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Outline of Buyer-Seller Rights and Remedies in Default and Breach Situations Under the UCC

Stanley V. Kinyon*

The following was prepared by Professor Kinyon for use by his students in the Commercial Law series at the University of Minnesota Law School. Because it proved so successful, the Review sought and received permission to print it herein. It is believed that this summary and outline will also provide an extremely useful device for the practicing lawyer faced with such remedy problems under the Code.

I. INTRODUCTION

In any alleged breach situation in contracts for the sale of goods—where one party claims breach by the other and seeks a remedy as a result—there are three distinct basic issues:

- 1) Has there been non-performance or default *in fact*? This involves interpretation of the contract and answering such questions as, what was required? Has the requirement been fulfilled or tendered?
- 2) If there has been non-performance or default in fact, *does it constitute a breach*? That is, was there any excuse or justification for non-performance?
- 3) If there is a breach, *what remedy or remedies are available* to the aggrieved party?

Contracts for sale involve both goods-performance and payment-performance. While goods-performance is primarily Seller's responsibility and payment-performance primarily that of the Buyer, each involves some obligation on both parties. For example, there is the obligation of cooperation,¹ the obligation to accept goods or payment upon proper tender² and to present and attempt to collect checks received,³ the obligation of good

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1. UNIFORM COMMERCIAL CODE § 2-311. All references are to the 1962 Text and Comments Edition of the Uniform Commercial Code. In Minnesota the Code is in Chapter 336 of the 1967 Minnesota Statutes (§§ 336.1-101 thru 336.10-105).

2. §§ 2-301, 2-507(1), 2-511(1).

3. § 3-501(1) (b) & (c).

faith⁴ and the general contractual duty not to interfere with or prevent performance by the other party.⁵ Yet, in considering the numerous problems of non-performance, excuse, breach and remedy, it is very helpful to divide them into these two categories. Thus, the question of whether there has been default *in fact* is one that can be discussed only in terms of specific contractual arrangements, and is therefore beyond the scope of this summary. The various issues involving breach and remedy will be considered in the framework of *payment-performance*, primarily defaults by Buyer, and *goods-performance*, primarily defaults by Seller.

II. PAYMENT-PERFORMANCE

A. EXCUSABLE NON-PAYMENT OR DELAY

Just as tender of payment by Buyer is a condition to Seller's duty to tender and complete delivery of the goods or documents unless the contract provides for pre-payment or deferred-payment,⁶ so proper tender of conforming goods or documents is a condition to Buyer's duty to tender and complete payment unless otherwise agreed.⁷ Thus, Buyer's failure or refusal to pay where justified—by Seller's failure to tender the goods or documents as contracted or by Seller's rejectable tender⁸—is *not* a *breach* by Buyer, does not subject Buyer to liability and does not entitle Seller to any remedies. Also, *delay* in payment may be excused where Seller unexpectedly demands legal tender⁹ or, presumably, where the delay is caused by factors beyond Buyer's control such as tornado, flood, or hurricane.¹⁰

B. WRONGFUL FAILURE OR REFUSAL TO PAY BEFORE ACCEPTANCE OF GOODS

Where Buyer wrongfully fails to make an advance payment, repudiates the contract before tender of goods, or fails or refuses without excuse to accept¹¹ and pay for conforming goods properly tendered or delivered, Buyer is in breach of both his pay-

4. § 1-203.

5. 6 A. CORBIN, *CONTRACTS* § 1264 (1962); 5 S. WILLISTON, *CONTRACTS* § 677 (3d ed. 1961).

6. § 2-511(1).

7. § 2-507(1).

8. § 2-601(a).

9. § 2-511(2).

10. *Compare* § 2-615.

11. § 2-606.

ment and goods obligations. However, except in limited situations,¹² such breach does *not* entitle Seller to force the goods on Buyer and recover the *price*. In other words, Seller cannot ordinarily get specific performance, but must settle for damages for breach.¹³

C. DISHONOR OF CHECK GIVEN IN PAYMENT

Payment-by-check—whether in advance or upon receipt of goods or documents, or after receipt and acceptance in the credit sale—is conditional payment.¹⁴ Thus, if the check is dishonored¹⁵ there is a breach of Buyer's payment obligation and he is liable to its holder under negotiable instruments law for the amount of the check;¹⁶ alternatively he is liable for breach of the contract of sale,¹⁷ if Seller holds or takes up the dishonored check.¹⁸ Also, if this was a cash sale with Buyer obtaining delivery of the goods or documents by giving the check, Seller can elect to rescind the transaction and recover the goods from Buyer.¹⁹ However, if Buyer received the goods on credit, failure of his subsequent payment through dishonor of his check merely subjects him to liability on the check or, if Seller elects, for the *price*.²⁰

D. WRONGFUL FAILURE OR REFUSAL TO PAY AFTER ACCEPTANCE OF GOODS IN SALE-ON-CREDIT

After receipt and acceptance of goods in a sale-on-credit, Buyer becomes the owner of the goods and is obligated to pay Seller the *price* in accordance with the credit terms.²¹ If, because of defective goods, Buyer is entitled to revoke his acceptance²² or keep the goods and give Seller notice of defects which amount to breach of warranty or contract,²³ he may deduct the

12. § 2-709.

13. These remedies are outlined in § 2-703 and elaborated upon in §§ 2-704 to 2-708 and 2-710. Damages in this case would basically come under §§ 2-706 or 2-708 plus 2-710.

14. § 2-511(3). Exceptions are to be found in § 3-802(1)(a).

15. § 3-507(1).

16. §§ 3-413(2), 3-414.

17. §§ 2-703 through 2-710.

18. § 3-802(1)(b).

19. *See, e.g., J.I. Case Threshing Mach. Co. v. Bargabos*, 143 Minn. 8, 172 N.W. 882 (1919). *See also* § 2-511(3).

20. § 2-709(1)(a).

21. §§ 2-607(1), (2), 2-709(1)(a).

22. § 2-608.

23. § 2-507(3).

damages from the price.²⁴ Absent such excuses, however, Buyer's failure to pay is a breach and Seller is entitled to recover the price.²⁵ If the transaction was a straight sale on open-account or other unsecured credit, Seller has no rights with respect to the goods except in the case where Buyer misrepresented his solvency.²⁶ Absent such misrepresentation, Buyer has become full owner of the goods and Seller is merely a general creditor for the price without goods-rights, except as he may be able to acquire them by suing for the price and then attaching or levying on the goods. This, of course, will not help Seller if in the meantime the goods have been sold, mortgaged or pledged by Buyer or if Buyer goes bankrupt within four months of such attachment or levy.

It is because of Seller's limited rights as general creditor in the simple sale-on-credit that he often insists on a security agreement²⁷ by which he retains a security interest²⁸ and goods-rights for his protection in the event of Buyer's default in payment of the price. The various aspects of such security are dealt with in Article Nine of the Code.

III. GOODS-PERFORMANCE

A. TYPES OF NON-PERFORMANCE AND BREACH

(1) Either party, after the contract is made but before performance is due, may repudiate by indicating to the other an intention not to perform. Such "anticipatory repudiation"²⁹ may give the other party the option to proceed as if there were a present breach.

(2) Seller may be guilty of a present breach by wholly failing to tender the goods or documents; by failing to tender or ship at the time or place or in the manner specified in the contract; by tendering or delivering non-conforming goods or documents in breach of description or warranty; or by failing to perform a subsequent obligation to repair, replace, or take back.

(3) Buyer may be guilty of a present breach by preventing proper tender by Seller,³⁰ by rejecting properly tendered and

24. § 2-717.

25. § 2-709(1) (a).

26. § 2-702(2).

27. § 9-105(1) (h).

28. § 1-201(37).

29. §§ 2-610, 2-611.

30. Examples of such interference with proper tender might be failure to give shipping instructions or furnish transportation or other means of receiving the goods. See §§ 2-319(3), 2-503(1) (b).

conforming goods, or by wrongfully revoking his acceptance. Also, Buyer may fail to fulfill a condition of his goods-rights by failing to give proper notice of defects in tender or goods.³¹ It should be noted that a breach by Buyer of his goods-obligations is often accompanied by a breach in his *payment* obligations, since he fails "to accept and pay in accordance with the contract."³²

(4) Seller's insolvency may result in business failure, receivership, or bankruptcy before he has completed his goods-obligations, thus causing a breach. Buyer's cause of action for damages³³ in such case is merely a general-creditor claim, but if Buyer has already paid part or all of the price, he may have goods-rights³⁴ superior to the rights of other creditors. And, if title has already passed to him,³⁵ Buyer can keep the goods and merely pay any balance due on the price, since the goods are no longer assets of the Seller.

B. EXCUSE FOR NON-PERFORMANCE OR DELAY IN GOODS-PERFORMANCE CAUSED BY EXTRINSIC EVENTS

(1) In contracts for specific goods and before risk of loss has passed to Buyer, accidental destruction or damage without fault will wholly or partly excuse Seller's failure to perform.³⁶

(2) Extrinsic interferences with manner or method of performance will justify alternative performance or delay.³⁷

(3) Failure of pre-supposed conditions—"frustration"—may excuse delay in performance or nonperformance under certain conditions.³⁸

C. REMEDIES FOR BREACH BY SELLER OR BUYER IN THEIR GOODS-PERFORMANCE OBLIGATIONS

Assuming that there is proof of breach by Seller or Buyer, the options and remedies available to the aggrieved party depend to a considerable extent upon the stage of performances at which the breach occurs. The following chart covers various types of Buyer and Seller breach at successive stages in performance, and the remedies available under applicable UCC provisions.

31. § 2-607(3) (a).

32. § 2-301.

33. §§ 2-711, 2-712, 2-713.

34. § 2-502.

35. § 2-401.

36. § 2-613.

37. § 2-614.

38. §§ 2-615, 2-616.

REMEDIES AND OPTIONS IN GOODS-PERFORMANCE

STAGE AT WHICH BREACH OCCURS	BREACH BY SELLER (<i>Buyer vs. Seller</i>)	BREACH BY BUYER (<i>Seller vs. Buyer</i>)
<p style="text-align: center;">BREACH BEFORE IDENTIFICATION IN CONTRACTS FOR FUTURE GOODS</p>	<p>Seller repudiates without ever identifying any goods to the contract, or obtaining or producing as required by the contract.</p> <ol style="list-style-type: none"> 1) Buyer has no goods-rights. §§ 2-711 (2) (a), 2-716 (3). 2) Buyer may be entitled to a decree of specific performance under § 2-716 (1) (2). See <i>Eastern Rolling Mill Co. v. Michlovitz</i>, 157 Md. 51, 145 A. 378 (1929). 3) Normally, at this stage Buyer's only remedy will be a privilege to cancel the contract plus a right to recovery of damages as per § 2-711 (1): <ol style="list-style-type: none"> a—Buyer has the option to cover and recover damages as per § 2-712; or b—Buyer may not cover and recover damages as per § 2-713 measured by market value, §§ 2-723, 2-724, plus incidental and consequential damages per § 2-715, if any; or c—Buyer may recover any agreed liquidated damages per § 2-718, or 	<p>Buyer repudiates before identification, instructing Seller not to ship or deliver. Normally this will constitute anticipatory repudiation. §§ 2-610, 2-611.</p> <ol style="list-style-type: none"> 1) Seller may cancel the contract per § 2-703 (f) and <ol style="list-style-type: none"> a—Sue Buyer for damages per §§ 2-708, 2-723, 2-724 and 2-710, or for liquidated damages or agreed <i>re-dress</i>, if any, per §§ 2-718, 2-719; or b—Proceed to identify per § 2-704, and resell and get damages per § 2-706 plus § 2-710. This corresponds to Buyer's remedy to cover, § 2-712, but note the restrictions on resale in § 2-706. Specifically manufactured goods may not be resalable after being identified as per § 2-704, in which case Seller may hold them for Buyer and sue for the price per § 2-709 (1) (b), (2) and (3). <p style="text-align: right;">At this stage, whether Seller can simply forget about identifying and sue for</p>

obtain agreed redress per § 2-719 if the provisions are valid under § 2-302.

These remedies of cancellation plus specific performance are also available as options for Buyer at later stages provided he has either not received the goods, or has rightfully rejected or revoked his acceptance of a defective tender. They are not available after Buyer's unrevoked acceptance. § 2-714 governs Buyer's rights in such cases.

damages under § 2-708, or should identify and try to resell, depends upon whether he can mitigate the damages or, if not, whether he can prove damages without reselling. He cannot use the resale option to increase the damages.

These remedies of cancellation plus damages, or possibly, price, are also available to Seller until, but not after Buyer has received and accepted the goods. They are the basic pre-acceptance remedies for wrongful repudiation or rejection by Buyer.

Seller repudiates, sells to others, or improperly fails to tender.

4) Buyer has the same options and remedies as above (cancellation, damages with or without cover, and possibly specific performance.) But if cover is not available and Buyer wants the goods, he may be able to:

a—Replevy the goods as per § 2-716 (3) since they are identified. Note, however, that replevin is not available against third-party b.f.p.'s. See § 2-403 (3); and

b—If Seller is insolvent, Buyer's right to replevy and acquire the goods is controlled by § 2-502.

Buyer repudiates or buys elsewhere, telling Seller not to tender delivery of or ship the goods. This, too, will normally be anticipatory repudiation subject to §§ 2-610, 2-611.

2) Seller has the same option and remedies as before identification (cancellation, damages with or without resale, and possible action for the price). Note that action for the price is available only when the goods are not resalable, as per § 2-709 (1) (b). Normally Seller cannot force the goods on Buyer and recover the price at this stage.

BREACH AFTER IDENTIFICATION PER § 2-501 BUT BEFORE TENDER PER § 2-503

REMEDIES AND OPTIONS IN GOODS-PERFORMANCE

STAGE AT WHICH BREACH OCCURS	BREACH BY SELLER (<i>Buyer vs. Seller</i>)	BREACH BY BUYER (<i>Seller vs. Buyer</i>)
<p>BREACH UPON OR AFTER TENDER AS PER § 2-503 BUT BEFORE ACCEPTANCE AS PER § 2-606 (<i>Distinguish among delivery, receipt and acceptance.</i>)</p>	<p>Seller makes a materially improper and non-conforming tender either as to manner, time, place or goods. This often involves the critical fact issue of whether the tender <i>was</i> nonconforming. If so, Seller is in breach. If not, Buyer must accept or he is in breach. Assuming Seller is in breach, he may have the option to <i>cure</i> per § 2-508.</p> <p>5) Buyer has a choice at this point per §§ 2-601, 2-612 and 2-609, assuming Seller does not cure:</p> <p>a—Buyer can accept per § 2-606, notify Seller per § 2-607(3) (a), be liable for the <i>price</i> per § 2-709, but have <i>damages</i> per § 2-714 or offset per § 2-717; or</p> <p>b—Buyer can <i>reject</i> per §§ 2-602, 2-603, 2-604, and 2-605, and <i>cancel</i> and recover <i>damages</i> as per §§ 2-711, 2-712 or 2-713 and 2-715 as above.</p>	<p>Seller makes a proper, conforming tender, shipment or delivery, but Buyer wrongfully refuses goods or documents, wrongfully claims improper tender by Seller, or fails to reject properly per §§ 2-602 and 2-605.</p> <p>3) Seller's remedies are summarized in § 2-703:</p> <p>a—Seller may stop delivery in transit per § 2-705, even though risk and title may have passed to Buyer on shipment.</p> <p>b—Seller may recover <i>damages</i> with or without resale per §§ 2-706 or 2-708 and 2-710.</p> <p>c—Where the goods are not resalable, Seller may recover <i>price</i> as per § 2-709(1) (b), (2) and (3) plus § 2-710.</p> <p>d—Normally at this stage Seller has the burden of disposition upon Buyer's wrongful rejection, but Seller is entitled to recover for all expenses and losses in disposing as per § 2-710.</p>

Buyer discovers hidden defects, Seller fails to cure as promised, or, despite known defects in goods or tender, Buyer accepts but gives Seller notice as per § 2-607(3) so as to preserve his rights.

- 6) Buyer may be entitled to revoke his acceptance as per § 2-608.
- 7) Whether or not Buyer revokes, if he gives Seller the required notice of defects, § 2-607(3) (a), and carries his burden of proof as per § 2-607(4), he is entitled to *damages*: under §§ 2-714 and 2-715 if there has been no revocation of acceptance; under §§ 2-711, 2-712 or 2-713, and 2-715 if Buyer rightfully revokes acceptance; or under §§ 2-718 and 2-719 if there has been an agreement for liquidated damages or remedy.*

**BREACH AFTER
RECEIPT AND
ACCEPTANCE AS
PER § 2-606**

A breach by Buyer after acceptance is usually a breach in payment obligations, or breach of the security agreement if a credit sale. However, Buyer may default with respect to the goods by wrongfully revoking acceptance, or may lose rights by failing to give notice.

- 4) Seller's remedies upon Buyer's wrongful revocation of acceptance are summarized in § 2-703 and detailed in §§ 2-706, 2-708, 2-709 and 2-710.
- 5) Buyer's failure to give notice as required by § 2-607(3) (a) may preclude him from recovery for defects, unless Seller waives notice under § 2-209.*

* Note that upon default or threat of default of a § 2-612 installment contract, or at various stages of other contracts, the aggrieved party may be entitled to demand *adequate assurance* of performance as per § 2-609.

For detailed discussion of these various options and remedies, see Hey, *Remedies for Breach of Sales Contract Under the Code*, 7 WASHBURN L.J. 35 (1967); Peters, *Remedies for Breach of Contracts Relating to Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199 (1963).

