THE UNIFORM COMMERCIAL CODE SALE OF GOODS

The Uniform Commercial Code Article 2 on the Sale of Goods “fills in the gaps,” providing controlling contract terms where the contracting merchants either didn’t agree or just forgot to discuss the matter. In many commercial transactions, the buyer and seller only discuss how many goods, how much to pay, and perhaps when delivery or payment is due. It is only later, after problems arise, that merchants will also discuss or argue about many more specific terms such as: “Where will the goods be delivered?” or “Is the buyer under any obligation if the goods are slightly defective?” The UCC answers most of these questions by basically providing the parties with a “50-page fine print contract,” whether they know it or not.

The parties are almost always allowed to “contract out of the UCC.” If the merchants do discuss and agree to terms different from the UCC, then the parties’ own terms will apply.

The UCC takes a very pragmatic and common sense approach to commercial transactions. It is usually not precise and does not provide exact rules. Many flexible terms are used, such as “reasonable” or “standards in the industry” or “commonly accepted practice.” This can be frustrating in that the answers to a dispute are not always clear. A buyer can still argue about whether a seller took a “reasonable” approach. However, these terms do allow flexible and common sense solutions to practical problems.

The UCC has a philosophy of elastic performance to try and keep deals together. This philosophy frowns upon an “all or nothing” approach. The parties have to work together to keep things moving. For example, a buyer is generally not relieved of any further obligation if there are defects or delays in some deliveries. The seller will have a right to “cure” defects and continue deliveries. The buyer may be entitled to a credit for damages from the defects or delay, but the buyer must continue to take deliveries.

Goods

Goods are “all things which are moveable.” Lumber, asphalt, concrete, computers, trucks and gift shop greeting cards are all goods. UCC Article 2 applies to the sale of all such “goods.” Note that goods can include items that are now attached to real estate but can later be “severed” or removed from the real estate. This includes stone, sand and timber, as well as agricultural crops like corn.

The UCC does not apply to any transaction to buy or sell the real estate itself. More importantly, Article 2 does not cover any service contract like an employment contract for a salesperson. The UCC also does not apply if labor is a “significant part” of a contract. A contract for the sale of lumber is definitely a sale of goods, and Article 2 applies. A contract for carpentry labor only, where the owner is supplying the material, is definitely a service contract, and Article 2 will not apply.

Many construction contracts are in the “gray area,” where it is hard to tell whether the UCC applies. For example, in a typical carpentry subcontract for labor and materials, the labor is a “significant part” of the contract and Article 2 will not apply. Mere delivery and unloading of materials are probably not “significant labor.” Many such transactions are in gray areas, and it is not clear whether the UCC applies.

FORMATION AND MODIFICATION OF CONTRACT

When Do You Have a Contract?

Think about how contracts are formed in real life. You have letters and telephone conversations. Material suppliers send offers, proposals and quotes. Contractors send purchase orders. These documents go by electronic mail, regular mail and facsimile machine. Sometimes the parties never write anything down and instead deal “on a hand shake.” How do you know when you are bound to a contract? This is the issue of “contract formation.”

2 UCC Section 2-105(1); UCC Section 2- 107.
3 UCC Section 2-102.
Contract Creation

Under the UCC, an offer can be accepted in “any medium and manner, which is reasonable.”5 Sending a response letter is usually a reasonable manner of accepting an offer. Simple performance may also be enough.6 If a contractor says he will take 2,000 studs if the supplier can provide them tomorrow, it may not be necessary for the lumberyard to send a return letter. Rather, it can accept by performance. If the delivery truck simply appears at the contractor’s yard the next day with 2,000 studs, there has probably been an offer and a reasonable manner of acceptance. There is a binding contract.

Essential Parts of a Contract

The Uniform Commercial Code takes a very elastic, practical and common sense approach to contracts for the sale of goods:7 Many contracts can be oral; written agreements do not have to say “Contract” across the top; and letters are often enforceable contracts. It is not necessary to have agreement on all terms.8

Terms Can Be Missing

The UCC will fill in these blanks. There will still be a binding contract if the parties never agree on a time for delivery, the manner of delivery, the place for delivery or the time that payment is due.9 It is not even necessary to know exactly when a contract existed,10 because it can develop over a series of conversations, letters or actions.

Written Confirmation

The Uniform Commercial Code added a new feature designed to grease the wheels of commerce. After a verbal agreement is made either a buyer or seller can prepare and send a “confirmation” of the contract.11 If the confirmation is sent between merchants, the party receiving the confirmation can be bound to it, unless they send written notice of objection within 10 days of receipt.12 This means that buyers and sellers must read their mail and send return letters (or at least handwritten objections) if they believe mail received does not accurately describe agreements made. There are other places in the UCC where merchants can lose contract rights if they fail to read and respond to mail from other merchants.13

Battle of the Forms

Let’s think again about the way modern commerce works. Material suppliers email or fax offers. Contractors send back purchase orders. Both offers and purchase orders often have detailed “fine print.” The fine print terms on the offer often conflict with the fine print terms on the purchase order. What provisions are in the final contract?

Contract on Base Terms

The first thing to remember is that these parties have a contract on the terms on which there is agreement.14 It doesn’t matter that some terms are missing or in complete conflict.15

Firm Offers and Price Quotes

In order to have an enforceable contract, there must be an “offer” that has been accepted. It can be important in establishing the terms of the contract whether the buyer or seller made the initial offer. The terms of the offer will be the contract, if the offer is accepted.16 Once an initial offer is made, the recipient must object to terms in the

5 UCC Section 2-206(a).
6 UCC Section 2-206(1)(b).
7 UCC Section 2-204(1).
8 UCC Section 2-204(2).
9 UCC Section 2-311(1).
10 UCC Section 2-204(2).
11 UCC Section 2-207(1).
12 UCC Section 2-207(2)(c).
13 See section below, Battle of the Forms.
14 UCC Section 2-207(3).
15 UCC Section 2-204(3).
offer or those terms will be part of the contract. Additional or different terms in a response do not become a part of the contract if there is an objection or if those additional or different terms “materially alter” the agreement.17 Accordingly, it is easier to establish terms in an initial offer. It is more difficult to change terms through a response.18 The party that sent the initial offer has an advantage in this respect. All buyers and sellers would prefer to “fire the first shot” in the Battle of the Forms by making the first firm offer.

It is sometimes difficult to tell whether a correspondence is a firm offer or simply conversation. An offer must be sufficiently detailed regarding the product, quantity and price so that an acceptance would result in an enforceable contract.19

There does seem to be some prejudice in the courts against seller quotes as firm offers. Generally, price quotes are not considered offers, but rather a “mere invitation to enter into negotiations.”20 It is the submission of a purchase order by a buyer that is generally viewed as an offer, which may then be accepted or rejected by the seller.21 Sellers should be particularly careful to include all important terms in proposals or quotes and make it clear the documents are an “offer” that can be accepted by acknowledgment or calling for delivery.22

A seller should either sign the offer or make sure there is no signature line for the seller.23 An offer should not state that all orders are subject to review and acceptance at seller’s place of business, as this would mean that there was no offer ready for acceptance.24 A seller can overcome the prejudice against seller offers by making sure an offer is clearly expressed and ready for acceptance.25

**Responses and Confirmations**

When the second party (buyer or seller) sends the return document (which is definitely accepting or confirming an agreement), the parties will have a contract even though the confirmation contains provisions adding to or differing from the original offer.26

Under common law prior to the Uniform Commercial Code, the “mirror image” rule required that the buyer’s acceptance be a mirror image of the seller’s offer.27 At common law, if the acceptance is not a mirror image of the offer, it rejects the initial offer and operates as a counteroffer. This is still the rule for most contract negotiations. If the contract involves the sale of goods, however, the Uniform Commercial Code controls.

The Uniform Commercial Code rejects the mirror image rule and converts a common law counteroffer into an acceptance even if it states additional or different terms.28 The UCC states:

>A definite and seasonal expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.29

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17 See subsection below, Responses and Confirmations.
26 UCC Section 2-207(1).
28 Idaho Power Co. v. Westinghouse Electric Corp., 596 F.2d 924, 926 (9th Cir. 1979).
29 UCC Section 2-207(1).
This means that if there is a response that indicates an acceptance, the parties have a contract even if the response has additional or different terms than the offer. In a response, there is a difference between “additional” terms (that add some new term to the offer) and “different” terms (that conflict with a term in the offer).

The UCC considers “additional terms” to be “proposals for addition to the contract.” If the transaction is between merchants, these additional terms will become a part of the contract unless the additional provisions: (1) “materially alter” the agreement, (2) the other party objects to the new terms or (3) the original offer was expressly limited to the terms of the offer. The UCC states that:

The additional terms are to be construed as proposals for additions to the contract. Between merchants, such terms become part of the contract unless:

a) the offer expressly limits acceptance to the terms of the offer;

b) they materially alter it; or

c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Courts have disagreed on the fate of “different” terms that conflict with terms in the offer. Some courts follow the same rule as for additional terms and the different terms become a part of the contract if there is no objection. The majority view, however, is the “knock out” rule. The conflicting terms in the offer and acceptance knock each other out, so that neither is in the contract. The UCC filler terms, discussed below, are used to fill in the gaps. The contract would be the terms agreed by the parties, which would be the terms in the offer and acceptance that do not conflict, plus the contract terms added by the UCC.

It is important to join the “Battle of the Forms” within the meaning of the UCC. It is not enough to respond with a confirmation that is silent about the terms in an offer. The recipient must expressly reject or object to any objectionable terms of sale or propose different terms. Sending purchase orders that only acknowledge the material and pricing, but were otherwise silent, certainly constitutes an acceptance of a supplier’s proposal and cannot be a “counteroffer” proposing a sale with no terms. Simply telephoning a supplier and verbally requesting shipment of materials, as often happens, also constitutes an acceptance of a supplier’s proposal and would not be a counteroffer.

A response or confirmation can be made conditional on an agreement to the additional or different terms. A buyer could respond to an offer by stating “I will agree to this only if you agree to remove your limitations of liability and extend your payment terms to 90 days.” This would not be an acceptance. This is a counteroffer and there is no contract unless the additional or different terms are accepted.

If additional or different terms are added in a response or confirmation (and the response or confirmation is not made conditional on an agreement to the additional or different terms), it becomes relevant whether the additional or different terms were “material.” Lawyers can spend a long time and a lot of your money arguing about whether the additional provisions “materially altered” the contract. This exception is possible protection if a return purchase order has a very important and costly provision in the fine print. It is normally better and easier, however, to limit acceptance of an offer and object to any new terms added later.

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30 UCC Section 2-207(2).
31 UCC Section 2-207(2).
32 UCC Section 2-207(2).
34 UCC Section 2-207, Official Comment 6.
35 See subsection below, Contract Terms Added by the UCC.
36 UCC Section 2-207.
37 UCC Section 2-207(1).
38 Courts differ on the exact wording required to make a response a counteroffer and not an acceptance. Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 101-02 (3d Cir. 1991). Many courts hold that there is no counter offer unless the acceptance is expressly conditional on the assent to the terms in the response. The responder must clearly reveal an unwillingness to proceed with the transaction without assurance of assent to the different or additional terms. Reaction Molding Technologies, Inc. v. General Elec. Co., 588 F.Supp. 1280,1288 (E.D. Pa. 1984);egan Machinery Co. v. Mobil Chemical Co., 660 F.Supp. 35 (D. Conn. 1986).
39 If the parties perform at this point, as if they had a contract, UCC Section 2-207(3) would apply, which states that: Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale.
Terms that would not be material alterations in a response or confirmation would include provisions for reasonable interest on unpaid invoices, limiting remedies for delays outside the seller’s control, or a clause fixing a reasonable time for complaints.\textsuperscript{40} Courts have held that addition of an attorney’s fee provision is a material alteration.\textsuperscript{41} An indemnification clause\textsuperscript{42} or a “no damage for delay” clause\textsuperscript{43} would materially alter the terms of an agreement. If the offer had included warranties, then a confirmation containing a disclaimer of warranties and limitation of remedies would “materially alter” the agreement.\textsuperscript{44} On the other hand, if the offer had excluded warranties, then a confirmation adding warranties would “materially alter” the agreement.\textsuperscript{45} This difference exemplifies the importance of making the first firm offer.

**Conclusions on Battle of the Forms**

It is important to both buyers and sellers to be the first to make a firm offer. It is easier to establish terms in an offer, than to add different terms in a response acceptance or confirmation.\textsuperscript{46} For example an offer to buy or sell can add warranty rights or limit remedies and warranty rights.\textsuperscript{47} Once an offer has done either, however, a response or confirmation adding warranty rights or eliminating warranty rights would not be enforceable as a material alteration of the original offer.\textsuperscript{48} As discussed below, it is also easier to limit acceptance of an offer than to make a response acceptance conditional. A signed agreement from the other party may be necessary, or is at least advisable, to change the terms of an offer. Accordingly, both buyers and sellers should endeavor to “fire the first shot” in the Battle of the Forms. Make sure that your offer is clearly expressed as a definite offer to buy or sell, with enough detail regarding the goods and the price to be an enforceable contract and including strong terms of sale.

It is also always preferable to get a signed agreement, rather than depending on the Battle of the Forms to establish your terms. A signed agreement will eliminate much uncertainty and make it much harder for the other party to add or modify terms.\textsuperscript{49}

The best advice is also to expressly limit acceptance of all proposals, offers, purchase orders or confirmations you send out. Offers sent out should state that “This proposal is subject to the terms and conditions on the reverse side.” This would make it more difficult for the return “acceptance” to change the terms of the agreement.\textsuperscript{50}

Even if the initial offer limited acceptance to the terms of the offer, the other party could send a response or confirmation that expressly rejects the terms of the offer and states that any contract must be on the terms of the response. This is a “counteroffer,” and you have no contract unless there is agreement to the changes.\textsuperscript{51} If you ship or accept product at this point, however, you are taking a risk that that your initial offer will not apply and that the response terms do apply.\textsuperscript{52} This is another instance where it is important to read your mail and send written

\textsuperscript{40} UCC Section 2-207, Official Comment 5.
\textsuperscript{41} Herzog Oil Field Serv., Inc. v. Otto Torpedo Co., 570 A.2d 549 (Pa. Super. Ct. 1990); Food Team Intern., Ltd. v. Unilink, LLC, 872 F.Supp.2d 405, 421-22 (2012). These cases imply that a limited right to legal fees may not be material and UCC Section 2-207, Official Comment 5 states that a clause fixing the seller’s standard credit terms where they are within the range of trade practice would not be material.
\textsuperscript{42} Trans-Aire International, Inc. v. Northern Adhesive Co., 882 F.2d 1254, 1263 (7th Cir. Ill. 1989).
\textsuperscript{44} Valtrol, Inc. v. General Connectors Corp., 884 F.2d 149,155 (4th Cir. S.C).
\textsuperscript{45} Valtrol, Inc. v. General Connectors Corp., 884 F.2d 149,155 (4th Cir. S.C).
\textsuperscript{50} UCC Section 2-207(2)(a).
\textsuperscript{51} Courts differ on the exact wording required to make a response a counteroffer and not an acceptance. Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 101-02 (3d Cir. 1991).
\textsuperscript{52} See e.g. Kraft Foods N. Am., Inc. v. Banner Eng’g & Sales, Inc., 446 F. Supp. 2d 551 (E.D. Va. 2006); but also see Deere & Co. v. Ohio Gear, 462 F.3d 701, 707-08 (7th Cir. 2006) and UCC Section 20-07(3), stating that the contract would consist of the terms on which the parties agree and the UCC supplementary terms.
objections if you receive a confirmation that you believe does not accurately describe an agreement. A final signed agreement is also advisable to eliminate doubt regarding terms.

It is important to have good forms available for offers, proposals, purchase orders and confirmations. The provisions you have in the fine print of a firm offer will be a part of your contract, unless they are expressly rejected. The fine print provisions in these documents involve a fairly small, one-time investment by you or your company, but can considerably reduce your risk and costs for years to come.

A Supplier Proposal could state:

Acceptance is limited to terms of this Proposal. Seller objects to any different or additional terms contained in any purchase order, offer or confirmation sent or to be sent by Buyer, which are expressly rejected. The price offered will be held firm only if acknowledgment is received by Seller or Buyer calls for delivery within 30 days of this Proposal, either of which shall be an acceptance of all terms herein. This Proposal is conditional on Buyer’s agreement to all terms and Seller is otherwise unwilling to proceed with this transaction. This is the final expression of this agreement and here will be no waiver or modification of any of these terms unless in writing signed by both parties. If Seller does expressly make any further agreement regarding these goods, all terms of this Proposal shall be incorporated into and shall become a part thereof.

If you are sending a return document or “confirmation,” you have an opportunity to change or neutralize some of the harsh terms in the original offer you receive. It is more difficult to add different terms in a response acceptance or confirmation, however, than it is to establish terms in an offer. To effectively change terms, a response acceptance or confirmation must be expressly conditional on assent to those different terms. It is not enough to say that “acceptance is limited to the different terms and conditions.” A response acceptance or confirmation must clearly express an unwillingness to proceed with the transaction unless there is assurance of assent to the different terms. It is advisable to both parties to get an actually signed contract at this point if it is important to know the terms of the final agreement.

A buyer purchase order should state something like:

Acceptance is limited to terms of this Purchase Order. Buyer objects to any different or additional terms expressed or implied in any quote, proposal, offer or confirmation sent or to be sent by Seller, which are hereby expressly rejected and superseded by this Purchase Order. This Purchase Order is expressly conditional on Seller’s assent to all terms herein and Buyer is unwilling to proceed in this transaction without that assent. The first to occur of Seller’s acceptance of this order or shipment of goods shall constitute Seller’s agreement to all of the terms and conditions in this Purchase Order. This is the final expression of this agreement and there will be no waiver or modification of any of these terms unless in writing signed by both parties.

End of the Battle of the Forms

When does the Battle of the Forms end? It does seem clear that an actually signed and complete agreement would be final. Subsequent letters and emails cannot change the terms of the agreement, unless they qualify as modifications to the agreement, discussed below.

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54 UCC Section 2-207.
In the absence of an actually signed and complete agreement it is not clear that the Battle of the Forms ever ends. An invoice sent on the day of delivery can act as a written confirmation that can add terms, but could not change terms in light of the “knock out” rule. A disclaimer of warranties and limit of liability on a product label can be effective if no prior contract had been formed.

**CONTRACT INTERPRETATION**

Many disputes concern the correct interpretation of a contract in both oral and written forms. There may be no question that a contract exists. There may be many detailed provisions over which the parties have no doubt. A dispute may arise because of an event neither party anticipated when entering into the contract. Even detailed written contracts can have terms that are ambiguous, often because of unforeseen circumstances.

When an agreement is plain and unambiguous in its terms, it will be given full effect. This means that buyers and sellers of materials that are not consumers and are regularly in the business of buying and selling materials will usually be stuck with their contract terms. This is true, even if you were not even aware of some contract terms, because you did not read them or you never joined the “Battle of the Forms” by expressly objecting to terms and conditions received.

**Contract Terms Added by the UCC**

The UCC does have several special provisions that only apply to the interpretation of contracts for the sale of goods. These are mostly “fill in the gap” rules that provide the parties a contract term to resolve an issue they neglected to consider when entering into the contract.

**Open Price Term**

Parties can have a binding contract even if they never agreed to a price. This will be true, however, only if the parties intended to enter into a binding agreement. Sometimes buyers or sellers haven’t yet discussed price. They may agree to negotiate a price later, or they may agree on a formula or standard to set the price at a later time. In each of these cases, the UCC states, “The price is a reasonable price at the time of delivery.” Note that the parties are bound to the price at the time of delivery. In the case of fluctuating prices, it could be very important whether the enforceable price was the market price at the time of the agreement or the market price at the time of later delivery.

**Delivery**

All goods described in a contract must be delivered in a single lot, unless otherwise agreed. In other words, a seller could not unilaterally decide to deliver some of the goods now and make the buyer wait until later for the rest.

Generally speaking, the place for delivery of goods is the seller’s place of business. A buyer cannot assume that there will be delivery to the buyer, unless such delivery is made a part of the contract.

Unless otherwise agreed, payment by the buyer is a condition precedent to the seller’s duty to deliver.

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60 See official comment to UCC Section 2-207(2), which states: “Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained in the confirmation or in the acceptance falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional or different terms.”


65 UCC Section 2-305(1).

66 UCC Section 2-305(1).

67 UCC Section 2-305(1).

68 UCC Section 2-310(a).

69 UCC Section 2-307.

70 UCC Section 2-308(a).

71 UCC Section 2-511(1).
**Time for Performance**

Goods must be delivered within a “reasonable time” if the parties have not agreed on any other schedule.\(^{72}\) This is again vague, but it does mean something. In most markets, it is not reasonable for a lumberyard to deliver two months after an order.

What is reasonable will vary depending on such factors as the nature of goods to be delivered, the purpose for which they are used, the extent of seller’s knowledge of buyer’s intentions, transportation conditions, the nature of the market and so on.\(^{73}\) A court would look at (1) the course of dealing between the parties; (2) trade usage in the industry; and (3) buyer’s notification to seller of time concerns. A purchase order with a definite delivery date can make time of the essence for a material supplier.\(^{74}\)

The most common “counterclaim” or “back charge” dispute with a supplier is that the materials were delivered late and delayed the job. If the contract defines a particular delivery schedule, then the supplier can be liable for damages if the materials are delivered late. If there is no definite delivery schedule, however, then the supplier cannot be liable for damage as long as the materials are delivered in a reasonable time. In other words, if a supplier has not agreed to deliver goods on twenty-four hours verbal notice, there is no breach of contract if a supplier is unable to do so.

**Time for Payment**

Payment is due for goods supplied at the time and place of delivery, unless the parties have agreed otherwise.\(^{75}\) This means that no credit or “time” is ever assumed. Most material supplier invoices state “due on receipt of invoice” or “due within 30 days.” Such provisions on an invoice are actually granting more time for payment than otherwise exists. Material suppliers should consider remaining silent on invoices about the time for payment or stating “payment is due on the receipt of goods.”

Many material suppliers and subcontractors are concerned about beginning work on a project before they have a signed contract. This may not be such a problem, however. On a sale of goods under the UCC, we have seen that the law will fill in most of the missing provisions. If the party on the other side of the transaction supplies the written contract, then the contract form provisions will help them far more than the provisions will help you. If you are in an unequal bargaining position, you may be better off without the written contract.

If the goods are shipped in multiple lots, a material supplier is also entitled to payment on each delivery.\(^{76}\) A construction subcontractor with a labor and materials contract (not covered by the UCC) will be entitled to payment upon completion, but will not be entitled to partial payments as the work progresses. This may be a serious problem. A subcontractor would have to complete his entire contract, spending large sums of money for months on materials and payroll, without any progress payments. For this reason alone, many labor and material subcontractors must make sure they have a signed subcontract. A supplier of goods, however, may be better off without a written contract, deciding to utilize the terms provided by the UCC, if the supplier is unable to require the use of the supplier’s form contract.

Where the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment.\(^{77}\) Post-dating the invoice or delaying the invoice’s mailing, however, will correspondingly delay the start of the credit period.

Unless otherwise agreed, payment by the buyer is a condition precedent to the seller’s duty to deliver.\(^{78}\) The buyer may make payment in any manner “current in the ordinary course of business.”\(^{80}\) If the parties have not made any other agreement as to credit or payment, the seller has the right to demand legal tender (cash).\(^{81}\) In this case, however, the seller must give “any extension of time reasonably necessary” to procure the cash.\(^{82}\)

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73 White and Summers Uniform Commercial Code, Vol 1. Ch. 3 at 126; Am Jur Sales § 268 and Corpus Juris Secondum Sales §170.
74 Kim v. Champion Iron Fence Co., 86 Va 608, 10 S.E. 885 (1890).
75 UCC Section 2-310.
76 UCC Section 2-307.
77 UCC Section 2-310(d).
78 UCC Section 2-310(d).
79 UCC Section 2-511(1).
80 UCC Section 2-511(2).
81 UCC Section 2-511(2).
82 UCC Section 2-511(2).
Normally, the buyer has the right to inspect the goods before accepting them and before payment is due, unless otherwise agreed.83 The term “COD” (collect on delivery) means that the buyer must pay for the goods before inspection.84

**Termination or Modification of Ongoing Supply Contracts**

Many verbal and written supply contracts run over a long period of time, with many successive deliveries. An example would be the ready mix contractor who gets weekly shipments of cement and stone. Either party can terminate such a contract at any time, unless otherwise agreed.85 If your business is dependent upon a steady flow of materials, you may want to have a contract requiring shipments in steady quantities. Remember that a seller can agree to such a contract, even if the price or quantity is not set. A buyer can get a commitment that the seller will ship all of the buyer’s requirements, even if the buyer has not committed to buy from the seller.

Any contract that can be terminated can also be modified. A material supplier that is able to terminate an ongoing supply relationship also can call the buyer and say, “I will terminate shipments unless you agree to a higher price or agree to do your own trucking.”

**F.O.B. and C.I.F. Terms**

F.O.B. means “Free on Board.”86 Contracts, proposals or letters often state that materials will be delivered, for example, F.O.B. seller’s plant, F.O.B. carrier or F.O.B. buyer’s place of business.

When the term is F.O.B. place of shipment (usually the seller’s plant), the seller must put the goods into the possession of the carrier at that place.87 The seller bears the risk until the goods are in the possession of the carrier.88 It would be the seller’s problem, for example, if the goods are stolen or damaged before the seller puts them in the possession of the carrier.89

If the term is F.O.B. vessel or carrier, the seller also bears the risk and expense of loading the goods for the carrier.90 If the term is F.O.B. the buyer’s place of business or some other place of destination, the seller must deliver the goods to that place at the seller’s risk and expense.91 The term F.A.S. is similar; it means “Free Along Side” and is normally used in connection with shipments by boat.92

The term C.I.F. means “the price includes in a lump sum the cost of the goods, the insurance, and the freight.”93 The term C. & F. (or C.F.) means that the price includes “cost and freight” only.94

**Risk of Loss**

Generally, the risk of loss stays with the seller until delivery.95 It will be the seller’s problem if the goods are damaged or stolen before the risk of loss transfers to the buyer. If the seller has breached the contract, however, and the buyer has rightfully rejected the goods, then the risk of loss remains with the seller after delivery.96

**Warranties**

Warranties can be “expressed” or “implied.”

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83 UCC Section 2-513(1).
84 UCC Section 2-513(3)(a).
85 UCC Section 2-309(2).
86 UCC Section 2-319(1).
87 UCC Section 2-319(1)(a).
88 UCC Section 2-319(1)(a).
89 UCC Section 2-319.
90 UCC Section 2-319(1)(c).
91 UCC Section 2-319(1)(b).
92 UCC Section 2-319(2).
93 UCC Section 2-320(1).
94 UCC Section 2-320(3).
95 UCC Section 2-509.
96 UCC Section 2-510.
Express Warranties

Modern automobile or equipment manufacturers normally supply lengthy written warranties to buyers. This is only one type of express warranty. Express warranties can arise in other ways, and a seller is often unaware that they are providing an express warranty at all. Any affirmation of fact or any promise can create an express warranty. Material salespersons must be trained not to express opinions on material performance. Salespersons should refer the buyer to architects, engineers or other professionals, unless the salesperson has had adequate training and does know how materials will perform.

Any type of description of goods supplied by a seller can also be an express warranty. Advertising brochures, for example, which describe material capabilities, will be express warranties of material performance. Sample materials provided by a supplier, specifications, correspondence or other communications can also be express warranties. If the goods eventually delivered do not confirm with the samples, specifications or correspondence, this will constitute a “breach of warranty.” According to the UCC, an express warranty is created by “(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain...or (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.”

It is important to remember that the express warranty will not mean that other implied warranties do not apply. To do this, the written warranty must expressly exclude the implied warranties and this language must be conspicuous. This is why you often see contracts and warranties with language in large, capitalized print stating “BUYER ACCEPTS THIS WARRANTY IN LIEU OF ANY OTHER WARRANTY EXPRESSED OR IMPLIED, INCLUDING THE WARRANTY OF MERCHANTABILITY.”

Implied Warranties

Implied warranties are another type of “fill in the blank” provision where the UCC is supplying contract terms that the parties did not discuss.

Implied Warranty of Merchantability

In all sales of goods, unless expressly excluded, the seller warrants to the buyer that the goods are merchantable. This means that the goods: (1) would pass without objection in the trade under the contract description; (2) are of fair, average quality within the description; (3) are fit for the ordinary purposes for which such goods are used; (4) are of even kind, quality and quantity within each unit or lot and among all units or lots involved; (5) are adequately packaged and labeled; and (6) conform to the promises or affirmations of fact made on the container or label. These are again somewhat vague and flexible concepts, but they are very important to protect buyers of materials.

Implied Warranty of Fitness for a Particular Purpose

Under the implied warranty of merchantability, sellers warrant that their materials are fit “for ordinary purposes.” Sellers do not warrant that materials are fit for any particular purpose, however, unless the seller has reason to know the purpose for which the materials will be used and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods. Such a warranty is an implied warranty of fitness for a particular purpose. Material salespeople must be trained to listen to unusual statements from buyers about the use of materials and suggest that the buyer investigate whether the materials are fit for that purpose.

97 UCC Section 2-313.
98 UCC Section 2-313(1).
99 UCC Section 2-313(1)(b).
100 UCC Section 2-313(1)(c).
101 UCC Section 2-313.
102 UCC Section 2-316(2).
103 UCC Section 2-314(1).
104 UCC Section 2-314(2).
105 UCC Section 2-314.
106 UCC Section 2-315.
107 UCC Section 2-315.
Exclusion of Warranties

Express and implied warranties are cumulative. In other words, a buyer would have the choice of suing under an express written warranty or an implied warranty or both. Even if an express warranty is offered, the seller must carefully exclude the implied warranty of merchantability.

The UCC permits disclaimers of express warranty. If a seller has excluded all express warranties, it does not matter what any salesperson may have said in any meetings. The buyer has agreed in advance not to rely on any oral statement. A writing must only be “conspicuous” to exclude warranties under the UCC.

It is not easy to contract out of the implied warranty of merchantability. Any exclusion of this warranty must be “conspicuous” and must specifically identify the warranty of merchantability. This is why you often see such language in large print, all caps, in a contract or written warranty. This would make the exclusions conspicuous as a matter of law.

Language excluding any other implied warranty, such as warranty of fitness for a particular purpose, must be in writing and must be conspicuous, but does not need to be as specific.

Limitation of Liability

A buyer can agree that remedies will be limited for any breach of contract by a seller. Where sophisticated business professionals enter into an arms-length transaction, a court will enforce the terms of the agreement between them absent some compelling reason that enforcement would be unreasonable or unjust. When an agreement is plain and unambiguous in its terms, it will be given full effect. Construction industry buyers and sellers are sophisticated business people. If they waive warranties or limit liability in contract documents, they will be held to those terms. These terms could even be inserted in an offer during the “Battle of the Forms” without the actual knowledge of the buyer.

A buyer can be bound to limits of liability and exclusions of warranties in a credit agreement for any sales of goods after the credit agreement is signed. A buyer can also be bound to these same limits of liability and exclusions of warranty if they are stated in each proposal or offer for each individual sale of goods.

A Supplier Proposal could state:

Seller agrees to replace or, at Seller’s option, repair any defective goods within a reasonable time. Buyer’s remedies for any delay or any defect in the materials are subject to and limited by any limitations contained in the manufacturer’s terms and conditions to Seller. Further, Buyer’s sole and exclusive remedy and Seller’s limit of liability for any and all loss or damage resulting from defective goods shall be for the purchase price of the particular delivery and materials with respect to which loss or damage is claimed, plus any transportation charges actually paid by the Buyer. In no event shall Seller be liable for any damage due to delay of any type, nor consequential, special or punitive damages. THE FOREGOING WARRANTY IS EXCLUSIVE AND IS IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING THE WARRANTY OF TITLE, AGAINST LIENS, INFRINGEMENT, THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.

108 UCC Section 2-316(1).
110 UCC Section 2-316(2).
112 UCC Section 2-316(2).
113 UCC Section 2-316(2).
115 McLean House v. Maichak, 231 Va. 347, 349, 344 S.E.2d 889, 890 (1986); Gordonsville Energy v. Virginia Elec. & Power Co., 257 Va. 344, 354, 512 S.E.2d 811, 817 (1999) (reiterating that “when contract terms are clear and unambiguous, the words used by the parties must be given their plain and ordinary meaning”).
The Uniform Commercial Code allows a limitation of the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods.\(^\text{118}\) This could eliminate the potential for any claim or counterclaim against a seller for allegedly defective material, if the buyer has not paid the purchase price. A buyer would have at most a defense to a seller’s claim for the unpaid purchase price. If the seller repairs or replaces any defective goods within a reasonable time, the buyer would owe the full purchase price.\(^\text{119}\)

It is probably important to be clear in a contract that these remedies are “sole and exclusive.” Remedies for breach of contract or breach of warranty are generally cumulative. Saying a buyer has one remedy does not necessarily mean that all other remedies are excluded.\(^\text{120}\)

A buyer can also waive incidental, consequential, special, punitive or delay damages. Damages are generally either “direct” or “consequential” (“indirect”). Direct damages are those which arise “naturally” or “ordinarily” from a breach of contract. They are damages that can be expected to result from a breach in the ordinary course of human experience. Consequential damages are those which arise from the intervention of “special circumstances” not ordinarily predictable.\(^\text{121}\) Generally, direct damages are compensable. If damages are consequential, they are compensable only if it is determined that the special circumstances were within the “contemplation” of both contracting parties or were “predictable.”\(^\text{122}\) Consequential damages may be limited or excluded, unless they are unconscionable.\(^\text{123}\) If experienced parties agree to allocate unknown or undeterminable risks, however, they should be held to their bargain. Courts should not be permitted to rewrite the agreement.\(^\text{124}\)

**CONTRACT PERFORMANCE AND BREACH**

**Buyer’s Right of Inspection**

As discussed above,\(^\text{125}\) the buyer normally has the right to inspect goods before payment is due.\(^\text{126}\) If the parties have agreed that payment must be made prior to an opportunity to inspect (COD), then the buyer will still have an opportunity to later reject the goods or revoke any acceptance of the goods.\(^\text{127}\)

**Rejection of Goods**

The buyer has the right to reject any goods that do not conform to the contract.\(^\text{128}\) The buyer may reject the whole delivery or accept part of the delivery and reject the rest.\(^\text{129}\) The buyer must pay the contract price for any goods that have been accepted.\(^\text{130}\)

The buyer must affirmatively reject the goods within a reasonable time, or they will be deemed accepted.\(^\text{131}\) If the buyer is a merchant and has the right to reject the goods, then the buyer will still have the obligation to act reasonably and to use reasonable care to hold the goods for a time sufficient for the seller to retrieve them.\(^\text{132}\) The merchant buyer also must follow reasonable instructions received from the seller if the seller is geographically far away and unable to

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\(^{119}\) Marr Enterprises, Inc. v. Lewis Refrigeration Co., 556 F.2d 951, 955 (9th Cir. 1977).

\(^{120}\) UCC Section 2-719(1)(b).


\(^{122}\) UCC Section 2-715(2) states that “consequential damages resulting from the seller's breach include...any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know...” (emphasis added).

\(^{123}\) UCC Section 2-719(3).


\(^{125}\) See section above, Contract Interpretation; subsection, Contract Terms Added by the UCC; sub-subsection, Time for Payment.

\(^{126}\) UCC Section 2-513.

\(^{127}\) UCC Section 2-601; UCC Section 2-608.

\(^{128}\) UCC Section 2-601(a).

\(^{129}\) UCC Section 2-601.

\(^{130}\) UCC Section 2-607.

\(^{131}\) UCC Section 2-602(1); Moore & Moore General Contractors, Inc. v. Basepoint, Inc.

\(^{132}\) UCC Section 2-602.
promptly retrieve the goods. If the seller does not provide instructions, then the buyer must take reasonable efforts to resell the goods on the seller’s account if the goods are perishable or will quickly decline in value.

When a buyer rejects goods, the buyer must give the seller notice of any “particular defect which is ascertainable by reasonable inspection.” The buyer cannot later rely on any unstated defect to justify rejection or to establish breach if: (1) the seller could have cured the defect if the seller had received notice of it, or (2) the buyer and seller are both merchants and the seller, after rejection, made a request in writing for a full and final statement of all defects on which the buyer will rely. Any seller whose goods have been rejected would be advised to make such a request in writing promptly. This may limit the defects on which the buyer can later rely. It may also provide the seller a notice of defects that the seller can promptly cure.

**Seller’s Right to Cure**

If the buyer has rejected goods and the time for delivery has not passed, the seller may give the buyer notice of the seller’s intent to cure. In this case, the buyer must allow the seller to cure by making another delivery of goods that do conform to the contract.

In a typical construction material context, the time for the seller’s performance will not usually be “expired” at the time a buyer rejects the goods. If a supply contract states that “delivery shall be made by 10:00 a.m. on January 5,” then the time for performance would have expired at that time. Most construction material supply contracts, however, do not state such a specific time for delivery. Delivery must be within a “reasonable time,” therefore, and the seller would also have a reasonable time to cure any defective delivery.

Even if the time for performance has expired, the seller will have a right to cure within a reasonable time, if “the seller had reasonable grounds to believe [that the goods] would be acceptable with or without money allowance.” This is to avoid injustice to the seller by reason of a surprise rejection.

**Seller’s Right to Reclaim Goods**

The seller may have the right to reclaim goods if the buyer breaches. The buyer’s right to retain goods is conditional upon the buyer making payments due. In other words, the buyer never really made payment if the check does not clear. If a check does not clear, the seller has the right to reclaim the goods if the seller makes demand within 10 days after delivery of the goods.

The seller also has the right to reclaim goods within 10 days after the receipt if “the seller discovers that the buyer has received goods on credit while insolvent.” As long as the seller makes demand within 10 days after receipt in accordance with the UCC, the seller can reclaim and again become the owner of the goods. If the owner fails to make demand within the time stated, then the buyer will remain the owner of the goods and the seller will only own a debt and be another creditor of the buyer.

To reclaim goods under the UCC, the creditor-reclamation claimant must prove:

1. The debtor was insolvent at the time of delivery
2. Written demand was made within 10 days of delivery (extended to 20 days after bankruptcy, if bankruptcy is filed within 45 days after delivery)
3. The goods are “identifiable” at the time of the reclamation demand
4. The goods are in possession and control of the debtor at the time of the reclamation demand.

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133 UCC Section 2-603.
134 UCC Section 2-603(1).
135 UCC Section 2-605(1).
136 UCC Section 2-605(1).
137 UCC Section 2-508(1).
138 UCC Section 2-508(1).
139 UCC Section 2-508(2).
140 UCC Section 2-508, Official Comment 2.
141 UCC Section 2-507(2).
142 UCC Section 2-511(3).
144 UCC Section 2-702(2).
145 UCC Section 2-702(2); In Re Helms Veneer Corp., 287 F.Supp. 840 (W.D. Va. 1968).
A creditor should be sure to send notice by some method providing third-party verification of receipt, such as commercial courier, Federal Express, certified mail or service by the Sheriff. Otherwise, it will be difficult to prove receipt of written demand.

The right to reclaim goods is always important to creditors when a debtor files bankruptcy. A vendor with the right of reclamation becomes a secured creditor and may be able to retake possession of the goods sold. If there is no right or reclamation, the vendor is a general unsecured creditor.\footnote{11 USC §546(c). See chapter below, Bankruptcy Primer for Creditors; section, Adversary Proceedings; subsection, Reclamation Rights.}

The bankruptcy code always has generally respected the state law right of reclamation in the UCC and now actually expands this right. A creditor can reclaim goods delivered within the 45 days prior to a bankruptcy petition, as long as written reclamation demand is delivered within 20 days after the bankruptcy petition.\footnote{11 USC §503(b)(9).} A creditor can file for an administrative expense claim for any goods delivered within the 20 days prior to a bankruptcy petition in any event, regardless of whether any reclamation notice has been sent.\footnote{11 USC §546(c). See chapter below, Bankruptcy Primer for Creditors; section, Adversary Proceedings; subsection, Reclamation Rights.}

If the buyer made a misrepresentation in writing concerning solvency within three months before delivery, then the 10-day limitation under the UCC does not apply.\footnote{11 USC §546(c). See chapter below, Bankruptcy Primer for Creditors; section, Adversary Proceedings; subsection, Reclamation Rights.} The seller could reclaim the goods more than 10 days after delivery. Credit applications are important for this reason. They can be representations concerning solvency that induce a material seller to deliver.

The right to reclaim goods after delivery will be of limited help to a construction materials supplier, however, because the goods delivered will normally be resold promptly by the buyer. Once 2x4 studs go into the construction of a house or asphalt goes into the construction of a highway, title (ownership) of these materials has passed through the buyer to the owner of the property. It will be too late to reclaim. The seller’s right to reclaim is subject to the rights of this type of buyer in the ordinary course of business or a good faith purchaser.\footnote{UCC Section 2-702(2).; UCC Section 2-702(3).} Under those circumstances, a seller may not have a right to reclaim the goods but may have an administrative expense claim in the bankruptcy or state law mechanic’s lien or payment bond rights.

It can also be very expensive or impossible for a construction materials supplier to repossess goods such as large quantities of gravel. Note also that successful reclamation of goods excludes all other remedies under the UCC. In other words, the seller cannot reclaim the goods and sue the buyer for damages. Nonetheless, this right to reclaim can provide the seller an opportunity to get something from a bankrupt debtor where the seller may otherwise get nothing.

Where the seller discovers the buyer is insolvent, the seller may also refuse future deliveries unless the buyer pays cash for future deliveries and pays for all goods delivered up to that time.\footnote{UCC Section 2-609(1).} The seller may also stop any deliveries that are under way.\footnote{UCC Section 2-609(2).}

**Right to Adequate Assurance of Performance**

A material buyer has the right to expect that goods will be delivered. A material seller has the right to expect payment for the materials. When reasonable grounds for “insecurity” arise, the other party may demand in writing an “adequate assurance of due performance.”\footnote{UCC Section 2-609(2).} If a seller, for example, has reasonable grounds to believe that the buyer will be unable to make payment, that seller could demand an assurance that the buyer is capable of paying, before goods are delivered.

“Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.”\footnote{UCC Section 2-609, Official Comment 3.} The Official Comment to the UCC states that a seller has reasonable grounds for insecurity if a buyer falls behind in his account with the seller, even though the items involved have to do with separate and legally distinct contracts.\footnote{UCC Section 2-609, Official Comment 3.} On the other hand, a buyer who requires

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\footnote{11 USC §546(c). See chapter below, Bankruptcy Primer for Creditors; section, Adversary Proceedings; subsection, Reclamation Rights.}

\footnote{11 USC §503(b)(9).}

\footnote{UCC Section 2-702(2).}

\footnote{UCC Section 2-702(3).}

\footnote{UCC Section 2-702(3).}

\footnote{UCC Section 2-702(1).}

\footnote{UCC Section 2-702(1); UCC Section 2-705(1).}

\footnote{UCC Section 2-609(1).}

\footnote{UCC Section 2-609(2).}
precision parts has reasonable grounds for insecurity if he discovers the seller is making defective deliveries of such parts to other buyers.\textsuperscript{157}

**Anticipatory Repudiation**

If either party “repudiates the contract,” the other party can treat the contract as “breached” at the time of repudiation and does not have to wait until performance is due.\textsuperscript{158} For example, a material supplier can tell a buyer that it will be unable to deliver, or the buyer could notice that the seller’s manufacturing plant has closed down. In either case, the buyer does not have to wait until delivery is due in order to declare the seller in breach. Once the contract is “repudiated,” the buyer can arrange for substitute goods and hold the seller responsible for damages.\textsuperscript{159} A repudiation can be retracted, unless the aggrieved party has materially changed his position.\textsuperscript{160}

An “installment contract” is one that requires multiple delivery of materials in separate lots.\textsuperscript{161} There are special rules if there are defects in any one delivery of an installment contract.\textsuperscript{162}

**Notice of Breach to Seller**

The Uniform Commercial Code Section 2-607(3) states that when a buyer has accepted goods, the buyer must notify the seller within a reasonable time after the buyer discovers or should have discovered any breach—or be barred from any remedy.\textsuperscript{163} This generally means that a buyer has to notify a seller fairly promptly after delivery if there are any defects in the material. Otherwise, the buyer will lose the right to claim breach of contract or breach of warranty.\textsuperscript{164}

This code section is helpful to a seller, especially where a buyer waits to complain of problems until after the seller files suit to collect the purchase price. However, the UCC probably does not require written notice or a complete statement of defect,\textsuperscript{165} and a buyer may claim that notice of defects was given verbally to employees of the seller. It is also not clear how long a buyer can wait to complain.\textsuperscript{166} These uncertainties can be eliminated in a contract term requiring written notice and an opportunity for the seller to cure within a defined period of time, like paragraph 4 in the sample Proposal Form available in the Appendices.


\textsuperscript{157} UCC Section 2-609, Official Comment 3.
\textsuperscript{158} UCC Section 2-610.
\textsuperscript{159} UCC Section 2-610(b).
\textsuperscript{160} UCC Section 2-611.
\textsuperscript{161} UCC Section 2-612(1).
\textsuperscript{162} UCC Section 2-612.
\textsuperscript{163} UCC Section 2-607(3).
\textsuperscript{164} Begley v. Jeep Corp., 491 F. Supp. 63 (W.D. Va. 1980) (Whether plaintiffs gave defendants reasonable notice of breach of warranty is ordinarily a question of fact reserved for the jury, however, if the evidence is clear, the court can rule as a matter of law that a party failed to give proper notice. Plaintiffs violated the letter and spirit of by waiting over two years to give defendants notice and sanction of dismissal should operate against them); Hebron v. American Isuzu Motors, Inc., 60 F.3d 1095 (4th Cir. 1995) (a two-year delay in giving notice under subsection (3) was unreasonable as a matter of law where no explanation for the delay was provided and actual prejudice was sustained).
\textsuperscript{165} Cancun Adventure Tours, Inc. v. Underwater Designer Co., 862 F.2d 1044 (4th Cir. 1988) (The provision does not require that notification include a clear statement of all objections. A buyer simply is required to notify the seller that the transaction is troublesome and should be watched); See also Virginia Transformer Corp. v. P.D. George Co., 932 F. Supp. 156 (W.D. Va. 1996).
\textsuperscript{166} Begley v. Jeep Corp., 491 F. Supp. 63 (W.D. Va. 1980) (Plaintiffs violated the letter and spirit of by waiting over two years to give defendants notice and sanction of dismissal should operate against them); Hebron v. American Isuzu Motors, Inc., 60 F.3d 1095 (4th Cir. 1995) (a two-year delay in giving notice under subsection (3) was unreasonable as a matter of law where no explanation for the delay was provided and actual prejudice was sustained).