

GOOD FAITH

- Every party to every contract for the sale or lease of goods owes every other party a duty of *good faith*.
- As of January 1, 2011, twenty-eight states' enactments of UCC Article 1 define "good faith" to require a **non-merchant** to behave **honestly** in fact and observe **reasonable commercial standards of fair dealing**; in the other twenty-two states and the District of Columbia, non-merchants need only behave honestly to satisfy their duty of good faith.
- Regardless of which version of UCC Article 1 is in effect in a particular state, a **merchant** must behave honestly and observe reasonable commercial standards of fair dealing in the trade.
- The parties **cannot waive or disclaim** the UCC's good faith requirement.
- The UCC duty of good faith applies when **performing** or **enforcing** a contract; it does not apply prior to or during contract formation.

TENDERING DELIVERY

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

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

PLACE OF DELIVERY: NONCARRIER CONTRACT

- If the contract does not designate the place of delivery and
 - (1) the **buyer/lessee is to pick them up** from the seller/lessor, the place of delivery is the **seller's/lessor's place of business**, or the seller's/lessor's residence, if he has no regular place of business; or
 - (2) the goods are being **held by a bailee**, the place of delivery is where the **goods are located**.

PLACE OF DELIVERY: SHIPMENT CONTRACT

- If the contract requires or authorizes the seller/lessor to ship the goods by carrier, the seller/lessor must
 - (1) deliver the goods to a **carrier**;
 - (2) make a **contract**, reasonable given the nature of the goods and their value, **for transport** of the goods;
 - (3) obtain and promptly deliver any **documents of title** the buyer/lessee needs to take possession of the goods from the carrier; and
 - (4) **promptly notify** the buyer/lessee that the goods are en route.

PLACE OF DELIVERY: DESTINATION CONTRACT

- If the contract requires the seller/lessor to deliver or arrange for the delivery of the goods to a particular destination, the seller/lessor must
 - (1) tender the goods at a **reasonable hour**;
 - (2) keep the goods available for a **reasonable period of time** for the buyer/lessee to take possession; and
 - (3) obtain and promptly deliver any **documents of title** the buyer/lessee needs to take possession of the goods from the carrier; and
 - (4) **promptly notify** the buyer/lessee that goods are available for her to take delivery.

PERFECT TENDER RULE

- If the goods or the tender fail *in any respect* to conform to the contract, the buyer/lessee may
 - (1) **accept** the goods,
 - (2) **reject** the entire shipment, or
 - (3) **accept** part and **reject** part.

PERFECT TENDER: EXCEPTIONS

- **The Parties' Agreement:** The parties can include exceptions in their contract.
- **Right to Cure:** When any tender of delivery is rejected because the goods are nonconforming, and the time for performance has not yet expired, the seller/lessor can
 - (1) **notify the buyer/lessee** of the seller's/lessor's intention to cure and then
 - (2) **repair, adjust, or replace** the nonconforming goods *within the time for performance specified in the contract.*
- **Cure Out of Time:** A seller may be entitled to cure even *after* the time to perform has passed, if the seller timely made the nonconforming tender *reasonably believing* that the buyer/lessee would accept.
- **Substitute Carrier:** When the agreed manner of delivery is unavailable or impracticable *through no fault of either party*,
 - (1) the seller/lessor may, at his own expense, use a **commercially reasonable** substitute,
 - (2) the use of which will constitute sufficient tender.

INSTALLMENT CONTRACTS

- If a contract requires or authorizes delivery in two or more separate lots, to be accepted and paid for separately,
 - (1) the buyer/lessee may reject tender only if the nonconformity **substantially impairs the value of the installment** and cannot be cured;
 - (2) the entire installment contract is breached only when one or more nonconforming installments **substantially impairs** the value of the **entire contract**; and
 - (3) if the buyer/lessee **subsequently accepts** a nonconforming installment without notifying the seller/lessor of cancellation, the contract is reinstated.

COMMERCIAL IMPRACTICABILITY

- When an occurrence, *unforeseeable* by either party at the time the contract was made, makes performance commercially impracticable,
 - (1) the perfect tender rule **no longer applies**, and
 - (2) delay in delivery or nondelivery in whole or in part is **not a breach** of contract, provided that
 - (3) the seller/lessor **notify** the buyer/lessee as soon as practicable of the delay or nondelivery; but
 - (4) in the event that the seller/lessor is able to at least **partially perform**, it is obligated to
 - (a) fairly and reasonably **allocate** any remaining production and deliveries among those to whom it is contractually obligated to deliver the goods, and
 - (b) **notify** the buyer/lessee of the allocation, which the buyer/lessee is free to **accept or reject**.

DESTRUCTION OF GOODS

- The parties are excused from performance, when
 - (1) an **unexpected event**, through **no fault of either party**,
 - (2) **destroys goods identified** when the contract was formed,
 - (3) **before the risk of damage passed** to the buyer/lessee.
- If the goods are only **partially destroyed**, the buyer/lessee may inspect them and either
 - (a) **cancel** the contract, or
 - (b) accept the damaged goods at a **reduced price**.

ASSURANCE AND COOPERATION

- **Right to Assurance:** If one party has “reasonable grounds” to believe that the other party will not perform as agreed, she may, in writing, “demand adequate assurance of due performance” from the other party.
 - Both the reasonableness of the grounds on which the first party seeks assurance and the adequacy of the assurances the second party provides depend on reasonable commercial standards of fair dealing.
- **Duty to Cooperate:** If one party’s performance requires the cooperation of the other party, the second party’s failure to cooperate suspends (and may eventually excuse) the first party’s obligation to perform.

PAYMENT AND INSPECTION

- **Payment Term:** When goods are sold on credit, the buyer must pay according to the credit terms provided in the contract, not when she receives the goods. When goods are leased, the lessee must make the lease payments required by the lease agreement.
- **Method of Payment:** The buyer/lessee may pay by any means specified by the parties, or by **any reasonable means** if the parties do not specify a method of payment. If the seller/lessor insists on cash when a buyer/lessee tenders a check or credit card, the seller/lessor must give the buyer/lessee **reasonable time** to obtain cash.
- **Right to Inspect:** The UCC requires that the buyer/lessee be given an opportunity to inspect the identified goods as a **condition precedent** to the seller's/lessor's right to enforce payment under the contract.
 - Unless otherwise agreed, inspection can take place at **any reasonable place and time** and in **any reasonable manner**, in light of the customs of the trade, past practices of the parties, and the like.
 - Unless otherwise agreed, the **buyer/lessee bears the cost** of inspection.

ACCEPTANCE

- A buyer/lessee can accept the delivered goods by
 - (1) **expressly accepting** the shipment by words or by conduct,
 - (2) **failing to reject** the goods with a **reasonable period of time** after having had the opportunity to inspect the goods, or
 - (3) in the case of a sales contract, acting in any manner **inconsistent with the seller's ownership** (e.g., reselling the goods to a third party).

- If some, but not all, of the goods delivered are nonconforming, and the seller/lessor has failed to cure, the buyer/lessee may make a **partial acceptance**, provided that the buyer/lessee cannot accept less than a single **commercial unit**.

- **Commercial Unit:** A unit of goods that, by commercial usage, is viewed as a “single whole” for purposes of sale (e.g., five sticks of chewing gum in a pack, a sleeve of three golf balls).

ANTICIPATORY REPUDIATION

- If, before the time for a promisor's performance, he clearly communicates to the promisee his inability or intention not to perform, the promisee may
 - (1) treat the repudiation as a breach and **cancel** the contract,
 - (2) treat the repudiation as a breach and **sue**,
 - (3) **wait and see** if the repudiating party retracts his repudiation and performs as called for, or
 - (4) seek **adequate assurances** from the repudiating promisor that he will, in fact, perform as and when performance is due.
- In any case, the nonrepudiating promisee may **suspend** her own performance unless and until the repudiating promisor performs.
- At any time before the nonrepudiating promisee materially changes her position in reliance on the repudiation, the repudiating promisor may **retract** his repudiation and perform as and when promised.

SELLER'S/LESSOR'S REMEDIES: GOODS IN THE SELLER'S/LESSOR'S POSSESSION - PT. I

- If the buyer/lessee breaches the contract before it has received the goods, the seller/lessor may:
 - (1) **cancel** the contract, giving the buyer/lessee notice of cancellation,
 - (2) **withhold delivery**,
 - (3) **resell or otherwise dispose** of the goods, in a *commercially reasonable* manner, retaining any profit over the contract price or holding the buyer/lessee liable for any deficiency, plus any incidental damages,
- **Unfinished Goods:** If the goods are unfinished at the time of the breach, the seller/lessor may, if commercially reasonable, **cease** manufacturing the goods and dispose of them for **salvage** value.
- **Notice:** Unless the goods are perishable or threaten to rapidly decline in value, the seller/lessor must give the buyer/lessee notice of the resale or other planned disposition.

SELLER'S/LESSOR'S REMEDIES: GOODS IN THE SELLER'S/LESSOR'S POSSESSION - PT. II

- (4) if the seller/lessor is unable to dispose of the goods in a commercially reasonable manner, **sue to recover the purchase price or payments due**, plus incidental damages, or

- (5) sue to recover as **damages**
 - (a) the **difference between the contract price and the fair market price of the goods** (at the time and place of tender), plus incidental damages, or

 - (b) the seller's/lessor's **lost profits**, including a reasonable allowance for overhead and other expenses.
 - A seller/lessor can only recover lost profits if recovering the difference between the contract price and the market price at the time and place of tender will not place her in the same position she would have been in had the buyer/lessee performed.

SELLER'S/LESSOR'S REMEDIES: GOODS IN TRANSIT

- If the seller/lessor has delivered the goods to a carrier or bailee, but the buyer/lessee has not yet received them, the seller/lessor may:
 - (1) if the **buyer/lessee is insolvent**, stop the carrier or bailee from delivering the goods to the buyer/lessee, or
 - (2) if the **buyer/lessee has breached the contract but is not insolvent**, stop the carrier or bailee from delivering the goods only if the quantity shipped is at least a carload, truckload, planeload, or a larger shipment.
- In order to stop delivery, the seller/lessor must **timely notify** the carrier or bailee.
- The seller's/lessor's **right to stop delivery expires** if:
 - (a) the **buyer/lessee obtains possession** of the goods;
 - (b) the **carrier or bailee acknowledges** the buyer's/lessee's right to possession; or
 - (c) in a sales transaction, the buyer possesses the **document of title**.

SELLER'S/LESSOR'S REMEDIES: GOODS IN THE BUYER'S/LESSEE'S POSSESSION

- When a buyer/lessee breaches a contract after receiving the goods, the seller may:
 - (1) if the buyer/lessee refuses to pay, **sue for the purchase price or payments due**, plus incidental damages; or
 - (2) in a lease transaction, if the lessee refuses to pay or otherwise defaults, **reclaim** any leased goods in the lessee's possession; or
 - (3) in a sales transaction, if the buyer is insolvent, **reclaim** any goods sold on credit
 - (a) **within 10 days** of the buyer's receipt, or
 - (b) **at any time** if the buyer **misrepresented her solvency** in writing within 3 months prior to the delivery of the goods.
- If the seller elects to reclaim, she will be barred from seeking any other remedy, such as incidental damages.

BUYER'S/LESSEE'S REMEDIES: NONDELIVERY - PT. I

- If the seller/lessor refuses to deliver the goods to the buyer/lessee, the buyer/lessee may
 - (1) **cancel the contract**, relieving the buyer/lessee of any further obligations under the contract, while retaining all rights against the seller/lessor;
 - (2) if she has made partial or full payment for identified goods in the possession of an insolvent seller/lessor, **obtain the goods** by tendering to the seller/lessor any remaining balance of the contract price;
 - (3) if the goods are unique and any legal remedy will be inadequate, require the seller/lessor to **specifically perform** the contract by tendering the identified goods to the buyer/lessee;
 - (4) in good faith and without unreasonable delay, **purchase or lease substitute goods** (a.k.a. *cover*) from a third party, and sue to recover from the seller/lessor any **difference between the contract price and the price of the replacement goods**, plus any incidental and consequential damages, less any costs saved by the breach;

BUYER'S/LESSEE'S REMEDIES: NONDELIVERY - PT. II

- (5) if the buyer/lessee can show that she is unable, after a reasonable effort, to obtain cover for the contract goods, *replevy* (*i.e.*, take or demand possession of) **goods subject to the contract**; or
- (6) sue to recover the **difference between the contract price and the fair market price of the goods** (at the time that the buyer/lessee learned of the breach), **plus** incidental and consequential damages, less any costs saved.

BUYER'S/LESSEE'S REMEDIES: NONCONFORMING GOODS - PT. I

- When the seller/lessor delivers nonconforming goods or makes a nonconforming tender, the buyer/lessee, *following reasonable notice* to the seller/lessor of the defects in the goods or the tender, may
 - (1) within a reasonable period of time after delivery, **reject the goods**, provided that
 - (a) if the rejecting buyer/lessee is a **merchant**, and
 - (b) the seller/lessor has no agent or business at the place of rejection,
 - (i) the buyer/lessee must follow any **reasonable instructions** from the seller/lessor regarding the goods, or
 - (ii) lacking instructions, the buyer/lessee may **sell or lease** the goods in good faith or **store** the goods if they are nonperishable;

BUYER'S/LESSEE'S REMEDIES: NONCONFORMING GOODS - PT. II

- (2) within a reasonable period of time after the buyer/lessee discovers or should have discovered a nonconformity that *substantially impairs* the value of the goods to her, **revoke her acceptance** of the goods, as long as she
 - (a) did not discover the nonconformity prior to acceptance, either because it was not apparent or because assurances from the seller/lessor kept the buyer/lessee from inspecting the goods, or
 - (b) accepted the goods on the reasonable assumption that any nonconformity would be cured and its has not been cured within a reasonable time; or
- (3) keep the goods and sue for the **difference between the value of the goods as accepted and their value as promised** in the contract.

LIMITING REMEDIES AND RECOURSE

- **Contractual Limitations:** The parties may agree to expand or limit the remedies provided by the UCC.
 - **Exclusive Remedy:** If the contract unequivocally provides an exclusive remedy, a court should enforce it unless the circumstances cause the exclusive remedy to *fail in its essential purpose*.
 - **Limiting Consequential Damages:** The parties may also limit or exclude **consequential** damages as long as the limitation or exclusion is not **unconscionable**, given the relative bargaining strength of the parties.
- **Statute of Limitations:** An action for breach of contract under the UCC must be **commenced** within **four years** after the injured party knew or should have known of the breach.
 - The parties may contractually agree to **reduce** this period to **not less than one year**, but may not extend it beyond four years.
 - A buyer who accepts nonconforming goods must notify the breaching party of the breach within a **reasonable time** to permit the breaching party to cure; the buyer's failure to do so will **bar** any claim for breach.

LETTERS OF CREDIT

■ Letter of Credit:

- (1) A written instrument,
- (2) issued by a bank (the *issuer*)
- (3) on behalf of a customer (the *account party*),
- (4) promising that the bank will honor drafts and other demands for payment, in accordance with the terms of the letter,
- (5) made by the recipient of the letter (the *beneficiary*) or its assignee.

- The letter of credit is **independent of the underlying contract** between the buyer and seller, and the issuer is bound to honor the letter regardless of any dispute between the buyer and seller.

REMEDIES FOR BREACH OF INTERNATIONAL CONTRACTS

- CISG remedies are very similar to those provided by Article 2 of the UCC. Namely:
 - Article 74 of the CISG provides for **money damages**, including *foreseeable consequential damages*.
 - Article 49 permits a buyer to **avoid** obligations under the contract if the seller breaches the contract or fails to perform within the agreed time.
 - Likewise, Article 64 permits a seller to avoid obligations under the contract if the buyer breaches the contract, fails to accept performance within the agreed time or fails to pay for the seller's goods.
 - Article 28 permits **specific performance**, but only if the court in which a party seeks specific performance under the CISG could grant specific performance under its domestic law.