

Part 6

Breach, Repudiation, and Excuse

70A-2-601 Buyer's rights on improper delivery.

Subject to the provisions of this chapter on breach in installment contracts (Section 70A-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 70A-2-718 and 70A-2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

- (1) reject the whole;
- (2) accept the whole; or
- (3) accept any commercial unit or units and reject the rest.

Amended by Chapter 258, 2015 General Session

70A-2-602 Manner and effect of rightful rejection.

- (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
- (2) Subject to the provisions of the two following sections on rejected goods (Sections 70A-2-603 and 70A-2-604),
 - (a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and
 - (b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this chapter (Subsection (3) of Section 70A-2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but
 - (c) the buyer has no further obligations with regard to goods rightfully rejected.
- (3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this chapter on seller's remedies in general (Section 70A-2-703).

Enacted by Chapter 154, 1965 General Session

70A-2-603 Merchant buyer's duties as to rightfully rejected goods.

- (1) Subject to any security interest in the buyer (Subsection (3) of Section 70A-2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.
- (2) When the buyer sells goods under Subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding 10% on the gross proceeds.
- (3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of action for damages.

Amended by Chapter 272, 1977 General Session

70A-2-604 Buyer's options as to salvage of rightfully rejected goods.

Subject to the provisions of the immediately preceding section on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

Enacted by Chapter 154, 1965 General Session

70A-2-605 Waiver of buyer's objections by failure to particularize.

- (1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach:
 - (a) where the seller could have cured it if stated seasonably; or
 - (b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.
- (2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent in the documents.

Amended by Chapter 42, 2006 General Session

70A-2-606 What constitutes acceptance of goods.

- (1) Acceptance of goods occurs when the buyer
 - (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
 - (b) fails to make an effective rejection (Subsection (1) of Section 70A-2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
 - (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.
- (2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

Enacted by Chapter 154, 1965 General Session

70A-2-607 Effect of acceptance -- Notice of breach -- Burden of establishing breach after acceptance -- Notice of claim or litigation to person answerable over.

- (1) The buyer must pay at the contract rate for any goods accepted.
- (2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this chapter for nonconformity.
- (3) Where a tender has been accepted
 - (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and
 - (b) if the claim is one for infringement or the like (Subsection (3) of Section 70A-2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable

time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

- (4) The burden is on the buyer to establish any breach with respect to the goods accepted.
- (5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over
 - (a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.
 - (b) if the claim is one for infringement or the like (Subsection (3) of Section 70A-2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after reasonable receipt of the demand does turn over control the buyer is so barred.
- (6) The provisions of Subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (Subsection (3) of Section 70A-2-312).

Enacted by Chapter 154, 1965 General Session

70A-2-608 Revocation of acceptance in whole or in part.

- (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
 - (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
 - (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
- (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
- (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

Enacted by Chapter 154, 1965 General Session

70A-2-609 Right to adequate assurance of performance.

- (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
- (2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.
- (3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.
- (4) After receipt of a justified demand failure to provide within a reasonable time not exceeding 30 days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

Enacted by Chapter 154, 1965 General Session

70A-2-610 Anticipatory repudiation.

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:

- (1) for a commercially reasonable time await performance by the repudiating party;
- (2) resort to any remedy for breach (Section 70A-2-703 or Section 70A-2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
- (3) in either case suspend his own performance or proceed in accordance with the provisions of this chapter on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 70A-2-704).

Amended by Chapter 258, 2015 General Session

70A-2-611 Retraction of anticipatory repudiation.

- (1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation canceled or materially changed his position or otherwise indicated that he considers the repudiation final.
- (2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this chapter (Section 70A-2-609).
- (3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

Enacted by Chapter 154, 1965 General Session

70A-2-612 "Installment contract" -- Breach.

- (1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.
- (2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within Subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.
- (3) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

Enacted by Chapter 154, 1965 General Session

70A-2-613 Casualty to identified goods.

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 70A-2-324) then:

- (1) if the loss is total the contract is avoided; and
- (2) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

Enacted by Chapter 154, 1965 General Session

70A-2-614 Substituted performance.

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

Enacted by Chapter 154, 1965 General Session

70A-2-615 Excuse by failure of presupposed conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (1) Delay in delivery or nondelivery in whole or in part by a seller who complies with Subsections (2) and (3) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
- (2) Where the causes mentioned in Subsection (1) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
- (3) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under Subsection (2), of the estimated quota thus made available for the buyer.

Amended by Chapter 258, 2015 General Session

70A-2-616 Procedure on notice claiming excuse.

- (1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this chapter relating to breach of installment contracts (Section 70A-2-612), then also as to the whole,
 - (a) terminate and thereby discharge any unexecuted portion of the contract; or
 - (b) modify the contract by agreeing to take his available quota in substitution.

- (2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding 30 days the contract lapses with respect to any deliveries affected.
- (3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

Enacted by Chapter 154, 1965 General Session