

## THOMSON REUTERS PRACTICAL LAW

## Delivery of Goods

by Practical Law Commercial Transactions

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*This Practice Note discusses delivery provisions in a sale of goods transaction under Article 2 of the Uniform Commercial Code (UCC). It explains the concepts of tender of delivery by the seller and taking delivery by the buyer under the UCC's default provisions and how they can be varied by contract. This Note also reviews shipment contracts, destination contracts, and shipping terms such as FOB (free on board) and EXW (ex works).*

Delivery provisions in a sale of goods contract specify when, where, and how the seller delivers the goods to the buyer. While these terms can vary greatly depending on the nature of the goods and the type of industry, they generally address the allocation of risk and expense between the parties relating to the delivery of goods. Depending on the importance of the goods to the buyer's business and the value of the transaction to the seller, delivery provisions can have critical implications for the business of each party. For sample clauses containing delivery provisions with drafting notes that include negotiating tips for both the buyer and the seller, see [Standard Clauses, General Contract Clauses: Delivery Provisions](#).

### Delivery: A General Overview

Delivery means the voluntary transfer of title, control, or possession. Delivery can be either:

- **Actual.** The seller transports the goods to the buyer.
- **Constructive.** The goods remain in the same location, but title, control, or possession passes from the seller to the buyer. For example, the seller may deliver the contents of a safe deposit box by delivering the key or combination to the buyer, without actually moving the contents. This is also known as symbolic delivery.

In a sale of goods transaction, the basic performance obligations of the parties relate to delivery. They are:

- **Tender of delivery by seller.** The seller must tender delivery of conforming goods to the buyer (see [Tender of Delivery by Seller](#)).
- **Taking delivery by buyer.** Proper tender of delivery by seller of conforming goods triggers the buyer's obligation to take delivery and make payment (see [Taking Delivery by Buyer](#)).
- **Payment by buyer.** For an example of both a pro-seller and a pro-buyer clause providing for payment in a sale of goods transaction, see [Standard Documents: General Terms and Conditions for the Sale of Goods \(Pro-Seller\): Section 10](#) and [General Purchase Order Terms and Conditions \(Pro-Buyer\): Section 13](#).

### Delivery Provisions Versus Shipping Terms

"Delivery provisions" and "shipping terms" are often used together or interchangeably as synonyms. But there are distinct differences between them:

- **Shipping terms.** Generally, shipping terms are:
  - standardized terms governing the shipping mode, costs, risks, and other practical arrangements related to the movement of goods, such as FOB (free on board) and EXW (ex-works);

- a subset of delivery provisions;
- terms of art with specific legal implications on which party bears the expense and risk of loss of transporting the goods from the seller to the buyer; and
- sometimes used only in reference to the price of the goods, with the parties including additional or varying contractual terms to the definitions found in the [Uniform Commercial Code](#) (UCC) (see [Standard Clauses, General Contract Clauses: Delivery Provisions: Section 1\(b\)](#)).

For a discussion of shipping terms under the UCC, see [UCC Shipping Terms](#).

- **Delivery provisions.** Delivery provisions in a sale of goods agreement are:
  - more general contractual provisions which accomplish the voluntary transfer of title, possession, or control from the seller to the buyer;
  - often contain a shipping term, but not always; and
  - sometimes defined only by reference to a shipping term, but more often, the parties include additional or varying contractual terms.

## Incoterms® Rules

The scope of this Note is limited to domestic transactions governed by the UCC. In international transactions, parties commonly rely on Incoterms® rules, which are various shipping terms published by the [International Chamber of Commerce](#) (ICC). The use of Incoterms® rules in purely domestic transactions has also become more common in recent years because Incoterms® rules:

- Reduce or eliminate the risk of inconsistent interpretations by courts located in different states.
- Resemble modern shipping practices.
- Were expected to replace UCC shipping terms completely following the now-withdrawn 2003 amendments to the official text of Article 2 of the UCC (see [UCC Shipping Terms Remain Intact After Withdrawal of 2003 Amendments](#)).

One of the most commonly used Incoterms® rules is EXW (ex-works), a shipping term that:

- Places the least amount of responsibility and risk on the seller.
- Is commonly used by sellers in quotations of price, as no extra costs are included.

Under Incoterms® rule EXW:

- The seller makes the goods available for pick-up at the seller's factory or location.
- The seller is not responsible for loading the goods.
- The buyer bears the risk and expense of transporting the goods to their destination, including loading the goods.

For more information on Incoterms® rules, see [Standard Document, General Purchase Order Terms and Conditions \(Pro-Buyer\): Drafting Note: Shipping Terms](#). Incoterms® is a trademark of the ICC.

## Delivery Provisions Under UCC Article 2

Article 2 of the UCC contains several default provisions which apply to a sale of goods transaction unless the parties agree otherwise. These provisions, known as gap-fillers, are intended to help form a valid, binding, and enforceable contract in cases where the parties are silent on a particular term. While it is relatively rare for a sophisticated buyer and a merchant seller to rely on gap-fillers, all parties should be aware of these provisions because gap-fillers:

- Can inform negotiations between the buyer and the parties.
- Are often restated by the parties in the contract, with slight or no variations.
- Govern the contract absent an affirmative agreement between the parties.

The gap-filler delivery provisions under the UCC address:

- The time of delivery (see [Time of Delivery](#)).

- The place of delivery (see [Place of Delivery](#)).
- The manner of delivery (see [Manner of Delivery](#)).

## Tender of Delivery by Seller

To tender delivery properly, the seller must make the goods available to the buyer or the carrier at the time, place, and manner specified in the sale of goods contract. If the contract is silent on a particular point, the UCC provides that the seller must:

- Put and hold conforming goods at the buyer's disposal.
- Notify the buyer, if necessary, so that the buyer can take delivery.
- Tender delivery at a reasonable hour.
- Keep goods available for a reasonable time to allow the buyer to take possession of the goods.

([UCC § 2-503\(1\)](#).)

## Time of Delivery

Unless the parties agree otherwise, the seller must deliver the goods to the buyer within a reasonable time ([UCC § 2-309\(1\)](#)). What is a reasonable time may be inferred from:

- The circumstances surrounding the transaction.
- Any course of dealing between the parties.
- Industry standards.

For examples of both pro-buyer and pro-seller clauses specifying the time of delivery, see [Standard Clauses, General Contract Clauses: Delivery Provisions: Section 1\(a\)](#).

## Place of Delivery

The UCC's gap-filler provision for the place of delivery is the seller's place of business ([UCC § 2-308\(a\)](#)). This delivery point affords the seller the least amount of responsibility and risk. If both parties are aware that the goods are in a location other than the seller's place of business, then that location is the gap-filler provision ([UCC § 2-308\(b\)](#)). For an example of delivery clauses that both reflect and vary the UCC's gap-filler provision regarding the place of delivery, see [Standard Clauses, General Contract Clauses: Delivery Provisions: Section 1\(b\)](#).

## Manner of Delivery

Unless the parties agree otherwise, the seller must tender the goods in a single delivery ([UCC § 2-307](#)). This means that the buyer can reject even conforming goods if delivery does not take place in one shipment. For an example of a delivery clause that allows the seller to deliver the goods in several lots, see [Standard Clauses, General Contract Clauses: Delivery Provisions: Section 1\(c\)](#).

## Taking Delivery by Buyer

Proper tender of conforming goods is a [condition precedent](#) to the buyer's performance obligations. The buyer's performance obligations consist of:

- Acceptance of the goods.
- Payment.

([UCC § 2-201](#).)

Unless the parties agree otherwise, the buyer must also provide reasonably suitable facilities for the receipt of the goods ([UCC § 2-503\(1\)\(b\)](#)).

A sophisticated buyer and a merchant seller rarely rely on the gap-filler provisions of the UCC. This holds true for acceptance of delivery and payment provisions. Depending on their respective bargaining power, usage of trade, or industry standards, each party to a sale of goods contract normally tries to either:

- **Negotiate terms more favorable than the UCC.** For example, the seller can include a provision that requires the buyer to take delivery within a certain number of days of tender rather than the reasonable time imposed by [Section 2-309\(1\) of the UCC](#) (see [Standard Clauses, General Contract Clauses: Delivery Provisions: Section 1\(d\), first alternative clause](#)).
- **Incorporate the UCC terms into the contract if these terms are in its favor.** For example, the buyer can include a provision that restates the requirement of [Section 2-503\(1\) of the UCC](#) and requires the seller to notify it in writing when the goods have been delivered at the delivery point (see [Standard Clauses, General Contract Clauses: Delivery Provisions: Section 1\(d\), second alternative clause](#)).

## Non-Delivery

Generally, if the seller does not deliver the goods to the buyer, the buyer's remedy is limited to a claim for damages ([UCC § 2-502](#), official cmt. 1). However, under the UCC, the buyer has a limited right to recover the goods if either:

- The goods were bought for personal, family or household purposes.
- The seller becomes insolvent within ten days after the seller receives the first installment of the purchase price.

([UCC § 2-502\(1\)](#).)

The buyer's limited right to recover the goods is further conditioned on whether:

- **The goods have been identified to the contract.** The parties are free to agree how goods are identified to the contract. If the contract is silent on this matter, identification of the goods to the contract occurs:
  - when the contract is made, if the goods already exist and are identified; or
  - when the goods are shipped, marked or otherwise associated with the contract by the seller as the goods to which the contract refers, if the goods are future goods.

([UCC § 2-501\(1\)](#).)

- **The buyer has paid all or part of the purchase price.** The buyer must have paid at least part of the purchase price ([UCC § 2-502\(1\)](#)).
- **The buyer tenders any remainder of the purchase price.** If the buyer did not pay the entire purchase price, it must be ready to pay the balance ([UCC § 2-502\(1\)](#)).

The parties are free to vary the UCC's provisions on non-delivery by contract and most do so. Many sellers include a non-delivery clause in the agreement which specifies that in case of non-delivery:

- **The seller is not liable unless the buyer timely notifies the seller of non-delivery.** Depending on its bargaining power, the seller can further reduce its liability risk for non-delivery by:
  - including a short notice period within which the buyer must notify the seller;
  - requiring the notice to be in writing; and
  - limiting the seller's liability even if the seller is negligent.

Many buyers resist including a non-delivery clause altogether and most insist on excluding protection to the seller if the seller is negligent. The buyer can also negotiate for as long of a notice period as possible. For a sample non-delivery clause with drafting notes that include negotiating tips for both the buyer and the seller, see [Standard Clauses, General Contract Clauses: Delivery Provisions: Section 2\(a\)](#).

- **The buyer's sole remedy is the delivery of conforming goods or adjustment of the invoice.** The seller can further reduce its liability risk for non-delivery by specifying that the time within which it must deliver conforming goods is a reasonable time rather than a specific number of days. The buyer can resist the inclusion of this provision altogether or it can negotiate for the shortest possible time for delivering conforming goods. For a sample clause with drafting notes that include negotiating tips for both the buyer and the seller, see [Standard Clauses, General Contract Clauses: Delivery Provisions: Section 2\(b\)](#).

## Non-Conforming Delivery

Generally, the seller must deliver goods that conform to the contract. The buyer has the right to reject any non-conforming goods or delivery ([UCC § 2-601](#)). For more information on acceptance of goods under the UCC, see [Practice Note, Acceptance of Goods](#).

If the buyer rejects a non-conforming delivery, the seller has the right to cure if:

- The time for delivery has not yet passed.
- The seller promptly notifies the buyer of its intention to make a conforming delivery or tender.
- The seller makes a conforming delivery within the original contract time.

([UCC § 2-508\(1\)](#).)

The UCC further protects the seller from a surprise rejection of delivery by the buyer. Even if the time for delivery has expired, the seller is entitled to replace the goods within an additional period of reasonable time if the seller:

- Reasonably believed that the tender would be conforming.
- Promptly notifies the buyer of its intention to cure.

([UCC § 2-508\(2\)](#).)

The meaning of reasonable belief and prompt notice is determined by course of dealing or performance, trade usage, and the circumstances of the particular transaction.

The buyer can include a "no replacements" clause in its purchase contract to explicitly defeat the seller's rights under [Section 2-508\(2\)](#).

## Non-Acceptance of Delivery

Non-acceptance of proper delivery has important consequences for the passage of the risk of loss. Even if the buyer has fully paid the purchase price and the seller has notified the buyer that the goods are at its disposal, under the UCC the risk of loss **does not** pass to the buyer until the buyer receives the goods, if:

- The place of delivery is the seller's place of business.
- The seller is a merchant.

([UCC § 2-509](#), official cmt. 3.)

Many sellers, therefore, vary the UCC's provisions by specifying in the contract that if the buyer does not take delivery of conforming goods:

- The risk of loss passes to the buyer.
- The buyer is responsible for insurance and storage costs.

For a sample clause, see [Standard Clauses, General Contract Clauses: Delivery Provisions: Section 1\(e\)](#).

The buyer should negotiate a carve-out for rejecting delivery due to the seller's breach. The UCC provides the buyer with a right to inspect the goods before acceptance or making payment ([UCC § 2-513\(1\)](#)). Many buyers insist on including inspection rights explicitly in the contract. For examples of a clause providing the buyer with the explicit right to inspect the goods and reject any nonconforming goods, see:

- [Standard Clauses, General Contract Clauses: Acceptance of Goods](#).
- [Standard Document, General Purchase Order Terms and Conditions \(Pro-Buyer\): Section 10](#).
- [Standard Document, General Terms and Conditions for the Sale of Goods \(Pro-Seller\): Section 8](#).

## Shipment Contracts, Destination Contracts and Shipping Terms

The UCC and the Incoterms® rules contain several different shipping terms, each with a specific definition. Therefore, it is helpful to think of these terms as falling into two categories:

- **Shipment contracts.** Generally, under a shipment contract:
  - the seller must enter into a reasonable contract with a carrier for the transportation of the goods;
  - the seller must deliver the goods to the carrier; and

- the buyer bears the risk of loss during shipment.
- **Destination contracts.** Generally, under a destination contract:
  - the seller must deliver the goods to the specific destination named in the contract; and
  - the seller bears the risk of loss during shipment.

Under the UCC, all contracts are deemed to be shipment contracts, unless the parties agree otherwise ([UCC § 2-503](#), official cmt. 5).

## UCC Shipping Terms

Shipping terms are standardized terms that allocate responsibility and risk between the buyer and the seller for transporting the goods. UCC shipping terms include:

- FOB (free on board) (see [FOB](#)).
- FAS (free alongside).
- CIF (cost, insurance, and freight).
- C&F (cost and freight).
- DES (delivered ex-ship).

([UCC §§ 2-319 to 2-324.](#))

### FOB

The UCC shipping term FOB is one of the most widely used UCC shipping terms. FOB is used in connection with a location, for example:

- FOB (place of shipment).
- FOB (place of destination).
- FOB (vessel).

Many sellers prefer to use FOB in connection with their location or factory because this term imposes minimal responsibility and risk on the seller.

Under FOB (seller's location):

- The seller bears the expense and risk of putting the goods in the possession of the carrier, but because the named place is the seller's own location, both the risk and expense are minimal.
- The risk of loss passes to the buyer when the goods are picked up from the seller's location by the carrier.
- The buyer bears the expense and risk of:
  - loading the goods; and
  - transporting the goods.

([UCC § 2-319.](#))

### UCC Shipping Terms Remain Intact After Withdrawal of 2003 Amendments

The 2003 revisions to Article 2 included the deletion of all shipping terms from the model code because they were thought to no longer adequately reflect modern shipping practices. However, no state enacted these amendments. In 2011, the Permanent Editorial Board for the UCC recommended the withdrawal of the amendments from the official text of the UCC. Therefore, the current official text of Article 2 has reverted to the pre-2003 version enacted in most states, with all shipping terms intact. However, many sources still retain the outdated text of the 2003 Amendments 2 which does not contain shipping terms. Counsel should ensure it is working with the current version of Article 2, which does contain shipping terms.

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