

the damages resulting from any breach of the contract from any part of the price still due under the same contract.

§ 2-718. Liquidation or Limitation of Damages; Deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which that is reasonable in the light of the anticipated or actual harm caused by the breach and, in a consumer contract, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty. Section 2-719 determines the enforceability of a term that limits but does not liquidate damages.

(2) Where If the seller justifiably withholds delivery of goods or stops performance because of the buyer's breach or insolvency, the buyer is entitled to restitution of any amount by which the sum of his the buyer's payments exceeds (a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or (b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes:

(a) a right to recover damages under the provisions of this Article other than subsection (1), (1); and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where If a seller has received payment in goods, their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but (2). However, if the seller has notice of the buyer's breach before reselling goods received in part performance, his the resale is subject to the conditions laid down in of this Article on resale by an aggrieved seller (Section 2-706).

Official Comment

1. The last sentence of subsection (1) clarifies the relationship between this section and Section 2-719.

2. A valid liquidated damages term may liquidate the amount of all damages, including consequential and incidental damages. As under former law, liquidated damages clauses should be enforced if the amount is reasonable in light of the factors provided in subsection (1). This section thus respects the parties' ability to contract for damages while providing some control by requiring that the term be reasonable under the circumstances of the particular case.

Under original Section 2-718, a party seeking to enforce a liquidated damages term had to demonstrate the difficulty of proving the loss and the inconvenience or nonfeasibility of obtaining an adequate remedy. These requirements have been eliminated in commercial contracts but are retained in consumer contracts.

3. Original Section 2-718(1) stated that an unreasonably large liquidated damage term was void as a penalty. This language has been eliminated as unnecessary and misleading. If the liquidated damages are reasonable in light of the test of subsection (1), the term should be enforced, thereby rendering the penalty language of the former law redundant. The language was also misleading because of its emphasis on unreasonably large damages. A liquidated damages term that provided for damages that are unreasonably small is likewise unenforceable.

4. If a liquidated damages term is unenforceable, the remedies of this Article become available to the aggrieved party.

5. Under subsection (2), only the buyer's payments that are more than the amount of an enforceable liquidated damages term need to be returned to the buyer. If the buyer has made payment by virtue of a trade-in or other goods deposited with the seller, subsection (4) provides that the reasonable value of the goods or the goods' resale price should be used to determine what the buyer has paid, not the value the seller allowed the buyer in the trade-in. To assure that the seller obtains a reasonable price for the goods, the seller must comply with the resale provisions of Section 2-706 if the seller knows of the buyer's breach before the seller has otherwise resold them.

Subsection (2) expands the situations in which restitution was available under prior law. Original Section 2-718(2) was limited to circumstances in which the seller justifiably withheld delivery because of the buyer's breach. Subsection (2) extends the right to situations where the seller stops performance because of the buyer's breach or insolvency.

6. Subsection (3) continues the rule from the former law without change. If there is no enforceable