

Sales and Leases
Professor Keith A. Rowley
William S. Boyd School of Law
University of Nevada Las Vegas
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Sales Contract Terms

I. Express and Implied-in-Fact Terms

A. The Article 2 Parol Evidence Rule: § 2-202

1. Extrinsic evidence of a prior agreement or of a contemporaneous oral agreement may not contradict
 2. **a writing**
 - a. that the parties **intended**
 - b. as a **final expression** of their agreement
 - c. with respect to **terms included** in the writing.
 3. However, a party may explain or **supplement** the written terms using evidence extrinsic to the writing – including, but not necessarily limited to
 - a. the parties' **course of performance** (§ 1-303(a)) or **course of dealing** (§ 1-303(b)) or a relevant **usage of trade** (§ 1-303(c));
 - b. to the extent not clearly negated or varied by the terms of the written agreement, any relevant UCC **gap fillers**; and
 - c. *if the writing is not fully integrated*, **consistent additional terms**.
- ◆ **UCC Hierarchy:**
- (1) **Express Terms** trump
 - (2) **Course of Performance** trumps
 - (3) **Course of Dealing** trumps
 - (4) **Usage of Trade** trumps
 - (5) **Terms Implied as a Matter of Law** trump
 - (6) **Consistent Additional Terms**.

B. **Discarded Presumptions:** The UCC specifically **discards** the following common law presumptions:

1. a written agreement is presumed to be fully integrated, § 2-202 cmt. 1(a);
2. the parties intended that the terms of their agreement be given their “plain” meaning, rather than some other meaning that might be discovered by looking outside the four corners of the document to the circumstances surrounding the contract’s formation, § 2-202 cmt. 1(b); and
3. a contract must be ambiguous before the court may admit evidence of, *inter alia*, course of performance, course of dealing, or usage of trade, § 2-202 cmt. 1(c).

C. **Written Contracts May Be Fully or Partially Integrated**

1. A ***fully integrated*** contract is a final and complete expression of all the terms agreed upon between (or among) the parties.
2. A ***partially integrated*** contract is one that is the final expression of one or more the terms contained in that agreement, but not a final and complete expression of all the terms agreed upon between (or among) the parties.
3. **Whether, and the Extent to Which, a Written Contract is Integrated is an Issue of Law for the Court**
 - a. **The Issue:** While a written, facially integrated, and unambiguous contract signed by both parties ***may*** be decisive of the extent of integration, a writing cannot of itself prove its own completeness.
 - b. Thus, while the court must determine whether the agreement is integrated before any parol evidence other than that specified in § 2-202(a) may be admitted for the trier of fact’s consideration, the trial court is free to rely on that parol evidence in reaching its threshold determination that the agreement is fully integrated, partially integrated, or not integrated.
 - c. **Extent of Negotiations:** Did the parties negotiate the term in question prior to signing the writing? If so, the party who signed the writing containing the term she now wants to dispute is going to fight an uphill battle.
 - d. **The Significance of “Merger” Clauses:** The fact that a written contract contains a clause stating something to the effect that “there are no representations, promises, or agreements between the parties except those found in this writing” evidences, but does not prove, full the writing’s integration.

D. Evidentiary Consequences

1. If the writing is *fully integrated*, then § 2-202 will only permit the court to admit evidence of course of performance, course of dealing, and trade usages in order to explain or supplement the terms of the writing itself.
2. If the writing is *partially integrated*, then § 2-202 will also allow the court to admit evidence of consistent additional terms.
3. **“Additional” vs. “Inconsistent” Terms:** Even in those instances where § 2-202 permits the court to admit evidence of prior or contemporaneous terms or agreements, it may only do so if the evidence reflects terms that are *additional* to – as distinct from *inconsistent* with – the integrated terms of the written contract.
4. **“Prior or Contemporaneous” vs. Subsequent:** § 2-202 only bars consideration of prior or contemporaneous agreements; it does not bar the consideration of subsequent agreements, even if they modify the terms of the integrated writing.

Caveat: If the writing requires that any subsequent modifications or agreements be written, then subsequent oral agreements are unenforceable, *see* § 2-209(2); however, that does not make them irrelevant, *see* § 2-209(4)-(5).

5. Evidence of **trade usage, course of dealing, and course of performance** is admissible, even if the writing is fully integrated, as long as
 - a. the trade usage, course of dealing, or course of performance is not offered to contradict an integrated term; and
 - b. the express terms of the writing do not “carefully negate” a particular trade usage, course of dealing, and course of performance.

E. Parol Evidence Under the CISG

1. **No Parol Evidence Rule:** Article 11 provides that “[a] contract of sale need not be concluded in or evidenced by writing” and “may be proved by any means, including witnesses.”
2. **Interpretive Guidance**
 - a. **Subjective Intent:** Like *Restatement (Second) of Contracts* § 201(2), the CISG gives effect to the subjective intent of one party to the contract if the other party knew or should have known the first party’s intent. CISG art. 8(1).

- ◆ Unlike § 201(2), the CISG does not explicitly require that, in order to bind party X to party Y's subjective intent, party Y must be actually and constructively unaware of party X's intent. However, it seems fair to imply that requirement in Article 8(1).
- b. **Objective Intent:** If neither party knew or should have known the other party's subjective intent (or if both parties knew or should have known the others' intent and also know their own intent to be different), statements made by and other conduct of a party are to be interpreted using a "reasonable person" test. CISG art. 8(2).
- 3. **Relevant Circumstances:** Article 8(3) provides that, in determining contractual intent, courts should give "due consideration" to all relevant circumstances of the case including
 - a. the **negotiations**,
 - b. any **practices the parties have established** between themselves,
 - c. **usages** and
 - d. the parties' **subsequent conduct**.

II. Warranties

A. Basic Warranty Analysis

1. Did the seller make one or more warranties in this transaction?
2. When did the buyer **discover** the nonconformity and when and how did the buyer first act on the nonconformity?
 - a. Prior to acceptance, the buyer may reject the goods and, if necessary, "cover" by purchasing/leasing replacement goods and suing the original seller for difference in price
 - b. After acceptance, the buyer may
 - i. revoke acceptance or
 - ii. retain the goods and sue for difference between what the buyer received and what the buyer expected to receive.
3. Did the buyer **waive**, or did the seller **disclaim** or **modified**, the warranty?

B. Express Warranty (§ 2-313)

1. An **affirmation** of fact or **promise** relating to the goods that the **seller** (or her agent) **made to the buyer**,
 - ◆ Whether a statement constitutes a warranty – as opposed to a mere opinion or commendation – depends on
 - (1) the type of goods sold and
 - (2) the circumstances of the sale.
2. a **description** of the goods, or
3. a **sample** or **model**,
4. which becomes part of the **basis of bargain**,
5. creates a warranty that the **goods conform** to the affirmation, promise, description, sample, or model. § 2-313(1)(a)-(c).
6. **No “magic words”** are required. § 2-313(2).

C. Implied Warranty of Merchantability (§ 2-314)

1. The seller must be a **merchant**. *See* § 2-104(1).
2. If not waived or modified by agreement, the goods must:
 - a. **pass without objection** in the trade; and
 - b. if fungible, be of **“fair average” quality**; and
 - c. be **fit for the ordinary purpose** for which such goods are used; and
 - d. run, within **variations permitted by agreement**, of even kind, quality, and quantity within each units and among all units; and
 - e. be **adequately contained, packaged, and labeled**; and
 - f. **conform to** any promises or affirmation of fact on **container or label**.
3. **No reliance** required: The buyer need only prove that the warranty exists.

D. **Implied Warranty of Fitness for a Particular Purpose (§ 2-315)**

1. **Elements**

- a. Seller knows or has reason to know that the buyer has a **particular purpose** in mind;
- b. Seller **knows or has reason to know** that the buyer/lessee is **relying** on the seller's advice and expertise in choosing a product suitable for that purpose; and
- c. Buyer **actually relies** on the seller's advice and expertise.

2. What is a **"particular purpose"**?

- a. **"Majority Rule"**: Something other than the good's ordinary purpose. *See* § 2-315 cmt. 2.
- b. **"Minority Rule"**: Particular purpose can also be the good's ordinary purpose as long as the elements of § 2-315 are met.

3. The seller **need not be a merchant** to create this warranty.

E. **Implied Warranty of Good Title (§ 2-312)**

1. **Basic Provision**: Subject to § 2-312(2), a seller warrants that

- a. the seller has the **right to sell** the goods;
- b. the seller conveys **good title**; and
- c. the seller will deliver the goods free from any **security interest or other lien or encumbrance of which the buyer was unaware** at the time of contracting. § 2-312(1).

2. **Special Warranty for Merchant Sellers**: A merchant seller warrants that the goods it sells are free of any rightful third-party claim, except that a buyer who furnishes specifications to a merchant seller must hold the merchant seller harmless against any claim arising out of the merchant seller's compliance with the buyer's specifications. § 2-312(3).

3. **Void vs. Voidable Title**

- a. **"Void" Title**: Seller has no rights in the goods, and therefore cannot transfer any rights in the goods.

- b. **“Voidable” Title:** Seller does not have good title, but can transfer title to a *good faith purchaser for value* per § 2-403(1).
 - ◆ The good faith purchaser must have purchased the goods in a commercially reasonable way and honestly believing that the seller had good title.
 - ◆ To have voidable title, the seller must have tricked the true owner into *voluntarily* transferring possession of the goods to the seller.

- 4. **Entrustment Doctrine:** “Any entrusting of possession of goods to a merchant who deals in goods of that kind gives [the merchant] the power to transfer all rights of the entruster to a buyer in the ordinary course of business.” § 2-403(2).
 - ◆ The buyer in the ordinary course of business must not know that the sale of the entrusted good would violate a third party’s (*e.g.*, the true owner’s) rights. § 1-201(b)(9).

F. **UCC Warranty Privity**

- 1. **Vertical Privity:** a buyer’s ability to sue a seller other than its immediate seller for breach of warranty (*e.g.*, suing John Deere, not just Lowe’s)

- 2. **Horizontal Privity:** a non-buyer’s ability to sue the seller for breach of warranty (*e.g.*, Sherri buys a John Deere lawnmower from Lowe’s, lawnmower injures Chris, Chris sues Lowe’s). § 2-318.
 - a. **Alternative A (majority rule):** family members or household guests of the buyer/lessee may sue for personal injuries caused by a breach of warranty

 - b. **Alternative B:** “any natural person who may reasonably be expected to use, consume, *or be affected by* the goods” may sue for personal injuries caused by a breach of warranty

 - c. **Alternative C:** “any natural person who may reasonably be expected to use, consume, or be affected by the goods” may sue for personal injuries, *property damage, or economic loss* caused by a breach of warranty

G. UCC Warranty Disclaimers/Limitations

1. **§ 2-316(2):** Subject to § 2-316(3), in order to exclude or modify
 - a. the implied warranty of merchantability, the disclaimer must
 - i. **specifically** mention “merchantability” and
 - ii. if written, be **conspicuous**
 - b. the implied warranty of fitness for a particular purpose, the disclaimer or modification
 - i. must be in **writing**,
 - ii. must be **conspicuous**,
 - iii. but may use **general language** such as “There are no warranties which extend beyond those described in this document.”
2. **Warranty of Title:** A seller may exclude or modify this warranty only by
 - a. **specific language** or
 - b. circumstances which give the buyer **reason to know** that the seller
 - i. **does not claim title** in himself or
 - ii. purports to sell only **to the extent** of the seller’s right or title. § 2-312(2).
3. **§ 2-316(3)**
 - a. **Blanket Disclaimers:** Unless the circumstances indicate otherwise, all implied warranties may be disclaimed by expressions such as “as is,” “with all faults,” “no warranties,” or other language which *in the common understanding* makes plain there are no implied warranties.
 - b. **Inspection:** If the buyer, before purchasing, has examined the goods as fully as she desired *or has refused to examine* them, there is no implied warranty as to defects she should have discovered during inspection.
 - c. **Implied Waiver:** Implied warranties may be excluded or modified by course of performance, course of dealing, or trade usage.

H. CISG Warranties

1. **Express Warranty:** The seller must deliver goods
 - a. of the **quantity, quality and description** required by the contract,
 - b. **contained or packaged** in the manner required by the contract, Art. 35(1), and, if applicable,
 - c. possessing the qualities of goods the seller has held out to the buyer as a sample or model, Art. 35(2)(c).
2. **Implied Warranty of Merchantability** [Art. 35(2)(a) & (d)] – not as robust as its UCC counterpart
3. **Implied Warranty of Fitness** for a Particular Purpose [Art. 35(2)(b)]
4. **Title Warranties:** The CISG does not address void/voidable title or the rights of GFs. *See* Art. 4. However, it creates a basic title warranty, under which a buyer may sue a seller for delivering goods that are not “free from any right or claim of a third party, unless the buyer has agreed to take the goods subject to that right or claim.” Art. 41.
5. **Limiting CISG Warranties**
 - a. Article 35 recognizes the parties’ ability to “agree otherwise,” suggesting that all implied warranties are subject to limitation or exclusion.
 - b. Article 35(3) relieves a seller from liability for a nonconformity that the buyer knew about or could not have been unaware of at the time the contract was formed.

III. Other Implied Terms (Mostly UCC “Gap Fillers”)

- A. **The Basic Idea:** The agreement that the parties have reached or the writing they have executed does not necessarily contain all terms relevant to the contract; therefore, the law will imply certain terms to make the contract “complete.”
 1. **Terms Implied by Law:** Legal consequences of the parties’ decision to contract with one another.
 2. **Terms Implied by Fact:** Natural consequences of the parties’ words, acts, and relationship.

3. **Freedom of Contract:** Parties can avoid most implied terms by specifically waiving or disclaiming them in the agreement (often explicitly providing some express alternative to the implied term), but there are exceptions. One cannot contract out of the duty of good faith (although the parties may be able to agree about what constitutes good faith performance and enforcement of their agreement).
 - a. **Severability Clause:** A clause that expresses the parties' intent to be bound by all enforceable parts of the agreement, notwithstanding a later adjudication that some part of the agreement is not enforceable.
 - b. **Savings Clause:** A clause that says, in essence, "If we screwed up, please make whatever adjustments are necessary."

B. **Good Faith**

1. UCC § 1-304: Every contract requires the parties to **perform and enforce** it in good faith.
2. UCC § 1-201(b)(20): "Good faith" means "honesty in fact and the observance of reasonable commercial standards of fair dealing."
 - ◆ *But see, e.g.,* UTAH CODE ANN. § 70A-1a-201(2)(t) (West Supp. 2011) (requiring only "honesty in fact").

C. **Payment and Delivery Terms**

1. **Payment:** Price may be payable in goods or otherwise and in whole or in installments. § 2-304.
2. **Single vs. Several Lots:** Goods must be delivered in a single lot, and payment is only due following delivery in full, unless the contract or circumstances dictate/permit otherwise. § 2-307.
3. **Place of Delivery:** Unless otherwise agreed,
 - a. goods are to be delivered at the seller's place of business or, having no place of business, at the seller's residence, § 2-308(a); unless
 - b. the parties know at the time of contracting that the goods are elsewhere, in which case that will be the place of delivery, § 2-308(b).
4. **Time for Delivery:** Unless otherwise agreed, goods shall be delivered within a "reasonable time." § 2-309(1).

5. **Time for Payment:** Unless otherwise agreed, payment is due at the time and place at which the buyer is to receive the goods, even though the place of delivery may be elsewhere. § 2-310(a).

♦ **CISG art. 58(1):** “If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer’s disposal in accordance with the contract and this Convention...”

- D. **Open Price Term:** Parties can conclude an enforceable contract despite not agreeing on price, provided that they intend to be bound despite the absence of a fixed price term. §§ 2-204(3) & 2-305(1).

1. The price will be a reasonable price (*e.g.*, the “market” price) at the time of delivery if

- a. the contract is **silent** as to price,
- b. the parties **fail to later agree** as they had agreed to do, or
- c. the **third-party basis** the parties agreed to fails. § 2-305(1).

♦ **CISG art. 55:** “Where a ... validly concluded [contract] does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

2. A party empowered to set price must do so in **good faith**. § 2-305(2).
3. When the price is to be set other than by agreement, an innocent party may cancel the contract or set a reasonable price if the other party is at fault for the agreed price’s failure to manifest. § 2-305(3).

- E. **Open Quantity Term**

1. While Article 2 generally insists that the parties agree on a particular quantity of goods, parties can form an enforceable contract without agreeing on quantity in one of two ways sanctioned by § 2-306(1):

a. **Output Contract:** An agreement whereby the buyer agrees to purchase all of the seller’s output of a good (sometimes limited by the contract to the output of one or more of the seller’s facilities).

- b. **Requirements Contract:** An agreement whereby the buyer agrees to purchase from the seller all of a good that the buyer needs (again, sometimes limited by contract to the needs of one or more of the buyer's facilities).

2. **Limitations on Output/Requirements Contracts**

- a. **Good Faith:** Output/requirements means "such actual output or requirements as may occur *in good faith*." § 2-306(1).
- b. **Proportionality:** Actual, good faith output/requirements cannot be unreasonably disproportionate
 - i. to any **stated estimate** in the contract or,
 - ii. in the absence of a stated estimate, to any "normal or otherwise comparable **prior output**." *Id.*