PART 7

REMEDIES

Working Redraft, Part 7A

January, 1996

[A. IN GENERAL]

SECTION 2-701. SUBJECT TO GENERAL LIMITATIONS. The remedies of the seller and buyer under this Article and Subparts 7B and 7C are subject to the general limitations and principles stated in Subpart 7A.

Notes

1. Section 2-701 states that remedies of the seller and buyer are subject to the general remedial policies expressed in subpart A of Part 7. Some of these policies were expressed in §2-701 of the May, 1994 Draft. Particular remedies for the seller are stated in subpart B and for the buyer are stated in subpart C. This organization for remedies, which is new in the October, 1995 Draft, follows that in Article 2A, Part 5.

Jim McKay recommends that §2-701 be deleted as superfluous. If done, the sections numbers will be renumbered.

2. **CISG.** Revised Part 7 is consistent with the remedial structure in CISG. Chapter II states the obligations of the seller (Articles 30-44) and the remedies of the buyer upon breach of contract by the seller. Article 45. Buyer's remedies include the "rights" provided in Articles 46-52, which are unique to the buyer, and "damages" claimed under Articles 74-77, which are common to the buyer and the seller. Similarly, Chapter III states the obligations of the buyer (Articles 53-59) and the remedies of the seller upon breach by the buyer. Article 61. Seller's remedies include the "rights" provided in Articles 62-65, which are unique to the seller, and "damages" claimed under Articles 74-77, which are common to both parties. In general, the Convention prefers specific performance over damages and states applicable damage principles in general terms.

SECTION 2-702. BREACH; PROCEDURES. If a party is in breach,

the party seeking enforcement:

(1) has the rights and remedies as provided in this article and, except as limited by this part, as provided in the contract;

(2) may reduce its claim to judgment or otherwise enforce the contract by [self-help or] any available administrative or judicial procedure, or the like, and arbitration when agreed to by the parties; and

(3) may enforce the rights and remedies available to it under other law.

SOURCE: Licenses, Section 2-2501 (September, 1994); Section 2A-501.

Notes

This section, which was §2-501 in the May, 1995 Draft, states the general remedial options available upon breach of contract. Breach and default are defined in §§2-601 and 2-602. Arbitration is available only when agreed to by the parties. See Federal Arbitration Act, 9 U.S.C. §2.

SECTION 2-703. REMEDIES IN GENERAL.

(a) The remedies provided in this article shall be liberally administered with the purpose of placing the aggrieved party in as good a position as if the other party had fully performed.

(b) Unless otherwise provided in Part 7 of this article, an aggrieved party may not recover that part of a loss that could have been avoided by taking measures reasonable under the circumstances to avoid any loss resulting from the breach. The burden of establishing a failure to take reasonable measures under the circumstances is on the party in breach.

(c) The rights and remedies provided in this article are cumulative, but a party may not recover more than once for the same injury. A court may deny or limit a remedy if, under the circumstances, it would put the aggrieved party in a better position than if the other party had fully performed.

(d) This article shall not be construed to impair a remedy for breach of any obligation or promise collateral or ancillary to a contract for sale.

SOURCE: Licenses, Section 2-2502 (September, 1994); Sales, Section 2-701 (December, 1994)

Notes

1. The remedial policies in §2-703 are derived from §2-502 of the May, 1995 Draft and §2-701 of the May, 1994 Draft. The breaches which trigger these remedies are defined in §§2-601 and 2-602.

2. Subsection (a) directs the courts to protect the so-called "expectation" interest. This restates the principle in §1-106(1) without intending to escape the other limitations of that Section, i.e., that punitive damages and consequential damages are not allowed unless permitted by Article 2 or another rule of law.

Other remedial interests, such as reliance and restitution, can be protected under the general damage measure in §2-704.

3. Subsection (b) states a general mitigation of damages requirement and is consistent with CISG Art. 77. It supplements the mitigation principles built into particular remedy sections of Part 7. See, e.g., §§2-706 and 2-717. However, a party who complies with the mitigation requirements of a particular section or seeks to enforce an agreed remedy, such as liquidated damages, is not subject to subsection (d). This relationship is clarified in the text.

A failure to mitigate means only that the aggrieved party cannot recover the preventable loss resulting from a breach. In most cases, the burden of establishing a failure to mitigate damages is on the defendant.

4. Subsection (c) reiterates the policy favoring cumulation of remedies by the aggrieved party. Giving the aggrieved party a relatively free choice of remedies, despite possible inconsistency, is supported by variables at the time of the breach, such as the stage of performance, condition and location of the goods, market stability and availability, and the importance of protecting the value of the bargain as agreed at the time of contracting through price, quantity and duration terms.

Nevertheless, this choice of remedies must be made in good faith and be consistent with the general remedial policy of subsection (a). Accordingly, the court, if requested by the defendant, may deny a particular choice when that remedy under the circumstances puts the aggrieved party in a better position than full performance would have done. In most cases, this will occur when the aggrieved party's choice of damages based upon the difference between contract and market price substantially exceeds the profits that would have been made by full performance. Subsection (c) also rejects the view that the exercise of one remedy, such as resale by the seller, automatically precludes a subsequent choice to pursue another remedy, such as market damages. Again, the question is whether the choice exceeds the expectation principle.

The limitation would not apply to enforceable agreed remedies, such as liquidated damages, or to remedies which seek to restore the plaintiff to the position occupied at the time of contracting or breach, such as restitution and reliance claims.

SECTION 2-704. DAMAGES IN GENERAL. To the extent that the remedies in Part 7 of this Article fail to put the aggrieved party in as good a position as if the other party had fully performed, the aggrieved party may recover the loss resulting in the ordinary course from the default as determined in any reasonable manner, together with incidental damages and consequential damages, less expenses and costs saved as a result of the breach.

SOURCE: Sales, Section 2-701 (March, 1995)

Notes

1. This section, which is derived from §2-701 of the May, 1994 Draft, provides a general damage measurement to supplement more particular applications. It is comprehensive enough to protect all of the interests of an aggrieved party, especially where the expectation interest alone is inadequate. See Bausch & Lomb, Inc. v. Bressler, 977 F.2d 720 (2d Cir. 1992).

2. An aggrieved party who is unable to establish general or "direct" damages may still recover incidental and consequential damages as permitted under §§2-705 and 2-706.

SECTION 2-705. INCIDENTAL DAMAGES. Incidental damages resulting from a breach include any commercially reasonable charges, expenses, or commissions incurred after a breach in:

(1) inspection, receipt, transportation, care, and custody of property after the other party's breach;

(2) stopping shipment;

(3) effecting cover, return, or resale of property;

(4) connection with reasonable efforts otherwise to minimize the consequences of breach; and

(5) avoiding losses resulting from the breach under Section 2-703(b).

SOURCE: Sales, Sections 2-715, 2-710 (December, 1994)

Notes

1. Section 2-705 combines the incidental damages of seller and buyer into a single section. It replaces §§2-710 and 2-715(1) of the 1990 Official Text.

2. Incidental damages are reasonable expenses incurred after a breach to mitigate damages, perform duties with regard to the goods and to effect other remedies. They should be distinguished from consequential damages, which result from expenditures or commitments made before the breach to enable the aggrieved party to obtain and use the other party's performance. This distinction, although helpful, is not always observed in practice.

SECTION 2-706. CONSEQUENTIAL DAMAGES.

(a) Consequential damages include:

(1) losses resulting from a breach which the breaching party at the time of contracting had reason to know would probably result from the aggrieved party's general or particular requirements and needs and which the aggrieved party could not prevent by reasonable measures under the circumstances; and

(2) subject to Section 2-318A, injury to person or property proximately resulting from breach of warranty.

(b) If a court concludes that under the circumstances damages recoverable under subsection (a)(1) are unreasonably disproportionate to the risk assumed in the contract by the breaching party, the court may limit damages by excluding or limiting recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise.

SOURCE: Sales, Sections 2-710(b), 2-715(b) (March, 1995).

Notes

As a result of considerable discussion of consequential damage during the drafting process, the following changes, reflected in §2-706, have been made.

1. Sellers may now recover consequential damages under the same standards applicable to buyers. The Drafting Committee rejected the interpretation that former §2-710, in combination with §1-106(1), denied consequential damages to sellers.

The following examples illustrate the application of §2-706 to sellers. Assume that the foreseeability and mitigation requirements have been satisfied.

(a) Seller makes a special expenditure in preparation to perform which will not be reimbursed by Buyer's full

performance. After breach, Seller is unable to salvage the investment. The unreimbursed expenditure is recoverable as consequential damages.

(b) Seller has a profitable business opportunity the capture of which depends upon prompt payment by Buyer of the contract price. Buyer fails to pay and Seller is unable, after reasonable efforts, to obtain substitute financing. The lost profits, if proven with reasonable certainty, are recoverable as consequential damages. If Seller had been able to obtain a loan at 8% interest to capture the opportunity, the interest paid would be consequential rather than incidental damages.

(c) Seller borrowed money at 8% interest to finance performance of the contract. The loan was to be repaid from the contract price. Buyer was late in payment and Seller could not obtain more favorable financing to pay off the loan. Consequential damages include the interest paid on the loan between the time when Buyer promised to pay the price and the time when it was paid.

2. In addition to the usual limitations on the recovery of consequential damages, i.e., foreseeability, mitigation of damages, cause in fact, and proof with reasonable certainty, subsection (b) gives a court to limit losses which are "unreasonably disproportionate" to risk fairly assumed by the breaching party by limiting otherwise provable consequential damages. This limitation is derived from §355 of the Restatement, Second, of Contracts.

The background of subsection (b) should be clear, especially where the buyer is the plaintiff. Consequential damages result where the buyer is deprived of timely use of conforming goods because of repudiation, non-delivery or breach of warranty. They usually include lost business profits, but courts will occasionally award damages for loss of good will, unreimbursed reliance and various disruption losses caused to the buyer or third parties. The potential scope of consequential damages is influenced by the purpose for which the goods are purchased, the nature of the breach, and the type of loss caused. Where the purpose is to use the goods in a business or to resell them and breach is by non-delivery, the loss is profits (opportunity costs) that would have been made if delivery were timely. Where the purpose is resale or the goods are intended as components for use in or with other goods sold to third parties and a breach of warranty occurs, (i.e., the goods are unmerchantable) more than the buyer's lost profits are involved. Third parties now have claims for breach of warranty against the buyer, including possible damage to person and property, which can be asserted cumulatively by the buyer against the seller as consequential

damages for breach of warranty. Finally, the liability potential may be exacerbated if there is a product recall. See Brad Stone, Recovery of Consequential Damages for Product Recall Expenditures, 1980 B.Y.U. L. Rev. 485. Thus, the risk of uncertain and potentially heavy consequential damages is a matter of continuing concern to sellers.

3. Section 2-706(a)(1) a complex default rule which tends to favor the buyer but which is easy to limit or exclude by agreement. In the current jargon, it is a "penalty" default rule because the buyer is penalized (no recovery) if it fails to inform the seller of particular circumstances or losses of which the seller would otherwise have no reason to know. So if the foreseeability test is not satisfied or the contract contains an excluder clause, the risk of consequential losses is on the buyer.

Even without an excluder clause, the buyer must satisfy four conditions to recover under subsection (a)(1):

(a) The loss must result from (be caused by) the breach. This cause-in-fact requirement is common to all breach of contract claims, but may be more difficult to establish when the loss is remote from the breach.

(b) The loss must result from general or particular requirements of the buyer of which the seller had notice (knowledge or reason to know) at the time of contracting. This is Article 2's version of the famous principle in Hadley v. Baxendale. In addition, subsection (a)(1) now requires the breaching party to have reason to know at the time of contracting that the loss "would probably result from the breach." See Restatement, Second, Contracts §351. This occupies the middle ground between losses that are "likely to result" and losses that are simply "in the cards," and is unlikely to change the operation of this section.

(c) An otherwise foreseeable loss is not recoverable if, after the breach, it could have been prevented by "reasonable measures under the circumstances." This limitation, which is a specific application of §2-703(b), works best where the buyer can cover to minimize or avoid lost profits.

(d) The plaintiff must prove the loss with reasonable certainty. This limitation controls loss in complex cases of remote or speculative damage, (e.g., loss of good will, new businesses) but is not an insuperable barrier in most cases.

4. The Drafting Committee rejected an alternative to subsection (a)(1), taken from §4A-305(d), which provided that

between merchants, no consequential damages are recoverable unless they are expressly agreed to in a record.

This rejected alternative is a simple but extreme penalty default rule. The seller has no liability for consequential damages unless the buyer bargains for protection that is expressly agreed to. This default rule may work well in an Article 4A funds transfer, where the low cost of the transfer has no relationship to the dollar amount transferred or the risk that a payment order will be late, improperly executed or not executed at all. Given the traditional risk allocation function of the price in contracts for the sale of goods, however, the appropriateness of the Article 4A approach depends upon other considerations. For example, the 4A default rule between merchants might be justified on efficiency grounds: (a) It is a simple rule that corresponds to the outcome that most merchants would probably reach through bargaining (i.e., consequential damages excluded); (b) The buyer is in the best position to communicate special needs to the seller and bargain for protection and is in at least as good a position as the seller to take precautions to minimize or avoid consequential damages; (c) Requiring bargained for protection against consequential damages minimizes the risk of cross-subsidization, where a liability rule causes one firm (here the seller) to subsidize another firm's (the buyer) preferences for product type or quality. Under the rejected alternative, there would be no cross-subsidization, because the seller can increase the price in exchange for agreeing to pay consequential damages. See Daniel Schecter, Consequential Damages Limitations and Cross-subsidization: An Independent Approach to Uniform Commercial Code Section 2-719, 66 S. Cal. L. Rev. 1273 (1993).

4. Subsection (a)(2) still provides that consequential damages include "injury to person or property proximately resulting from breach of warranty." This subsection, however, is now subject to Section 2-318(A).

5. CISG: There is no specific provision permitting the recovery of incidental damages, but both seller and buyer can recover foreseeable consequential damages. Article 74.

SECTION 2-707. SPECIFIC PERFORMANCE.

(a) A court may decree specific performance if the parties have expressly agreed to that remedy or if the goods or the agreed performance of the breaching party are unique or in other proper circumstances.

(b) A decree for specific performance may include any terms and conditions as to payment of the price price, damages, or other relief that the court considers just.

(c) The buyer has a right to recover goods identified to the contract if, after reasonable efforts, the buyer is unable to effect cover for that property or the circumstances indicate that an effort to obtain cover would be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

SOURCE: Licenses, Section 2-2506 (September, 1994); Section 2A-521; Sales, Section 2-716 (December, 1994).

Notes

1. There are two changes in subsection (a):

First, specific performance is not limited to the buyer [former §2-716(1) applied only to buyers]. A seller may obtain specific performance of the buyer's agreement to accept and to pay for the goods in appropriate cases. This simply affirms what some courts have always done, especially in long term supply contracts. Specific performance is an alternative to the seller's action for the price under §2-722. Unlike an action for the price, however, specific performance preserves the contract and acts in personam to enforce the agreement for future performance.

Second, the parties may expressly provide for the remedy of specific performance in the contract. The expectation is that a court will enforce the agreed remedy even though legal remedies at the time of the breach are entirely adequate. This expectation is consistent with a growing consensus that specific performance is, in most cases, a more efficient remedy than damages. See, e.g., Alan Schwartz, The Myth That Promisees Prefer Supra Compensatory Remedies: An Analysis of Contracting For Damage Measures, 100 Yale L. J. 369 (1990.

Note that subsection (a) gives the court discretion ("may") to award specific performance if the parties have so agreed. Thus, the court might decline to make the award where the remedy

is burdensome to administer. Further, the assumption is that a court will condition the specific performance decree upon full performance by the aggrieved party. Thus, a seller cannot obtain specific performance of the buyer's agreement to pay the price in the future unless the seller tenders goods that conform to the contract. See §2-722.

2. CISG. Specific performance is the preferred remedy for sellers and buyers under the Convention. See Articles 46 and 62. See also, Steven Walt, For Specific Performance Under the United Nations Sales Convention, 26 Tex. Int'l L. J. 211 (1991). Article 28 provides, however, that if under CISG "one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment 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."

SECTION 2-708. CANCELLATION; EFFECT.

(a) If a party breaches a contract, the aggrieved party may cancel the contract if the conditions of Section 2-715 or Section 2-723(a)(2) are satisfied or if the contract so provides.

(b) Cancellation is not effective until the canceling party sends notice of cancellation to the other party.

(c) Upon cancellation, each party is subject to the same obligations and duties with respect to goods in its possession or control as the party would be if it had rejected a nonconforming tender and remained in control of the goods of the other party or if the contract had terminated according to its own terms.

(d) Subject to subsection (e), upon cancellation all obligations that are still executory on both sides are discharged.

(e) The following survive cancellation:

(1) any right based on prior default;

(2) any limitation on the scope, manner, method, or location of the exercise of rights in goods;

(3) any limitation on disclosure of information;

(4) any obligation to return goods, which obligation must be promptly performed; and

(5) any remedy for default of the whole contract or any unperformed balance.

(f) Unless a contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or similar terms must not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

SOURCE: Licenses, Section 2-2504 (September, 1994); Section 2A-505; Sales, Sections 2-106(3)(4), 2-720, 2-721 (December, 1994).

Notes

1. This section, which is new, is derived from several existing sources and presents a coherent approach to the self-help remedy of cancellation for breach by: (1) stating the grounds for cancellation; (2) requiring notice of cancellation; (3) stating the obligations and duties of the parties upon cancellation; (4) stating what obligations are discharged and what survives upon cancellation; and (5) preserving, in most cases, damage claims for antecedent breach. Further coordination is needed, especially in perfecting the relationship between rejection, cure and cancellation.

2. **CISG.** CISG's equivalent to "cancellation" is "avoidance" for a fundamental breach of contract. See Art. 25, 49(1) and 64(1). The effects of a proper avoidance are stated in Art. 81-84. In general, it is more difficult to avoid the contract under CISG than it is to cancel under Article 2. Moreover, the seller's remedies of contract-market price damages or resale and the buyer's remedies of contract-market price damages and "cover" depend upon avoidance. Art. 75 and 76.

SECTION 2-709. CONTRACTUAL MODIFICATION OF REMEDY.

(a) Subject to Section 2-710 on liquidated damages:

(1) An agreement may add to, limit, or substitute for the remedies provided in this article, unless the effect of the agreement is deprive the aggrieved party of a minimum adequate remety. An agreement may also limit or alter the measure of damages recoverable for breach or limit the buyer's remedies to return of the goods and repayment by the seller of the price or to repair and replacement of nonconforming goods or parts by the seller.

(2) Resort to an agreed remedy under subsection (a)(1) is optional, but if the the parties expressly agree that the remedy is exclusive it is the sole remedy.

(b) If because of a breach of contract or other circumstances an exclusive agreed remedy fails substantially to achieve the purpose of the parties, the aggrieved party, to the extent of the failure, may resort to remedies provided in this article.

(c) Except where injury to the person is involved, Section 2-318A, consequential damages where the loss is commercial, consequential injury to property and incidental damages may be limited or excluded by agreement, unless the agreement is unconscionable. A conspicuous term which limits or excludes consequential or incidental damages for commercial loss or consequential injury to property and is contained in a record is

presumed to be conscionable.

(d) If, in a consumer contract, a limited, exclusive agreed remedy fails under subsection (b), a buyer may revoke acceptance under Section 2-609 and obtain from the seller either a refund of the price paid or a replacement of the goods and have other remedies to the extent permitted in Section 2-723.

SOURCE: Sales, Section 2-719 (December, 1994) as modified during January, 1995 meeting; Licenses, Section 2-2503 (September, 1994).

Notes

1. Section 2-709(a) validates agreements modifying or limiting remedies. The unstated assumption is that such agreements must be conscionable at the time of contracting, §2-105, and not otherwise subject to the defenses of fraud, mistake or duress. See §1-103.

An unanswered question is how far such agreements may go in varying the standard remedies for breach of contract. At what point does an agreed remedy become a penalty (too much) or sink below some minimum adequate remedy (too little)? In commercial cases where exclusive, limited remedies have been agreed, the courts have given the parties wide latitude. See Canal Electric Co. v. Westinghouse Electric Corp., 973 F.2d 391 (1st Cir. 1992), upholding an allocation of risk between "highly sophisticated business entities." On the other hand, the aggrieved party, despite the agreement, should be entitled at the very least to some minimum adequate remedy, presumably restitution. See McDermott, Inc. v. Iron, 979 F.2d 1068 (5th Cir. 1992). This limitation is now expressed in subsection (a).

2. The "failure of essential purpose" problem in subsection (b) continues to plague the courts and challenge the commentators.

Beyond a breach of contract, no attempt is made to define when "circumstances" cause a failure. Clearly, the inability of the seller after reasonable efforts to comply with the agreed remedy is a prime example. This is a breach of contract. Other "circumstances" are left to the courts. A failure, however, leaves the buyer facing a breach of warranty or breach of an agreement to repair by the seller and usually in possession of

nonconforming goods.

Subsection (b) provides a mainstream solution to the problem. The starting point is clear: To the extent that the agreed remedy has failed the aggrieved party has the remedies provided by Article 2. In short, the "default" remedies fill the gap. The court, therefore, must determine (1) the intended scope of the agreed remedy, (2) the extent to which the agreed remedy has failed, and (3) and the "default" remedies available to the aggrieved party.

What about agreed remedies, such as limitations or exclusions of consequential damages, which are outside of and not dependent upon the failed agreed remedy? If a term excluding consequential damages is found to be independent of the failed remedy, enforceability depends upon whether it was unconscionable under §2-709(c). Stated another way, subsections (b) and (c) are independent of each other unless the excluder clause under subsection (c) depends upon a functioning agreed remedy under subsection (b). See Colonial Life Insurance Co. of America v. Electronic Data Systems Corp., 817 F. Supp. 235 (D. N.H. 1993)(supporting this analysis). But see International Financial Services, Inc. v. Franz, 534 N.W.2d 261 (Minn. 1995), holding that the "excluder" clause is deemed to be independent in contracts between merchants even though it is lumped together with the failed agreed remedy.

Nevertheless, lingering problems which cannot easily be resolved in legislation remain. Suppose, for example, that the excluder term appears to be independent of the failed remedy and conscionable at the time of contracting but the seller committed fraud or acted in bad faith in dealing with the failed remedy package. Or suppose that after the agreed remedy failed, the buyer has no adequate remedy if the excluder term were enforced. These circumstances have prompted some courts to deny enforcement to the excluder clause, presumably because either the seller was in some way at fault or the buyer had no minimum adequate remedy, such as restitution. This latter problem is addressed in subsection (a). Issues of fraud and bad faith are left to the courts.

3. Subsection (c) states that consequential or incidental "commercial loss" can be limited or excluded by agreement unless the agreement is unconscionable. "Commercial loss" includes economic loss and, presumably, damage to the goods sold. See §2-318A(a). The phrase permitting the exclusion of "incidental damages" was approved at the January, 1995 meeting of the Drafting Committee. Thus, in commercial cases the parties may agree that the aggrieved party assumes the risk of both losses resulting from investments made before the breach (consequential

damages) and expenses incurred after the breach to mitigate loss (incidental damages). Such an agreement was enforced in McNally Wellman Co. v. New York State Electric & Gas Corp., 63 F.3d 1188 (2d Cir. 1995)(New York law).

Note that subsection (c) now provides that a conspicuous term in a record excluding consequential damages for commercial loss and injury to property, including other than the goods sold, is presumed to be conscionable. This provides a limited safe harbor against attack.

4. Subsection (d) provides a special rule for consumer contracts where limited remedies fail of their essential purpose. Section 2-318A governs where injury to person is claimed.

5. CISG: There is no comparable provision in the Convention. Perhaps §2-719 is a rule of validity within Article 4(a).

SECTION 2-710. LIQUIDATION OF DAMAGES; DEPOSITS.

(a) Damages for breach by either party to a contract may be liquidated, but only at an amount that is reasonable in the light of the then anticipated or actual loss caused by the breach and the difficulties of proof of loss in the event of breach. In a consumer contract, a term fixing unreasonably large or small liquidated damages is void as a penalty.**[**unenforceable**]**. If a liquidated damage term is unenforceable under this subsection, the aggrieved party has remedies as provided in this article.

(b) If a seller justifiably withholds or stops performance because of the buyer's breach or insolvency, the buyer is entitled to restitution of the amount by which the sum of payments exceeds the amount to which the seller is entitled under terms liquidating damages in accordance with subsection (a).

(c) A buyer's right to restitution under subsection (b) is subject to offset to the extent that the seller establishes a

right to recover damages under the provisions of this article other than subsection (a) and the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(d) If a buyer has received payment in goods, their reasonable value or the proceeds of their resale are payments for the purposes of subsection (b).

SOURCE: Sales, Section 2-718 (December, 1994)

Notes

1. Subsection (a) revises former Section 2-718(1) to expand the power of commercial parties to contract for liquidated damages in three ways: First, the liquidation need only be reasonable in light of anticipated not actual loss ["actual loss" has been resotred]; Second, the liquidation need only be reasonable in light of the difficulties in proof of loss, not also in obtaining a remedy; and Third, a term fixing a reasonable liquidation at the time of contract is enforceable even though the amount fixed is unreasonable in light of the actual loss. In short, the "hindsight" rule is rejected.

2. In consumer contracts, a term fixing an unreasonably large or small liquidated damage is void as a penalty.

3. Section 2-710 deals with the liquidation not the limitation of damages by agreement. The latter is covered by §2-709. To illustrate, suppose commercial parties negotiated a reasonable liquidated damage amount of $5,000 under subsection (a) but the actual damages were $100,000. This agreement is enforceable as liquidated damages, even though damages were underliquidated. On the other hand, suppose, without any effort to liquidate, the parties agreed that under no circumstance will the seller's damages for breach exceed $5,000. This is a limitation (an arbitrary fixing) rather than an attempt to fix a reasonable amount and its enforceability is governed by §2-709(c).

4. Subsections (b), (c) and (d) have been revised to clarify a breaching party's right to restitution after the aggrieved party's damages have been calculated and paid.

5. CISG: There is no provision dealing with liquidated damages in the Convention. Restitution claims are permitted in certain cases of avoidance for fundamental breach. See Articles 81(2), 82 and 84.

SECTION 2-711. REMEDIES FOR MISREPRESENTATION OR FRAUD. Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach. Rescission or a claim for rescission of the contract for sale and rejection or return of the goods do not bar, and are not inconsistent with, a claim for damages or other remedy.

SOURCE: Sales, Section 2-721 (December, 1994)

SECTION 2-712. PROOF OF MARKET PRICE.

(a) If evidence of a price prevailing at the times or places described in this article is not readily available, the following rules apply:

(1) The price prevailing within any reasonable time before or after the time described may be used.

(2) The price prevailing at any other place that in commercial judgment or usage of trade is a reasonable substitute may be used, making any proper allowance for the cost of transporting the goods to or from the other place.

(3) Evidence of a relevant price prevailing at another time or place offered by one party is not admissible unless the party has given the other party notice that the court finds sufficient to prevent unfair surprise.

(b) If the prevailing price or value of goods regularly bought and sold in any established commodity market is in

dispute, reports in official publications or trade journals or in newspapers, periodicals, or other means of communication in general circulation and published as the reports of that market are admissible in evidence. The circumstances of the preparation of such a report may affect the weight of the evidence but not its admissibility.

SOURCE: Sales, Sections 2-723, 2-724 (December, 1994).

Notes

1. Section 2-712 is an integration of former §§2-723 and 2-724, with one exception. Former §2-723(1), dealing with the time for measuring damages for repudiation when the case came to trial before the time for performance, has been deleted. This issue is now covered in §§2-721 and 2-727.

2. The reasons for this proposed revision are as follows. Original §2-723(1) dealt with the proof of market price when an action based on repudiation came to trial "before the time for performance with respect to some or all of the goods." In order to reduce uncertainty regarding proof of future prices (a sound objective), market price was determined at the time when the seller or buyer "learned of the repudiation." Original §2-723(1), however, created several dilemmas:

First, it appeared to be inconsistent with the provision for repudiation damages in §2-713(1) of the 1990 Official Text, which were measured at the time the buyer "learned of the breach." Similarly, it seemed to ignore §2-610(a) of the 1990 Official Text, which provided that an aggrieved party could wait for performance for a "commercially reasonable time" after the repudiation.

Second, it stated that "any" damages based on market price were subject to the "learned of the repudiation" test, even though the time for delivery of some goods under the repudiated contract had passed at the time of trial. If the purpose of original §2-723(1) was to deal with uncertainty in the proof of future prices, the "any" damages language made no sense at all.

Third, the original §2-723(1) did not clearly provide for the special problems of repudiated long-term contracts. For example, no distinction was drawn between goods sold on the

"spot" market and the market price of goods sold under long-term contracts and there was no explicit requirement that profits awarded for repudiation of long-term contracts be discounted to present value.

The solution to these problems starts with the policy judgment made by the Drafting Committee that if there is a breach by repudiation and there has been no resale or cover, the aggrieved party's market damages under revised §§2-721(a) and 2-727(a) should be measured when a commercially reasonable time after the aggrieved party learns of the repudiation has expired. This avoids speculation by the aggrieved party in a changing market and ties the market price to the time when the aggrieved party "should" have resold, covered or taken other action. For example, suppose the parties enter a 5 year contract, dated January 1, 1990, for the delivery of goods in installments at a contract price of $100 per unit. On July 1, 1992, Seller writes a letter repudiating the contract which Buyer receives on July 5. Buyer has "learned" of the repudiation on July 5 and, under revised §2-613, can, among other things, wait for performance for a "commercially reasonable time." Suppose that this time expires on August 1, 1992 without performance or retraction of the repudiation. Buyer takes no remedial action, i.e., no "cover," sues for damages under §2-727 and the case comes to trial on February 1, 1993. Under revised §2-727(a), August 1, 1992 is the time for measuring all of Buyer's market damages for Seller's repudiation, even though the time for performance between August 1, 1992 and February 1, 1993 has passed. This revision combines the policy judgment that Buyer should not be permitted to speculate on the market between August 1 and the agreed times for delivery and the policy judgment contained in former §2-723(a) that uncertainty in proving damages for repudiated future deliveries should be measured on (or shortly after) the aggrieved party learned of the repudiation.

3. CISG. Article 76 states the time when and place where the current price for damages is to be determined, but makes to provision for proof of market price.

SECTION 2-713. WHO CAN SUE THIRD PARTIES FOR INJURY TO GOODS. If a third party deals with goods identified to a contract for sale and causes actionable injury to the goods, the parties to that contract have the following rights and remedies:

(1) A party with title to or a security interest, special property interest, or insurable interest in the goods has a right

of action against the third party.

(2) If the goods have been destroyed or converted, the party who had the risk of loss under the contract for sale or since the injury has assumed that risk as against the other also has a right of action against the third party.

(3) If at the time of the injury the party plaintiff does not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, any suit or settlement is subject to the party plaintiff's interest as fiduciary for the other party to the contract.

(4) Either party may with the consent of the other sue for the benefit of a concerned party.

SOURCE: Sales, Section 2-722 (December, 1994)

Notes

There are no changes of substance in former §2-722 of the 1990
Official Text.

SECTION 2-714. STATUTE OF LIMITATIONS.

(a) An action for breach of a contract for sale, including any agreement under Sections 2-503 and 2-504, must be commenced within four years after the cause of action has accrued. By the original agreement, the parties may reduce the period of limitation to not less than one year but may not extend it.

(b) Except as otherwise provided in subsection (c), a cause of action accrues when the breach occurs, regardless of the

aggrieved party's lack of knowledge of the breach. For purposes of this section, a breach by repudiation occurs when the aggrieved party learns of the repudiation.

Alternative A

(c) If a breach of warranty occurs, the following rules apply:

(1) Subject to paragraph (2), a cause of action accrues when the seller has tendered delivery of, or completed any agreement to assemble or install, nonconforming goods, whichever is later.

(2) If a warranty expressly extends to performance of the goods after delivery, a cause of action accrues thereafter when the buyer discovers or should have discovered the breach.

(3) If the seller, after delivery, attempts to conform goods to the contract and fails, the period of limitation is tolled during the time of the attempt.

Alternative B

(c) If a breach of warranty occurs,the following rules apply:

(1) If a breach of warranty or indemnity occurs, a cause of action accrues when the buyer discovers or should have discovered the breach.

(2) If the seller, after delivery, attempts to conform goods to the contract and fails, the period of limitation is tolled during the time of the attempt.

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(d) If an action commenced within the applicable time limitation is terminated but a remedy by another action for the same breach is available, the other action may be commenced after the expiration of the time limit and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure to prosecute.

(e) This section does not alter the law on tolling of the statute of limitations and does not apply to a cause of action that have accrued before this article took effect.

SOURCE: Sales, Section 2-725 (December, 1994)

Notes

1. Subsection (b) retains the time of breach rather than the time of discovery rule for all but a breach of warranty. Thus, an action must commence within four years of the breach, unless the parties have agreed to a shorter time, not less than one year.

2. For breach of warranty, two alternatives a proposed. Alternative A preserves the "time of breach" rule and clarifies when the limitation period is tolled. Alternative B, following §2A-506(2), adopts a "discovery" test for when the cause of action accrues and preserves the four year time limitation thereafter. The "discovery" test responds to the real risk that a buyer might not know or have reason to know of a breach of warranty until the limitation period has expired.

3. CISG. The Convention has no statute of limitations, relying upon the Convention on the Limitation Period of the International Sale of Goods (1974) to fill the gap. The United States has ratified the Limitation Convention.