and cost of product defects of the seller.

## Warranties under CISG

- I. Never uses the term "warranty," but it has the same effect as UCC warranties with the addition of provisions that reveal the long-distance nature of the covered transactions.
- II. **Article 35(1):** *The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.*
  - a. General standard that essentially requires the seller to comply with the terms of the contract: deliver quantity, quality, and description OR contained in package required by contract
  - b. Warranty law under CISG not only:
    - i. (1) places the risk of product quality on the seller who makes an express warranty, BUT ALSO
    - ii. (2) places on the seller who makes statements or engages in conduct during contract negotiations the risk of knowing under what circumstances its language or acts will reasonably be construed as warranty "**descriptions**" in the understanding of the buyer
  - c. **Description:** recognition that any such description constitutes an express warranty, breach of which means that the seller hasn't complied with **Article 35(1)**'s obligations.
    - i. CISG is **silent**:
      1. (1) source of the descriptions
      2. (2) whether only explicit statements count, or
      3. (3) whether statements in advertisements or catalogues are included.

d. **Proving existence of such description is a more important question under CISG**

i. CISG doesn't have parol evidence rule

1. Claims that a seller made particular oral statements concerning the quality of the goods will be admissible in contracts governed under the CISG

e. What is a description? **NOT**: puffing language or statements of opinion

f. BUT: this is a hard distinction because international transactions are likely to entail **cultural differences** that complicate the inquiry

g. **Hypo**: American seller of herbicide informs Zambian buyer that even though product costs a little more, it "outperforms all competitors." After buying, Zambian realizes it's nothing special.

- i. What if Zambians are less disingenuous than Americans so that Zambian is more likely to interpret the seller's words more literally.

h. **Article 8**: Deals with the interpretation of parties' acts and words which may help determine the scope of the warranty. *"statements made by... a party are to be interpreted according to his intent where the other party knew or could not have been unaware what the intent was."*

- i. **Article 8(3)**: **Buyer**: we should consider *"all the relevant circumstances"* in deciding what understanding a reasonable person would have understood.

1. Background understanding of the Zambian buyer would count here.

- ii. **Article 8(2)**: **Seller**: where the other party is reasonably ignorant of the speaker's intent, the speaker's statements are to be interpreted *"according to the understanding that a reasonable person of the same kind as the other party [recipient] would have had in the circumstances"*

1. If a reasonable Zambian buyer would interpret it as a statement of warranty, then the warranty exists.

III. **Article 35(2)**: Additional content to the concept of **"conformity"** required by Article 35(1) and that concept essentially creates a basis for both **express** and **implied** warranties →

a. *(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:*

- i. *(a) are fit for the purposes for which goods of the same description would ordinarily be used;*

1. Borrows from the UCC's **warranty of merchantability** by limiting "conforming" goods to those that are as described above.
2. This limited definition of "conformity" may leave the buyer open to some degree of strategic seller behavior that is foreclosed under **UCC 2-314** (which requires that merchantable goods be of fair average quality within the contract description of the goods).

- a. Ex: Contract for 3 barges of "No. 2 yellow corn." Assume it's acceptable in the trade for it to contain no more than 2% of other products. An average barge may contain no more than 1%. Nevertheless, a barge with 2% within the trade as meeting the contract description. Sellers might have incentive of shipping the "dirtier" barges to distant buyers that are less likely to complain. Omission of the appeal to "fair, average quality" gives the buyer who suffers less recourse in CISG than in UCC.

3. What if concept of fitness for ordinary use is different in seller's country than in buyers?

- a. Austrian Court: The seller can't be charged with knowledge of special rules governing goods in the buyer's country, unless the buyer specifically bargained for them. In that case, noncompliance with buyer's requirements would constitute a violation of **Article 35(1)**:

- ii. *(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;*

1. Embodies **fitness for a particular purpose**.
2. **Excluded**: when there's no reliance on the seller's skill or judgment
3. Serves same risk allocation function as UCC

- iii. *(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;*

- iv. (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

- 1. Shipping perishables w/o proper refrigeration or fragile goods w/o appropriate padding would constitute a breach of this implied warranty (even if the contract says nothing about the packaging method)

IV. **Disclaimers:** CISG doesn't address it explicitly, but it is clear that they are waivable.

- a. **Article 35(2):** makes the implied warranties subject to contrary agreement by the parties.
- b. **Article 6:** respects the contract of the parties by allowing abrogation of any of the CISG provisions & would apply to permit disclaimers.
- c. **Article 35(3):** recognizes that disclaimer is possible simply by examining the circumstances in which a contract was made.
  - i. Seller isn't liable under **Article 35(2)** for any lack of conformity of which the buyer knew or could not have been unaware at the time of conclusion of the contract.
- d. **Unresolved issue:** Hidden or inconspicuous disclaimers; disclaimers that don't contain key language (UCC).
  - i. **Argument 1:** One might claim that CISG doesn't have requirements like UCC 2-316 so that more general disclaimers than are recognized under UCC might be acceptable.
  - ii. **Argument 2:** BUT → we can change an inquiry into the effect of a disclaimer into one about the "validity" of the disclaimer under **Article 4**.
    - 1. **Counterargument:** Reading "validity" too broadly doesn't make sense.

## Limitations on Remedies

Limitations on Remedies under the UCC

Limitations on Remedies Under the CISG

## Risk of Loss

Introduction: Loss Allocation in Transactional Settings

- Period between formation of K and successful completion → goods can be lost, damaged, or stolen
- Four scenarios:
  - o (1) Loss occurs while goods are in the seller's possession
  - o (2) Goods are in possession of a 3<sup>rd</sup> party bailee when the loss occurs. Buyer is expected to either obtain the goods from the bailee or to resell the goods without ever receiving physical possession of them from the bailee.
  - o (3) Loss happens when goods are in transit from seller to buyer
  - o (4) Loss happens after the goods have reached the buyer, prior to the time the buyer has accepted them.
- Risk Allocation → Typically the party who possesses or controls the goods can best avoid risk and insure goods. **Efficiency principles** require that risk of loss follow possession and control rather than title.

Risk of Loss Under the UCC

- Embraces efficiency rationale →
  - o Comment 3 to **UCC 2-509**: "the underlying theory of [loss allocation] is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.
  - o Courts (**Galbraith**) → "the rationale of the risk of loss rules... is to place the risk of loss on the party most likely to insure the goods. The rules recognize that a merchant who is to make physical delivery at his own place of business continues to exercise dominion and control over the goods and can be expected to insure his interest in them until delivery.
- UCC does not tell courts to place the loss on the party best positioned to avoid it, but instead defines situations in which tendency will be for control and dominion to rest with either seller or buyer.
- **Risk of Loss Where Seller Retains Goods 2-509(3)**
  - o If seller is a merchant, risk of loss passes to the buyer on receipt of the goods.

- Receipt = taking physical possession of the goods **2-103(1)(c)**
- Efficiency = a buyer who hasn't obtained the goods has little opportunity to care for the.
- If seller is not a merchant, risk passes to the buyer on tender of delivery. (**difficult**)
  - Hypo: Consumer-seller of used car agrees to sell car to buyer on following Tuesday so that seller can take out his stuff. Seller also says he will be out of town so he will leave key under floor mat. After seller complies with his obligations, but before buyer arrives to claim the car, a tree falls on the car.
    - **Seller's Argument 1:** Seller may claim he tendered the goods by making them available to the buyer. UCC **2-503(1)** → seller will have tendered delivery by holding conforming goods at the buyer's disposition and giving the buyer notification reasonably necessary for the buyer to take delivery.
    - **Counterargument:** Seller controlled the location of the car and thus was in a superior position to avoid the loss.
    - **Seller's Argument 2:** Seller can claim he cancelled his insurance after the completion of the sale so that the "**best position to insure**" rationale may point to placing the risk on the buyer, while the "**best position to avoid loss**" may point to the seller. (**split**)
  - Situation in which "**best position to insure**" and "**best position to avoid loss**" point to seller
    - Hypo: Buyer agrees to purchase dining room table at an estate sale and the table is damaged in the seller's home while buyer is going to get his car. Seller is best positioned to **both avoid loss and insure**. Here, the seller argues it has already tendered.
- Proposed Revision → Eliminated the distinction between merchant and non-merchant sellers for risk of loss purposes.

#### - **Risk of Loss Where Goods are Held by a Bailee** **2-509(b)**

- Goods may suffer injury while in the hands of a 3<sup>rd</sup> party (e.g. warehouseman) who is holding the goods at the time of transaction.
- **2-509(b)** → If goods are to be delivered to the buyer without being moved from bailee's premises, risk of loss passes to the buyer on the **first of 3 events**:
  - **(1) Buyer receives a negotiable document of title covering the goods (because the person who holds this has the ability to control the disposition of the goods.**
    - Essentially, constructive possession of the goods
  - **(2) Bailee acknowledges that the buyer has a right of possession**
    - **Jason's Foods Inc. v. Peter Eckrich & Sons Inc.** → seller of ribs brought an action for the price after the ribs had been destroyed in a fire. Ribs were held in warehouse of bailee and the sale was to occur by transfer from the seller's account to the buyer's account on the warehouse books. This happened on 01/13 but buyer didn't receive confirmation until 01/24. Fire happened on 01/17.
      - ♦ **Seller's argument:** It surrendered all control over the ribs once the paper transfer was effected and that it could not insure what it no longer owned. Therefore, risk of loss had passed to the buyer.
      - ♦ **Buyer's argument:** Could not be responsible for goods it didn't know it owned.
      - ♦ **Court's conclusion:** Relevant acknowledgement had to be made to the buyer. Language of the provision suggested of this result. But also found that policies underlying risk of loss were inconclusive. Once seller ordered transfer, it had no reason to insure or care, and until the buyer learned of the transfer, it similarly had no reason to insure or protect.
        - The fact that the buyer had a "well-founded expectation" that transfer had been finalized prior to loss was insufficient to shift the risk of loss.
        - Since risk of loss transactions are governed by **2-509(2)(a)** and **(c)** only passed when buyer received evidence of the transfer, the court imposed similar requirements on **2-509(2)(b)** transactions
    - **Agency Law?** Bailee must truly be independent of the buyer if receipt by the bailee is not to be attributed to the buyer under agency law.

- ♦ **In re Julien Co.** → Representative of cotton sellers delivered cotton to a warehouseman pursuant to Ks under which cotton was sold to the buyer. After buyer's drafts in payment were dishonored, the representative of the seller demanded return of goods. Buyer filed BK. In proceedings, representative claimed warehouseman served as bailee from whom representative could claim the cotton.
    - **Conclusion:** Warehouseman was an agent of the buyer. Warehouse was owned by an affiliate of the buyer and was managed primarily for the benefit of the buyer.
- **(3) Receipt by the buyer of non-negotiable document of title or other written direction for the bailee to deliver the goods.**
  - Receipt of such document constitutes tender under 2-503(4)(b).
  - Once tender has occurred, buyer has the type of control and dominion over the goods that efficiency dictates.
- Another case: buyer may ask seller to retain goods until the buyer can procure delivery. 2-509(3) → If goods are lost or damaged during this period,
  - **Argument #1:** A seller who would bear the risk under 2-509(3) might claim that it had been transformed into a bailee or agent of the buyer.
    - If bailee → risk of loss passed to buyer on seller's acknowledgment that the buyer could obtain the goods at any point.
    - If agent → risk of loss passed to the buyer because buyer "received" the goods under agency principles.
  - Courts have been **reluctant to accept such arguments**
    - **Conway:** Goods that seller was holding for buyer under "layaway" were stolen from seller's store. Seller claimed it was acting as bailee for the buyer. Court concluded seller wasn't holding goods for buyer's benefit, but for its own (secure purchase price)
    - **Caudle:** Court rejected claim of seller of trailer that it was bailee for the buyer. Trailer stolen from seller's premises while being prepared for delivery to buyer. Seller argued it was acting as bailee and by executing contract it had acknowledged right to possession of the buyer. Court said that under 2-509(2) said that bailees could only be persons in the business of storing goods for hire.
- **Risk of Loss During Transit**
  - Risk of loss in this case is very tied to the payment terms under the contract with the "carrier" (independent carrier)
    - If buyer is using its own trucks, then buyer has retained possession and is covered by 2-509(3) and not carrier provisions
  - Hypo: Wine shipped, carrier puts the boxes of wine in truck improperly and the bottles break during shipment.
    - **Shipment contract:** when seller delivers goods to the carrier
      - Risk passes to buyer when goods are duly delivered to the carrier
  - § 2-509(1) *Where the contract requires or authorizes the seller to ship the goods by carrier*
    - (a) *if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but*
      - **Shipment contract** → Passes risk of loss to buyer when goods are duly delivered by the carrier → so under shipment contract, buyer bears the risk
      - "duly delivered" 2-504 → requires seller to enter into a **reasonable contract** for transportation of goods with a carrier and placing the goods in possession with that carrier.
        - ♦ "reasonable contract" → depends on the nature of the goods (example: seller's failure to use refrigeration of perishable goods may be unreasonable)
          - **Cook Specialty:** court found that seller had entered into reasonable contract for transportation, even though carrier's insurance fell below value of cargo. "Reasonableness" = requires only that the mode of transportation be satisfactory in light of the nature of the goods.

- **F.O.B. place of shipment Contracts** (“free on board”): parties intend a shipment contract rather than a destination contract since no particular destination is mentioned.
  - ♦ **2-319(a)**: when the term is F.O.B. place of shipment, the seller must at that place ship the goods in a manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into possession of the carrier
- **C.I.F. Contracts** (“cost, insurance, and freight”): parties intend a shipment contract but then why is the seller buying insurance? Insurance obtained by the seller is for the benefit of the buyer → seller required to obtain a policy “providing for the payment of loss to the order of the buyer or for the account of whom it may concern” but seller is in best position to get that insurance b/c the policy must be consistent with current terms of the port of shipment.
- **Strong presumption of classifying contracts as 2-509(1)(a)** - strong commercial presumption that contracts of carriage = shipment contracts
  - ♦ In cases of doubt, courts should construe contracts as placing risk of loss on the buyer during transit.
  - ♦ Rebuttable: explicit agreement that imposes on seller an obligation to deliver to a particular destination. A mere agreement to ship “to” a particular city will not suffice”
- **(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.**
  - Risk of loss during destination contract → risk of loss passes to the buyer when goods are duly tendered + designated destination
    - ♦ **“tender” 2-503** → requires conforming goods to be placed at the buyer’s disposition and that the buyer receive any notification reasonably necessary to enable it to take delivery.
  - Thus, seller bears risk during transportation until tendered.
  - Meshes with **2-319(1)(b)**: *“when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503)”*
- Distinguishing between shipment contracts and destination contracts.
  - Shipment contract = typical contract
  - Destination contract = parties mean to allocate risk to seller during transportation.
    - Not always the buyer’s address
    - Parties agree to a particular transfer point to transfer to buyer.
- Hypo: California seller, NY buyer. Price changes depending on the type of shipment.
  - **C.I.F.** = seller charges for cost of goods + insurance + transportation
    - 1. \$1000 F.O.B. Cal [1000 price + 50 ins. + 50 trans.] = 1100]
    - 2. \$1075 C.I.F. N.Y. [1075 price + 0 ins. + 0 trans.] = 1075
    - 3. \$1050 C&F N.Y. [1050 price +0 (ins.) + 50 (trans)] = 1100

## - Risk of Loss During Breach

○

## Rights to Goods: Bona Fide Purchase and Reclamation

### Good Faith Purchase Rules (UCC)

- Question of recovery depends on the (1) rights of the buyer’s transferor and (2) the buyer’s good faith
- Employs principle of **nemo dat quod non habet**: purchaser acquires all title that its transferor had power to transfer **2-403(1)**
  - Purchaser gets no better rights than the seller had

- Original owner can reclaim the goods from the purchaser, just as he or she could have from the dispossessor.
- **Good Faith Purchaser:** One without the knowledge that the seller lacks good title who has also given value for the good. We are dealing with two innocents: the original owner and the purchaser and one must suffer a loss. How do we resolve?
  - **Option A: Corrective Justice** → Principle might initially suggest that original owner should be able to reclaim the goods. But, you can also argue that corrective justice principles also protect the “right” of the good faith purchaser for value not to have its property subjected to an unconsented interference by requiring return.
    - **Problem:** Notion of corrective justice that requires redress only against one who has acted wrongfully does not permit the original owner to reclaim the goods from one who, like the good faith purchaser, did not dispossess the original owner of the good through a wrongful act.
  - **Option B: Least Cost Avoider (UCC)** → Loss from the dispossession should be allocated to the party who was in the best position to prevent the original dispossession or who is in a superior position to insure against the loss that materializes when that dispossession occurs. Principle induces least cost avoider to take inexpensive measures to prevent losses.
    - **Problem:** It is difficult to identify the party best situated to avoid losses.
      - **Original owner:** Can prevent losses by taking better care of goods in their possession & check reputation of parties to whom they give their goods for safekeeping. Also better able to insure against loss or theft. **BUT** → This principle induces good faith purchasers to purchase only goods from reputable sellers and thus to reduce the marketability of goods taken by wrongful dispossession.
- **UCC's Distinction Between Sellers for Purpose of Granting/Denying Original Owner Right to Recover**
  - Competition between **original owner v. good faith purchaser**
  - **UCC 2-403: Power to Transfer; Good Faith Purchase of Goods; Entrusting**
  - *(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. (EXCEPTION) A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though*
  - A purchaser acquires all title that its transferor had power to transfer = **A person with void title cannot pass better title to a subsequent purchaser.**
    - Thief? Thief has not title or void title to stolen goods, so the transferee similarly received not title.
  - **Policy:** Loss minimizing rule. UCC drafters must have believed it is generally easier for good faith purchasers to detect their sellers are thieves than it is for original owners to prevent the theft from occurring in the first place. Careful buyers may be able to determine with relatively little effort that the goods they are purchasing have passed through a thief.
    - **BUT** → Used goods market. Checking origins of goods is difficult for buyer.
  - **EXCEPTIONS to nemo dat principle** → These exceptions occur where the party who received the goods from the original owner did not have void title, as in theft, but instead had voidable title (original owner consented to the original transfer of the good, but did so on a condition that, once defeated, allows the original owner to recover the goods).
    - **Policy:** Appears that the original owner was in a relatively good position to avoid loss.
    - **Exception Rule: (someone with voidable title can pass good title to some 3<sup>rd</sup> parties)** When original owner delivers the goods under a “transaction of purchase (i.e. any voluntary delivery),” the “purchaser” (initial transferee) can pass good title to subsequent purchaser as long as the subsequent purchaser:
      - (1) acts in good faith
        - ◆ Subjective test that requires nothing more than “honesty in fact”
        - ◆ “Pure heart and empty head” test
      - (2) gives value
        - ◆ **Policy:** Fairness concerns and the desire to avoid windfall gains and losses may trump the loss minimization principle.
  - Persons with voidable title include **UCC 2-403(1)**:

- (a) *the transferor was deceived as to the identity of the purchaser, or*
  - **Imposter** who deceived original owner as to identity. Seller has greater ability to determine true identity of who it is dealing with.
- (b) *the delivery was in exchange for a check which is later dishonored, or*
  - **Check** was used as payment. Original owner who releases the goods before the time the check clears can't recover goods if the check bounces if the purchaser has resold to a good faith purchaser for value.
- (c) *it was agreed that the transaction was to be a "cash sale", or*
- (d) *the delivery was procured through fraud punishable as larcenous under the criminal law.*
- (2) Any entrusting of possession of goods to a **merchant who deals in goods of that kind gives** him power to transfer all rights of the entruster to a **buyer in ordinary course of business**.
- (3) **"Entrusting"** includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be *larcenous under the criminal law*.
- **Policy**: Least cost avoider rationale. Buyers will have a difficult time tracing the origins of goods they purchase in these situations, at least relative to the ability of owners to ensure that they entrust their goods only to merchants of good reputation.
- **Entrusting**: Original owner's delivery of goods to a 3<sup>rd</sup> party and acquiescence in their retention by that party, notwithstanding that conditions are placed on that acquiescence. (e.g. watch in repair shop)
  - **Merchant who deals in goods of the kind** → If transferred to this merchant, merchant has the power to transfer all the rights of the entruster to a **"buyer in the ordinary course of business"**
    - Includes good faith purchasers that buys from the merchant who is in the **business of selling goods of that kind**.
    - Original owner has no right to reclaim from the purchaser.

#### Seller's Right to Recover and Reclaim Goods

- General Matter: **title** to good passes to buyer at time and place at which seller completes his performance with respect to physical delivery of goods.
  - BUT → fact that buyer has title doesn't prevent seller from recovering goods should buyer fail to perform its obligation for them (buyer's obligation to pay **2-301**)
    - **2-401(1)**: rights of sellers and buyers apply regardless of who has title
- **2-507: Effect of Seller's Tender; Delivery on Condition**
  - (2) *Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.*
    - Buyer's right to retain or dispose of them "as against the seller" is conditional on making payment when due
    - Seller may reclaim goods from a buyer who fails to make payment
- **Limitation on seller's reclamation rights**: A buyer of goods typically will have voidable title to them and will be able to pass good title to a good faith purchaser for value.
  - **IMPORTANT** → While **2-507(2)** governs the relationship between unpaid seller and the buyer, **2-403** governs the relationship between the unpaid seller and subsequent transferees from the buyer.
- **2-403: Power to Transfer; Good Faith Purchase of Goods; "Entrusting"**
  - If this provision gives priority to the transferee (good faith purchaser + value) nothing in **2-507(2)** gives more right to the seller.
- BUT → Situations in which seller can **recover the goods** or **stop their delivery** to the buyer even when buyer's obligation to pay has not been triggered.
- **Insolvency of Buyer: 2-702 Seller's Remedies on Discovery of Buyer's Insolvency**
  - (1) *Where the seller discovers the buyer to be **insolvent** he may **refuse delivery** except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (Section 2-705).*
    - Enables seller to refuse delivery (except if buyer is paying in cash) – seller must be super sure that the buyer is insolvent

- (2) Where the seller discovers that the buyer has received goods on **credit** while insolvent he may reclaim the goods upon demand made within **ten days after the receipt**, (**CAVEAT**) but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.
- Hypo: Seller to deliver goods by July 1 and buyer supposed to make payment 30 days after (credit). On June 15, seller discovers buyer is insolvent.
  - **2-507(2)**: **Doesn't help** here because payment isn't due yet.
  - **2-702(2)**: **10-day rule is additional weapon!** If buyer received the goods on credit while insolvent, seller may reclaim goods if he acts within 10 days after the buyer has received the goods.
  - **CAVEAT**: If buyer **misrepresents financial status** to seller in writing and within 3 months before delivery, the 10-day limitation does not apply. **Seller has longer time to reclaim goods.**
  - **NOTE**: Seller's reclamation rights are only against buyer, not subsequent purchaser. (then **2-403** would limit seller's reclamation)
- **2-705 Seller's Stoppage of Delivery in Transit or Otherwise:**
  - Right to **stop delivery**: (1) *The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.*
  - Right to **stop their delivery** ends when (2) *as against such buyer the seller may stop delivery until*
    - (a) *Buyer receives goods*
    - (b) *When a non-carrier bailee acknowledges to the buyer that the bailee holds the goods for the buyer*
    - (c) *When a carrier provides such acknowledgement to the buyer by reshipment or as warehouseman*
    - (d) *When negotiable documents of title covering the goods have been negotiated to the buyer*
  - Right to **stop their delivery** and bailees... (3)(a) *To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.*
    - Seller only has right if it notifies the bailee in time for the bailee to prevent delivery (if not, seller doesn't have action against bailee)
    - (b) *After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.*
      - If bailee receives sufficient notice, he/she is obligated to hold and deliver the goods in accordance with the seller's instructions.
    - (c) *If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.*
      - If bailee has issued negotiable document of title (like a bill of lading) when picking up the goods, the bailee need not obey notification to stop delivery until the negotiable document has been surrendered.
    - (d) *A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.*

#### Goods-Oriented Remedies Under CISG

- CISG does NOT address concepts of title and contains no provision that is similar to **2-403: Power to Transfer; Good Faith Purchase of Goods; "Entrusting"**
- **Article 4(b)** → Explicitly provides that CISG isn't concerned with the effect that the contract has on the property of goods sold.
- Alternative → Remedies for **fundamental breach** by the buyer include provisions that allow aggrieved seller the right to reclaim goods that have been delivered.
- CISG does NOT make a distinction similar to **2-507(2) Effect of Seller's Tender; Delivery on Condition** (buyers who failed to make payment when due) or **2-702(2) Seller's Stoppage of Delivery in Transit or Otherwise** (buyers who have received goods on credit while insolvent).

- **Article 81(b)** → (2) *A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.*
  - Grants to sellers who have performed their contracts in whole OR in part a right of restitution from the other party *“of whatever the first party has supplied”* under the contract.
  - **Most Commentators:** This permits sellers to recover goods that have been delivered to the nonpaying buyer.
    - **Secretariat Commentary:** restitutionary “return” of what the aggrieved party provided rather than just a right to damages.
      - *Paragraph (2) authorizes either party to the contract who has performed in whole or in part to claim return of whatever he has supplied or paid under the contract... the party who makes demand for restitution must also make restitution of that which he has received from the other party. If both parties are required to make restitution, they must do so concurrently” unless they agree otherwise*
- **Article 81(1)** – (1) *Avoidance of the contract releases both parties from their obligations under it, subject to any damages which 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.*
  - Explicitly involves the consequences of **avoidance** and it makes sense to read **Article 81(2)** as a further itemization of those consequences.
  - **Seller has right to recover goods ONLY WHEN SELLER HAS RIGHT TO AVOID CONTRACT**
- **Article 64(1)(a)** – Seller’s right to avoid the contract is contingent on the existence of a **fundamental breach**
  - **Article 25** – **fundamental breach** consists of a breach that *“results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.”*
- **Is there a fundamental breach?**
  - When buyer fails to make a payment when due
    - **UCC:** Similar to situations covered under to **2-507(2) Effect of Seller’s Tender; Delivery on Condition** (buyers who failed to make payment when due)
    - **CISG:** Buyer who receives the goods but fails to make a payment when due not only violates the primary duty owed by the buyer under CISG, but also deprives the seller of primary benefit for which it entered the contract in the first place.
  - When the buyer is insolvent and when the seller wants to stop delivery
    - **UCC:** **2-702** and **2-705**
    - **CISG:** **Article 25** defines breach in terms of a detriment to the seller that deprives him of *“what he is entitled to EXPECT”*
      - Language of **expectation** implies that **prospective breaches** by one party may be sufficient to trigger the right of avoidance by the other.
      - Current likelihood that an insolvent buyer will be unable subsequently to satisfy its obligation to pay for the goods should be sufficient to permit a seller to call a **fundamental breach** even before the time for payment has occurred.
      - Finding **fundamental breach** → triggers right to **avoidance** under **Article 65** → triggers right under **Article 81** to obtain the **return of the goods**.
- **Recovery from third parties?**
  - None of the principles above affect the right of 3<sup>rd</sup> parties.
  - If buyer transfers goods prior to the time the seller exercises his right of restitution, **nothing in CISG permits the seller to pursue the goods into the hands of that purchaser.**
  - **Secretariat Commentary to Article 81** – (makes this very clear) *“the right of either party to require restitution by Article 81 may be thwarted by other rules which fall outside the scope of the international sale of goods.”*

# Excuse, Impediments, and Adjustment of Terms

## Introduction

- When conditions change so significantly that those assumptions are no longer true, one of the parties may stand to profit from the transaction much more than it initially anticipated, while the other stands to lose much more than it intended to risk
  - o Latter party is likely to claim the contract was never intended to apply to the changed situation and to seek **excuse from performance**
- Law of Excuse → Mechanism by which we allocate risk of changed circumstances

## Under the UCC

- Courts have routinely denied relief made available under 2-615 regardless of who requests it because courts construe the provision **very narrowly**
  - o **Policy**: Parties are better able to allocate risks of changed circumstances at the time of negotiation than courts are able to allocate to them after a risk has materialized. **Rule that regularly denies claims of excuse induces parties to reach an optimal bargain.**
    - Courts have difficulty of verifying that the prerequisites for excuse have been satisfied, while parties can more easily consider the conditions under which the contract will not operate.
- **2-615. Excuse by Failure of Presupposed Conditions.** *Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:*

1. Did the party seeking excuse assume a greater obligation than would otherwise apply?

2. Was there an occurrence of a contingency, the nonoccurrence of which was a basic

assumption of contract – basically a foreseeability test?

3. Did the occurrence of the contingency render performance impracticable (not

necessarily impossible)?

- o **First Element Assumption of greater obligation**: allows a party to assume the risk that circumstances will change between contract formation and performance in a manner that causes the party to regret having entered into the contract.
  - **Explicit**: As where a seller negotiates to exclude a “force majeure” clause in return for a higher price for the goods.
  - **Implicit**: Can be inferred from the circumstances. **Requires judges to reconstruct bargain reached by parties → Problem** = filled with erroneous guesses
    - Example: Parties negotiate 5-year coal supply contract & they tie price to CPI. Then, spot price for coal increases by a lot more than CPI. Seller may seek to be excused by claiming that parties assumed that changes in spot price would parallel changes in CPI or that parties assumed price for coal would stay within historical range. But, buyer can respond that selection of a particular index implicitly allocated the risk that the index would fail to perform as seller expected.
    - **Difficult**: Without knowing reasons why specific term was selected, it's unclear whether its presence in the contract constitutes an assumption of a particular risk. We can also conclude that ANY consequence that follows from the inclusion of each clause was accepted by the party who would be adversely affected by the operation of such clause.
      - ♦ Unless we make this assumption, it's going to be unclear whether parties bargained about the clause.
  - **Default Rule (of routinely denying claims) reflects the difficulty courts have in either discerning the parties' intent or imposing a sharing of losses where the parties have been silent.**

- (a) *Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.*
- **Third Element: Commercial impracticability:** If the risk hasn't been assumed, excuse is permitted only if the condition that causes regret makes performance impracticable
  - **Not impracticable:** Increased costs alone. But price increases or decreases never occur "alone," they occur due to some other conditions like economic crisis, oil embargo, or war.
  - **Net Gains Approach:** Reference to a reasonable assumption that parties at least **expected their agreement to produce net gains**.
    - Limiting case for claims of excuse based on increased seller's costs would exist where that increase > the gain the buyer would enjoy from performance.
    - **International Minerals:** Buyer of natural gas said it couldn't comply with environmental regulations w/o shutting down gas powered boilers and thus its need for gas fell below contractual expectations.
      - ◆ Impracticability ≠ Impossibility
      - ◆ Performance is impracticable if it could only be accomplished at "**excessive or unreasonable cost**"
        - We would not expect buyer to incur additional cost of \$10k for \$100 profit.
        - **BUT ALSO** → When contract produces a **net social loss insofar as losses exceed gains**
        - **Problem/Policy:** Parties and courts will be unable to quantify gains and losses with such precision, and the presumption against granting excuse will lead courts to require significant discrepancy (hence the strong language of "excessive or unreasonable") between gains and losses before allowing excuse
      - ◆ Court considered additional costs (public policy). Combined social costs of pollution and increased costs to the buyer exceeded the benefits of performance to the seller and this permitted a finding of impracticability.
    - **Zero-Sum Effect:** In many cases, the obligor's loss will offset the obligee's gain. Dramatic increases in prices mean that the seller will receive from the buyer an amount equal to what the buyer will have to pay in excess of expectations.
      - ◆ **Unless buyer can show additional losses**, such as significant losses on downstream contracts or impending bankruptcy if performance is required (and if all other conditions of **2-615** are satisfied) then **Comment 4** correctly suggests that **increased costs alone don't warrant excuse**.
        - Not simply case that seller losing money by performance should be the base for impracticability. This implies that there are situations in which party has to perform and lose money.
      - ◆ **Very different from not being able to get the goods** (vs. I can get them but at a higher price)
    - Price Escalation Clause → Specifically allocating the risk to themselves that that clause wouldn't work well. There are explicit price and quantity terms and this is an express risk allocation. If those terms don't work well for the seller then the party has assumed a greater obligation.
- **Second Element:** Impracticability must result from a **contingency the nonoccurrence** of which was a **basic assumption of the parties**. This means that either the parties didn't contemplate the contingency OR they considered it and affirmatively believed it wouldn't occur. **Unforeseeability Test:** Excuse is permissible only when the background conditions that make performance more difficult are **unforeseeable**
  - **What must be unforeseeable? Contingency – (broad reading –** (e.g. inability to secure the goods vs. tortious interference with XYZ) If the parties could anticipate that **something**

might occur to increase prices, although the more precise cause is unknown and unprecedented, then the event that materialized was foreseeable. **The more specifically we describe the contingency, the less foreseeable the actual event seems to be.**

- ◆ Commercial actors can control through contract consequences, even if they cannot control the materialization of a particular event that requires adjustment.
  - ◆ Renegotiation clauses, hedging one contract with a broad portfolio of others
  - ◆ **No need to identify a specific event in order to allocate risk emanating from externally imposed shocks to contractual expectations.**
  - ◆ Example: Oil embargo after 1970s. Many cases arose because oil prices spiked dramatically. Courts had to determine whether events related to oil prices were foreseeable. Some courts called the event an “oil embargo” (less foreseeable). Other courts called it “unrest in the Middle East” (more foreseeable – this has been happening forever!). Both explain what happens but at different levels of specificity.
  - ◆ **Problem:** Unforeseeability is a slippery slope – very wishy washy standard! No reason to favor one interpretation (broad) over another (specific). Prone to a variety of interpretations.
- **What does unforeseeable mean? RECOGNIZE THE ARGUMENTS! THERE’S NO ONE**
- ◆ **Difficulty:** If we had enough time, we could think about all kinds of contingencies, but do we really want contracting parties to sit around thinking about things that could go wrong? No!
  - ◆ **NOT:** No one would have ever thought of it; if bargainers with unlimited time and resources had thought up a list of events that might interfere with contractual expectations they never would have considered the event that materialized.
  - ◆ **Least cost avoider:** Cost effective allocation is the basis of foreseeability. If it was worthwhile to discuss, then we will call it foreseeable.
    - **ONE APPROACH:** *Specialty Tires*: Define foreseeability as given the probability that this risk would materialize, was it worth bargaining about?
      - If the expected loss was so low (much less than the cost of negotiation to allocate the risk), then we are going to call it **unforeseeable**.
    - **GILLETTE’S APPROACH:** **BUT** → Mere fact that it’s low should matter. You decide whether to negotiate those risks. Imposing the risk on the party induces the party to negotiate and make decisions about whether and how much they want to spend in identifying and negotiating about risk.
      - **Constraining excuse narrowly induces parties to think about the risks.**
      - Make sure parties are induced to make those investigations up to the efficient point by telling parties that they will bear the loss. You decide how much to invest. Individual party
      - **Institutional confidence in courts – This is what my decision should hinge on.** What you choose depends on how accurate courts
    - Ask which party was in a superior position to avoid the materialization of a risk or to insure against it.
  - ◆ **GILLETTE’S APPROACH:** (same as above organize later) **Ex Ante Approach:** What we expect rational parties to devote to risk allocation.
  - ◆ Focus on the **bargaining process:** at some point in that process, the expected value of the contingency is so small that it is not worth bargaining for at all.
    - **Conclusion 1:** Risk has been unallocated because it was not worth considering.
    - **Conclusion 2:** (**better conclusion**) Risk has been implicitly assumed because the cost of reallocating it elsewhere was not worth incurring.
      - **Policy:** Avoids difficult judicial efforts to adjust obligations (reduces judicial intervention); induces each party to make rational

calculations of which risks are in fact worth including in the contract. **A flat rule that imposes loss on the seller induces it to take efficient loss avoidance measures.**

- **Is the rule to impose significant losses on commercial parties who fail to negotiate for specific risk allocations too harsh?** No, parties can actually control for significant changes in circumstances. Mediating factors:
  - ♦ (1) Renegotiation clauses can be negotiated with less difficulty as long as they don't require identification of the particular risk. They simply impose an obligation to share risks when any event causes a clear divergence from contractual expectations.
  - ♦ (2) Buyer and seller will each have a portfolio of contracts at any given time to diversify the risk. (contracts with different price, quantity, delivery terms)
- **Does the rule encourage actors to behave strategically?** No, there are extra-legal sanctions like **reputation loss**.

- *(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.*
- *(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.*

- **2-614: Substituted Performance**

- *(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.*
- *(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.*
- 

- **Under the CISG**

- **Article 79:** Exempts either the seller or the buyer from liability for failure to perform contractual obligations if that party can prove **three requirements**:
  - *(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*
    - **First Element:** "beyond his control" **Inquiry into reasonable precautions:**
      - Language should be read in terms of what we would expect a reasonable obligor to do under the circumstances in which the contract is being performed.
      - An impediment sufficient to trigger a right to exemption would exist only if the event materialized notwithstanding reasonable precautions against occurrence by the obligor.
      - **Similar to UCC:** Efforts that would be impracticable because they eliminate the net value of the contract are **not required** by the **CISG**.
    - **Second Element:** "he could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract" **Inquiry into reasonableness of obligor's conduct:**
      - **Similar to UCC:** similar to "basic assumption of the contract"
      - Ask if seller could have **reasonably foreseen** that the attack occurred, then it should have taken that possibility into account at the time of the contract and expressly allocated it to the buyer through force majeure or other.
        - ♦ "reasonably foreseen" → (still some **skepticism** like in **UCC**) a person who devoted a reasonable amount of time and resources into contemplating what might occur

- during the performance of the contract would not have considered the risk that materialized. **BUT**: slippery slope
- **Third Element**: once impediment materialized, (1) he could not have reasonably avoided it OR (2) overcome it or its consequences
    - “**reasonably expected**” also modifies this part
    - **ASK**: did the seller ask reasonably when he failed to provide a conforming substitution that imposes a loss on him?
    - **ASK: Joint Maximization**: Look at effect of nonperformance on the joint interests of the parties. Small loss incurred by the seller may be justified if it would prevent a larger loss by the buyer.
      - ♦ **Problem**: Courts can’t easily determine the costs to the parties of nonperformance.
      - ♦ **Policy**: Courts may be better off allowing losses to lie where they fall and deny exemption in an effort to induce parties to allocate risks more explicitly.
    - Some guidance in **UCC Official comment to 2-615**: excuse under that section is not available due to “*increased costs alone*” but that is more forgiving towards “*severe shortage... which either causes a marked increase in cost or altogether prevents the seller from securing supplies*”
  - **RESTRICTION OF EXEMPTION**: (2) *If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:*
    - (a) *he is exempt under the preceding paragraph; and*
    - (b) *the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.*
    - Allows any obligor to rely on some 3<sup>rd</sup> party’s non-performance if both the obligor and that 3<sup>rd</sup> party could have claimed the exemption under **Article 79(1)**.
      - **Nonperformance of the subcontractor alone does not exempt the seller.**
    - **NOT**: Cases of suppliers of raw materials who might face difficulty in providing seller with goods that are necessary for the seller to complete the contractual obligation to the buyer.
      - **Distinction**: **hard to draw** because raw material suppliers can often be looked on as subcontractors. (**ASK CG**)
    - **YES**: Cases in which he obligor **subcontracts** with others to perform its own obligations under the contract.
  - (3) *The exemption provided by this article has effect for the period during which the impediment exists.*
    - Temporary difficulties in performance may extend the time for delivery of goods or payment, but do not necessarily eliminate them.
  - (4) *The party who fails to perform must give **notice** to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, **he is liable for damages resulting from such non-receipt.***
    - **NOTICE REQUIREMENT**: Exemption requires notice to the other party within a reasonable time after the party seeking exemption knew or should have known of the impediment.
    - **ONLY DAMAGES**: Even in the case of a valid exemption the effect is only to preclude a claim for damages.
  - **CAUTION** (5) *Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.*
    - EVEN IF successful in claiming the exemption, the party that claimed the exemption may still be vulnerable to the other party’s right to (1) **demand specific performance** OR (2) **avoid the contract**.
    - **Difficulties created by this provision**:

## Seller’s Damages and Other Remedies

Under the UCC

Seller Recovering Profits → Profit = K Price – Cost of performance

- (1) **2-709** allows seller under some conditions to recover K price from B

- Receiving profit as damages
- (2) 2-706 allows seller to get profits if damages are measured by the contract-resale difference
  - $D=K-R$  ( $K=D+R$ )
- (3) 2-708 allows seller to get profit by using market price – contract market price difference
  - $D=K-M$  ( $K=D+M$ )

#### Seller's Remedies: **Action for the Price**

- Specific relief → Counterpart to the seller of the buyer's right to specific performance
- § 2-709. **Action for the Price.**
  - *(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price*
  - Allows seller under prescribed conditions to recover the contract price from the buyer
  - Action for price enables seller to **receive its profit**
    - *(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and*
    - *(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.*
  - As with a right to specific performance, availability of an action for the price is restricted. 2-703 permits seller to recover the price "in a proper case"
  - The seller may recover the price where in **three instances – Conditions to action for price**
    - (1) Buyer as accepted the goods
    - (2) Goods are damaged or destroyed within a reasonably time frame after the risk of loss has passed to the buyer
    - (3) Seller is unable to resell the goods at a reasonable price
  - **Policy:** Price action minimizes the seller's damages when the seller's resale costs > buyer's resale costs
    - Given breach, goods must be resold either by seller or buyer
      - **Seller resells:** It can recover the cost of resale as an incidental expense (2-710)
      - **Buyer resells:** It incurs resale costs but avoids having to pay the seller's resale costs because none are incurred.
    - Because seller's resale costs are part of its recoverable damages, seller's damages are minimized when the goods are resold by the party with the lowest resale costs.
      - Seller's resale costs are lower: Cost of breach is minimized by giving the seller the responsibility to resell the goods.
        - ◆ **Denying seller price action.**
      - Buyer's resale costs are lower: Cost of breach is minimized by giving the buyer the responsibility to resell.
        - ◆ **Granting the seller a price action.**
    - 2-709(1)'s conditions are proxies for when the seller's resale costs > buyer's resale costs
      - (1) Buyer as accepted the goods → Buyer is in possession of the goods. Proximity gives the B an advantage in resale. Seller might not operate a secondary market for goods.
      - (2) Goods are damaged or destroyed within a reasonably time frame after the risk of loss has passed to the buyer → Seller has no advantage in reselling them
      - (3) Seller is unable to resell the goods at a reasonable price → Seller has no advantage in reselling
  - *(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.*
  - *(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.*
- **Potential Issues with Action for Price**
  - **Questions of Acceptance/Rejection & Reasonableness of Resale**

- **Granvia Trading** → Plaintiff seller sold winter coats to defendant buyer. K price was \$316k (not custom or specialized goods). S sent email to B, but B never responded or paid for the goods. Goods being stored by someone else for \$7k. Market value was \$317k.
  - Seller's arguments: Can recover under 2-709(1) because either
    - ♦ (1) Buyer accepted the goods because he failed to make an effective rejection through lack of notice OR
    - ♦ (2) Seller made reasonable yet unsuccessful efforts to resell coats.
  - Buyer's arguments: Transaction falls under 2-708 & that seller suffered no damages because market price > contract price
  - **Defendant's Rejection or Acceptance of Goods**
    - ♦ Acceptance → 2-709(1)
    - ♦ Rejection → 2-708
    - ♦ Consider the following:
      - 2-606(1)(b) – buyer accepts goods when he makes a failed rejection (but such acceptance doesn't occur until buyer has had reasonable opportunity to inspect)
      - 2-602(1) – rejection must be within reasonable time after delivery or tender.
      - 2-602(2)(a) - Rejection is ineffective unless buyer seasonably notifies the seller
      - 2-602(1) – For a communication to serve as an effective rejection, it must be explicit and unequivocal.
        - “mere complaint” not enough for notice of rejection
        - Even when there has been some communication, this doesn't guarantee that such communication will serve as notice for purposes of effective rejection.
  - **Defendant's Efforts to Resell the Goods**
    - Seller's argues he made some efforts to resell (at a discount) to no avail, but buyer argues that seller's efforts were cursory & therefore not reasonable.
- **Can the buyer's wrongful revocation if its acceptance deprive the seller of a price action? Conflicting info.**
  - Because revocation operates as rejection, the seller cannot recover for price action under 2-709(1)(a).
    - 2-608(1) – Buyer may revoke acceptance if nonconformity of goods substantially impairs value to him. Revocation operates as rejection.
    - 2-607(2) – A rejection is inconsistent with an acceptance.
  - **Problem:** when goods conform to the K or the nonconformity doesn't substantially impair their value to the buyer but the buyer nonetheless tries to revoke acceptance.
    - 2-608(1) – Not allowed.
      - ♦ Thus, even procedurally proper revocation may not be effective to operate as a rejection.
    - Thus, wrongful revocation remains acceptance and the seller is entitled to the price under 2-709(1)(a)
  - BUT → 2-709(3) seller is entitled to damages if it is not entitled to the price as against the buyer who wrongfully rejects or revokes acceptance of the goods.
    - Suggests that seller might not have a price action even under 2-709(1) as against buyer who wrongfully revokes.
    - Conflict between 2-608(1) and 2-709(3)
- **Seller's Duty to “Mitigate” Damages**
  - Duty only applies when the seller tries to recover the price under 709(1)(b).
    - Allows price action if seller is (1) unable to resell at reasonable price OR (2) demonstrates that doing so would be unavailing.
  - If seller can mitigate by reselling at reasonable price (with reasonable effort) it can't recover under 709(1)(b).

- Seller must dispose of the goods and recover damages.
- **Policy:** Seller has presumptive advantage if he can make a reasonable resale. Denying seller a price action here minimizes the buyer's damage bill.
- 2-709(1)(a) does not require the seller to mitigate when the buyer has accepted goods.
  - Seller can maintain a price action for accepted goods even if it would dispose of them for reasonable price with reasonable effort.
  - **Policy:** Buyer that accepted usually has possession and in better position than seller to dispose of goods.
- **709(1)(b)'s Standard is One of Unsaleability**
  - Seller must be unable after reasonable effort to resell the goods at reasonable price or circumstances must reasonably indicate that doing so will be unavailing.
  - **Vague and hard to apply:** there have been random interpretations.
    - **Granvia:** Found that the seller's incomplete documentation failed to show that it had made reasonable efforts to dispose of the goods.
    - **Other cases:** Results turn on whether the seller showed it was unable to obtain a reasonable price for rejected goods.

#### Seller's Remedies: **Resale and Market Price Measures**

##### - **Calculation of Damages**

- **2-703** allows seller to measure damages in the below two ways
- **TWO OPTIONS:** If wrongful rejection, seller can measure damages under either **RESALE 2-706** or **MARKET 2-708(1) MEASURES**
  - They give the same recovery when resale and market price remain the same
  - BUT → resale and market price can differ when resale occurs after the time and place for tender of goods.
  - Costly – Seller will choose method with lowest cost
    - **Contract Resale Price Difference →**
      - ♦ Seller need not prove market price.
      - ♦ Seller can set damages by making a resale
      - ♦ Seller must prove that its resale was commercially reasonable and that it gave the buyer proper notice. (proving this can also be hard)
    - **Contract Market Price Difference → Costs**
      - ♦ Seller must prove the market price of the goods at time and place of tender. If volatile, or the market is thin the costs of proving the market price may be high.
- **OPTION #1 2-706 - Seller's Resale Including Contract for Resale.**
- *(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.*
  - Seller recovers damages equal to the contract-resale difference  $D=K-R$
  - **Three conditions:**
    - (1) Resale must be done in good faith and in a commercially reasonable manner (either public or private (see **(2)** below)
    - (2) Seller must notify the buyer (see **(3)** and **(4)** below)
    - (3) Resale contract must be "reasonably identified" to the breached contract
      - ♦ Requires that the resold goods be identified as the goods referred to by the breached contract.
- *(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.*

- Although resold goods need not be the same goods as covered by the breached contract, they must be “reasonably identifiable”
- **Apex Oil: “reasonably identifiable”**
  - Fungible goods resold pursuant to 2-706 must be goods identified to the K, but need not always be those originally identified to the K. **At least where fungible goods are concerned, identification is not always an irrevocable act and does not foreclose the possibility of substitution.**
  - BUT → resale must be reasonably identified as referring to the broken K and every aspect of the sale including method, manner, time, and place must be commercially reasonable
  - “Reasonable” depends on whether the market value of and the price received for the resold goods “accurately reflects the market value of the goods which are subject to the contract.”
  - Conclusion: Apex’s delay of 6 weeks between breach and resale was unreasonable. Long delay + apparent volatility of the market.
- *(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.*
  - If private, notice must state what the seller intends to resell
- *(4) Where the resale is at public sale*
  - *(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and*
  - *(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and*
  - *(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and*
    - If public, where practicable, the notice must give the time and place of resale
  - *(d) the seller may buy.*
- *(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.*
- *(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2-711).*
- **OPTION #2 2-708(1) Seller's Damages for Non-acceptance or Repudiation.**
- *(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), 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 (Section 2-710), but less expenses saved in consequence of the buyer's breach.*
  - Seller can recover the difference between the contract price and the market price of the good at the time and place for tender.
  - Market price → sometimes difficult or impossible to determine.
    - **2-723(2)** – allows market price to be the one prevailing within a reasonable time frame before or after the time and place for tender to suffice.
    - What if buyer repudiates K and case comes to trial before time of tender?
      - ♦ **2-723(1)** – deems the relevant market price to be the one at the time the seller learned of the repudiation.
- **Incidental Expenses VS. Consequential Damages**
  - **Incidental Damages - 2-710** – “charges, expenses, or commissions incurred” suggests that they are out of pocket expenses expended as a result of breach.
  - **Consequential Damages** – Opportunity costs such as discounts, tax benefits, or investment returns lost on breach.

- 2-706 and 2-708(1) both allow the seller to recover **incidental damages (YES)** in addition to contract-resale or contract-market price damages
  - **Consequential damages → (NO) NOT** a seller's remedy. between incidental expenses and consequential damages.
    - ♦ **Problem/Policy:** Not allowing this undercompensates seller. If damages don't reflect opportunity costs, then the expectation interest isn't fully protected.
- **Election of Remedies**
  - May a seller who makes a proper resale under 2-706 (contract-resale price) choose to measure damages under 2-708(1) (contract-market price)?
    - Question arises when market price at time of tender is lower than the price at which seller resold the goods.
      - Contract-market price difference > contract-resale price difference
  - UCC isn't clear on whether you can elect your remedy freely or it depends on whether you choose to resell or not.

#### Seller's Damages: **Damages Measured by Lost Profits**

- Sometimes seller can't use 2-706(1) or 2-708(1) to recover for lost profits.
- Both circumstances below, 2-706(1) and 2-708(1) formulas are inadequate because they don't give the seller the lost profit.
  - Assume market price on tender of delivery and resale price remained the same as the contract price. Then, the formulas would have no damages! Nonetheless, the seller still has lost profit on the breached contract.
  - **Situation #1: Uncompleted goods**
    - Seller decides not to complete production or acquire the goods from its supplier after the buyer breaches.
    - Because seller doesn't have the goods in deliverable form, it can't resell them or measure their value by their market price. (can't do contract-resale or contract-market price calculation for damages)
    - 2-706 Contract-resale ( $D=K-R$ ) and 2-708 Contract-market price ( $D=K-M$ ) are inapplicable
  - **Situation #2: Lost volume**
    - Seller completes or acquires the goods and resells them after the buyer breaches, but had the buyer not breached seller would have sold goods to this second buyer too. Sale to second buyer is an additional sale not a substitute for the breached contract.
    - Because the buyer breached, seller makes only one sale and one profit.
    - 2-706 Contract-resale
      - $D=K-R$
      - $O=10-10$
    - 2-708 Contract-market price
      - $D=K-M$
      - $O=10-10$
  - **2-708 Seller's Damages for Non-Acceptance and Repudiation**
    - *(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 (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.*
    - When 2-708(1) formula is inadequate, the seller can recover its lost profit according to the formula described in 2-708(2)
    - **IMPORTANT:** Applies only when the market-price formula is inadequate, but it isn't much of a stretch to make it applicable when resale formula is also inadequate.
- **Calculating Lost Profit**
  - **2-708 Seller's Damages for Non-Acceptance and Repudiation**
    - How are lost profits measured?

- Seller's Profit = contract price – variable costs
- Variable costs = cost of performance, that wouldn't otherwise happen – not fixed costs
- Fixed costs = labor, taxes, etc.
  - ♦ Don't affect the seller's economic profit
- **Formula:** (Profit) + (Incidental Expenses) + (Costs Incurred) – (Payments) – (Proceeds of Resale)
- When is a seller entitled to recover lost profits under this subsection?
- **2-708(2)** defines seller's damages as *"the profit (including reasonable overhead) ... together with incidental damages ... due allowance for costs reasonably incurred and due credit for payment or proceeds of resale"*
  - Doesn't give seller damages when the seller completes production of the goods and resells them for a price equal to the K price.
- **BUT → Works for UNCOMPLETED GOODS**
  - (1) Components Seller → partially performs but reasonably does not complete performance, its costs incurred will not equal its variable costs and the proceeds of resale are not equal to the contract price.
  - (2) Jobber → Middleman who acquires from a supplier the goods it has contracted to sell. If the seller doesn't acquire the goods after the buyer's breach, it incurs no costs and obtains no proceeds from reselling the goods.
- **Lost Volume Seller →** If the buyer hadn't breached the seller would have made two sales and enjoyed two profits. Courts take two different views:
  - **One view:** Seller has lost volumes if it has the capacity to make two sales and in fact made a sale to a 3<sup>rd</sup> party after the buyer breached.
    - Consider the second sale an additional sale, not a substitute sale for the breached good.
    - Reason that if seller in fact made a second sale and had the capacity to make two sales, the second sale would have been made regardless of buyer's breach. Seller lost volume because of breach.
  - **Another view: (Diasonics)** It isn't enough that the seller is operating below full capacity. Requirement that seller establish 2 things:
    - Requirement: (1) Must prove it could have made a **profit** for the second sale AND (2) that it probably would have made the second sale.
    - Seller has lost volume if it could profitably make two sales and in fact made a sale to a 3<sup>rd</sup> party after buyer's breach.
    - Seller must establish that the marginal costs of making second sale < or = to the contract price.

#### Under the CISG

- **Article 61** – Refers to seller's remedies
- **Article 81** – Restitution, an additional remedy not mentioned in **Article 61** (also available to buyer under **Article 44**)
- Peculiar to CISG → **Avoidance Channels Access to Remedies:** Distinction between remedies that are available only when the contract is avoided and remedies available only when the contract is not avoided.
  - **Avoidance** puts end to contract for breach and the breach must be either (1) fundamental or (2) performance doesn't occur within the Nachfrist period
  - **Damages that require seller's avoidance** = **Article 76** market price, **Article 75** substitute transaction, **Article 81(2)** restitution
  - **Damages that don't require seller's avoidance** = (1) specific relief, (2) price reduction
  - **Damages available regardless of seller's avoidance** = general damages under **Article 74**
- **Recovery of the Price**
  - Seller's right to specific performance is the right to the contract price from the buyer
  - **Article 62** – Entitles seller to the contract price **subject to two limitations:**
    - (1) **Seller hasn't resorted to an inconsistent remedy:** Avoidance is an inconsistent remedy.
    - (2) **Domestic laws:** **Article 28** provides that courts are not bound to order specific performance unless the court would do so under its own law for similar sales contracts not governed by the CISG. Forum court has discretion to order the buyer to pay the price, but **Article 28** doesn't require it to do so.

- **Reclamation and Stoppage Rights**
  - o **Reclamation/Restitution Article 81(2)** – gives party that has avoided the contract the right to obtain restitution,
    - Seller – most likely case for avoidance is buyer's failure to pay the contract price, and the claim for restitution is for the return of the goods it delivered.
      - Here, seller isn't limited to just reclaiming the contract price. He can also get the goods!
    - **Only against buyer** – Article 81(2) says nothing about reclaiming from third parties. CISG doesn't determine whether seller's reclamation right is cut off by the buyer's sale of the goods to a good faith purchaser. Also doesn't determine how this right survives bankruptcy.
  - o **Stoppage Rights/Prospective breach by the buyer Article 71(1)** – gives seller control of the goods when there is a prospective breach by the buyer.
    - Seller can suspend its own performance if it *"becomes apparent" that the buyer will not perform a substantial part of its obligations, as a result of serious deficiency in its ability to perform.*
    - **Power to prevent carrier/bailee from handing goods to buyer** if the goods are out of the seller's control.
      - Regardless of whether buyer holds document of title that is duly negotiated (broader right than under UCC)
      - **Little practical use because of domestic laws:** Operates **only against buyer** because carriage contracts are usually covered by domestic transport law. Carrier/bailee doesn't necessarily have to take seller's order to stop delivery.
- **Article 74's General Damages Rule – Measures damages regardless of avoidance**
  - o **Article 61(b)** – Allows the seller to recover damages if the buyer *"fails to perform any of his obligations"* under the contract. Injured party need not rely on market price or substitute transaction calculations provided by Article 75 or Article 76.
  - o Damages = all loss resulting from breach, not just lost profits (goal = expectation)
    - All loss = lost profits, incidental damages, consequential damages
    - No punitive damages
    - Formula is hard to apply because there is **no formula for lost profits**
    - **Are attorney's fees included?** Unclear
      - **For:** Article 74's principle of full compensation allows it because litigation expenses are a foreseeable loss resulting from breach.
      - **Against:** Litigation expenses are the result of litigation to recover damages for breach, not themselves a result of the breach.
  - **Foreseeability limitations**

## Buyer's Damages and Other Remedies

- Most are close counterparts to seller's remedies **EXCEPT** → availability of **consequential damages**
  - o Can be recovered by the buyer, but not the seller.
- Remedies divided on **whether or not the buyer has accepted goods**.
  - o **Accepted** → 2-714
  - o **Rejected or Revoked acceptance** → 2-712 or 2-713
  - o **Seller's Breach** (Buyer didn't accept or reject) → Buyer can recover the goods under prescribed conditions.
    - If conditions aren't met → buyer can recover money damages under 2-712 or 2-713

## Recovery of Goods

- Buyer can **recover** on **3 different bases**:
  - o **(1) Specific performance** – when goods are **unique OR inability to cover/replaceability/fungible**
    - Available if seller has breached by not delivering.
    - **2-716** – specific performance *may be decreed where the goods are unique or in other proper circumstances*.

- **BUT** → specific performance is unavailable when buyer's legal remedies are adequate to compensate loss from breach. **Comment 1 to 2-716.**
- **in other proper circumstances**: Permits SP when goods are **fungible**. (more liberal attitude)
  - ♦ **Comment 2 to 2-716: inability to cover**: if buyer can't cover by making substitute purchase, even ordinary goods are irreplaceable.
  - ♦ **Replaceability of ordinary goods**: a matter of degree
    - Irreplaceable: when the price of a substitute purchase is extremely high
    - Replaceable: when the substitute price can be made at a price modestly above contract.
- **(2) Replevin & (3) Replevin after payment of at least the contract price**
  - **2-716(3)**: Provides alternative to SP – Buyer can **replevy the goods** (even if buyer doesn't have title to the goods) **IF**
    - (1) they are identified under the contract **AND**
    - (2) buyer cannot reasonably cover
  - **Odd** → **2-716(1)** already allows SP when buyer can't cover under "*other proper circumstances*" - **Superfluous.**
  - **Odd** → **2-716(3)** more restrictive than **2-716(1)** because it requires that the goods be identified under the contract.
  - **Some benefits** → This is non-discretionary as opposed to **2-716(1)**. Buyer can recover when the conditions are met. Court doesn't have the discretion to deny this remedy.
- **Bander v. Grossman**: Buyer of 1965 Aston Martin from seller sports car dealer. Seller sold to someone else when price rose. Buyer sued for monetary SP two years after.
  - **Holding**: Although the car is unique, delay makes specific performance an inappropriate remedy.
  - **Rule**: If buyer is delayed in requesting SP, then the court is less likely to rule in his favor. Because market values and the condition of goods may change quickly, a harmed party must seek specific performance immediately after breach.
    - Otherwise, it may appear opportunistic, waiting to sue when market price is highest.
    - Aston Martin was **unique** good under **2-716(1)**
    - Giving Bander SP would put him in a better position than he would under either (1) performance of the contract AND (2) if court had awarded SP immediately after trial. **UCC wants to put buyer in the same position, not better.**
- **Monetary specific performance?**
  - **2-716(1)** doesn't say whether, at buyer's request, a court may require the breaching seller to turn over the proceeds of sale when the contract goods are sold to another buyer.
  - If granted, monetary SP gives buyer the seller's gain from the sale (which might be more than buyer's loss during seller's breach).
- **Is specific performance an efficient remedy?**
  - **Efficient breach**: seller's breach of contract is efficient if gains of breach > buyer's loss from not receiving goods.
  - Whether SP is efficient depends on whether the **risk of inefficient nonperformance is > than the risk of inefficient performance**.
    - Comparative size of these risks is an empirical matter and there's almost no evidence.
- **Case law & SP clauses** – tends to refuse to give automatic effect to contractual provisions that call for specific performance.

## Cover and Market Price Measures of Damages

- **The Measures**

- Buyer that **rejected or revoked** acceptance has two choices (below) and buyer chooses the remedy depending on the cost of proving the respective elements.
  - (1) **Substitute purchase/Cover transaction** and measure damages under **2-712(2)** as the difference between the cover price and the contract price. (Damages = contract price – cover price): **Requirements:**
    - **2-712(1)** *without unreasonable delay* - Cover transaction must be made within reasonable time after seller's breach.
    - Cover must be by way of substitute purchase
      - ◆ Purchase must be connected in some way with the breached contract.
      - ◆ **Policy:** Prevents the buyer from making a series of purchases and selecting the highest price as the cover price.
    - Cover must be a reasonable substitute for contract goods.
      - ◆ Don't need to be identical, but at least comparable
    - **NOTE** → If buyer fails to meet above requirements, he must measure damages under market price **2-713(1)**
  - (2) **Market Price - Abstain from making substitute purchase** and measure damages under **2-713(1)** as the difference between the market price and the contract price. (Damages = contract price – market price).
    - **Market Price** = relevant market price at the time buyer learned of the breach.
      - ◆ "*learned of the breach*" – which one?
        - **Option 1:** Time of performance/time of tender
          - **Policy:** We create perverse incentive for buyer to gamble with seller's money. Buyer can sit back and play the market between repudiation and seller and see what happens. If market price increases, buyer can get difference
        - **Option 2:** Time of unequivocal repudiation
          - **Policy:** Gives buyer incentive to act fast. Places on the buyer the risk of market movements that buyer can't predict. Buyer will quickly go into market and enter into new contract.
      - ◆ Can be problematic when seller repudiates contract before performance is due.
      - ◆ **If anticipatory repudiation** → **2-610(b)** allows buyer to measure damages by **2-713(1)**'s formula.
        - **Market price:** last point in time within which the buyer could cover.
- **Self-Cover under 2-712(1)?** Can the buyer cover by producing substitute goods itself or by substituting goods it has on inventory?
  - **Some case law:** Yes.
  - **Most case law:** No. Arguments:
    - **2-712(2)** requires a "purchase"
    - Price of goods the buyer uses to self-cover is likely to be = market price at the time buyer learned of breach and **2-713(1)** would be adequate and give the same measure of damages.
- **Lost Profits as a Limit on Market Price Damages**
  - **2-713(1):** Can the buyer rely on the market price-contract difference to measure its damages when the difference gives it more than its lost profits from the seller's breach?
    - Illustration: S agrees to sell to B1 good for \$10. B1 agrees to sell good to B2 for \$12 with the right to cancel the K if S fails to deliver good to B1. Market price of good increases from \$10 to \$15 and S refuses delivery. B1 cancels K with B2 and sues S to recover damages for

breach. S's breach caused lost profit of \$2, but market price formula gives B1 damages of \$5. Can buyer rely on 2-713(1) when damages exceed lost profits?

- **Different answers available: Courts are divided:**

- **Yes:** 2-713(1) doesn't say that the formula is inapplicable to the extent that it puts buyer in a better position. (compare to seller's remedy in 2-708)
  - ♦ Because the market price calculation doesn't consider the actual loss to the buyer from seller's breach, we get "**statutory liquidated damages**"
  - ♦ **TexPar Energy:** Texpar's actual loss was approximately \$236,000, which includes the \$45,000 in lost profit and the \$191,000 Texpar paid to Starry. However, applying the market-price calculation under 2-713 results in \$386,370 in market damages. Although Texpar's market damages are much higher than Texpar's actual loss, 2-713 states that Texpar is entitled to market damages. Murphy has provided no justification for deviating from 2-713's rule. Accordingly, the district court's judgment is affirmed.
- **No:** 1-305(a) says that UCC's remedies are to be liberally administered to the end that the injured party be put in the same position as if the breaching party had performed.
  - ♦ Liberal application of 2-713(1) according to most courts limits the buyer to the lost profits (\$2)
    - **NHF Hog Marketing:** NHF supposed to sell hogs to Swif at a price of X. K is to be fulfilled months later. At same time NHF enters into K with Swif, NHF enters into contract with other seller PM at market price of X-\$0.33. NHF will resell the hogs later and will make a profit of \$0.33 per hog in the contract with Swif. Price for hogs increases to 2X and PM says they won't deliver at X-\$0.33. Only thing NHF is losing is the lost profit and Swif offers to give the lost profit to NHF. Paying lost profit places NHF in same position. NHF says no, they don't just want lost profit, they want damages measured by 2-713(1) which is much more (better position).
      - **Holding:** 1-305 is the overriding objective so only thing you need to pay is lost profits.
    - **Policy:** Deter deliberate breaches. This isn't an inefficient breach.
    - **BUT** → creates a windfall for the breaching seller.
    - When NHF entered into this K, it had 2 ways of fulfilling the K. Buy at the spot when tender was due or enter into the K with PM (and that's what it did). NHF had fixed its loss because they agreed to resell at same price they were buying + commission. Chose to offload the risk of market price increase to PM. It could have taken the market risk, but it didn't. If we only give lost profits, PM would be the only one that gets the benefit that NHF purchased. **Strong case to be made that court got it wrong when limiting damages (didn't consider inherent risk allocation in transaction to see that buyer has bargained for the ability to get 2-713 damages.**

Under the CISG

- **Specific Performance.** Article 46 – Buyer's right to specific performance is broad.
  - (1) *The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.* (super broad)
  - **BUT** → Article 28 cuts back on this broad right → can look to domestic law. If Article 28 applies, the court MAY deny to give SP unless it would do so under its own law.

- *If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a **court is not bound** to enter a judgement for specific performance unless the court would do so under its own law in respect of **similar contracts** of sale not governed by this Convention.*
  - **similar contract** – how broadly do we define this? **Two options.**
    - ♦ Contract for goods generally
    - ♦ Goods are unique and there's difficulty to cover
      - Example: Gutenberg bible
      - **BUT** maybe broader sense – internationality is a signal that goods are unique/difficult to cover.
        - Maybe mere fact that it's an international transaction indicates that there's difficulty of cover.
        - **Counterargument:** In a global economy this doesn't apply. Maybe you can obtain goods more cheaply elsewhere. Then international transactions aren't evidence for inability to cover.

#### - Buyer's Remedies

- **Article 74** - Sets the standard and principle: **full compensation.**
  - **Consequential damages:** Includes lost profits of downstream contracts. Buyer would have to prove the damages with some degree of certainty (burden of proof).
- When contract is **avoided**:
  - **Avoidance + Repurchase:** **Article 75** - *If the contract is avoided and if, in a **reasonable manner and within a reasonable time** after avoidance, the **buyer has bought goods in replacement** or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.*
    - Difference between contract price and repurchase price (Damages = contract price – repurchase price)
      - ♦ Very similar to **2-712** – ask same questions
    - **Reasonable manner:**
      - ♦ Did buyer wait too long to avoid?
      - ♦ Did buyer wait too long to repurchase?
    - **Goods must be bought in substitution/replacement:**
      - ♦ In replacement doesn't necessarily mean identical.
      - ♦ If buyer purchased at higher than contract price and market price, was it reasonable to do that?
        - Hypo: Wa
    - **NOTE** → If buyer doesn't meet the requirements of **Article 75**, he can turn for damages under **Article 76**.

10/1: K for 100 computers @ \$3000 p/computer between San Francisco seller and Toronto buyer; delivery in Toronto 11/1 by seller's trucks.

11/1: Breach by seller who fails to deliver

Toronto P = \$3500

SF P = \$3450

11/5: Buyer avoids contract

Toronto P = \$3700

SF P = \$3650

11/9: Buyer purchases computers @ \$4000

Toronto P = \$3900

SF P = \$3850

- **Just Avoidance: Article 76: Market price. MUST REWATCH SECOND HALF OF LAST CLASS**

10/1: K for 100 computers @ \$3000 p/computer between San Francisco seller and Toronto buyer; delivery in Toronto 11/1 by independent trucker under shipment contract.

10/20: Seller delivers computers to trucker

Toronto P = \$3200

SF P = \$3150

11/1: Computers arrive Toronto

Toronto P = \$3500

SF P = \$3450

11/3: Buyer makes timely inspection and avoids contract

Toronto P = \$3600

SF P = \$3550

- (1) *If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the **current price at the time of avoidance** as well as any further damages recoverable under article 74.*
  - **current price at the time of avoidance:** Buyer has a period of time between time of performance and time of avoidance to see what is going on in the market.
    - ♦ Contract price (\$3000) – market price at time and place of avoidance (\$3500)
  - **Article 47 – “Additional Period”** – Buyer can exercise this to allow seller to perform. Moves avoidance decision back.
    - ♦ But what if the price increases after the additional period to \$3900
    - ♦ **Policy:** Similar to seller, there's a perverse incentive here.

- ♦ **BUT** → *If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.*
- (2) *For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.*
  - When did buyer **take over** the goods? It's a shipment contract.
    - ♦ When seller has delivered goods and goods turn out to be defective and buyer has opportunity to inspect.
- **Article 31** – if the seller isn't bound to deliver at a particular place, his obligation to deliver consists (a) in shipment contract – in handing the goods over to the first carrier for transmission to the buyer.

10/1: K for 100 computers @ \$3000 p/computer between San Francisco seller and Toronto buyer; delivery in Toronto 11/1 by independent trucker under shipment contract.

10/20: Seller delivers computers to trucker

Toronto P = \$3200

SF P = \$3150

11/1: Computers arrive Toronto

Toronto P = \$3500

SF P = \$3450

11/3: Buyer makes timely inspection and avoids contract

Toronto P = \$3600

SF P = \$3550

is English (United States) 1729

10/1: K for 100 computers @ \$3000 p/computer between San Francisco seller and Toronto buyer; delivery in Toronto 11/1 by seller's trucks.

11/1: Breach by seller who fails to deliver

Toronto P = \$3500

SF P = \$3450

Buyer exercises Article 47 "additional period" to 11/9

11/9: No performance by seller; buyer avoids

Toronto P = \$3900

- *If you have made a resale and repurchase, you can't take advantage of Article 76.*

- **Article 50** - *If the goods do not conform with the contract and whether or not the price has already been paid, 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. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.*

3/15 – K for commodity (coal) of specified grade (low sulphur) @ \$10 million.

6/30 – Buyer receives coal of lower grade (high sulphur) than contracted for.

Value on 6/30 of coal as contracted for would have been \$12 million.

Value on 6/30 of coal as received was \$8 million.

Buyer retains coal

Article 74 damages = sum equal to the loss

Article 50 remedy = reduction of the price to reflect percentage of value

- If buyer has retained the coal, buyer cannot avoid the contract. This means that buyer can't use **Article 75** or **Article 76**.
  - **Article 74**: sum equal to the loss. \$4 million (preserves benefit of the bargain and places buyer in same situation. Difference b/w value of goods as promised and value of the goods as delivered. \$10 million - \$4 million = buyer pays \$6 million.
    - Buyer's benefit is \$2 million.
  - **Article 50: Price reduction alternative**. Ability to reduce the price.
    - Not contingent on avoidance (so no need for fundamental breach).
    - **Note**: This is not a damage, it's a remedy. Therefore, limitations on damages don't necessarily apply.
    - Reduced Price  $\rightarrow x/KP = \text{value at time of delivery of delivered goods} / \text{value at the time of delivery of conforming goods}$ .
      - \$8 million / \$12 million = 2/3
      - What is 2/3 of \$10 million? \$6.6 million. (this is more than **Article 74**)
      - \$8 million - \$6.6 million = 1.4 million (buyer's benefit is less than buyer's benefit under **Article 74**)
- Does this mean that Article 50 is useless? No. See other example of **DECREASING MARKET**. (see image below)
  - **Article 74** – difference between coal as promised – coal as delivered = \$8 million - \$6 million. = \$2 million in damages.
    - Here buyer isn't getting out of bad deal because after deducting **\$2 million damages** from \$10 million paid, he's still paying \$8 million for goods worth \$6 million. He ends up in same position as if there was performance = he's in a bad deal.
    - Buyer ends up paying \$8 million for goods worth \$6 million – this is a \$2 million loss.
  - **Article 50** – Reduced Price  $\rightarrow x/KP = \text{value at time of delivery of delivered goods} / \text{value at the time of delivery of conforming goods}$ .

- \$6 million / \$8 million =  $\frac{3}{4}$
- $\frac{3}{4}$  of \$10 million = \$7.5 million → paying this for coal that is worth \$6 million. The loss is \$1.5 million. (loss is less than in Article 74)
- In a decreasing market, Article 50 is better.

3/15 – K for commodity (coal) of specified grade (low sulphur) @ \$10 million.

6/30 – Buyer receives coal of lower grade (high sulphur) than contracted for.

Value on 6/30 of coal as contracted for would have been \$8 million.

Value on 6/30 of coal as received was \$6 million.

Buyer retains coal