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No. 67306-8

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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**REGAL ALUMINUM PRODUCTS, INC, a Washington corporation,**

**and REGAL ALUMINUM PRODUCTS, INC., a Canadian**

**corporation,**

**Appellants,**

**v.**

**COSTCO WHOLESALE CORPORATION,**

**Respondent.**

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STATE OF WASHINGTON  
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**BRIEF OF APPELLANTS**

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Jerry N. Stehlik, WSBA # 13050  
Andrea D. Orth, WSBA # 24355  
BUCKNELL STEHLIK SATO &  
STUBNER, LLP  
2003 Western Avenue, Suite 400  
Seattle, WA 98121  
Telephone: (206) 587-0144  
Facsimile: (206) 587-0277

Counsel for Appellants

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## **I. INTRODUCTION**

Regal Aluminum Products, Inc. of Washington and Regal Aluminum Products, Inc. of Canada (collectively "Regal Entities") appeal trial court orders (a) denying Regal's Revised Motion to Vacate Arbitration Award, and (b) striking material evidence, and the trial court's entry of judgment against the Regal Entities. The trial court erred in refusing to vacate the arbitral awards because they disclosed on their face various grave legal errors (and such errors are even more apparent upon review of evidence referenced and incorporated into arbitral award). The trial court also erred and exceeded its jurisdiction by entering judgment against the Regal Entities when the arbitral awards were entered against only one defendant and the arbitrator did not decide or indicate the precise identity of the sole defendant. Finally, the trial court abused its discretion in striking the material evidence referenced in the Revised Motion to Vacate Arbitration Award and attached to the Revised Declaration of Andrea Orth.

## **II. ASSIGNMENTS OF ERROR**

A. Trial court erred in denying Regal's Motion to Vacate Arbitration Award when the Final Reasoned Award displayed clear and obvious errors, including:

1. Erroneous application of RCW 62A.2-609 when the undisputed facts show (a) that Regal completed

performance prior to Costco's request for assurances and (b) Regal was in breach for failure to pay prior to Costco's request for assurances, and persuasive case law prohibits reliance upon UCC Section 2-609 under such facts;

2. Erroneous conclusion that the consequence of failing to provide adequate assurances is revival of a right to reject goods not established to be non-conforming, and general conflation of the separate and distinct UCC concepts of adequate assurances and rejection;
3. Erroneous award of a measure of damages that is inconsistent with the law respecting failures to give adequate assurances and for which there was no factual or legal justification; and
4. Erroneous denial of Regal's claims for monies owed on ladders ordered by Costco and stored by Regal as an accommodation on the apparent basis that the parties' contract had been repudiated.

B. The trial court lacked the authority and jurisdiction to enter Judgment on the arbitral awards against two entities—Regal Washington and Regal Canada—when only one defendant participated in the arbitration and only one defendant was referenced in the arbitral awards.

C. The trial court abused its discretion in granting Costco's Revised Motion to strike because its order is vague and incomprehensible, and the pleadings and exhibits presumably stricken were material to the Motion to Vacate and the Petition for Confirmation, were before Judge Alsdorf and were part of the Arbitration Award.

### III. STATEMENT OF THE CASE

#### A. Background facts.

##### 1. Contract to purchase ladders.

Costco purchased approximately 33,120 Model 1205 Telesteps telescoping ladders from Regal under an Import Vendor Agreement, CP 234-258, and related purchase orders, CP 309-340. See generally Final Reasoned Award at CP 121-122, and 124. Costco issued 23 purchase orders, corresponding to 23 shipments of 1,440 ladders each, to be delivered at locations and on dates specified therein. CP 309-340. In March 2007, at which time Regal had delivered 20 of the 23 ladder shipments to Costco and agreed to store the remainder for Costco's convenience, CP 341-344, Costco became concerned that the ladders in its possession were not compliant with American National Standards Institute standards for analogous ladders (ANSI A14.2), as represented by Regal. CP 124-125 (line 15-p.5, line 6). Thereafter, Costco refused to pay for 3 shipments of ladders received and for the 3 ladder shipments being stored

by Regal for Costco. CP 127-128 (arbitrator acknowledges Costco's failure to pay for ladders received and retained), CP 364.<sup>1</sup> The parties' interactions devolved into disputing whether Regal had provided sufficient assurances that the ladders were ANSI A14.2 compliant. Costco never took possession of the final 3 shipments of ladders (4,320 ladders) that Regal had agreed to temporarily store for Costco. CP 127-128, 341-44, and 364.

2. Arbitration Demand and Proceedings.

Costco filed a Demand for Arbitration with the American Arbitration Association against one entity: "Regal Aluminum Products, Inc.," who Costco alleged to be "a Washington corporation headquartered in British Columbia, Canada." CP 10. Thereafter, Costco served the Demand upon only one entity: Regal Aluminum Products, Inc., a Washington Corporation ("Regal Washington"), by serving the Demand upon the registered agent for Regal Washington: George Smith of Smith & Zuccarini, P.S., located in Bellevue, Washington.<sup>2</sup> CP 37, 39.

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<sup>1</sup> On March 1, 2007, Regal agreed to temporarily store 3 shipments that were then *en route* to Costco depots and were within the control of Costco's shipping agent. CP 345-348.

<sup>2</sup> Mr. Smith is not an agent of the Canadian company bearing the same name: Regal Aluminum Products, Inc. (herein "Regal Canada.") CP 7 at para. 6. Costco did not serve the demand on Regal Canada. CP 7 at para. 7.

There are, in fact, two entities having the name Regal Aluminum Products, Inc.: a Canadian corporation that, at the relevant times, imported and sold ladders and other aluminum products in Canada and the US (herein "Regal Canada"), and a Washington corporation that handled order fulfillment and delivery for the Canadian corporation in a portion of the US (herein "Regal Washington"). CP 46-48, 51-53.

Bucknell Stehlik Sato & Stubner, LLP ("Bucknell Stehlik") appeared for and defended the named defendant, Regal Washington Aluminum Products, Inc., without identifying the state or country of incorporation. CP 41-44. In the Answering Statement and Counterclaim, Bucknell Stehlik stated, "Regal is a corporation incorporated under the laws of the Province of Alberta, Canada which is registered to carry on business in the Province of British Columbia, Canada headquartered in British Columbia, Canada." CP 41.

Thereafter, Costco was repeatedly advised of the existence of two different entities bearing the name Regal Aluminum Products, Inc. First, in response to Costco discovery requests, Regal Washington supplied an organization chart identifying Regal Washington, Regal Canada and other entities that shared common ownership. CP 46-48. The chart showed two different entities with the name "Regal Aluminum Products, Inc." and it noted that Regal Washington was a lessee and manager of US warehouses

distributing the product of Regal Canada that charges Regal Canada ("the operating company") a management fee. CP 48.

Second and somewhat later in the case, Costco deposed Norm Liefke, the President of both Regal entities respecting the ownership and affiliations of Regal Washington. Counsel to Costco recognized that there were two distinct entities with the same name and asked questions regarding the delineation between Regal Washington and Regal Canada. CP 50 – 53. Mr. Liefke explained that the entity contracting with Costco was Regal Canada, and that Regal Washington is a corporation that leases warehouse space for US distribution of Regal Canada products and handles payroll deductions and IRS matters for US employees. CP 51-53 at pp. 85-88, 95-97. He further noted that Regal Washington does not sell Regal ladders or any Telesteps products; all sales are through Regal Canada. Id.

At no time throughout the pendency of the arbitration or at the arbitration hearing did Costco ever attempt to serve Regal Canada, attempt to add an additional defendant to the arbitration, or claim or assert that its claims articulated in the Demand and prosecuted at the arbitration hearing were made against more than one Regal entity.

3. *Final Reasoned Award on all Substantive Issues and Subsequent Fee Award.*

The arbitration of the parties' claims occurred in late October 2010. The arbitrator issued his substantive decision on November 19, 2010 in a document titled Final Reasoned Award on all Substantive Issues (herein "Final Reasoned Award"). The Final Reasoned Award listed only one defendant: Regal Aluminum Products, Inc., and the arbitrator made no findings as to the defendant's state of incorporation. CP 121-128.

In the Final Reasoned Award, the arbitrator employed UCC language and specifically found that (a) Costco had a "reasonable basis" to request adequate assurance, CP 124 at lines 15-22 (emphasis added), (b) "Regal failed to respond in a reasonable fashion to [Costco's] request for assurance," CP 125-126 (p. 5, line 12 – p. 6, line 2), and (c) "Regal's actions did not constitute a reasonable assurance of compliance with Regal's prior product-related representations," CP 126 at lines 3-4 (emphasis added). The arbitrator concluded, "[i]n the absence of reasonable assurance from Regal that the ladders it had already supplied and those it was still seeking to supply to Costco had in fact been manufactured in compliance with Regal's representations and labels, Costco was entitled to reject or return the ladders." CP 127 at lines 9-12 (emphasis added). The arbitrator then awarded Costco \$469,584.70 in

damages, largely comprised of Costco's losses on salvage sales of the entire ladder inventory that had been in Costco's possession on the date it purportedly requested adequate assurances. CP 127 – 128. The arbitrator excused Costco from paying for the 3 ladder shipments Regal stored for Costco and rejected Regal's counterclaim therefor, CP 128 at lines 8-9, presumably because Regal failed to give assurances. Importantly, the arbitrator made no finding on the issue of whether the ladders were ANSI A14.2 compliant or otherwise non-conforming. CP 121-128.

The arbitrator concluded, "[a] single issue remains in this case, but it is not a substantive issue as to the merits of the claims, counterclaims or defenses. . . . Claimant [Costco], as the prevailing party, is entitled to the award of its fees and costs, and the costs of arbitration." CP 128 at lines 11-14.

On January 6, 2011, the arbitrator issued the supplemental award of fees and costs, entitled "Final Award" but herein referred to as "the Fee Award" to better identify its purpose and scope. See CP 72 (line 15) – CP 73. Again, there was only one named defendant in the caption of the Fee Award: Regal Aluminum Products, Inc. The arbitrator awarded Costco \$316,813.50 in attorneys' fees and \$42,711.80 in costs, and further ordered Regal Washington to reimburse Costco \$25,478.50 for AAA fees and arbitrator's expenses paid by Costco. See CP 409-411.

4. Post Award Matters.

Regal Washington filed a Revised Motion to Vacate Arbitration Award, seeking complete vacatur of the Final Reasoned Award and the Fee Award. CP 94-106. Costco opposed the Motion and filed a Revised Motion to Strike the Revised Declaration of Andrea Orth and all attached exhibits and portions of the Motion to Vacate on the exclusive ground that they referenced factual matters and/or allegations not found on the face of the award and were therefore immaterial. CP 365-371.

Costco filed a Petition for Confirmation of Arbitration Award and Entry of Judgment, seeking confirmation of the Fee Award and entry of judgment against Regal Washington and Regal Canada based upon the Final Reasoned Award and Fee Award. CP 1-5. Curiously, in the caption of Costco's Petition Costco included two defendants—Regal Washington and Regal Canada—even though all other pleadings and documents in the arbitration referred only to a single Regal entity.<sup>3</sup> Put simply, in its Petition Costco added a new party—as judgment debtor—that was never a party to the underlying arbitration.

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<sup>3</sup> Compare CP 1 with CP 10 (Demand), CP 37 (Affidavit of Service), CP 41 (Regal Answering Statement), CP 46 (Regal's responses to discovery), CP 50 (Liefke Deposition transcript), 121 (Final Reasoned Award), 130 (Costco Arbitration Brief), 159 (Regal Hearing Memorandum), 199 (Costco's Proposed Final Award), and CP 219 (Regal Proposed Award.)

The trial court denied Regal's Motion to Vacate, CP 407-408, and granted Costco's Petition for Confirmation of Arbitration Award and Entry of Judgment, CP 409-11. The court entered a Judgment and Order Confirming Arbitration Award against Regal Washington and Regal Canada. CP 409-11.

The trial court also granted Costco's Motion to Strike, purportedly striking, "materials to which Regal submitted as 'undisputed facts' that were not before Judge Alsdorf, nor part of the Arbitration Award." CP 405-06. The trial court made no findings respecting which facts it believed were or were not before Judge Alsdorf or which facts were not part of the Arbitration Award. Id.

**B. Undisputed and Dispositive Facts Bearing on Motion to Vacate, and Referenced or Incorporated in Final Reasoned Award.**

There is a very small universe of *undisputed and legally dispositive* facts – referenced or incorporated in the Award – which eliminate RCW 62A.2-609's "Right to adequate assurance of performance" as a basis for liability in this case. The arbitrator's erroneous reliance on RCW 62A. 2-609 in the face of these facts is one of the many errors justifying vacatur. Such facts, outlined below, are material to this appeal.

First, it was not and cannot be controverted that **Regal had completed its performance per the 23 ladder purchase orders as of**

**late February or early March 2007 by shipping and/or delivering all of the ladders Costco had ordered by that time.** Costco's arbitration exhibit 334, CP 343-344, established that 20 of the 23 ladder shipments were received by Costco by **March 16, 2007** (10 shipments of ladders in December 2006, 6 shipments of ladders in January 2007, 2 shipments of ladders in February 2007, and 2 shipments of ladders in March 2007.)<sup>4</sup> See also CP 364. Arbitration exhibit 636, CP 345-348, evidenced the March 1, 2007 Costco/Regal agreement that Regal would store 3 ladder orders for Costco for 12 weeks and arbitration exhibit 714, CP 350-356 at CP 352, 354 and 356, showed that those shipments had left Regal and were *en route* to Costco on March 1, 2007. The arbitrator was cognizant of and referenced the status of Regal's performance on the date Costco requested assurances in his Final Substantive Award, when he acknowledged that Costco developed concerns about the ladders' compliance with ANSI A14.2 at a time when Costco had already received much of the ladder product ordered and was continuing to receive ladders, CP 124 at lines 15-21, the latter presumably referring to the three stored shipments.

In his damages ruling the arbitrator also referred to, incorporated and relied upon arbitration exhibit 334 and other evidence showing (a) the

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<sup>4</sup> The "Rcv Date" in exhibit 334 is the date Costco received Regal ladders. The 7-digit code starts with a 1, followed by 2 digits for the year, 2 digits for the month and 2 digits for the day. Thus, a "Rcv Date" of 1070316 stands for 03/16/07.

dates of Costco's receipt of 20 ladder shipments in his damages ruling, and (b) that Costco had indeed received 20 of 23 shipments prior to requesting assurances. He stated, "the Arbitrator has determined that the measure of damages testified to by Michael Parrott and illustrated by him in demonstrative exhibits was reasonable and supported by a preponderance of the evidence . . ." CP 127 at line 19 – CP 128, line 1 (emphasis added). The demonstrative exhibits referred to, relied upon and incorporated by reference by the arbitrator state that per arbitration exhibit 334, 28,800 ladders were delivered to Costco. CP 360. This is important because the quantity of ladders received – 28,800 – equates perfectly to the 20 ladder shipments (each shipment contained 1,400 units) of which Costco was in possession on the date it first requested assurances. The record before the arbitrator also conclusively showed that as of **late February 2007** Regal had turned over 100% of the ladders ordered to Costco's shipping agent.<sup>5</sup>

Second, it was undisputed that **Costco made its first alleged demand for adequate assurances on March 20, 2007 (after Regal**

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<sup>5</sup> Additional *undisputed* evidence shows that Regal's performance was actually completed by 2-07 because by that date Regal had turned over all ladder shipments to Costco's shipping agent. Each of the 23 Costco purchase orders required Regal to deliver the referenced shipment to Costco's shipping agent on dates ranging from 10-27-06 to 2-17-07, CP 318-340. Regal did so, and the completion of Regal's performance was admitted by Costco in a 3-2-07 email acknowledging that the balance of Costco's orders "had all shipped from China and [were] arriving in the next two weeks." CP 282. These shipments had vessel departure dates in Jan. or early Feb. 2007 and estimated times of arrival at Costco depots on 2-23, 2-28 and 3-5-07. CP 352, 354 and 356.

**completed its performance on most if not all of the purchase orders).**

In its arbitration brief, Costco alleged that it made its first demand for adequate assurance on **March 20, 2007**. CP 147-149. The language of the Award reveals that the arbitrator accepted Costco's allegation because he noted that the demand came after questions were raised about the appearance of one or more ladders and regarded product “already received.” CP 124 at lines 14-22. (The reference to concerns regarding the appearance of the Regal ladders places a definitive time-stamp on the demand as having occurred sometime after March 15, 2007—the date Costco received a report from its testing facility with pictures of the ladders showing cosmetic variations from previously tested ladders. CP 308; compare CP 260 – 280 with CP 286-306.) Because Regal completed its performance in late February 2007 or March 16, 2007 at the latest, Costco's first demand for assurances post-dated Regal's completion of performance (or at least the 87% of its performance since Costco had by then received 87% of the ladders ordered). Further, it is clear from the arbitrator's adoption of Costco testimony and demonstrative exhibits that he concurred that Costco had received 28,800 ladders prior to demanding adequate assurances about their compliance with ANSI A14.2. CP127 at line 19 –CP 128 at line 1, CP 360.

Third, it cannot be disputed that **Costco breached the parties' agreements by failing to timely pay for ladders received prior to demanding adequate assurances.** This too is apparent from the award because the arbitrator remedied Costco's failure to pay for 3 ladder shipments it received when he adopted Costco's damages calculations including a deduction for the 3 ladder shipments. CP 127 at line 22 – CP 128 at line 1; CP 357-62. Costco Illustrative Exhibit Page 1, which the arbitrator accepted and expressly referenced in the award, shows the deduction for "payment to Regal for Ladders Received . . .", referring to the 3 ladder shipments Costco received but failed to pay for. CP 358.

Costco's undisputed failure to pay for these shipments was a breach of the parties' Import Vendor Agreement. CP 235 – 258.

Moreover, the data from Exhibit 334 (CP 343-44) establishes that Costco was in breach *prior to the first demand for assurance* on March 20, 2007 because (a) Costco received ladders on Purchase Order 0714-292 on January 31, 2007, (b) per the Import Vendor Agreement, CP 255, payment was due on such shipment "net 30 days" from Costco's receipt thereof, i.e., March 2, 2007, and (c) Costco clearly did not pay for this shipment at any time, such failure only being remedied in the arbitrator's Final Reasoned

Award. Costco had thus breached the contract over two weeks prior to its first demand for assurances on March 20, 2007.<sup>6</sup>

C. **The Arbitrator's Liability Determination in the Final Reasoned Award was Exclusively Based Upon the Right to Adequate Assurances Set Forth in RCW 62A.2-609.**

The arbitrator based liability on RCW 62A.2-609, entitled "Right to adequate assurance of performance," which permits a party who has reasonable grounds to question whether the other will perform future contractual obligations to (a) demand adequate assurance of future performance, and (b) essentially terminate the executory i.e., yet to be performed, portions of the contract if assurances are not provided.

Although the arbitrator referred generally to the UCC without express citation to RCW 62A.2-609, it is clear from the language and structure of the Award that the statute was the exclusive basis for his liability determination; Costco's anticipated argument that the decision was based in contract is belied by the language of the Award and the absence of contractual rights sufficient to otherwise support the arbitrator's ruling.<sup>7</sup>

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<sup>6</sup> Costco again breached the agreement when it failed to pay within thirty days of its receipt of shipments on 3-6-07 and 3-16-07. CP 364. Notably, on 3-8-07, Costco placed a payment hold on Regal's account. CP 284.

<sup>7</sup> The arbitrator's failure to cite RCW 62A.2-609 is immaterial given that he expressly referred to the UCC generally as the basis for Costco's rights. That he did not refer to the statute is also not surprising given that Costco cited RCW 62A.2-609 as the singular legal authority for liability in its Proposed Award. CP 199 - 217 at 212-213.

The express basis for the arbitrator's ruling was that Regal failed to give adequate assurances in response to Costco's proper demand therefore. See *supra*, p.7-8. The arbitrator referred to "assurances" or "reasonable assurance" six (6) times and referred to Costco's "reasonable" beliefs or conduct twice—each such reference appearing in the analysis section of the Award. Id.; CP 121-128. In contrast, the arbitrator used the word "breach" only three times and only in reference to the parties' claims; he did not find or refer to any breach whatsoever in the analysis section of the Final Reasoned Award. CP 121 at line 20, CP 122 at line 2.

Moreover, a cursory review of the contractual provisions cited by the arbitrator confirms that liability could not have been founded in contract; the contract did not afford Costco the right to seek adequate assurances or provide a remedy for failure to give assurances. Section 11 of the contract afforded Costco the right to test or re-test the merchandise, CP 123, and Section 20 outlined the bases for rejection or revocation of acceptance to include non-conformity of goods – a matter on which the arbitrator made no finding whatsoever, CP 123-24. See also CP 241-242 and 246-247. Neither Section 11 nor 20 of the contract gave Costco a right to demand assurances, and Section 20 did not afford Costco the right to reject merchandise upon a vendor's failure to give adequate assurances of conformity. The right to demand assurances comes only from RCW

62A.2-609, and the statutory remedies for failure to give assurances include damages to cover and the right of the demanding party to cancel the executory portions of the contract. Notably, rejection of received goods is not a remedy available under the statute for failure to give assurances.

Indeed, the arbitrator's only references to the parties contract in his analysis relate to its provision—Section 11—permitting Costco to test the product at its whim. (He does not refer to Section 20 or use the language from this section in his analysis.) For instance, the arbitrator noted, "[u]nder the terms of the contract cited above, Costco secured and retained the right to test and/or re-test vendors' products at any time in its discretion." CP 124 at lines 14-15. The arbitrator then used a compound and complex sentence to establish that the contract—Section 11—gave Costco the right to question and investigate product compliance but the UCC gave Costco the right to seek assurances. He stated,

Based on the continued issues of possible pinching of fingers and other hand injuries, and questions raised at the time by the appearance of one or more of Regal's . . . ladders, Costco had a reasonable basis under the contract and **the UCC to question and to seek assurances** . . .

CP 124 at lines 15-22 (emphasis added – contract items underlined, UCC items in bold.) This sentence contains a lists of the sources of Costco's rights (contract and UCC), and a list of those rights (to question and seek

assurances.) Reading the sentence properly so that the sources and the rights are linked based on their order, it is clear that the arbitrator concluded that Costco had a contractual right to question (underlined text above) and a UCC right to seek assurances (bold text above) respecting questions of conformity. (This reading, of course, also conforms to the contractual terms and the law.)

Finally, it is clear from the arbitrator's words that his erroneous conclusion that Costco was entitled to reject the ladders was exclusively premised upon Regal's failure to give assurances, and not on any of the contractual bases for rejection in Section 20 or any proper basis for rejection under RCW 62A.2-601. He stated,

In the absence of reasonable assurance from Regal that the ladders it had already supplied and those it was still seeking to supply had in fact been manufactured in compliance with Regal's representations and labels, Costco was entitled to reject or return the ladders.

CP 127 at lines 9-12. Importantly, the arbitrator did not refer to Section 20 of the contract or employ any of its terms or base for rejection, i.e., non-conformity, shipping error, defect, or inadequacy in warnings, labels instructions or safety guards. CP 123-24.

#### IV. ARGUMENT

The Regal entities appeal the trial court's resolution of three different motions: (a) Regal's Revised Motion to Vacate Arbitration

Award; (b) Costco's Petition for Confirmation of Arbitration Award and Entry of Judgment; and (c) Costco's Revised Motion to Strike. In each case, the trial court made either grave errors of law or abused its discretion.

A. **The Trial Court Erred in Denying Regal's Revised Motion to Vacate Because the Final Reasoned Award Discloses Multiple Legal Errors.**

The errors apparent on the face of the Final Reasoned Award and undisputed evidence referenced therein fall into three categories. First, various aspects of the Final Reasoned Award reveal that the arbitrator erroneously applied RCW 62A.2-609 and the concept of adequate assurances. That concept does not apply where performance of a contract or a discreet installment thereof is complete and/or where the demanding party is in breach for failure to pay for goods already received.

Second, the Final Reasoned Award discloses that the arbitrator erroneously conflated the UCC concepts of demands for adequate assurances and rejection by ruling that a failure to give assurances entitles the demanding party to reject already received goods.

Third, the arbitrator made drastic errors in calculating damages based on the articulated theory of liability (failure to give adequate assurances), by ignoring the fact that Regal had completed performance of the parties' agreement by delivering the goods or a vast majority of them

to Costco prior to the demand for assurances, and awarding damages that would be appropriate for a breach as to all goods without making the requisite finding that the goods delivered were non-conforming.

Finally, the arbitrator's rejection of Regal's claim for payment for three shipments of ladders, based upon a conclusion that the parties' contract was repudiated under RCW 62A.2-609, was clear error since the statute had no application in this case.

1. *Washington's Uniform Arbitration Act mandates vacatur of arbitral awards facially displaying clear legal error.*

The right to seek vacatur of an arbitral award is so fundamental that the legislature made the right non-waivable. RCW 7.04A.040(3). This view is reflected in Washington cases noting that the policy encouraging arbitration would be undermined if arbitrators were permitted to ignore the law or the parties' contractual provisions. See, e.g., Agnew v. Lacy Co-Ply, 33 Wn. App. 283, 289-90, 654 P.2d 712 (1982).

RCW 7.04A.230(d) provides that "[u]pon the motion of a party, the Court shall vacate an award if . . . [a]n arbitrator exceeded the arbitrator's powers." (Emphasis added.) An arbitrator exceeds his or her power when he or she makes an error of law apparent on the face of the award, including the adoption of an erroneous rule of law or the

misapplication of law to fact. See, e.g., Broom v. Morgan Stanley DW Inc., 169 Wn.2d 231, 237-40, 236 P.3d 182 (2010).

Limiting the review to the face of the award is merely "a shorthand description for the policy that courts should accord substantial finality to arbitrator decisions." Federated Services Ins. Co. v. Personal Representative of Estate of Norberg, 101 Wn. App. 119, 123, 4 P.3d 844 (2000). Thus "[i]n deciding a motion to vacate, a court will not review the merits of the case, and *ordinarily* will not consider the *evidence weighed* by the arbitrators. Id. at 123-24 (emphasis added). This standard of review, however, does not prohibit reviewing courts from reviewing or relying upon *undisputed evidence* not cited in the award in vacating the arbitral award. See, e.g., Agnew, 33 Wn. App. 283 (vacating award ordering each side to pay their own attorneys' fees and costs where contract contained a mandatory attorney fee provision not cited in award). Serious or repeated errors warrant a new hearing before a new arbitrator. Agnew, 33 Wn. App. at 290.

Washington courts have vacated arbitral awards that were internally inconsistent,<sup>8</sup> subject to more than one interpretation—one of

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<sup>8</sup> In Tolson v. Allstate Ins. Co., 108 Wn. App. 495, 32 P.2d 289 (Div. I 2001), the court vacated an award where it was *potentially* internally inconsistent and/or because it lacked essential factual findings. The arbitrator referenced expert testimony regarding memory loss, but awarded no damages for memory loss. Had he found that memory loss had occurred, failure to award damages would have been clear error but if he found no actual

which involves a clear error of law,<sup>9</sup> or otherwise contrary to Washington law.<sup>10</sup> Under the foregoing authorities, particularly Lindon and Tolson, the trial court erred in denying the motion to vacate where the arbitral award is contrary to various UCC provisions and case law.

2. *Vacatur is required because the arbitrator based his liability determination on RCW 62A.2-609 and the statute does not apply where performance is completed by delivery of goods or where the demanding party is in breach.*

The arbitrator's reliance upon RCW 62A.2-609 was erroneous for two distinct reasons. First, the statutory language dictates and all cases confronting the issue uniformly hold that where one party has completed performance, the other party may not avail himself of UCC Section 2-609. By its reference to "expectations" of performance, suspension of performance where the agreed upon return has not been received, and "future performance," RCW 62A.2-609 clearly provides that it may be invoked only to obtain assurances regarding future shipments or future performance. By its terms, the statute clearly does not apply to past performance and does not permit a party to

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memory loss, the award would be appropriate. Id. at 497-98. "[T]he internal inconsistency amounts to an error of law on the face of the award." Id. at 499.

<sup>9</sup> In Lindon Commodities, Inc. v. Bambino Bean Co., Inc., 57 Wn. App. 813, 790 P.2d 228 (1990), the buyer paid a portion of the contract claiming the parties had orally agreed to the lower price. The arbitrator awarded the seller the difference between the amount paid and the contract price noting, "I have found no evidence of any consideration for any modification of the contract after the payment due date." Id. at 814. However, under RCW 62A.2-209 no consideration is required to make a contractual modification binding. Id. at 815. Because the award language contradicted UCC Section 2-209, vacatur was required.

<sup>10</sup> See, e.g., Broom, supra; Kennewick Educ. Ass'n v. Kennewick School Dist. No. 17, 35 Wn. App. 280, 666 P.2d 928 (1983).

request assurances about already received and accepted product as Costco did in this case. (Such a reading of RCW 62A.2-609 makes sense because concerns, rights and obligations concerning received goods are amply covered by RCW 62A.2-601 (buyer's rights on improper delivery), -2.602 (manner and effect of rightful rejection), and -2.607 (damages for breach relating to accepted goods.)) For this reason, there is no body of case law approving the use of UCC Section 2-609 where the goods about which the buyer has questions have already been received by the buyer.

Consistent with the statutory language, there is a body of case law holding that UCC Section 2-609 does not apply where a party's performance is complete, i.e., where there is no "future performance" remaining, even if there was a breach respecting performance.<sup>11</sup> Sumner v. Fel-Air, Inc., 680 P.2d 1109 (Ak. 1984), involving the sale of an airplane, is on "all-fours" with the instant case. In that case, months after the seller delivered the plane, the buyer learned that the seller did not have title to it. The buyer demanded documentation to resolve title issues and stopped making payments when the seller failed to provide it. Sumner, at pp. 1110-11. The trial court accepted the buyer's liability argument premised upon a failure to give adequate

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<sup>11</sup> See, e.g., Chronister Oil Co. v. Unocal Refining and Marketing, 34 F.3d 462, 464 (7th Cir. 1994) (holding that UCC Section 2-609 does not apply where performance has occurred and there is a breach; the doctrine "comes into play only when one party suspects that the other may break the contract when the other's performance comes due."); Magic Valley Foods, Inc. v. Sun Valley Potatoes, Inc., 10 P.3d 734, 739 (Idaho 2000) (buyer could not avail itself of right to demand adequate assurances where it had already received potatoes it had contracted to purchase).

assurances upon proper demand. The Alaska Supreme Court held that UCC Section 2-609 did not apply since the seller's performance was complete:

... AS 45.02.609 was inapplicable to the case at bar. By its terms, AS 45.02.609 may be invoked only in situations where a party to an executory contract has reason to be concerned about whether or not another party will tender a performance due in the future. In this case, the time for [the seller's] performance (delivery of marketable title to the [plane]) had passed when [buyer] made its demand. AS 45.02.609 is not relevant in situations where a breach has, in fact, occurred. Thus the Superior Court's reliance upon that provision was misplaced.

Sumner, at 1115-16 (emphasis added). Just like the seller in Sumner, Regal completed performance by shipping all of the ladders to Costco in February 2007—well before Costco first demanded adequate assurances on March 20, 2007. In any event, Regal's performance was undeniably complete as to the 20 shipments of ladders in Costco's possession as of the date of the demand for assurances. Thus, the arbitrator erred in applying RCW 62A.2-609.<sup>12</sup>

Second, the statute and case law prohibit a party in breach from using UCC Section 2-609. RCW 62A.2-609(1) provides that an insecure party may demand assurances of due performance "and until he receives such assurance may if commercially reasonable suspend performance for which he has not already received the agreed upon return."<sup>13</sup> The statutory language plainly

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<sup>12</sup> Further, under Sumner, supra, and Chronister Oil Co., supra, n.7, even if the Regal Ladders were "non-conforming" for failure to comply with ANSI A14.2 standards, Costco would not have been entitled to rely upon UCC Section 2-609.

<sup>13</sup> See also Cherwell-Ralli, Inc. v. Rytman Grain Co., Inc., 433 A.2d 984, 987 (Conn. 1980) (affirming judgment for seller for payment on goods received and retained and holding party to a sales contract may not suspend performance where it has already received the agreed upon return.); Argoindustrias Vezel, S.A. De C.V. v. H.P. Schmid,

prohibits the suspension of payment for goods already received. Similarly, the majority rule is that a party already in breach, due to failure to pay for goods received or otherwise, may not invoke UCC Section 2-609.<sup>14</sup> To hold otherwise would allow a breaching party to avoid liability by invoking UCC Section 2-609 and luring the other party into repudiating. Hope's Architectural Products, 781 F. Supp. at p. 715; see also Great Plains Gasification Associates, 819 F.2d at 834 n. 5 (UCC Section 2-609 may not be used as "subterfuge" to escape liability for breach).

Here, contrary to the statute, Costco suspended its performance by failing to pay for the ladder shipment received January 31, 2007 by the contractual deadline of March 2, 2007. See *supra* pp 14-15. It further suspended its performance for payment on two other shipments received on March 6, 2007 and March 16, 2007 when it issued a hold on all payments to Regal on March 8, 2007, CP 284, and then failed to pay for such shipments.

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Inc., No. 92-15078, 15 F.3d 1082 (9<sup>th</sup> Cir. 1994 (unpublished)) (UCC Section 2-609 cannot be used to justify non-payment where agreed upon return has been received and retained.); Express Scale Parts, Inc. v. Process Machinery Associates, Inc., 1987 WL 60305 at \*5 (USDC D. Kansas 1987) (summary judgment to seller; party may not suspend its own performance (payment) for which it has already received the agreed upon return.)

<sup>14</sup> See, e.g., Advanced Bodycare Solutions, LLC. V. Thione International, Inc., 615 F.3d 1352, 1361 (11<sup>th</sup> Cir. 2010) (buyer in breach for failure to make minimum purchases was not entitled to invoke Section 2-609 and suspend performance.); United States v. Great Plains Gasification Associates, 819 F.2d 831, 834-835 and n. 5 (8<sup>th</sup> Cir. 1987) (party in breach of a contract may not demand adequate assurances under Section 2-609); Hope's Architectural Products, Inc. v. Lundy's Construction, Inc., 781 F.Supp. 711 ( D.Kan. 1991) (window seller not entitled to invoke Section 2-609 because it was already in breach by failing to make timely delivery.); Magic Valley Foods, 10 P. 3d at 739; Lafarge Building Materials, Inc. v. Pozament Corp., 2010-51531 (NYMISC) (party may not claim repudiation while at the same time failing to pay per the contract.)

Costco's conduct is analogous to the buyer's in Magic Valley Foods, wherein the Idaho Supreme Court held that the non-paying buyer could not avail himself of Section 2-609.<sup>15</sup> The arbitrator's application of RCW 62A.2-609 was contrary to the letter of RCW 62A.2-609 and persuasive case law, and vacatur was required.

3. *The arbitrator erroneously conflated the concepts of adequate assurances and rejection, reaching a conclusion not permitted by the UCC.*

Vacatur is also required because the arbitrator wrongly conflated UCC law regarding demands for adequate assurance and rejection of goods. *Notably, this error of law is patent and does not depend upon the undisputed record facts outlined supra at pages 10 - 15.*

The arbitrator stated, "[i]n the absence of reasonable assurance from Regal . . . , Costco was entitled to *reject or return the ladders.*" CP 127 at lines 9-12 (emphasis added). This was a clear and blatant error of law. First, the adequate assurances concept regards future performance

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<sup>15</sup> The Magic Valley court stated:

Magic Valley failed to comply with [Idaho's statute incorporating Section 2-609] in two respects. First, Magic Valley did not seek assurances until the end of August 1995, but withheld payment from Sun Valley months prior to that. Thus Magic Valley had already begun suspending its performance to pay, months prior to seeking assurances that Sun Valley would deliver. Second, at the time Magic Valley was seeking assurances in August, it had already received the potatoes for which payment was owed. The statute allows suspension of performance only 'for which he has not already received the agreed return.' Thus because Magic Valley had already received the potatoes under contract 9418 and the previous contracts, it was obligated to pay without regards to Sun Valley's assurances of completion of contract 9418.

Magic Valley Foods, 10 P.3d at 739.

`whereas rejection or revocation of acceptance regards past performance.

Accordingly, any failure to assure regarding future performance by Regal has no legal impact on Regal's past performance or Costco's rights respecting Regal's past performance.

Second, the arbitrator's conclusion that Costco had a right to reject the ladders due to a failure to provide assurances was clearly erroneous because the consequences for failure to give assurances include cover damages and repudiation of the unperformed portion of the contract, RCW 62A.2-609(4); failure to give assurances does not permit rejection, *resurrect* a right to reject goods already received and accepted, or supply a basis for an action for breach damages relating to accepted goods. An aggrieved party must make a different showing—more than a mere lack of security—to justify rejection. A right to demand adequate assurances arises where one party has a reasonable ground for insecurity respecting the future performance of the other party whereas the right to reject arises only if the goods received are actually non-conforming. Compare RCW 62A.2-609 with 62A.2-601. Thus, even if a buyer establishes reasonable grounds for insecurity, if it does not establish a non-conformity there is no right to reject goods under RCW 62A.2-601. T&S Brass and Bronze Works, Inc. v. Pic-Air, Inc., relied upon by Costco, illustrates the foregoing points by holding that repudiation in an installment delivery

case operates only against installments due after the demand for assurances. 790 F.2d 1098 (4th Cir. 1985) (buyer was obligated to pay for shipments received prior to its demand, but was released from obligation to pay for final shipment because failure to give assurances resulted in repudiation of remainder of contract.)

In sum, as was the case in Lindon where the arbitrator statements in the award were contrary to controlling law, the arbitrator's reasoning here that a right to reject arose from Regal's failure to give adequate assurances is hopelessly at odds with the UCC and amounts to a clear and material error of law. This error was carried over into the arbitrator's damages calculation.

4. *Vacatur is required because the arbitrator awarded damages to which Costco was not entitled for Regal's failure to give adequate assurances under the UCC or otherwise.*

The arbitrator committed gross legal error by using a measure of damages—loss on Costco's salvage sales of its entire ladder inventory as of the date of its demand for adequate assurances—that is simply not available for failure to give adequate assurances, and is not otherwise legally supportable. *This error of law is also patent and does not depend upon the undisputed record facts outlined supra at pages 10 - 15.*

Repudiation is the statutory consequence for failure to give adequate assurances. RCW 62A.2-609(4). Logic, plain meaning and case law require the conclusion that the repudiation under RCW 62A.2-609(4) regards only the *unperformed portion of the contract* about which adequate assurances were requested; not the already performed portions of the contract. This view is consonant with the usual and common meaning of "repudiation", which relates to performance not yet due.<sup>16</sup> It is also consistent with RCW 62A.2-610, respecting anticipatory repudiation, and the comments thereto, which confirm that "repudiation" under the UCC relates to the *unperformed portions of a contract*.<sup>17</sup> The UCC remedies for repudiation—cancellation of the executory portion of the contract, recovery of pre-payments for "the goods involved" (goods about which assurances were demanded), costs to cover or damages for non-delivery, and specific performance/ replevin—likewise convey that repudiation regards only the executory portions of the contract. RCW 62A.2-711(1) -

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<sup>16</sup> Repudiation is defined as "[a] rejection, disclaimer, or renunciation of a contract before performance is due that does not operate as an anticipatory breach unless the promisee elects to treat the rejection as a breach and brings a suit for damages." Black's Law Dictionary, p. 903 (Abridged 6<sup>th</sup> Ed. 1991) (emphasis added). "Repudiation of a contract is in nature of anticipatory breach before performance is due . . . ." *Id.* (emphasis added).

<sup>17</sup> Section 2-610 provides that "[w]hen either party repudiates the contract with respect to performance not yet due the loss of which will substantially impair the value of the contract to the other," the aggrieved party may avail him or herself of the options stated in the statute. Comment 1 states: "anticipatory repudiation centers upon an overt communication of intention of an action which renders performance impossible or demonstrates a clear determination not to continue with performance." (Emphasis added.) Similarly, Comment 2 refers to the "rejection of the continuing obligation."

(2).<sup>18</sup> Finally, it is well settled in relevant decisions that repudiation regards only the unperformed portions of the contract. See, e.g., T&S Brass and Bronze Works, Inc., supra p. 28.

Contrary to the forgoing, the arbitrator erred by failing to restrict the monetary award to damages flowing from the repudiation of executory portions of the parties' contract. He made no effort to parse out the performed portions from the unperformed portions of the contract. (Of course, there were no "unperformed" portions of the contract between Costco and Regal because as of March 20, 2007 when Costco first demanded adequate assurances, Regal had already delivered to Costco 20 ladder shipments and had turned over possession of the remaining three to

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<sup>18</sup> The statute provides:

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (RCW 62A.2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (RCW 62A.2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this Article (RCW 62A.2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (RCW 62A.2-716).

RCW 62A.2-711 (emphasis added.) These remedies further demonstrate the inapplicability of the adequate assurances/repudiation notion where the seller has fully performed by delivering all goods.

Costco's shipping agent. At the very least, Regal had fully performed as to 20 of the 23 ladder shipments that were then in Costco's possession.) Given the status of Regal's performance, Costco suffered no damage from "repudiation" occurring after full performance, or possibly nominal damages in connection with the 3 shipments *en route* at the time of repudiation. The arbitrator's deviation from the statutory consequence and remedies for repudiation by virtue of a failure to give assurances is also evident from the fact that he made no reference, whatsoever, to any of the categories of relief available for repudiation in RCW 62A.2-711(1) and (2), e.g., "cover", non-delivery, cancellation or return of monies paid. Simply put, he did not apply the correct UCC remedy for failure to give adequate assurances.

Instead, the arbitrator awarded Costco all losses sustained in liquidating its entire ladder inventory; all of which was in Costco's possession on March 20, 2007—the first day it allegedly demanded adequate assurances. CP 343-44. He incorrectly concluded that the failure to give assurances allowed Costco to essentially repudiate (reject) purchase orders already fully performed! This view is contrary to the statutory framework and legal authority.

Further, to the extent the Final Reasoned Award based damages upon UCC remedies for rejection or justifiable revocation per RCW

62A.2-711(3) or damages for accepted goods per RCW 62A.2-714, it is not legally supportable. Vacatur would be required because (a) non-conformity of the goods is an essential prerequisite to (i) rightful rejection, RCW 62A.2-601, RCW 62A.2-711(3); (ii) justifiable revocation, RCW 62A.2-608, RCW 62A.2-711(1); and (iii) damages for breach respecting accepted goods, RCW 62A.2-607 and RCW 62A.2-714<sup>19</sup>, (b) Costco bore the burden of proving any non-conformity, RCW 62A.2-607(4), and (c) the arbitrator made no finding or conclusion regarding whether the ladders conformed to the contract. His findings respecting a "reasonable basis" to seek assurances and/or a failure to give them are legally insufficient to support damages for rejection, revocation or breach.<sup>20</sup> Accordingly, there simply was no legal basis on which the arbitrator was permitted to award Costco its claimed losses on the salvage sale of its entire ladder inventory, which was not proven to be non-conforming.

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<sup>19</sup> RCW 62A.2-714, entitled "Buyer's damages for breach in regard to accepted goods," permits reasonable damages relating to any proven non-conformity, and may include the costs to repair, the differential between the goods "as is" and their value had they been as warranted, and incidental and consequential damages in the proper case. See, e.g., Tacoma Athletic Club, Inc. v. Indoor Comfort Systems, Inc., 79 Wn. App. 250, 902 P.2d 175, rev. denied, 128 Wn.2d 1020 (1995).

<sup>20</sup> "Alleged" non-conformity or "suspicions" regarding conformity are not sufficient to establish breach. See, e.g., H.B. Fuller Co. v. Kinetic Systems, Inc., 932 F.2d 681, 687 (7<sup>th</sup> Cir. 1991) (The concept of "conformity" "does not subject the seller to performing the contract to the 'satisfaction' of the buyer, but only to performing in accordance with the terms of the parties' agreement." Where the agreement imposed only a duty to provide a machine that was free from defects, absent proof by the buyer of a defect or other non-conformity, the buyer had no right to revoke.)

5. *The arbitrator erred in denying Regal's claim for payments due on the stored ladders, which presumably was based upon his erroneous application of RCW 62A.2-609.*

Because Regal's alleged failure to give assurances was the sole legal theory articulated by the arbitrator, one may infer that his denial of Regal's claim for payment on 3 shipments of ladders stored by Regal for Costco was also based upon a finding that the agreement as to these shipments were repudiated. (The arbitrator did not state the basis for rejecting Regal's claim for payment due on the 3 ladder shipments Regal was storing for Costco. Rather he simply concluded his award of damages to Costco with the following statement, "[a]ll claims, counterclaims and defenses not otherwise explicitly granted and awarded above, are hereby DENIED and DISMISSED.") Since the arbitrator committed clear error in relying on UCC Section 2-609, his apparent correlative rejection of Regal's claims for payment on stored ladders on that same reasoning likewise fails.

To the extent the arbitrator rejected Regal's claims on some other unarticulated ground, the dismissal of Regal's claims must be vacated under Tolson. In that case the court vacated an arbitral award referring to the plaintiff's memory loss but failing to award any damages therefore. It was impossible to tell from the award whether the arbitrator had found that memory loss had, in fact, occurred. Because it would be clear error to find there was memory loss but fail to award damages therefor and because there was no factual finding on an essential issue, the award was vacated based

upon its *possible* internal inconsistency and the probability of legal error. Tolson, 108 Wn. App. 495. Similarly, here, if the arbitrator's rejection of Regal's claims was based upon the erroneous application of RCW 62A.2-609 as outlined herein, it was clear error and must be vacated.

6. *The trial court erred by denying Regal's Motion to Vacate where the arbitrator made numerous serious errors requiring vacatur of both arbitral awards and re-hearing before a new arbitrator.*

In sum, the arbitrator selected a rule of law that clearly did not apply under the circumstances noted by him in the Final Reasoned Award and established by undisputed facts of the case, he compounded this error by conflating UCC concepts, and his additional catastrophic errors in calculating damages lead to sizable and unjustifiable monetary award in the Final Reasoned Award and subsequent Fee Award. The trial court had the power and the obligation to seriously review the arbitral awards to confirm that they were not infected by clear and obvious legal error and it failed to do this job and preserve the integrity of the arbitration process and judicial review thereof. For the reasons stated above, the Regal entities respectfully request that the court of appeals reverse the Order Denying Regal's Motion to Vacate Arbitration Award, and direct the trial court to vacate the arbitral awards on remand.

B. **The Trial Court Erred in Entering Judgment Against Two Entities—Regal Washington and Regal Canada—When Only One Defendant Participated in the Arbitration and the Arbitral Awards Referenced Only One Defendant.**

The trial court's entry of the Judgment and Order Confirming Arbitration Award (herein "Judgment") was also erroneous for the reasons above-stated but also because the court entered judgment against two Entities when the underlying arbitration involved only one defendant, and the arbitral awards named only one defendant.

1. Standard of review.

The trial court's entry of Judgment against two Regal entities should be reviewed *de novo* on appeal since this was a matter first presented to the trial court, the issues presented were strictly legal in nature and were premised exclusively upon written submissions, and because the trial court made no factual findings.

2. The trial court erred and exceeded its very limited authority and jurisdiction by entering judgment against two Regal entities when only one defendant appeared at and participated in the underlying arbitration proceeding and the arbitral awards referred to only one defendant.

The arbitration record on this subject is clear: Costco named only one defendant in the arbitration proceeding, Costco served only on defendant (Regal Washington), only one defendant was listed on every pleading filed throughout the arbitration, only one defendant appeared and participated in the arbitration proceedings to their conclusion, and the

Final Reasoned Award and Fee Award were entered against only one defendant. Clearly, Costco prosecuted its claims against and obtained an award against only one defendant. Nonetheless, Costco sought entry of judgment against two entities based on arbitral awards entered against only one entity, and the trial court obliged. This was clear error.

The trial court's authority upon confirmation of an arbitration award is extremely limited and the trial court here simply did not have the authority to enter judgment against two parties when the arbitral awards referred to a singular defendant. RCW 7.04A.250(1) states, "[u]pon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity with the order."

A confirmation action is no more than a motion for an order to render judgment on the award previously made by the arbitrators, pursuant to contract. If the court does not modify, vacate, or correct the award, the court exercises a mere ministerial duty to reduce the award to judgment.

Price v. Farmers Ins. Co., 133 Wn.2d 490, 497, 946 P.2d 388 (1997) (emphasis added; citations omitted.) The Price court held that "[t]he confirming court does not have authority to go behind the face of the award or to determine whether additional award amounts are appropriate." Id. at 496-497. The trial court may not resolve factual issues not submitted to the arbitration. Id. at 498 (holding that coverage issues not

submitted to the arbitrators for disposition were beyond the jurisdiction of the superior court and court of appeals to determine, and reversing court of appeals' decision on new issue.)

Thus, the trial court's authority here was limited to confirmation of the arbitral awards and entry of judgment based exclusively thereon.

Since neither the Final Reasoned Award nor the Fee Award listed more than one defendant, the trial court exceeded its authority and jurisdiction by entering judgment against two Regal entities. Further, under Price, it was clear error for the trial court to receive, weigh and decide the factual issue of the precise identity of the defendant in the arbitration proceeding when that issue had not been submitted to or decided by the arbitrator and noted in either arbitral award. Price prohibits the trial court from making such additional determinations relating to an arbitration. Because the arbitral awards were entered against only one defendant, the issue of the defendant's identity was not submitted to the arbitrator, the trial court exceeded its authority and jurisdiction by entering judgment against two Regal entities and the Judgment must be reversed.

3. *In any event, any ambiguity as to the precise identity of the singular defendant in the arbitration was a result of Costco's failures and balancing the equities as between Costco and the Regal appellants, Costco should not be rewarded for its lack of diligence, particularly where doing so could deprive a Regal entity of due process.*

In our legal system it is the plaintiff's privilege and obligation to select its defendant. It was, of course, within Costco's power to initiate arbitration against and pursue both Regal entities, jointly and severally, or either of them individually. For whatever reason, Costco elected to pursue a single Regal entity as defendant in the arbitration despite learning early on in the case that there were two distinct entities bearing the same name. Since it never took steps to change that initial selection, Costco ended up with arbitral awards against only one entity.

Had Costco truly desired to initiate an arbitration against Regal Canada, it should have served it with the statutorily required notice, which would have put to rest the issue of whether Regal Canada was a party to the arbitration and ensured that Regal Canada had due and proper notice that claims were being made against it. Washington's Uniform Arbitration Act, Chapter 7.04 RCW, applied to the underlying arbitration, RCW 7.04A.030(2), and under the Act:

(1) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by mail certified or

registered, return receipt requested and obtained, or by service as authorized for the initiation of a civil action. The notice must describe the nature of the controversy and the remedy sought.

RCW 7.04A.090(1); see also Kelly Kunsch, 1 Washington Practice Section 14.21 (4<sup>th</sup> ed. 1997) ("When an arbitration clause is involved, RCW 7.04A sets forth certain procedural requirements designed to give the non-initiating party notice of the claim.")<sup>21</sup> However, it is undisputed that Costco did not provide notice to Regal Canada via "service as authorized for the initiation of a civil action" or "by mail certified or registered, return receipt requested and obtained." CP 7.

Additionally, it is undisputed that despite being advised multiple times that there were two distinct legal entities bearing the same name Costco never once attempted to add an additional defendant to the arbitration. Costco's lack of diligence is inexcusable.

In sum, Costco's apparent failure to proceed against the two Regal entities is the fault of Costco alone. Under these facts, allowing the Judgment to stand against both Regal entities would not only potentially

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<sup>21</sup> Washington Practice sample forms for the statutorily-required notice include the following bold-face typed language designed to place a party on notice of the consequences of failing to participate:

**NOTICE IS HEREBY GIVEN that being served with this Notice of Intent to Arbitrate is similar to being served with a civil lawsuit. If you fail to respond and/or participate in the proceedings, an award may be entered against you.**

Id. at UCC Section 14.40 at p. 308 (emphasis in the original).

deprive Regal Canada of due process, it would reward Costco for its extreme lack of diligence. Costco cannot simply add a new party defendant after the arbitration when to do so could potentially deprive the additional party of its due process rights.

4. *Any assertion by Costco that both Regal entities appeared and participated in the action lacks factual basis.*

The Regal entities anticipate that Costco will argue that Regal Washington was a party to the arbitration because Costco served the Demand upon it and that Regal Canada *must have participated in the action* because Regal's Answering Statement referred to Regal Canada or because Regal prosecuted a counterclaim in the arbitration seeking payment for ladders received and retained by Costco, which counterclaim belonged to Regal Canada. Such an argument is only that—a legal argument. The arbitrator made no findings as to the identity of the Regal defendant in the arbitration and since commercial claims are freely assignable, the mere fact that Regal asserted a counterclaim in the arbitration does not mean that Regal Canada appeared and participated in the arbitration.

In any event, whatever inference can be drawn as to the precise identity of the Regal entity defending Costco's claims and/or asserting of a counterclaim, it simply cannot be fairly inferred from Regal's Answering

Statement or its defense or prosecution of claims that **two** Regal defendants were party to the arbitration when all pleadings, and the arbitral awards refer to a single defendant. Again, it was clear and reversible error for the trial court to enter judgment against both Regal Washington and Regal Canada and the judgment should therefore be vacated.

C. **The Trial Court Abused its Discretion in Granting Costco's Revised Motion to Strike Because it's Order is Vague and Incomprehensible, and the Pleadings and Exhibits Presumably Stricken were (i) Material to the Motion to Vacate and the Petition for Confirmation, (ii) Were Before Judge Alsdorf and (iii) Were Part of the Arbitration Award.**

Costco moved to strike various factual references from Regal's Revised Motion to Vacate Arbitration Award, as well as the Revised Orth Declaration, and all exhibits thereto. CP 365-71. The trial court granted the motion, obliquely striking "materials to which Regal submitted as 'undisputed facts' that were not before Judge Alsdorf, nor part of the Arbitration Award" (herein, "Order Granting Motion to Strike") CP 405. By doing so, the trial court abused its discretion by striking evidence that was material to the resolution of the pending motions, and basing its decision on untenable grounds.

1. Governing law and standard of review.

Civil Rule 12(f) governing motions to strike provides that the striking of pleadings is discretionary, and that a court may strike from pleadings "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Costco's Revised Motion to Strike was exclusively premised on the assertion that the pleadings and exhibits were "immaterial" under Costco's restrictive view of what a trial court can consider upon review of an arbitration award; Costco did not complain of impertinent or scandalous matters.

The court of appeals reviews trial court decisions on motions to strike for abuse of discretion. King County Fire Prot. Dist. No. 16 v. Hous. Auth., 123 Wash.2d 819, 826, 872 P.2d 516 (1994). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Littlefield, 133 Wash.2d 39, 46-47, 940 P.2d 1362(1997).

2. The Order Granting Motion to Strike is vague and ambiguous and should be reversed on such grounds alone.

The trial court's order should be reversed on the ground that it is so vague and ambiguous that it is manifestly unreasonable. The Order Granting Motion to Strike does not specifically identify what materials are stricken. Instead, it obliquely references the undisputed facts advanced by

Regal that were not before Judge Alsdorf nor part of the arbitration award. CP 405. The order begs the question, "which facts were those?", particularly considering that all allegations and evidentiary materials presented to the trial court were part of the arbitration record. Is it only undisputed facts presented to Judge Alsdorf but not part of the arbitration award that were stricken? What does it mean to be "part of the arbitration award"? Does it mean the fact had to be specifically referenced by citation to an arbitration exhibit or is it sufficient that Judge Alsdorf generally referenced evidence incorporating the undisputed information? There simply is no way to tell exactly what the trial court attempted to strike and therefore the ruling is manifestly unreasonable and should be reversed on this ground alone.

3. *It was manifestly unreasonable and therefore an abuse of the trial court's discretion to strike portions of the pleadings, the Revised Orth Declaration and exhibits containing undisputed facts because such matters were material to the pending motions, and were within the scope of review for a motion to vacate.*

CR 12(f) prohibits the striking of material evidence or argument. The evidence stricken by the trial court here was material to the resolution of Regal's Revised Motion to Vacate and Costco's Petition for Confirmation of Arbitration Award and Entry of Judgment.

First, the facts described by Regal as "undisputed" were material to whether it was appropriate for the arbitrator to base his liability determination on RCW 62A.2-609. For clarity those facts are as follows:

- **Dates of Costco's receipt of ladders.** The dates of Costco's receipt of 20 ladder shipments, CP343-44 (which was offered as evidence at the arbitration *by Costco*), and the fact that the remaining three shipments had left Regal's custody and were *en route* to Costco on March 1, 2007, when Regal agreed to temporarily store the same, CP 346-348 and CP 350-356.
- **Date of Costco's demand for assurances.** The date of Costco's first alleged demand for adequate assurances: March 20, 2007, which was alleged in Costco's Arbitration Brief, CP 147-149, and alluded to in Final Reasoned Award. CP 124-125.
- **Costco's failure to pay for ladders received and retained.** This fact was admitted by Costco who proposed that its alleged damages should be reduced by the amount it still owed Regal for ladders received and retained, CP 358 (showing a deduction to its damages for payment for ladders received and retained), and *adopted by the arbitrator* who accepted such damages calculation including the deduction, CP 127-28. Additional arbitration exhibits establishing payments terms and failure to pay include: Import Vendor Agreement (Exhibit A) (CP235-258), CP 343-44(Exhibit 334), CP 284 (Costco's March 8, 2007 hold on all payments to Regal); and CP 364 (showing ladders shipments delivered to Costco but for which Costco had not paid.)<sup>22</sup>

The foregoing undisputed facts were material to the Motion to Vacate because they prohibit the application of UCC Section 2-609. As explained

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<sup>22</sup> It is important to note that Costco has never and simply cannot contest these facts, many of which Costco put into evidence. Costco *does dispute* the characterization of the facts or legal impact of these facts. For instance, Costco disputes that it breached the parties' agreement due to its undisputed failure to pay for three shipments of ladders. Costco also disputes that the undisputed fact that it was in possession of 20 of 23 ladder shipments eliminates the applicability of UCC Section 2-609. Costco's legal arguments regarding the import of the undisputed facts does not change the facts themselves.

*supra*, pp. 22-26, UCC Section 2-609 does not apply where a party has completed performance by delivery of the goods or where the demanding party is in breach for failure to pay. Moreover, RCW 62A.2-609 and UCC Section 2-609, strictly prohibit the suspension of payment when the agreed upon return has been received.

Second, the materiality of the foregoing facts is not eliminated by the scope of review applicable to motions to vacate. Costco vehemently asserts that case law prohibits the reviewing trial court from looking at anything other than the arbitral award. This is simply untrue. The case law, for good reason, indicates that the reviewing trial court may not review evidence *weighed* by the arbitrator because the policy of encouraging arbitration warrants great deference to the arbitrator's role as fact finder. See, e.g., Federated Services, 101 Wn. App. at 119. Such case law, however, does not prohibit review of material undisputed facts, which were not "weighed" or "decided" by the arbitrator. Agnew, 33 Wn. App. 283, is a prime example of a trial court's resort to and reliance upon undisputed evidence from an arbitration proceeding—not cited in the award—but requiring vacatur for clear legal error.

In Agnew, the arbitral award merely concluded, "[e]ach party shall bear their own attorneys fees and costs." Id. at 286. However, the terms of the parties' underlying contract were undisputed and clearly provided

that legal fees and costs incurred in any arbitration proceeding should be awarded to the prevailing party. Id. at 285. The Agnew court reviewed and considered the contractual attorney-fee provision even though it was neither quoted nor referenced on the face of the award, and vacated the award for failure to award attorneys' fees and costs to the prevailing party. Id. at 287 ("Agnew argues that the court had the power to vacate . . . the award by virtue of the attorney's fees clause in the contract . . . A consideration of the contract leads us to the conclusion that Agnew is correct.") The court noted that "[t]o hold otherwise would require [the court] to ignore the express language of a contract, something that courts may not do. A court may not create a contract for the parties which they did not make themselves. It may neither impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties." Id. at 287.

Therefore, there is abiding legal precedent stating that it is appropriate to consider the *material undisputed* facts that bear on whether the arbitrator's decision was proper. Here that *material undisputed* evidence bears on whether the arbitrator selected the appropriate rule of law—the right to adequate assurances under RCW 62A.2.609—and whether he properly applied that law to the undisputed facts and facts as found by the arbitrator. Under Agnew, the trial court was permitted to

review the parties' Import Vendor Agreement and its undisputed payment provisions, and enforce the same as did the Agnew court. Because consideration of undisputed material evidence is permitted, it was error for the trial court to strike the Regal's pleadings and exhibits establishing the undisputed facts.

Finally, all pleadings attached to the Revised Orth Declaration were material to the pending Petition for Confirmation and Entry of Judgment against Regal Washington and Regal Canada because each such pleading showed that there was only one defendant—not two—in the underlying arbitration.

4. *To the extent the trial court struck portions of the pleadings, the Revised Orth Declaration and all exhibits thereto on the ground that such materials were "not before Judge Alsdorf", its reasoning is untenable and manifestly unreasonable.*

If the trial court based its striking of the pleadings and exhibits on the ground that such matters were "not before Judge Alsdorf" then it abused its discretion because such reasoning is untenable. The allegations in the Revised Orth Declaration were made in the underlying arbitration and all exhibits to the Revised Orth Declaration—arbitration pleadings and arbitration exhibits—were submitted to Judge Alsdorf and/or presented as evidence at the arbitration hearing.

5. To the extent the trial court struck portions of the pleadings, the Revised Orth Declaration and all exhibits thereto on the ground that such materials were "not part of the Arbitration Award", its reasoning is untenable and manifestly unreasonable.

The trial court erred in striking the materials on the ground that they were not "part of the Arbitration Award" when the Final Reasoned Award referred to, relied upon and incorporated evidence and exhibits establishing such facts. See *supra* pages 10-15. First, the Final Reasoned Award referred to documents incorporating Exhibit 334 establishing the date of Costco's receipt of 20 shipments of ladders prior to March 20, 2007, and adopted Costco's demonstrative exhibits which showed receipt of 28,800 ladders (equivalent to the 20 ladder shipments) prior to the demand for assurances. CP 343-44 and CP 360. Elsewhere, the arbitrator noted that Costco was in receipt of ladders prior to demanding adequate assurances. CP 124. Thus, Costco's receipt of 20 ladder shipments prior to March 20, 2007 was "part of the arbitration award."

Second, the Final Reasoned Award acknowledged that Costco made its demand for assurances after receiving ladder shipments and at a time where a few more shipments were anticipated. CP 124. Thus, the fact that Costco made its demand for assurances at some point during an installment contract was "part of the arbitration award." The date of Costco's first alleged demand was also referenced in the award when the

arbitrator tied the generation of Costco's concerns to its receipt of "a third test of Regal's ladder, [which] took place in March, 2007", and the question raised in that report regarding the appearance of Regal's ladders. CP 124 lines 15-18, and CP 125 at lines 1-6. Accordingly, the March 2007 date of Costco's first demand for assurances was "part of the arbitration award."

Finally, the fact that Costco had failed to pay for 3 ladder shipments received and retained was, most certainly, "part of the arbitration award." The arbitrator adopted the measure of damages articulated by Costco witness Michael Parrot "and illustrated by him in demonstrative exhibits", CP 127, which included an exhibit with a deduction from Costco's damages for ladders received and retained by Costco but not paid for. CP 358. The arbitrator also stated that he "accepts Costco's figures concerning . . . payment for ladders received and retained", CP 127 at line 22 – CP 128 at line 1. Thus the fact that Costco failed to pay for 3 ladder shipments received and retained was "part of the arbitration award."

In sum, the express bases for striking the materials at issue—that they were not before Judge Alsdorf or were not party of the arbitration award—are clearly incorrect and the trial court's reliance thereon was therefore untenable. For this reason, and because all such matters were

clearly material to whether the arbitrator selected and applied the correct rule of law, the trial court abused its discretion, and this Court should vacate the Order Granting Motion to Strike.

## V. CONCLUSION

In sum, the Regal Entities respectfully request that the court of appeals (a) reverse the trial court's Order Denying Regal's Motion to Vacate Arbitration Award and instruct the trial court to enter an order vacating the arbitral awards for legal errors therein, (b) reverse the trial court's Order Granting Costco's Revised Motion to Strike respecting facts referenced in the Motion to Vacate Arbitration Award and attachments to the Revised Declaration of Andrea Orth, and (c) vacate the trial court's Judgment and Order Confirming Award because, in addition to the fact that the arbitral awards were rife with legal error, the trial court exceeded its jurisdiction and authority by entering judgment against the Regal Entities when the awards were entered against a single defendant.

clearly material to whether the arbitrator selected and applied the correct rule of law, the trial court abused its discretion, and this Court should vacate the Order Granting Motion to Strike.

V. CONCLUSION

In sum, the Regal Entities respectfully request that the court of appeals (a) reverse the trial court's Order Denying Regal's Motion to Vacate Arbitration Award and instruct the trial court to enter an order vacating the arbitral awards for legal errors therein, (b) reverse the trial court's Order Granting Costco's Revised Motion to Strike respecting facts referenced in the Motion to Vacate Arbitration Award and attachments to the Revised Declaration of Andrea Orth, and (c) vacate the trial court's Judgment and Order Confirming Award because, in addition to the fact that the arbitral awards were rife with legal error, the trial court exceeded its jurisdiction and authority by entering judgment against the Regal Entities when the awards were entered against a single defendant.

DATED this 19th day of September, 2011.

BUCKNELL STEHLIK SATO & STUBNER, LLP



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Andrea D. Orth, WSBA #24355  
of Attorneys for Appellants

DECLARATION OF SERVICE

I, the undersigned, hereby certify that on the 19th day of September, 2011, a copy of BRIEF OF APPELLANTS was sent via LMI Legal Messengers, to:

Mr. Jeremy Larson  
Foster Pepper PLLC  
1111 Third Avenue, #3400  
Seattle, WA 98101-3299

DATED this 19th day of September, 2011.



Christie Percy

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STATE OF WASHINGTON  
2011 SEP 19 PM 4:53

# APPENDIX

## Select statutes from Washington UCC – Article 2 (Sales) (Chapter 62A.2 RCW)

### **§ 62A.2-601. Buyer's rights on improper delivery**

Subject to the provisions of this Article on breach in installment contracts (RCW 62A.2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (RCW 62A.2-718 and RCW 62A.2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

**History.** 1965 ex.s. c 157 § 2-601. Cf. former RCW sections: (i) RCW 63.04.120; 1925 ex.s. c 142 § 11; RRS § 5836-11. (ii) RCW 63.04.480; 1925 ex.s. c 142 § 47; RRS § 5836-47. (iii) RCW 63.04.700(1); 1925 ex.s. c 142 § 69; RRS § 5836-69.

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### **§ 62A.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 (RCW 62A.2-603 and RCW 62A.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 Article (subsection (3) of RCW 62A.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 Article on seller's remedies in general (RCW 62A.2-703).

**History.** 1965 ex.s. c 157 § 2-602. Cf. former RCW sections: (i) RCW 63.04.090; 1925 ex.s. c 142 § 8; RRS § 5836-8. (ii) RCW 63.04.510; 1925 ex.s. c 142 § 50; RRS § 5836-50.

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### **§ 62A.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 non-conformity; or

(b) fails to make an effective rejection (subsection (1) of RCW 62A.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.

**History.** 1965 ex.s. c 157 § 2-606. Cf. former RCW sections: (i) RCW 63.04.480(1); 1925 ex.s. c 142 § 47; RRS § 5836-47. (ii) RCW 63.04.490; 1925 ex.s. c 142 § 48; RRS § 5836-48.

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**§ 62A.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 non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(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 RCW 62A.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 seasonable 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 RCW 62A.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 seasonable 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 RCW 62A.2-312).

**History.** 1965 ex.s. c 157 § 2-607. Subd. (1) cf. former RCW 63.04.420; 1925 ex.s. c 142 § 41; RRS § 5836-41. Subd. (2), (3) cf. former RCW sections: (i) RCW 63.04.500; 1925 ex.s. c 142 § 49; RRS § 5836-49. (ii) RCW 63.04.700; 1925 ex.s. c 142 § 69; RRS § 5836-69.

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**§ 62A.2-608. Revocation of acceptance in whole or in part**

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity 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.

**History.** 1965 ex.s. c 157 § 2-608. Cf. former RCW 63.04.700 (1)(d), (3), (4), (5); 1925 ex.s. c 142 § 69; RRS § 5836-69.

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**§ 62A.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 thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

**History.** 1965 ex.s. c 157 § 2-609. Cf. former RCW sections: (i) RCW 63.04.540; 1925 ex.s. c 142 § 53; RRS § 5836-53. (ii) RCW 63.04.550(1)(b); 1925 ex.s. c 142 § 54; RRS § 5836-54. (iii) RCW 63.04.560; 1925 ex.s. c 142 § 55; RRS § 5836-55. (iv) RCW 63.04.640(2); 1925 ex.s. c 142 § 63; RRS § 5836-63.

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**§ 62A.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

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (RCW 62A.2-703 or RCW 62A.2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (RCW 62A.2-704).

**History.** 1965 ex.s. c 157 § 2-610. Cf. former RCW section: (i) RCW 63.04.640(2); 1925 ex.s. c 142 § 63; RRS § 5836-63. (ii) RCW 63.04.660; 1925 ex.s. c 142 § 65; RRS § 5836-65.

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**§ 62A.2-711. Buyer's remedies in general; buyer's security interest in rejected goods**

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (RCW 62A.2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (RCW 62A.2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this Article (RCW 62A.2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (RCW 62A.2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (RCW 62A.2-706).

**History.** 1965 ex.s. c 157 § 2-711. Subd. (3) cf. former RCW 63.04.700(5); 1925 ex.s. c 142 § 69; RRS § 5836-69.

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**§ 62A.2-712. "Cover"; buyer's procurement of substitute goods**

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (RCW 62A.2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

**History.** 1965 ex.s. c 157 § 2-712.

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**§ 62A.2-713. Buyer's damages for non-delivery or repudiation**

(1) Subject to the provisions of this Article with respect to proof of market price (RCW 62A.2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (RCW 62A.2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

**History.** 1965 ex.s. c 157 § 2-713. Cf. former RCW 63.04.680(3); 1925 ex.s. c 142 § 67; RRS § 5836-67.

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**§ 62A.2-714. Buyer's damages for breach in regard to accepted goods**

(1) Where the buyer has accepted goods and given notification (subsection (3) of RCW 62A.2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

**History.** 1965 ex.s. c 157 § 2-714. Cf. former RCW 63.04.700 (6), (7); 1925 ex.s. c 142 § 69; RRS § 5836-69.

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## **Select statutes from Washington Uniform Arbitration Act (Chapter 7.04A RCW)**

### **§ 7.04A.040. Effect of agreement to arbitrate-Nonwaivable provisions**

(1) Except as otherwise provided in subsections (2) and (3) of this section, the parties to an agreement to arbitrate or to an arbitration proceeding may waive or vary the requirements of this chapter to the extent permitted by law.

(2) Before a controversy arises that is subject to an agreement to arbitrate, the parties to the agreement may not:

(a) Waive or vary the requirements of RCW 7.04A.050(1), 7.04A.060 (1), 7.04A.080, 7.04A.170 (1) or (2), 7.04A.260, or 7.04A.280 ;

(b) Unreasonably restrict the right under RCW 7.04A.090 to notice of the initiation of an arbitration proceeding;

(c) Unreasonably restrict the right under RCW 7.04A.120 to disclosure of any facts by a neutral arbitrator; or

(d) Waive the right under RCW 7.04A.160 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this chapter.

(3) The parties to an agreement to arbitrate may not waive or vary the requirements of this section or RCW 7.04A.030 (1)(a) or (2), 7.04A.070, 7.04A.140, 7.04A.180, 7.04A.200 (3) or (4), 7.04A.220 , 7.04A.230, 7.04A.240, 7.04A.250 (1) or (2), 7.04A.901, 7.04A.903 , section 50, chapter 433, Laws of 2005, or section 51, chapter 433, Laws of 2005.

### **History. 2005 c 433 § 4.**

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### **§ 7.04A.230. Vacating award**

(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

(a) The award was procured by corruption, fraud, or other undue means;

(b) There was:

(i) Evident partiality by an arbitrator appointed as a neutral;

(ii) Corruption by an arbitrator; or

(iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(d) An arbitrator exceeded the arbitrator's powers;

(e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or

(f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(2) A motion under this section must be filed within ninety days after the movant receives notice of the award in a record under RCW 7.04A.190 or within ninety days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award under RCW 7.04A.200, unless the motion is predicated upon the ground that the award was procured by corruption, fraud, or other undue means, in which case it must be filed within ninety days after such a ground is known or by the exercise of reasonable care should have been known by the movant.

(3) In vacating an award on a ground other than that set forth in subsection (1)(e) of this section, the court may order a rehearing before a new arbitrator. If the award is vacated on a ground stated in subsection (1)(c), (d), or (f) of this section, the court may order a rehearing before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in RCW 7.04A.190(2) for an award.

(4) If a motion to vacate an award is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

**History.** 2005 c 433 § 23.

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**§ 7.04A.250. Judgment on award-Attorneys' fees and litigation expenses**

(1) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity with the order. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(2) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(3) On application of a prevailing party to a contested judicial proceeding under RCW 7.04A.220, 7.04A.230, or 7.04A.240, the court may add to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award, attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made.

**History.** 2005 c 433 § 25.

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