Nonconforming Goods

I. Buyer’s Article 2 Rights with Respect to Nonconforming Goods

A. General Rule: Unless otherwise agreed, if the goods or tender of delivery fail to conform to the contract between the buyer and seller, the buyer may:

1. reject the goods in their entirety;
2. accept the goods in their entirety; or
3. accept any commercial unit(s) and reject the remaining goods. § 2-601.

B. Perfect Tender Rule: The seller must tender exactly what the buyer ordered. Any deviation permits the buyer to reject, unless

1. the parties have limited remedies in the contract;
2. the seller properly cures the nonconformity;
3. the buyer’s rejection is ineffective; or
4. some prior course of dealing, course of performance, or usage of trade negates effect of nonconforming delivery. § 2-501.

C. Special Case: Installment Contracts

1. § 2-612(2): A buyer can only reject an installment if
   a. the nonconformity substantially impairs the value of that installment and
   b. the seller can’t cure the defect in a subsequent installment.

2. § 2-612(3): A buyer can treat the entire contract as breached if the nonconformity substantially impairs the value of the entire contract, unless
   a. the buyer accepts a nonconforming installment without seasonably notifying the Seller of cancellation, or
b. the buyer brings suit only with respect to past defective installments, or
c. the buyer demands performance as to future installments.

D. **Right to Inspect:** The buyer has right to inspect goods before accepting them unless otherwise agreed. The buyer must inspect

1. within a **reasonable** time following receipt,
2. at a **reasonable place**,
3. by **reasonable means**,
4. with all expenses **borne by the buyer**. § 2-513(1).

E. **Acceptance:** A buyer accepts goods, following a reasonable opportunity to inspect, by

1. **affirmatively signifying** her acceptance;
2. **failing to reject**;
3. engaging in some act **inconsistent with the Seller’s ownership**. § 2-606.
   ♦ Acceptance of any part of a **commercial unit** = acceptance of the entire commercial unit.

F. **Rejection:** In order for a buyer to effectively reject goods,

1. the rejected goods must be **nonconforming**;
2. the buyer must reject nonconforming **within a reasonable time** following tender or delivery; and
3. the buyer must **seasonably notify** the seller of the rejection (even if the seller knows it shipped nonconforming goods). § 2-602.

4. **Particularity Requirement:** In addition, the rejecting buyer must state with particularity the reason for her rejection of the nonconforming goods
   a. if the seller could have seasonably cured; or
   b. between merchants, if the seller has, following rejection, made a written request for a full and final written statement of all defects. § 2-605(1).
5. **Buyer’s Duties Viz. Rejected Goods**

   a. § 2-602(2)(b): A non-merchant buyer must hold the goods
      i. with **reasonable care**
      ii. for a **sufficient time** to permit the seller to retrieve them.

   b. § 2-603(1): If the seller has no local agent, a merchant buyer
      i. must follow the seller’s reasonable instructions, if any, as to resale, storage, return, etc.; and
      ii. if the goods are perishable or otherwise subject to a rapid decline in value, must sell the goods on the seller’s behalf.

F. **Revocation:** A buyer who accepts goods loses the right to reject them. § 2-607(2). However, under § 2-608, an accepting buyer may revoke her acceptance

   1. within a **reasonable time** after actual or constructive discovery of non-conformity; and

   2. before the **condition** of goods changes substantially as a result of anything other than the defect on the basis of which Buyer wishes to revoke; and

   3. if the nonconformity **substantially impairs** the value of the good or commercial unit; provided that

      a. the buyer accepted the good or commercial unit, notwithstanding the nonconformity, on the reasonable assumption that the seller would cure the nonconformity and the seller has not seasonably cured; or

      b. the buyer accepted the good or unit without discovering the nonconformity due to
         i. the difficulty of discovering the nonconformity at the time of acceptance, or
         ii. reasonable reliance on the seller’s assurances that there were no nonconformities.

   4. Whether a nonconformity “substantial impairs” the value of the goods is tested both subjectively and objectively:

      a. whether the nonconformity **impairs** the value of the good to the buyer is tested based on the buyer’s expectations;
b. whether the impairment is **substantial** is tested based on a
**reasonable person**’s evaluation of the extent of the impairment.

5. A buyer’s revocation is ineffective until the buyer **notifies** the seller.

G. **Seller’s Right to Cure**

1. A buyer who **rejects** must allow her seller an opportunity to cure any nonconformity if
   a. the seller’s **time for performance** has not yet expired, or
   b. the seller reasonably expected the buyer to accept the rejected goods. § 2-508.

2. A buyer who **revokes** may have to allow her seller an opportunity to cure.
   a. § 2-508 deals only with post-rejection cure – it says nothing about post-revocation cure. Therefore, some courts do not recognize a seller’s right to cure following a proper revocation.
   b. However, § 2-608(3) affords the same rights and imposes the same duties on a revoking buyer as on a rejecting buyer. Therefore, the recent trend among courts is to read § 2-608(3) to require the revoking buyer to give the seller the same opportunity to cure that the seller would be entitled to if the buyer had rejected.

   ♦ **U.C.C. § 2-508 (2003)** requires a revoking non-consumer buyer to give the seller the same opportunity to cure that a rejecting non-consumer buyer would have to give the seller.

3. **“Shaken Faith” Doctrine**: A buyer may not be required to accept its seller’s cure if the cure depends on the buyer’s ability to “trust” the seller and the nonconformity giving rise to the right to cure has reasonably affected the buyer’s ability to trust the seller.

II. **Nonconforming Goods in Leases and International Sales**

A. **Leases**

1. **Revocation of Acceptance in Finance Lease Transactions**: A finance lessee may revoke accepted leased goods only if the finance lessee failed to discover their nonconformity prior to acceptance because of the **finance lessor**’s assurances. § 2A-407.
♦ This exception will apply only in rare cases. Recall that one of the conditions of a finance lease under § 2A-103(1)(g) is that the lessee, not the finance lessor, selects the goods to be leased.

2. However, the finance lessee may sue the supplier for breach of warranty.

B. CISG

1. **Avoidance:** Article 49 of the CISG permits buyers to reject nonconforming goods in only two situations:

   a. **“Fundamental” Breach:** A breach that
      
      i. substantially deprives the buyer of what he is entitled to expect under the contract, unless
      
      ii. the seller did not foresee and a reasonable person in the seller’s circumstances could not have foreseen such a result. Art. 25.

      ♦ To avoid a contract based on fundamental breach, the buyer must notify the seller of the nonconformity “no later than a reasonable period following when the buyer knew or ought to have known of the defect.” Art. 49(2)(b)(i).

   b. **Untimely Delivery:** The seller’s delivery is later than an agreed date plus any agreed extension of the delivery deadline.

2. **Effect of Avoidance:** If the buyer successfully “avoids” the contract, both parties are relieved of their obligations, but the buyer may sue for damages. Art. 81(1).

3. **Seller’s Right to Cure**

   a. The UCC permits the buyer to reject nonconforming goods for any reason; therefore, the UCC gives the seller the right to cure the alleged defect in order to bind the buyer to the contract.

   b. The CISG permits buyers to reject/revoke only in very limited circumstances; but CISG permits a buyer who is “stuck” with nonconforming goods to demand that the seller cure the defect.