

## Disputes Involving Computer Systems (Part I) *By Mari L. Myer*

Businesses in need of new computers will frequently purchase a complete computer system from a single vendor. Relying on a single vendor, rather than purchasing hardware and software separately, may make the process of installing the software and hardware, converting data from an old system, and having everything work together as a unit, progress more smoothly. But what happens if a dispute arises between the purchaser and the vendor over the functionality of the computer system? This two-part article will address some of the relevant considerations. The first part of this article will discuss pre-litigation issues, including the determination of the legal principles applicable to the dispute. The second part of this article will address issues that may arise during litigation.



### I. Determining Whether the Computer System is a “Good” or a “Service”.

The first question to address is whether the computer system is a “good” governed by the Uniform Commercial Code (“UCC”), or a “service” governed by basic contract law. Although the final determination will depend on how much the computer system looks like a service as contrasted with simply a collection of goods, generally computer systems have been held to be “goods” under the UCC. See definition of “good” at O.C.G.A. §11-2-105(1); see also *Richard Haney Ford, Inc. v. Ford Dealer Computer Svcs.*, 218 Ga. App. 315, 316-317, 461 S.E.2d 282, 283 (1995); *Pentagram Software Corp. v. Voicetek Corp.*, 1993 Mass. Super. LEXIS 184, \*7 (1993); *USM Corp. v. First State Ins. Co.*, 37 Mass. App. Ct. 471, 641 N.E. 2d 115, 117, n.4 (1994); *Systems Design and Management Information, Inc. v. Kansas City Post Office Employees Credit Union*, 14 Kan. App. 2d 266, 788 P.2d 878, 882 (1990). A court might, however, reach a different conclusion if the primary purpose of the sale was to provide customization and the software and hardware represented only a small portion of what was sold.

The rest of this article will assume that the computer system you are analyzing is a “good” and that the UCC governs the parties’ relationship. This article will further assume that the computer system was sold in a commercial context. Consumer purchases of goods sometimes receive different treatment under the UCC and are beyond the scope of this article.

### II. Has the Computer System Been Accepted, Rejected, or the Subject of a Revocation of Acceptance?

#### A. Acceptance

Upon delivery, the purchaser should have the opportunity to inspect the computer system and to decide whether to accept or reject it. O.C.G.A. §11-2-606(1)(a). Acceptance is deemed by the UCC to occur upon the purchaser either signifying acceptance, failing to timely reject the goods, or taking action that is inconsistent with the seller’s ownership of the goods. See O.C.G.A. §11-2-606. Acceptance of goods with knowledge of a nonconformity precludes a subsequent claim by the purchaser on the basis of the nonconformity, unless the purchaser accepts the goods with the reasonable assumption that the nonconformity will be seasonably cured. O.C.G.A. §11-2-607(2). The purchaser must pay the agreed purchase price for all accepted goods. O.C.G.A. §11-2-607(1).

The parties can alter the standard for acceptance by contract. For example, the parties may want to specify in the written agreement that acceptance testing shall take place for a specified length of time before the purchaser will be deemed to have accepted the computer system. Such a provision is common where the software is complex, is still in the development stage, or requires significant customization to meet the purchaser’s needs.

#### B. Revocation of Acceptance

Once the purchaser has accepted the computer system, the purchaser can later revoke acceptance if the acceptance was given (a) on the reasonable assumption that any nonconformity would be cured and the nonconformity has

not been seasonably cured, or (b) without discovery of a nonconformity that was either difficult to discover or the subject of the seller's assurances prior to acceptance. See O.C.G.A. §11-2-608(1).

Any revocation of acceptance must be timely and must occur prior to "any substantial change in the condition of the goods which is not caused by their own defects." O.C.G.A. §11-2-608(2). Thereafter, the purchaser must take no action that is inconsistent with revocation of acceptance; any such action may result in re-acceptance of the goods. Thus, for example, a letter to the seller in which the purchaser announces that acceptance of the computer system is revoked, is negated where the purchaser uses the computer system after sending such a letter.

### C. Rejection of Goods

Rejection occurs only upon seasonable notification thereof to the seller. O.C.G.A. §11-2-602(1). The purchaser may rightfully reject goods only if the goods fail to conform to the contract. In addition to other remedies, a wrongful rejection by the purchaser will afford a seller a cause of action and support an award of damages to the seller to the extent that the seller has incurred any damages as a result of the wrongful rejection of the goods. See O.C.G.A. §§11-2-703, 708.

Once the goods have been rightfully rejected, the purchaser must not exercise ownership as to the goods, because, depending on the facts of the situation, such an exercise may either constitute acceptance of the goods or support an award of damages to the seller associated with the purchaser's use of property that remains the seller's. Instead, if the purchaser has possession of the goods, it must hold the goods with reasonable care long enough to allow the seller to retrieve the goods. O.C.G.A. §11-2-602(2)(b).

### D. Effect of Timely Rightful Rejection or Revocation of Acceptance of Nonconforming Goods

If the purchaser rightfully rejects or revokes its acceptance of goods on the basis of a nonconformity, the purchaser will have no obligation to pay the purchase price, will be entitled to a refund of any portion of the price that has been paid already, and will have the right to seek other damages, including "cover" damages to the extent that the purchaser is forced to pay more to a third party to purchase replacement goods. O.C.G.A. §§11-2-711, 712, 713, 714, 715, 716, 717.

In the next issue of this newsletter, Part II of this article will address issues that may arise in litigation over alleged nonconformities in a computer system.



*Mari Myer is a business litigator with Friend, Hudak & Harris, LLP in Atlanta, focusing on intellectual property matters including disputes involving computer hardware and software, the protection of trade secrets and confidential business information, and the drafting, interpretation and enforcement of restrictive covenants in employment agreements. She graduated from Wellesley College, cum laude, and earned her law degree from Boston University School of Law. She may be reached at 770-399-9500 or at [mmyer@fh2.com](mailto:mmyer@fh2.com).*