THE YALE LAW JOURNAL

VOLUME 73 DECEMBER 1963 NUMBER 2

REMEDIES FOR BREACH OF CONTRACTS RELATING TO THE SALE OF GOODS UNDER THE UNIFORM COMMERCIAL CODE: A ROADMAP FOR ARTICLE TWO

ELLEN A. PETERS

THE Uniform Commercial Code has now been enacted in 28 states, and is pending in several others.[1] Except in the deep South, virtually every major commercial jurisdiction has adopted this elaborate new codification. The legislative judgment that the Code represents a significant improvement over the pre-existing network of uniform statutes, such as the Uniform Sales Act and the Uniform Negotiable Instruments Law, reflects the almost unanimous endorsement which the Code has won from the community of scholars and practitioners who have examined its provisions.[2] But the most wholehearted concurrence in this combined judgment should not foreclose further scrutiny of the Code. It is time to stop evaluating the Code by the standards of the

1. As of October 1, 1963, the Uniform Commercial Code had been enacted in Alaska, Arkansas, California (effective Jan. 1, 1965), Connecticut, Georgia (effective Jan. 1, 1964), Illinois, Indiana (effective July 1, 1964), Kentucky, Maine (effective Dec. 31, 1964), Maryland (effective Feb. 1, 1964), Massachusetts, Michigan (effective Jan. 1, 1964), Missouri (effective July 1, 1965), Montana (effective Jan. 2, 1965), Nebraska (effective Sept. 2, 1965), New Hampshire, New Jersey, New Mexico, New York (effective Sept. 27, 1964), Ohio, Oklahoma, Oregon, Pennsylvania, Rhole Island, Tennessee (effective July 1, 1964), West Virginia (effective July 1, 1964), Wisconsin (July 1, 1965), and Wyoming. A bill, H.R. 5338, 88th Cong., 1st Sess. (1963), enacting the Code for the District of Columbia, has now been passed by both Houses of Congress. 109 CONG. REC. 6253 (daily ed. Apr. 22, 1963) and 21690 (daily ed. Nov. 26, 1963). The Code is under study in Florida, Hawaii, Idaho, Iowa, Kansas, Minnesota, Nevada, North Carolina, South Carolina, South Dakota, Texas, and Washington. 1 CCH INSTALLMENT CREDIT GUIDE § 700 (1963).

2. Although there has been some adverse comment, see, *e.g.*, Beutel, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334 (1952); Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561 (1950), most of the law review commentary has been highly laudatory of the Code's aims and achievement, see, *e.g.*, Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821 (1950); Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 YALE L.J. 364 (1952); Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427 (1950); Schnader, *The New Commercial Code: Modernizing Our Uniform Commercial Acts*, 36 A.B.A.J. 179, 252 (1950). A comprehensive bibliography collected for the American Law Institute contains ninety items purporting to deal with the general desirability of enactment of the Code. WYPYSKI, THE UNIFORM COMMERCIAL CODE, A BIBLIOGRAPHY OF LEGAL ARTICLES AND PUBLICATIONS 1-6 (1954).

past and to inquire instead into its own merits, into the adequacy of its solutions to the many commercial problems with which a mid-20th Century statute must deal.[3]

Article 2 of the Uniform Commercial Code is particularly worthy of careful restudy. This article, concerned with "transactions" in goods,[4] was the first part of the Code to be drafted. Indeed, in the 1940's the only project contemplated was the revision, for federal and state enactment, of the Uniform Sales Act. Only later was the decision made to undertake a complete restatement of the whole network of uniform commercial statutes.[5] In the twenty years since Karl Llewellyn began his monumental drafting job, Article 2 has, of course, been modified in many particulars, but it does not seem to have been redrafted or reorganized as a coherent whole. Failure to achieve internal unity not only undercuts Article 2's substantive achievements but may also adversely affect other parts of the Code, for the relationship between Article 2 and the rest of the Code is particularly intimate. Each of the other articles has

3. Much of the more recent Code literature is taking this direction. See, *e.g.*, Coogan & Gordon, *The Effect of the Uniform Commercial Code Upon Receivables Financing—Some Answers and Some Unresolved Problems*, 76 HARV. L. REV. 1529 (1963); Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333 (1963); Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, all addressed to possible sources of difficulty in Article 9 of the Uniform Commercial Code.

4. The scope of Article 2 is defined by § 2-102:

> *Scope; Certain Security and Other Transactions Excluded From This Article.*
>
> Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

What is noteworthy about this definition is its breadth. Presumably the use of "transactions" rather than "contracts relating to the sale of goods" was intentional, designed perhaps to encompass leases, bailments or similar types of contracts. The substantive sections of Article 2 are sometimes, but not always, restricted in terms to contracts of sale, or the rights and duties of buyers and sellers. The most important sections to raise problems of scope are those relating to the formation and interpretation of a binding contract, § 2-202 on parol evidence, §§ 2-206 and 2-207 on offer and acceptance, § 2-202 on modification, § 2-210 on assignments and delegations of duty, §§ 2-304 and 2-309 on price and delivery terms, § 2-302 on unconscionability, and § 2-303 on contractual allocations of risk. But other sections concerning nonperformance and remedies might also be invoked by contracting parties who are not buyers or sellers: §§ 2-610 and 2-611 on anticipatory repudiation, § 2-720 on interpretation of language of rescission, and §§ 2-718 and 2-719 on contractual variations of remedy. Furthermore, evidentiary sections, such as § 2-515 on preservation of evidence, and §§ 2-723 and 2-724 relating to proof of market prices, might reasonably be applied to non-sales contracts.

5. The history of the Code is described in Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958); Honnold, *An Introduction to the Sales Article of the Uniform Commercial Code*, in 1 N.Y. LAW REVISION COMMISSION, STUDY OF UNIFORM COMMERCIAL CODE 347-54 (1955); Malcolm, *The Uniform Commercial Code: Review, Assessment, Prospect—November, 1959*, 15 BUS. LAW. 348 (1960).

a well-defined scope of its own, Articles 3 and 4 dealing with negotiable instruments and bank collections, Articles 5 and 7 with documents of title and letters of credit, Article 8 with investment securities, Articles 6 and 9 with bulk sales and secured transactions. But, with the exception of Article 8, the other articles will most often come into play in a factual context arising out of the basic sales transactions governed by Article 2. Thus, obscurity in Article 2 formulations may well contribute to uncertainty in the application of the rest of the Code.

The heart of Article 2 is its treatment of the performance obligation of buyers and sellers. Although the article begins with a number of sections relating to the formation and modification of contracts,[6] its principal object is to furnish the guidelines by which the parties may describe, and the courts enforce, their affirmative responsibilities to each other and to affected third parties. The single most important innovation of Article 2 is its restatement of these responsibilities in terms of operative facts rather than legal conclusions: where pre-Code law looked to "title" for the definition of rights and remedies, the Code looks to demonstrable realities such as custody, control and professional expertise.[7] This shift in approach is central to the whole philosophy of Article 2. It means that disputes, as they arise, can focus, as does all of the modern law of contracts, upon actual, provable circumstances, rather than upon a metaphysical concept of elastic and endlessly fluid dimen-

6. Part 2 of Article 2, containing §§ 2-201 to 210, is labeled "Form, Formation and Readjustment of Contract." These sections include a statute of frauds and provisions regulating parol evidence, offer and acceptance, modification, waiver, assignment and delegation of duties for contracts within Article 2's scope. See also later sections, such as §§ 2-305 and 2-311, validating agreements whose indefiniteness raised questions of enforceability under prior law.

7. A typical example of the diversity of approach is to be found in the treatment of risk of loss for accidental destruction of conforming goods. Under the governing section of the Uniform Sales Act, § 22, the single determinant, absent express contractual provisions to the contrary, was titled:

> Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not. . . .

The corresponding Code section, § 2-509, allocates risk of loss by differentiating among various types of delivery requirements for the particular contract at hand. The Code visualizes three major alternative delivery arrangements: those requiring or authorizing shipment; those involving delivery, without movement, of goods continuously in the hands of a bailee; and all other cases. In the first class, risk of loss passes either at the point of shipment or at the point of arrival, depending upon whether the contract requires delivery at a particular destination. In the second class, risk of loss passes upon delivery of one of a variety of pieces of paper acknowledging the interest of the buyer. And, in the residual cases, risk passes upon receipt of the goods, or upon their actual tender to the buyer (if the seller is not a merchant). In point of fact, as the Sales Act cases worked out the location of title, there will be little or no difference in result except in the residual cases where there is no special delivery requirement. See, *e.g.*, Storz Brewing Co. v. Brown, 154 Neb. 204, 47 N.W.2d 407 (1951). Nonetheless the difference in approach is significant.

sions. Furthermore, it goes a long way toward transferring final control of the contract of sale from the judge to the parties. For title, much like the consideration doctrine, is a construct which gives to the court enormous freedom to affect results. Whichever way this power is exercised, admirably by a competent tribunal or lamentably by an inept, inexperiencd one, it impairs the freedom of the parties themselves to order their commercial relationships. A court will not have anything like the same degree of freedom if the issue before it is the custody, conformity or marketability of the goods.

Article 2, then, judges performance, and provides remedies, principally by standards within the control of the parties. Indeed, the Code recurrently invites the parties to state in the contract of sale who shall do what, where, and how, and with what consequences,[8] subject only to an inhibition against unconscionability.[9] The residual scrutiny for conscionability is markedly different in intent and import from a central inquiry about the location of title, although it does introduce a cautionary note which the parties must consider in departing from the statutory framework.[10]

8. In addition to repeated section-by-section invitations for contractual agreement to vary stated results, see, *e.g.*, § 2-509(4) on risk of loss, there is the general encouragement afforded to the contracting parties by § 1-102(3) and (4):

> (3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.
>
> (4) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

9. Section 2-302 provides:

> *Unconscionable Contract or Clause*
>
> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

10. The Code establishes two general outer limits with which contracts governed by the Code must conform. Affirmatively, the parties must act in good faith, defined by § 1-201(19) as "honesty in fact." And see § 2-103(1)(b). Negatively, they must not do something which is unconscionable; the criterion of unconscionability looks to whether the contract is "one-sided," whether its enforcement would lead to "oppression and unfair surprise." Section 2-302, Comment 1. Article 1, § 1-102(3), expressly interdicts contractual provisions designed to cut back obligations of good faith; presumably this interdiction would apply as well to attempts to contract out of § 2-302.

The precise ambit of good faith on the one hand and unconscionability on the other is incapable of exact definition. What is involved is a restatement in modern terms of the

In any case, the first inquiry must be directed toward the contents of the statutory framework, to the criteria and the sanctions the statute itself provides. Article 2 devotes many pages to a detailed description of the normal attributes of a contract of sale, the requirements of tender and delivery,[11] the buyer's obligation to pay,[12] and the definition of various and sundry mercantile terms.[13] These sections, drawn partially from mercantile experience, or, where prior codification was reasonably adequate,[14] from the existing statutes, suggest a wide range of alternative arrangements to the parties. They are designed to be responsive to the inquiry "what was the performance promised by this contract?" The article then considers the consequences which flow from nonperformance, the obligations of the party in default, and the rights and remedies of the party aggrieved. Here again the Code provides an abundance of permissible courses,[15] buttressed by injunctions against "pre-

conscience of the chancellor in an ancient court of equity. The Code is wise to leave these terms so open-ended, for any precise definition would in effect be restrictive. Precision might impair the freedom of courts to scrutinize the contracts before them for compliance with minimal standards of commercial decency; and it would invite the contracting parties to engage in behavior dangerously close to, but not within the express statement of, forbidden conduct. Some boundaries work best if they are left purposely vague. In contradistinction to the statement of the basic performance and remedial framework, which must be precise, good faith and unconscionability must remain flexible in order to be useful.

11. Sections 2-307 to -308, 2-312 to -318.

12. Sections 2-310, 2-511 to -513.

13. Sections 2-319 to -328.

14. One of the areas in which the Code was able to build on prior statutory experience was its statement of the law of warranty. Here the Uniform Sales Act had furnished a successful foundation for commercial development, to a large extent because warranty obligation was defined in factual rather than conceptual terms. Professor Williston in drafting the Uniform Sales Act rejected the English experience which links recovery for defects in tender to a characterization of breach as relating either to "conditions" or to "warranties," a differentiation which has been said to have added principally confusion to the English law. Stoljar, *Conditions, Warranties and Descriptions of Quality in Sale of Goods*, 15 MOD. L. REV. 425; 16 MOD. L. REV. 174 (1952-1953). Williston further abandoned the line of cases, strongest in New York, which had insisted that the buyer upon a tender of defective goods had only the choice of acceptance or rejection, without being able to accept and sue for damages. See Uniform Sales Act § 49, discussed in 3 WILLISTON, SALES §§ 484-89 (rev. ed. 1948). The principal changes which the Code makes are designed to cut back the remaining conceptual restrictions on warranty liability, by holding a merchant-seller to full responsibility for defects of merchantability, without regard to the existence of a sale by description, and by permitting a buyer to combine an action for damages not only with acceptance but also with rejection of a defective tender. *Compare* U.C.C. §§ 2-314 *and* 2-711 *with* U.S.A. §§ 15(2) *and* 69. For two recent examples of buyers coming to grief because of the Sales Act's "sale by description" limitations, see Esborg v. Bailey Drug Co., 378 P.2d 298 (Wash. 1963) and Kirk v. Stineway Drug Store Co., 38 Ill. App. 2d 415, 185 N.E.2d 307 (1963).

15. Comprehensive statements of alternatives are to be found in § 2-703, on seller's remedies, and § 2-711, listing remedies for the buyer. To these must be added at least § 2-721, on remedies for fraud, and § 1-103, preserving applicable principles of general law.

mature" election of remedies.[16] The total range of choice far exceeds that available in prior law. Each of the parties is promised, in the event of breach, broad powers to escape from the contract, to require full performance, or to recover damages. Furthermore, the parties are urged to consider the advisability of providing additional—or lesser—remedies by the terms of the contract itself.[17]

This array of choices is impressive. And certainly it is rational for the parties to concern themselves, in the process of negotiation, with the totality of risks they have assumed by the contract: the alternate profitable ventures they give up by allocating limited resources to the particular contract, in the event of performance, and the scope of their assumption of liability, in the event of nonperformance.

Unfortunately, delineation of the various choices, particularly on the remedial side, is not as precise as the scope of the draftsmen's conception. Restatement of the positive obligations in terms of factual referents turned out to be a much simpler undertaking than redrafting of remedies. In the course of the remedies sections, many extremely useful innovations are introduced: the broad opportunity for recourse to the market as a measure of damages, available to the seller by "resale"[18] or to the buyer by "cover" contract;[19] the possibility of "cure" to correct defective tenders;[20] and the right to suspend performance in the event of "insecurity" even without actual breach.[21] But each of these innovations in turn raises new questions: Is "resale" mandatory? When can the seller cure? What is the relationship between "insecurity" and anticipatory breach? Furthermore, the interrelationship between the various remedies is often left unnecessarily obscure in Article 2; a remedy which is permitted by one section appears to be interdicted by another; conduct apparently harmless when viewed from the vantage of one provision is fraught with danger when another section is considered. Finally, the Article is internally inconsistent in its attitude toward the status of the remedies it provides: are the remedies to be treated as matters of public

16. A number of sections are designed to mitigate the effect of prior law insofar as it forced a choice of remedy on the party aggrieved without regard to the adequacy of compensation so recovered. Buyers may now return defective goods and reclaim moneys paid, without losing their right to affirmative damages for the nonconformities of the tender, thus reversing the rule of such cases as Henry v. Rudge & Guenzel Co., 118 Neb. 260, 224 N.W. 294 (1929), and Authorized Supply Co. v. Swift & Co., 271 F.2d 242 (9th Cir. 1959). See U.C.C. §§ 2-608(3) and 2-711(1). Sellers who have mistakenly sought to recover a remedy in price may, without new pleadings, recover whatever is appropriate by way of damages. Section 2-709(3). And neither buyers nor sellers will be deemed by the use of language like "cancellation" or "rescission" to have waived existing claims for antecedent injuries. Section 2-720.

17. Section 2-719.

18. Section 2-706, discussed at text accompanying notes 159-60 *infra*.

19. Section 2-712, discussed at note 158 *infra* and accompanying text.

20. Section 2-508, discussed at text accompanying notes 36-50 *infra*.

21. Section 2-609, discussed at text accompanying notes 81-83 *infra*.

policy and social control, to which the parties must subordinate themselves, except for possibly permissible variations around the edges?[22] or are the remedial sections, like the sections defining contract-conforming performance, merely suggested sanctions to be modified at will by appropriate expression of contractual intent?

Inconsistencies and ambiguities in the statement of remedies will inevitably interfere with Article 2's goal of providing objective workable criteria by which the parties to a sales contract may order their relationship. And the textual weaknesses are not adequately offset by the official comments accompanying each section. Many of the comments seem too preoccupied with prior law, while others seem more appropriate to an earlier rather than to the present version of Article 2. Unfortunately, apart from the comments, there is no place other than text to which the contracting parties or the court can look for guidance. Most of the pre-Code case law on remedies is heavily skewed by the search for title.[23] And the Code's diversity of remedies contributes new possibilities for conflict with which prior law did not have to cope.

This article will consider in turn each of the three major remedial choices which the Code offers to a party "aggrieved" by nonperformance of a contract of sale. What kinds of options, with what attendant risks and responsibilities, has the fact of nonperformance opened up for the innocent party? Can he walk away from the contract entirely? Can he disregard the nonperformance and compel delivery of that for which he has bargained? Can he recover some monetary compensation? If so, how much? Each of these choices is, at least under some circumstances, available to both buyers and sellers under Article 2. Each of these choices can be affected, favorably or adversely, by "appropriate" contract provisions. None can be properly evaluated without a close reading of numbers of interconnected provisions of Article 2 and

22. This conflict appears even in Article 1. *Compare*, for example, § 1-106(1), *with* § 1-105(1):

> 1-106(1). The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.
>
> 1-105(1). Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

No persuasive reason is offered why the parties should have greater freedom to contract with regard to the applicable choice-of-law principles than with regard to special or consequential damages.

23. On the seller's side, the right to a price action, under U.S.A. § 63(1), or the right to measure damages by resale, under U.S.A. § 60, depended upon the demonstration that property had passed to the buyer. The buyer's action for conversion required a similar passage of property, see U.S.A. § 66; on the other hand, a buyer could reject nonconforming goods and maintain an action for damages only if property had *not* passed to him, U.S.A. § 69(1)(c).

Article 9. What follows is a roadmap indicating route numbers, with detours and roadblocks, and identifying at least one superhighway. If occasionally a magnifying glass is needed to track down a particular byway on the map, it should be remembered that the cartographer only records that which he finds before him.

THE RIGHT TO CALL THE CONTRACT OFF

We think of the right to discontinue a contract principally in terms of the buyer's right to reject non-conforming tenders. Often denominated a right to "rescind," a term the Code wisely eschews, this right is discussed expressly in a series of interlocking and overlapping sections of Article 2. Equally important, however, is the seller's right to undo a transaction which has gone sour, with which Article 2 deals much more obliquely.

The Buyer's Right to Reject

The basic provision governing the buyer's right to reject, in the event of improper delivery, is 2-601:[24]

> Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 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.

On its face, this is a simple restatement and reenactment of the perfect tender rule. The buyer can reject for *any* nonconformity, and can then recover any part of the price which he has paid.[25] Apparently, there are only two limitations, both of which will be discussed in detail below: 2-612, relating to installment contracts[26] and 2-718 and 2-719, empowering the contracting parties to modify the statutory remedies otherwise prescribed.[27] Of the two sections on contract modifications, 2-719 may be relevant; but the reference to 2-718 is surely misdirected, since that section talks exclusively of liquidation of damages and does not touch on the right to reject.

The principal difficulty with 2-601 is not so much, however, in what it says as in what it omits to say. The true ambit of the section is greatly restricted by a number of other provisions designed to cut back the perfect tender rule to a mere shadow of its formerly robust self.

24. Unless otherwise indicated, references to the text of the Code, both in the body of the article and in footnotes, are to the 1962 Official Text with Comments.

25. The introductory words to § 2-711 on buyer's remedies read: "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 . . . ."

26. See text accompanying notes 74-80 *infra*.

27. See text accompanying notes 212-20 *infra*.

A. *The Perfect Tender Rule Under the Code*

The Code links the buyer's right to reject with the discoverability of defects. Under 2-513(1)[28] and 2-606(1),[29] the buyer has a right to determine whether he wants to keep tendered goods or not; no implication of acceptance flows from buyer's custody until he has had an opportunity to inspect. This opportunity is, however, a double-edged sword, for its availability precludes subsequent rejection for defects immediately discoverable.[30] Furthermore,

28. Section 2-513(1) provides:

> Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

The section preserves the buyer's right to inspect at the buyer's destination even for contracts where delivery is to be accomplished through tender of the goods to a carrier at the seller's location. This was an issue in conflict under various sections of the Uniform Sales Act, U.S.A. §§ 42, 43, 46 and 47, and the pre-Code case law was not entirely consistent. See Deveso v. Chandler, 210 App. Div. 684, 206 N.Y. Supp. 604 (1924); Struthers-Ziegler Cooperage Co. v. Farmers Mfg. Co., 233 Mich. 298, 206 N.W. 331 (1926); River Bros. Co. v. Putney, 27 N.M. 177, 199 Pac. 108 (1921). *But cf.* Samuel M. Lawder & Sons v. Albert Mackie Grocery Co., 97 Md. 1, 54 Atl. 634 (1903).

Although § 2-513(3) indicates that the buyer waives his right to inspect if he agrees to a contract containing C.I.F. or C.O.D. provisions or an obligation to pay against documents of title, such a waiver would presumably be effective only if the goods were in fact conforming, despite § 2-512(1). Express or implied waivers of inspection would therefore be useful to the seller only insofar as he was willing to treat the buyer's wrongful request to look at the goods as a breach. In such an event, the seller could of course resell the goods elsewhere. (As will be seen below, this would be his principal remedy for *any* breach by the buyer.) Of course if the damages measured by the difference between contract and resale were significantly greater than could be accounted for by normal fluctuations of the market, the seller may be vulnerable to a back-door attack on the issue of conformity.

29. Section 2-606(1) reads:

> 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 nonconformity; or
>
> (b) fails to make an effective rejection (subsection (1) of Section 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.

30. See also § 2-316(3)(b) providing for disclaimer as a matter of law for patent defects which the buyer has, or could have, discovered:

> [W]hen the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him. . . .

If this language is taken literally, it may preclude not only a right to reject but also the right to recover damages.

once the period for inspection has passed, the buyer's privilege to reject for defects not immediately discoverable is cut back by 2-608 to those defects which substantially impair the value of the goods to him.[31] Section 2-608 has no analogue in pre-Code law; the Uniform Sales Act made no distinction in the substantive standards governing rejection for latent defects.[32] Under the Code buyers might avoid the restrictive rules of 2-608 by immediate and thorough testing of all incoming purchases, but the cost of such inspection in advance of contemplated use would frequently be prohibitive. Unless the buyer is operating in a rapidly declining market, or has reason to be especially suspicious of this particular tender, such an extended pre-acceptance investigation seems unlikely. For all practical purposes, therefore, the buyer will be able to reject at will only tenders nonconforming on their face.[33]

31. Oddly enough, the two sections discussing the effect of acceptance are not parallel in describing the kind of defect of which the buyer may complain after his initial inspection. Section 2-608(1) provides in part:

> The buyer may revoke his acceptance of a lot or commercial until whose nonconformity substantially impairs its value to him if he has accepted it
>
> * * *
>
> (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.

On the other hand, § 2-607(2) declares:

> 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.

One section looks to the "difficulty of discovery" of the non-conformity; the other looks to "knowledge" of the non-conformity. And "knowledge" as defined by § 1-201(25) means actual rather than constructive knowledge. Presumably this conflict will be resolved by giving priority to the § 2-608 statement, since that section is directly concerned with revocations of acceptance, while § 2-607 covers a whole range of consequences flowing from the fact of initial acceptance. But since § 2-608 is generally restrictive of the right to revoke acceptance, a court might be inclined to choose the more generous interpretation for the buyer in this instance.

32. Under the Uniform Sales Act, the buyer was equally prohibited from returning goods which he had accepted despite visible defects. But if defects were not immediately discoverable, their subsequent appearance privileged rejection without regard to the substantiality of the non-conformity. *Any* defect uncovered within a reasonable period of time permitted the buyer to "rescind" the sale, so long as the goods were still capable of being returned to the seller in substantially their original condition. U.S.A. § 69(3). But under the Sales Act, the effect of successful rescission was to bar the buyer from any additional remedy other than return of the purchase price. The best overall discussion of the buyer's pre-Code rights is Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457 (1949).

33. Of course, even a rejection of tenders non-conforming on their face must be accomplished in compliance with the Code's procedural requirements for an "effective" rejection. The buyer must promptly notify the seller of his intention to reject, §§ 2-602 and 2-605, and must then hold the goods at the seller's disposition, §§ 2-602 and 2-604. The

But even such nonconformities, despite the clear-cut language of 2-601, will not always avail the buyer. If the nonconformity pertains to the manner of tender, the buyer is met by 2-504 [34] and 2-614.[35] The first of these defines the seller's shipment and notification obligation, appending in the final sentence the observation that "failure to notify the buyer [of a shipment] . . . or to make a proper contract [for their transportation] . . . is a ground for rejection only if *material delay* or loss ensues" (emphasis added). The second requires the seller to tender and the buyer to accept "commercially reasonable" substitute delivery arrangements where the contractually agreed manner of delivery has become "commercially impracticable." Presumably, the possibility of minor losses and delays would not be sufficient to make a substitute tender commercially unreasonable. This leaves as the principal area for outright rejection patent defects in the quality of goods tendered. The frequency and importance of such defects in modern commercial transactions may easily be overestimated.

B. *Cure*

However, even if the buyer is tendered goods in such a form or in such a manner that he can reject them unhampered by the sections discussed

merchant buyer has additional obligations to safeguard the goods against deterioration. § 2-603. These sections are discussed in *Symposium—The Uniform Commercial Code and Contract Law: Some Selected Problems*, 105 U. PA. L. REV. 836, 864-80 (1957). A rejection need not, however, be unitary. Section 2-601 clearly permits a buyer to select and choose within the tender those goods that he will keep and those he will reject, so long as his choice is exercised by "commercial units." This is a useful advance over prior law, in which the effectiveness of "partial" rejections was doubtful. *Compare* Portfolio & Co. v. Rubin, 233 N.Y. 439, 135 N.E. 843 (1922), *with* Moscahlades Bros. Inc. v. Mallars & Co., 263 F.2d 631 (7th Cir. 1959). See Note, 35 COLUM. L. REV. 726 (1935).

34. Section 2-504 reads:

Shipment by Seller

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

35. Section 2-614(1) reads:

Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

above, his freedom to get out of the contract entirely is further restricted by the Code's provision on cure, 2-508.[36]

Section 2-508(1) allows the seller whose first tender has been rightfully rejected to make a second conforming delivery if he can do so within the contract time and if he so notifies the buyer. The decision to invoke the section rests entirely with the seller and does not depend in any way upon the buyer's consent. For the contract period, a period not always defined with precision, the seller's estimate of his own capability to live up to the contract will therefore preclude the buyer from going elsewhere in the market. Curability is not affected by the magnitude of the nonconformity which prompted the original rejection, except insofar as general considerations of good faith underlie all performance obligations under the Code.[37]

Where a second conforming tender cannot be made within the time period specified in the contract, a persistent seller may invoke 2-508(2):

> Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without monetary allowance, the seller may if he seasonably notifies the buyer, have a further reasonable time to substitute a conforming tender.

This section, one of the Code's significant innovations, has been applauded as preventing unfair "surprise" rejections by unscrupulous buyers seeking to escape bargains made unfavorable by a rapidly falling market.[38] Achievement of this important and far-reaching objective is not facilitated, however, by a section so remarkably obscure. The operative conditions which allow the seller to invoke the section may be impossible to define with precision. Yet neither text nor comment sheds any light whatsoever on foreseeable areas of doubt, such as recourse to cure under changing market conditions. For example, does a merchant seller have the right to be "surprised" that buyers demand stricter compliance to a contract when the market is dropping than when it is stable?[39] Nor is the extent to which contract clauses can preclude

36. Section 2-508 reads:

> *Cure by Seller of Improper Tender or Delivery; Replacement*
>
> (1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
>
> (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

37. See § 1-102(3); *cf.* § 2-302(1).

38. HAWKLAND, SALES AND BULK SALES 120-22 (1958).

39. Of course, for many purposes, past dealings between the parties will serve to define the extent of their obligations. The Code expressly recognizes the relevance of such past dealings, as well as trade custom and usage. Sections 1-205 and 2-208. What is unclear is whether condonation of past defaults will prevent future complaints concerning similar nonconformities.

deviations clarified in text:[40] can the seller be "surprised" by the contract which he has agreed to perform, in the absence of conduct by the buyer sufficient to amount to a waiver or modification under 2-209?[41] Finally, can the seller ever be "surprised" if the nonconformity of his original tender fails *substantially* to conform to contract specifications?[42]

The language which 2-508(2) contains is as confusing as some of the omissions. The principal ambiguity arises out of the reference to "monetary allowance." One possible reading of this language is to take it as a modification of the first part of subsection (2), as an element of the seller's surprise. The subsection would then be read: "where the buyer rejects a nonconforming tender, which the seller had reasonable grounds to believe would be, with or without monetary allowance, acceptable . . ." But, such an interpretation seems, in context, implausible. If the contract contained express provisions, perhaps permissible under 2-719,[43] requiring a buyer to accept a tender with monetary allowance for some of its defects, would that tender be "nonconforming"? Would there not be, then, simply an optional contract allowing the seller to make a conforming tender in one of two acceptable ways, perfect tender or imperfect tender plus money? If there was nothing in the contract about monetary allowances, could the seller argue that the buyer's unreadiness to accept a profferred monetary arrangement "surprised" him? This would seem possible only if the buyer had accepted such arrangements in the past, and then the more likely argument for the seller would again be that the tender was conforming since the conduct of the parties under the contract had created a modification or a waiver.[44]

Another way to interpret the section is to tie "with or without monetary allowance" to the second part of the subsection and to the adequacy of the final

40. Comment 2 to § 2-508 suggests that contract terms may require strict compliance with performance dates stipulated therein:

> If the clause appears in a "form" contract evidence that it is out of line with trade usage or the prior course of dealing and was not called to the seller's attention may be sufficient to show that the seller had reasonable grounds to believe that the tender would be acceptable.

If the comment is a correct interpretation of the statute, surely its reasoning requires lateral extension, so that even in non-form contracts, sellers may argue lack of notice that late tenders would be unacceptable.

41. Section 2-209(1) validates modifications without any requirements of consideration or form, unless the underlying contract is more restrictive. Section 2-209(2). Even in the latter contingency, ineffective modifications may operate as waivers. Section 2-209(4).

42. It has been generally assumed that "cure" would be appropriate only to insubstantial "technical" deviations in tender. See HAWKLAND, SALES AND BULK SALES 121-22 (1958). The only statutory basis for this restriction is that the seller must have had "reasonable" grounds to believe that the non-conforming tender would be acceptable. In light of the Code's express distinction between substantial and insubstantial nonconformities elsewhere, see *e.g.*, § 2-608, the cure section, as drafted, seems at best ambiguous as to scope.

43. See text accompanying notes 212-13 *infra*.

44. See § 2-209.

conforming tender. Thus, the section would read: "where the buyer rejects . . . the seller may with or without a monetary allowance . . . substitute a conforming tender." Perhaps the section means that a monetary allowance, added after the contract date, might shore up a defective tender to make it "conforming." This reading poses even greater difficulties. Courts which have been reluctant to allow such a partial monetary tender when sanctioned by express contract terms are not likely to use statutory implication to reach an unfavored result. Furthermore, to allow this kind of tender here would lead to an odd result for the section as a whole. It would mean a more lenient standard for the seller making a late re-tender than for one making a timely re-tender, for nothing in subsection (1) indicates that anything other than conforming goods will be acceptable in the latter case. The only statutory support for such a difference in standard is in the description of the seller's second effort as a "delivery" under subsection (1) and a "tender" under subsection (2). This is a slender reed on which to fasten a distinction surely unreasonable as a matter of policy.

A final possible reading of the section is to suggest that the monetary allowance is designed merely to compensate the buyer for the delay inevitable in a second tender after the contract date. Under this interpretation, Section 2-508 does not purport to alter any other sections of Article 2 which affirmatively govern performance. Instead, it permits additional tenders within the contract period and even for a short period thereafter, with compensation for damages caused by the delay. Of course the buyer's and seller's estimate of disruption from delay are likely to differ. The section then may require the buyer to accept any allowance from the seller which a court subsequently finds reasonable. Or perhaps the buyer could sever the monetary issue from that of acceptance. He might put the proffered allowance aside (or make an appropriate deduction from his payment if he has not paid in full) for subsequent adjustment or litigation. But he would be debarred from using the costs of delay as a basis for rejecting an otherwise conforming tender.

A further question about 2-508's impact on the buyer's right to reject relates to the section's applicability to contracts in which the seller tenders documents rather than goods. At common law, and under the Sales Act, documentary contracts required punctilious compliance of tender to specifications.[45] There were several reasons for such strictness. For one thing, docu-

45. The classic statement is that of Judge Learned Hand in Mitsubishi Goshi Kaisha v. J. Aron & Co., 16 F.2d 185 (2d Cir. 1926). The case involved a buyer's refusal to accept a documentary tender containing a bill of lading showing shipment from a point other than the seller's original delivery to the carrier. The bill tendered resulted from a diversion of the goods in transit, a diversion caused by the buyer's neglect to give timely shipping instructions. In this context, Judge Hand opined,

> There is no room in commercial contracts for the doctrine of substantial performance. . . . All the seller ever tendered was a bill of lading, Dallas to East Rochester, which was clearly not "f.o.b. . . . Pacific Coast. . . ." The buyer would have been within his rights in standing upon the letter of the contract . . . no matter what

mentary contracts were thought to be more favorable to sellers than to buyers,[46] and hence fairness required that the seller at least perform correctly the limited obligations which he had undertaken. Furthermore, buyers under a documentary contract were often buying, and known to be buying, for immediate resale; and resale might realistically be jeopardized by otherwise minor discrepancies in the seller's tender. Section 2-508, on its face, appears to treat identically the curability of documentary and non-documentary tenders. Furthermore, 2-503,[47] defining tenders of delivery, discusses jointly, and without

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were the facts [about possibly higher freight charges]. Any other rule would subject the parties to obligations dependent upon circumstances which they must ascertain outside the documents tendered, which they had made the measure of their undertakings.

Id. at 186.

46. Documentary contracts, *i.e.*, contracts requiring a buyer to pay or accept a draft upon the tender of a stipulated set of documents, have a number of advantages for the seller. The accompanying trade terms usually shift risk of loss for accidental destruction to the buyer early, at the time of tender of the goods to the carrier. However, the seller—or his assignee—retains a security interest in the goods through the outstanding documents until the buyer has actually paid or accepted the accompanying draft. Furthermore, the unavailability of the otherwise customary inspection rights reduces the likelihood that a tender will be rejected; and, if the goods turn out subsequently to raise issues of conformity, the documentary contract puts the seller in the favorable position of having the cash in hand and a lawsuit in his own forum. Because the documentary contract is usually self-liquidating in a short period of time, it furnishes the seller with a saleable asset, either by outright assignment or as collateral for a loan. The principle advantage that the documentary contract gives to the buyer stems out of the self-interest of the third parties issuing the defined documents: the bailee, to avoid liability on his own account, will indicate at least blatant quantity and quality discrepancies. See, *e.g.*, § 7-301. Thus, the buyer can rely at least to some extent on the face of the documents tendered.

For a general description of the documentary contract, see GILMORE & BLACK, ADMIRALTY §§ 3-9 (1957).

47. Section 2-503 provides:

Manner of Seller's Tender of Delivery

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved.

difference as to sanction, the various affirmative requirements for different kinds of tenders. Yet there are some indications that the common law distinction was not meant to be eradicated entirely. Comment 2 to 2-508 suggests, guardedly, that sellers will have a difficult time establishing "surprise" at the rejection of nonconforming documents, and that belated second tenders will hence not be possible.[48] More important, however, 2-612(2) indicates that, in the context of an installment contract, the seller may cure defects in goods, but not in documents.[49] And 2-612(2) is particularly instructive because the section *relaxes* the standards for acceptable tenders when deliveries are to be made in installments.[50] It would, therefore, be surprising to bar documentary cures under 2-612 and not in unitary contracts.

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form, except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2-323); and

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes non-acceptance or rejection.

48. The comment states:

> The seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract as, for example, strict conformity of documents in an overseas shipment or the sale of precision parts or chemicals for use in manufacture.

Presumably the comment did not intend to single out international documentary contracts for special treatment, since domestic contracts providing for payment against documents are not infrequent. What is unclear even in the comment is whether the casting of the sales contract in documentary form is *per se* sufficient to require a perfect tender, or whether it is only one factor among others to be considered in deciding whether the seller had reasonable grounds to be surprised by the buyer's refusal to accept a non-conforming tender.

49. Section 2-612(2) states:

> The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured *or if the non-conformity is a defect in the required documents*; but if the non-conformity does not fall within subsection (3) [non-conformity impairing value of whole contract] and the seller gives adequate assurance of its cure the buyer must accept that installment.

(Emphasis added.)

50. The effect of installment contracts on the rights of the parties to call off a contract is discussed below at text accompanying notes 74-81 *infra*.

Section 2-508, when read in conjunction with the remainder of Article 2, probably limits the buyer's right to reject less drastically than a first reading might suggest. The section is likely to be limited to non-documentary contracts, and in these its principal effect will be a postponement of decision, rather than a direct alteration of substantive standards. Among the various readings of the section's reference to monetary adjustments, a court is likely to choose the least drastic so as to preserve for the buyer the right to an ultimately conforming tender with compensation for the delay in its arrival. But, as it stands, the section is capable of other interpretations. Text, comment or both should be amended to eliminate this confusion.

The total effect of the sections discussed, 2-608, 2-504, 2-614, and 2-508, suggests that further considerations of 2-601 itself may well be in order. At the very least, the section ought to be amended to indicate that its textual cross-references are not to be taken as exclusive limitations on the operation of the section. Guidance to the sections mentioned above, whose immediate applicability might escape a hurried reader, would be useful. But more important, the broad exceptions to 2-601 raise questions of policy as to the wisdom of retaining the section in its present form. Section 2-601's absolute right to reject is likely to be invoked only by buyers who are clairvoyant about potential defects in tenders or made desperate by a rapidly falling market. As Professor Gilmore once pointed out:

> In the context of a dramatic price break, the buyer, if required to keep the goods, will end up bankrupt. In that situation . . . buyers no doubt feel that the perfect tender rule is a very good commercial rule indeed. The attempt by B to see that S goes bankrupt instead of himself may be thought to be an action taken entirely in commercial good faith . . . I see no convincing reason why buyers as a class, instead of sellers as a class, should end up in bankruptcy.[51]

Yet commercial contracts as a whole are not designed to be neutral with regard to market fluctuations. One of the primary functions of any forward contract of sale is to serve as a hedge against price breaks. This function should not be discarded without good reason. Perhaps in the context of a system vigorously and consistently enforcing the perfect tender rule, it is part of the seller's bargain that he risk loss of all advantage from the contract upon any defective tender. But the Code is emphatically not such a system; the instances in which it will permit a buyer to reject at will appear haphazard in their selection and unpredictable in their incidence. Retention of the perfect tender rule, in such instances, defeats rational bargaining and the legitimate expectations of the contracting parties. Section 2-601 should be redrafted to eliminate entirely the vestigial remnants of an outright power to reject. Recasting of the section in terms of substantial performance should have the

51. Gilmore, Lectures on the Law of Sales and Negotiable Instruments (unpublished mimeographed materials in Yale Law Library).

collateral benefit of permitting textual incorporation in 2-601 of other related provisions affecting the buyer's right to discontinue the contract.[52]

The Seller's Right to Cancel

The closest counterpart, on the seller's side, to 2-601, is to be found in 2-703 which contains an index to all seller's remedies:

> Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may
>
> (a) withhold delivery of such goods;
>
> (b) stop delivery by any bailee as hereafter provided (Section 2-705);
>
> * * *
>
> (f) cancel.[53]

The section is re-enforced by 2-511[54] which presumptively conditions all obligations of the seller on the buyer's prior tender of payment, and thus permits a seller to treat as lapsed any contract in which the buyer fails to tender within a reasonable period of time.[55]

52. For an over-all criticism of the perfect tender rule, see Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457 (1949).

In the context of the rest of Article 2, restriction of the buyer's right to reject for substantial defects would not by any means leave the buyer remediless. The Code's broadening of the warranty liability of the merchant seller should furnish a basis for recovery significantly greater than that afforded under much existing case law. See notes 14-16 *supra* and accompanying text.

Furthermore, the Code encourages the parties, in drafting their contracts, to plan for the possibility of market fluctuations. The Code expressly validates contracts with open price or quantity terms. Sections 2-305 and 2-306. The use of such terms in the contract permits adjustments outside of the context of breach. *Cf.* § 2-209.

53. Section 2-703 reads:

> *Seller's Remedies in General*
>
> Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may
>
> (a) withhold delivery of such goods;
>
> (b) stop delivery by any bailee as hereafter provided (Section 2-705);
>
> (c) proceed under the next section respecting goods still unidentified to the contract;
>
> (d) resell and recover damages as hereafter provided (Section 2-706);
>
> (e) recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709);
>
> (f) cancel.

54. Section 2-511(1) states that "unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery."

55. The seller may also suspend his performance if he has reasonable grounds to be insecure about the buyer's counterperformance. Section 2-609(1). Failure of the buyer to

Section 2-703 is noteworthy in several respects. Although the perfect tender rule is rarely applied against buyers,[56] 2-703 seems to impose absolute standards on buyer's performance. Of course, improper rejection or repudiation would generally be considered a material breach, but this section conditions the seller's rights as well on buyer's failure to make "a payment due." Mere delinquencies in payment have under prior law permitted the seller only to withhold delivery.[57] Section 2-703 broadens the seller's rights by giving him also immediate power to stop seller's goods in transit and to resell goods retained or retrieved. In addition the seller is given a right to cancel, stated baldly and without cross reference.

A. *Goods in Control of the Seller.*

What does this right to cancel encompass? So long as the seller is still in custody of contract goods, or has retrieved them through exercise of his right of stoppage in transit,[58] cancellation may permit the seller, upon buyer's

respond to a request for assurance permits the seller to consider the contract repudiated, § 2-609(4), and thus, to invoke his § 2-703 rights.

56. At common law, at the same time that buyers were being permitted to reject for technical deviations in shipping, Bowes v. Shand, [1877] 2 App. Cas. 455, and quantity, Norrington v. Wright, 115 U.S. 188 (1885), sellers were required to continue performance despite buyer's delays in taking deliveries, Simpson v. Crippin, [1872] 8 Q.B. 14, or in making payments, Mersey Steel and Iron Co. v. Naylor, Benzon & Co., [1884] 9 App. Cas. 434. Nothing in the Uniform Sales Act discussed directly the buyer's affirmative obligations under a unitary contract.

57. Under the Uniform Sales Act, an unpaid seller had the right to withhold delivery, U.S.A. § 53, but could not resell unless the goods were perishable or the buyer had been in default for an unreasonable period of time. U.S.A. § 60. Only the buyer's insolvency permitted the seller to stop the goods once they were in transit to the buyer. U.S.A. § 57. Of course, these powers of the seller were subject to expansion by appropriate contractual provisions.

58. The Code empowers the seller to stop goods in transit more readily than he could do so under the Uniform Sales Act. Section 2-705 provides:

Seller's Stoppage of Delivery in Transit or Otherwise

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until

(a) receipt of the goods by the buyer; or

(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3) (a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

breach, to deal with the goods as the seller's own.[59] This adds little to his enumerated powers, except in the unusual case where the seller wishes to use the goods in his own business enterprise, and is thus doing something more than "withholding" and yet is not "reselling."

B. *Replevy of Goods from the Buyer.*

The right to "cancel" may, however, be of greater significance if it is designed to include as well cases in which the goods have come into the hands of the buyer. Can the seller, by virtue of 2-703, replevy these goods upon any default in the buyer's payments?[60] Since 2-703 itself gives no further clues to the scope of "cancel," it is necessary to look elsewhere in Article 2 for sections possibly implementing such a power. Article 2 contains only two sections directly giving the unpaid seller rights to goods held by the buyer. Section 2-507(2) provides that

> Where the payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payments due.[61]

And 2-702(2)[62] allows a seller to reclaim goods, though delivered on credit, if the buyer is insolvent upon receipt thereof and if the seller acts with suffi-

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.

(d) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

The analogous pre-Code section, U.S.A. § 57, required a showing of the buyer's insolvency in all cases.

59. A similar thought was expressed by the Uniform Sales Act in U.S.A. § 61, allowing the seller upon breach to "rescind the transfer of title," and U.S.A. § 65, permitting the seller to "rescind the contract or the sale."

60. At common law, the unpaid seller had no lien interest in goods in his buyer's possession, see, *e.g.*, Southern Lumber Co. v. Colvin, 104 Ark. 130, 148 S.W. 496 (1912), unless he had a full-blown security interest, such as a conditional sale agreement expressly reserving title.

61. Section 2-507(1) defines the function and effect of the seller's tender in relation to the accrual of the buyer's obligation to pay.

62. Section 2-702 provides:

Seller's Remedies on Discovery of Buyer's Insolvency

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (Section 2-705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods

cient speed. These sections may give content, then, to the right to "cancel," since on their face they allow a seller to replevy when he has expressly contracted for a cash sale or when the buyer has suddenly become insolvent.

Sections 2-507(2) and 2-702(2) are, however, unreliable indicators of the seller's actual power to implement a right to cancel. All may be well so long as the litigation can be restricted to seller and buyer. But as soon as third parties, lien creditors or purchasers from the buyer, have standing to complain, the seller's power to replevy is severely jeopardized.

The seller's attempt to recover goods from a defaulting buyer will frequently be challenged by his buyer's creditors. Section 2-702 on fraud by insolvency expressly "subjects" the seller's reclamation to "the rights of a . . . lien creditor under this Article (Section 2-403)."[63] This clause has been read to mean that the seller occupies whatever was his pre-Code position with regard to a levying creditor.[64] At common law some states preferred the seller, some the creditor. Under this interpretation of the section, it recognizes the existence of a priority problem but is neutral with regard to its resolution.[65] An alternative reading of the section would give weight to the cross reference to the rest of Article 2 and particularly to 2-403. The last

on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

63. The real danger from the lien creditor comes not so much from the individual creditor of the buyer who asserts a lien position, but from the ability of the trustee in bankruptcy for the insolvent buyer to assume such a position. Bankruptcy Act, § 70, 30 Stat. 565 (1898), as amended, 11 U.S.C. 110 (1958).

64. See *In re* Kravitz, 278 F.2d 820 (3d Cir. 1960). Section 2-702(3)'s arguable subordination of the vendor to lien creditors puts such creditors into a better priority position than they enjoyed under the pre-Code case law. See, *e.g.*, Oswego Starch Factory v. Lendrum, 57 Iowa 573, 10 N.W. 900 (1881). Some states, including Illinois, New Mexico, and New York, have deleted this portion of § 2-702 in enacting the Code. The Code provision has been criticized by Hawkland, *The Relative Rights of Lien Creditors and Defrauded Sellers—Amending the Uniform Commercial Code to Conform to the Kravitz Case*, 67 COM. L.J. 86 (1962), and Kennedy, *The Trustee in Bankruptcy under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9*, 14 RUTGERS L. REV. 518, 549-56 (1960), and defended by Shanker, *A Reply to the Proposed Amendment of UCC Section 2-702(3): Another View of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent*, 14 W. RES. L. REV. 93 (1962). The Permanent Editorial Board for the Uniform Commercial Code in 1962 considered and rejected amending the text of the section on the ground that "the Board is not convinced that the decision in *In re* Kravitz requires an amendment of this section." PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT No. 1, 70 (1962).

65. Article 2 takes such a position of neutrality elsewhere with regard to creditors' rights. See, *e.g.*, § 2-402 describing the rights of seller's creditors to goods left in the possession of the seller after sale.

part of 2-403 [66] suggests that lien creditors may look to Article 9 on Secured Transactions as a source of priority powers. Article 9, insofar as it deals with collateral in the form of goods, gives to the lien creditor a priority position only over imperfect "security interests." Is the seller who replevies goods from an insolvent buyer under 2-702, or, for that matter, from a cash-sale buyer under 2-507, merely a righteous seller pursuing a balky buyer, or has he become a "creditor" collecting on security? The definition of "security interest" in 1-201(37)[67] includes "the retention or reservation of title by a seller of goods notwithstanding shipment or delivery to a buyer." The replevying seller runs a substantial risk that a court will find that his right to retake presupposes a title position that can either be characterized as a "retention or reservation of title" or is so closely analogous thereto that the same rules ought to apply. Once the seller's attempted replevin is deemed to involve assertion of a "security interest," it is likely to be vulnerable, because unperfected, to attack by innocent lien creditors of the buyer.[68] Hence, neither

66. Section 2-403(4) reads:

> The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

67. Section 1-201(37) states:

> "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of accounts, chattel paper, or contract rights which is subject to Article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2-401 is not a "security interest," but a buyer may also acquire a "security interest" by complying with Article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (Section 2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

68. Section 9-301(1) states:

> Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of . . .
>
> (b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected. . . .

Some sellers will be able to escape the bite of this section, since purchase money security interests in farm equipment having a purchase price not in excess of $2500 and in consumer goods can be automatically perfected without filing, by § 9-302(1)(c) and (d). Such perfection is effective against lien creditors (though not against buyers, see § 9-307). But the seller must also meet the statute of frauds requirement contained in § 9-203, that there be a written security agreement describing the collateral and containing the signature of the debtor-buyer. Even if the § 2-507(2) and § 2-702(2) powers are deemed to give

2-703's right to "cancel" nor the specific powers of 2-507(2) or 2-702(2) can be relied upon by a seller unless he moves before the buyer's creditors have attached a lien to the goods at stake.

The seller does not necessarily fare better if his competitor for priority, instead of levying on the goods, has bought them from the buyer. If the original buyer is a merchant, any delivery amounts to "entrusting," under 2-403(3),[69] and any entrusting permits passage of good title to an innocent buyer in the ordinary course of business, under 2-403(2). If the buyer is not a merchant, or the subpurchaser is not a buyer in the ordinary course, the seller must still clear the hurdles of 2-403(1). Section 2-403(1)(c) explicitly protects a good faith purchaser for value in a "cash sale" transaction. And the transaction described in 2-507, under which the seller may retake, is, in fact, nothing other than a cash sale. Hence the cash sale vendor will always lose to a subpurchaser.[70] The position of the vendor seeking to replevy from

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the seller an Article 2 security interest, § 9-113 requires that the Article 9 validation procedures be followed once the buyer receives possession of the goods.

69. Section 2-403 provides:

Power to Transfer; Good Faith Purchase of Goods; "Entrusting"

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale," or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

70. The pre-Code cases in theory protected the seller in these instances. The effect of a cash sale was said to be that the buyer got no title, and hence could pass none. See, *e.g.*, Kirk v. Madsen, 240 Iowa 532, 36 N.W.2d 757 (1949). But the doctrine was rarely applied against a really innocent purchaser; an exceptional case is Weyerhaeuser Timber Co. v. First Nat'l Bank, 150 Ore. 172, 38 P.2d 48, 43 P.2d 1078 (1935). For a spirited defense of the old rule, see Comment, *The Owner's Intent and the Negotiability of Chattels: A Critique of Section 2-403 of the Uniform Commercial Code*, 72 YALE L.J. 1205 (1963).

Under the Code, the best argument for the seller would depend upon persuading a court that the last sentence of § 2-403(1) referred back to the sentence immediately preceding

an insolvent buyer is probably equally hopeless. After all, 2-702(3) says, expressly, that the seller's right to reclaim is "subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Article (Section 2-403)." If the reference to 2-403 is taken to modify all of the sub-section, however, a protective argument of sorts may be fashioned for the seller against an ordinary purchaser. It depends upon persuading a court that a buyer's title in fraud by insolvency is, under state law, not merely voidable, but void.[71] Subpurchasers from buyers without title must depend on the last sentence of 2-403(1). That sentence lists only four contingencies in which subpurchasers will prevail. The closest to fraud by insolvency is subsection (1)(d), relating to fraud by larceny, and that does not seem applicable. Unless the four listed contingencies are merely non-exclusive examples of cases in which courts are invited to save subpurchasers from void transactions, a seller who can establish that his buyer never had title therefore should take priority. The long and intricate history of title litigation suggests, however, that a court is hardly likely to go out of its way to make the necessary finding of no title unless it has unprovable suspicions about the so-called good faith purchaser.[72]

The seller's right to cancel a contract turns then, primarily, on the extent of the seller's performance rather than on the buyer's non-performance. No matter how trivial the buyer's breach, the buyer cannot "cure,"[73] and the

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it, so that even the cash sale sub-purchaser would be protected only if his seller had received "voidable title." State law would then have to be looked to as the determinant of the title question. Such a reading seems exceedingly unlikely, for two reasons: it makes all of the last sentence superfluous, and it ignores the contrary intent of the draftsmen as expressed in comment 1.

71. Prior state law has generally protected subpurchasers from fraud by insolvency. See, for example, the discussion in Oswego Starch Factory v. Lendrum, 57 Iowa 573, 10 N.W. 900 (1881), in which the court says:

> Plaintiff's right to rescind the sale inhered in the contract and attached to the property. It could not be defeated except by a purchaser for value without notice of fraud. It is not important that we inquire as to the foundation of the rule favoring innocent purchasers. The facts upon which it is based are these: the payment of consideration for the property, and ignorance of the fraud. As we have seen, an attaching creditor has paid no consideration, and has not changed his condition relative to his claim by the attachment. He does not possess the same right held by an innocent purchaser under the rules recognized by the law.

57 Iowa at 578-79, 10 N.W. at 903.

72. See Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1057-62 (1954).

73. Two sections provide a minor analogue to the seller's power of cure. Section 2-511(2) states:

> Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

It thus gives the buyer an opportunity to make a belated tender in legal currency if the seller so requests. And § 2-614(2) allows the buyer to discharge his payment obligation

seller holding the goods has full freedom to stop performance and divert the goods elsewhere. No matter how aggravated the buyer's breach, relinquishment of custody and control over the goods by the seller waives any effective right to replevin where third party rights have intervened and reduces the seller to the status of the buyer's unsecured creditor. Such a reconstruction is consistent with other parts of Article 2, which also look to custody and control as an important detriment of rights and remedies.[74] From the point of view of drafting, however, the existing provisions of Article 2 give inadequate warning of the far-reaching qualifications on the power to cancel given to the seller in 2-703.

Installment Contracts

The rights of buyers and sellers to break off contract relationships because of nonconforming tenders are modified when the underlying contract is an installment contract. Two sections define the conditions under which a contract may be so characterized. The principal section is 2-612(1) which provides

> An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

Section 2-612(1)'s presumption in favor of interpreting ambiguous contracts as installment contracts, rather than as a series of related but independent and severable obligations, is limited, however, by another section which establishes a more basic presumption in favor of unitary deliveries and payments. Under 2-307,

> Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

The installment contract is, then, a way station between a unitary contract and a series of entirely severable contracts. The exact relationship between 2-612(1) and 2-307 is obscured, however, by the use of governing criteria which though related are not identical: 2-612(1) speaks of deliveries to be separately accepted, while 2-307 speaks of deliveries in separate lots to which parts of the contract price may or may not be apportionable. If the contract, read in light of trade custom and usage, permits deliveries to be made in

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with a commercially reasonable substitute if government regulations prevent payment as originally contemplated:

> If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

74. See, *e.g.*, §§ 2-509 and 2-510 on risk of loss.

installments, even though allocation of price to partial deliveries is infeasible, is this a contract authorizing "delivery . . . in separate lots to be separately accepted" for 2-612(1) purposes? Comment 2 indicates that it may be.[75] And the definitions of acceptance in 2-606 and 2-607 [76] do not depend upon immediate payment. Although eventually a buyer is liable for the full contract price of all goods accepted,[77] these sections do not require concurrency between the time for payment and the time for delivery.[78] But if "to be separately accepted" does not imply an immediate payment obligation on the buyer's part, it is hard to see what it adds to the authorization of delivery in separate lots.

The ambiguities of scope in 2-612 are minor, however, compared to the lack of clarity in the directive parts of the section. These provide:

> (2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure, the buyer must accept that installment.
>
> (3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract, there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

This language prompts two preliminary observations. First, it is noteworthy that while the statute imposes the same standard on buyers and sellers for abandonment of the contract as a whole, it singles out buyers for restrictive treatment when the issue is the right to reject individual nonconforming installments. This reverses the perfect tender rule with a vengeance, giving to

75. Comment 2 to § 2-612 states:

> In regard to the apportionment of the price for separate payment this Article applies the more liberal test of what can be apportioned rather than the test of what is clearly apportioned by the agreement. This Article also recognizes approximate calculation or apportionment of price subject to subsequent adjustment. A provision for separate payment for each lot delivered ordinarily means that the price is at least roughly calculable by units of quantity, but such a provision is not essential to an "installment contract." If separate acceptance of separate deliveries is contemplated, no generalized contrast between wholly "entire" and wholly "divisible" contracts has any standing under this Article.

76. Section 2-606 defines acceptance in terms of the buyer's conduct vis-à-vis the goods. Section 2-607 discusses the effect of acceptance on the buyer's rights to complain about the goods tendered.

77. Section 2-607(1) states: "the buyer must pay at the contract rate for any goods accepted."

78. The tender sections, §§ 2-507 and 2-511, establish a presumption that tender and payment occur concurrently. But this presumption is clearly subject to any other payment arrangements which the parties may wish to make.

the seller the buyer's pre-Code prerogative to reject individual installments for minor defaults. Second, the standard against which a right to cancel or reject is to be tested is whether the nonconformity "substantially impairs the value" of the installment or the contract as a whole. This is almost, but not quite, the language of 2-608 governing the buyer's right to revoke his acceptance of goods already accepted. 2-608 adds to "substantially impairs the value" the words "to him [*i.e.*, the buyer]." In fact, the better reasoned cases under the analogous provisions of section 45 of the Uniform Sales Act emphasized the personal costs of breach in assessing materiality.[79] It is to be hoped that the discrepancy in language between 2-612 and 2-608 is not intended to invoke for the installment contract that mythical character, the good faith objective observer, as the reference for injury, and, hence, the right to abandon.

The principal ambiguity in 2-612 arises, however, out of the various parts of subsection (2) and their relationship to subsection (3). If the buyer wants to reject a nonconforming installment and the entire contract, under what circumstances may he do so? The section is reasonably clear at the extremes. If the breach is trivial and curable, the buyer must accept the installment and cannot categorically refuse further installments. He may, however, be able to reduce or postpone payments otherwise due upon delivery. Section 2-717 allows a buyer to deduct unliquidated damages for breach from the purchase price;[80] and 2-609 allows a buyer, insecure about due performance, to demand

79. Section 45 of the Uniform Sales Act was the first American statutory revision of the perfect tender rule. Restricted in ambit to installment contracts, and to the right to reject *future* installments, it purported to lay down a uniform rule for both buyers and sellers: "it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation but not a right to treat the whole contract as broken." The case-law has on the whole followed the mandate of the section, inquiring closely into the needs of the parties and the availability of market alternatives. See, *e.g.*, Helgar Corp. v. Warner's Features, Inc., 222 N.Y. 449, 119 N.E. 113 (1918), and Glines v. Berry Box & Package Co., 248 Mass. 518, 143 N.E. 344 (1924). The best recent statement is that of Judge Hastie in Plotnick v. Pennsylvania Smelting & Refining Co., 194 F.2d 859, 862 (3d Cir. 1952):

> [T]he commercial sense of the statute yields two guiding considerations. First, nonpayment for a delivered shipment may make it impossible or unreasonably burdensome from a financial point of view for the seller to supply future installments as promised. Second, buyer's breach of his promise to pay for one installment may create such reasonable apprehension in the seller's mind concerning payment for future installments that the seller should not be required to take the risk involved in continuing deliveries. If any such consequence is proved, the seller may rescind.

80. Section 2-717 provides:

> *Deduction of Damages From the Price*
>
> The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

adequate assurance and to suspend his own performance until such assurance is proffered.[81] On the other hand, incurable breaches so substantial as to impair the value of the contract as a whole will privilege total rejection of installment and contract. Finally, a nonconforming *documentary* tender can always be rejected, though the contract may remain intact unless the breach substantially affects the whole.

It is the middle ground which remains unnecessarily uncertain. Consider the following cases:

(1) the defect is trivial and uncurable;
(2) the defect is trivial, curable, but not cured;
(3) the defect is substantial as to the installment only and not curable;
(4) the defect is substantial as to the installment only, curable, but not cured;
(5) the defect is substantial as to the installment, and as to the contract, and seller actually tenders adequate cure.

Probably the negative implication of the first part of subsection (2) bars *any* rejection for trivial defects, regardless of non-curability or non-cure. Thus the buyer must accept the installment tendered in case (2) as well as case (1). For more substantial nonconformities, one must sort out the various parts of subsection (2), before and after the semicolon. Inferentially, the governing criterion here is curability, not cure in fact. The buyer, therefore, can reject in case (3), but not case (4). But if "assurances of cure" do not mature into a realization of cure, what then? After the expiration of a reasonable — or unreasonable — period of time, the buyer should be entitled to a belated revocation of his acceptance, as 2-608(1) indicates,[82] which would

81. Section 2-609 provides:

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.

82. Section 2-608(1) says:

The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity 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

eventually put him into the same position as to remedies as if he had initially been permitted to reject. In the interim, pending the actual tender of cure, the buyer may invoke the powers given him under 2-609[83] to suspend his own performance. If any content is to be given to the language of "assurance" in 2-612(2), it must mean that the seller in these cases must supplement his ordinary obligation to notify of intent to cure by some additional conduct of assurance, or suffer the penalty of delay in payments otherwise due. The final situation which is unclear under the section is case (5). What is the relevance of a defect initially so substantial as to permit total rejection for which the seller makes a timely and adequate tender of cure? Subsection (3)'s failure to mention "cure" in the context of the specificity of 2-612(2) most likely indicates an intentional omission. Perhaps the draftsmen felt that a breach of this magnitude would never, under any circumstances, be curable. If cure were, in fact, tendered, however, nothing in subsection (2) expressly applies, since actual tender is certainly not identical with assurance. It would seem only sensible to consider this as a *casus omissus* and to allow complete rejection. The worst possible solution would be the one that a literal reading of the section would suggest, which would sanction rejection for the future while requiring acceptance of the particular installment which allowed the repudiation.

The present language of 2-612 is a law professor's delight. Introduced at the proper moment, when the class in commercial law needs to be shaken up, it guarantees at least two class hours of wandering through a maze of inconsistent statutory standards and elliptical cross references. Redrafting of the section would thus come at considerable professorial cost. Nonetheless, the section ought to be reworked to apply evenhandedly to both buyers and sellers. Furthermore, the sequence within the section ought to be reversed, so that any nonconforming tender is tested first in its effect on the contract as a whole. Only if the tender is sufficiently close to the mark so that the contract survives, should the individual installment's conformity per se be tested. In that connection, one resolution of the various options as to cure and assurances would be (1) to require acceptance despite trivial defects which are incurable; (2) to require acceptance despite curable trivial defects but to permit the buyer to request cure as an assurance for future performance; (3) to require acceptance despite substantial defects if cure is actually tendered; (4) to require acceptance despite substantial defects if cure is promised, but to permit the buyer to hold up payments allocable to the installment until cure is promised; (5) to permit immediate rejection for incurable substantial defects or for substantial defects in which the seller does not promptly promise to cure. Much of this can be drawn out of 2-612, but not with sufficient certainty to obviate further consideration.

(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.

83. For the text of § 2-609, see note 81 *supra*.

Modification by Contract

The right of buyers or sellers unilaterally to call off a contract governed by Article 2 can be summarized as follows: A buyer can usually reject only for substantial defects in the seller's tender; to escape into the perfect tender rule the buyer must discover an incurable defect immediately upon tender of goods under a unitary contract. The seller can usually cancel a contract insofar as he still has the contract goods in his control; in order to replevy goods from a defaulting buyer, the seller generally must act before third party rights have intervened; but in an installment contract, he cannot cancel future installments at all unless the buyer's breach has been substantial. These are the rules which apply in the absence of contractual stipulations to the contrary. To what extent can the parties, by agreement, modify so as to limit further or to enlarge their respective rights to back out of a contract upon breach?

The Uniform Commercial Code generally favors individual efforts by contracting parties to shape the law which will govern their relationship. Section 1-102 provides:[84]

> (3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by the agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.
>
> (4) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsecton (3).

This section is re-enforced by 2-719:

> (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
>
> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

84. Section 1-102 also provides:

> (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
>
> (2) Underlying purposes and policies of this Act are
>
> (a) to simplify, clarify and modernize the law governing commercial transactions;
>
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
>
> (c) to make uniform the law among the various jurisdictions.

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where the circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.[85]

A. *Modification of the Buyer's Rights*

Taking first the case of the buyer, is it possible for him to broaden his statutory powers of rejection? The most direct route to accomplish this result would be for the buyer to insist on high contract standards for the seller's performance. The greater the obligation assumed by the seller, the more likely that deviations will be substantial. High specifications, rigorously enforced, will, in addition, limit the seller's opportunity for belated cure. If the buyer cannot extract such affirmative undertakings, he might alternatively focus on his remedial alternatives alone. Then the crucial question becomes, can the buyer contract for a perfect tender rule, for a right to reject in those cases in which the Code provides for a rule of substantial performance? Section 2-504,[86], defining the seller's shipment obligation, illustrates the interpretation problem. It states that "unless otherwise agreed," the seller must follow certain statutory mandates with regard to the contract of shipment and notification of the buyer. Noncompliance with these mandates, the section goes on to say, will privilege rejection only in the event of material delay or loss. How far was the "unless otherwise agreed" language intended to go? Is it to be limited to the setting of standards or would a contract be upheld requiring strict compliance as the condition of acceptance? And if a contract for strict compliance in the manner of tender were permissible, why not as to the quality of tender as well? Or does 2-608 [87] contain the kind of "iron" rule with which there must be no tampering? There is no clear answer to these

85. Section 2-719 has one further subsection, concerning consequential damages, which is of no relevance here. It is discussed in text accompanying notes 217-19 *infra.*

86. Section 2-504 states:

Shipment by Seller

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

87. Section 2-608 limits the buyer's power to revoke his acceptance to latent defects which substantially impair the value of the contract to him.

questions; presumably the outcome of litigation on validity would be considerably colored by a court's evaluation of the over-all fairness of the particular contract before it.[88] But if a direct attack on the rule of substantial performance is risky, perhaps some sniping at the edges would be permissible. Instead of attacking the standard of substantial compliance, the buyer can direct his fire to the pre-conditions on which the standard rests. He can certainly contract for a single delivery so as to avoid 2-612. He can also postpone acceptance, and the stricter criteria of 2-608, by providing for a longer than usual testing period.[89]

If the buyer's rights can thus be augmented by contract, can they also be restricted? Section 2-601 expressly supports such limitation in its prefatory cross reference to 2-719. Just what does this empower the parties to do? Could they contract for any or all of the following?

(1) the buyer must accept, without waiving his counterclaim for damages, any tender by the seller substantially in conformity with contract requirements;
(2) the buyer must accept a substantially conforming tender accompanied by a monetary adjustment for deficiencies;
(3) the buyer must accept a substantially defective tender retaining a right to sue for damages;
(4) the buyer must accept a substantially defective tender accompanied by a monetary adjustment for deficiencies.

Pre-Code litigation has indicated sufficient judicial hostility to contracts limiting the buyer's right to reject[90] to cast great doubt on the validity of alternative (4), and to a lesser extent on the other formulations as well. The Code may be deemed to have adopted a substantial performance rule in a sufficient number of cases so as to permit some extension thereof, so long as the buyer retains a compensatory claim for damages. This may validate alternative (1) but not necessarily alternative (2), which might leave the amount of the compensating monetary tender, at least within the bounds of good faith, in the hands of the seller and not of a court.[91] The broad invitation to contract of 2-601 and 2-719 is, moreover, limited further by 2-612.[92] Its opening subsection suggests that a buyer's right to reject for substantial non-

88. *Cf.* § 2-302 on unconscionability, discussed in note 10 *supra.*

89. In fact, he can postpone all decisions as to the desirability of the goods by contracting for a "sale on approval" or a "sale or return." Such contracts permit the buyer to reject even totally conforming tenders. Section 2-326.

90. See, *e.g., In re* A. W. Cowen & Bros., 11 F.2d 692 (2d Cir. 1926).

91. The Code's use of monetary adjustments in the section on cure, § 2-508, suggests that it would look with approval on any reasonable contractual stipulation to this effect. For the discussion of the import of this language in the cure section, see text at notes 36 to 50 *supra.*

92. Section 2-612(1) provides:

> An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

conformity cannot be cut back simply by "a clause 'each delivery is a separate contract' or its equivalent." If, as seems likely, this language is designed as a substantive limitation, addressed to more than the issue of fair notice of modification, it indicates the range of contractual agreement that the Code intended to permit. It would support modifications (1) and perhaps (2) and cast great doubt on the validity of (3) and certainly of (4).

B. *Modification of the Seller's Rights*

On the seller's side, the power to cancel can easily be strengthened by complying with Article 9's few formal requisites for the validation and perfection of a security agreement.[93] Any default would then permit retaking of the seller's goods, without risk of subordination except to buyers in the ordinary course of business.[94] Substantive provisions for early, frequent, (and of course high) payments would give the seller maximal standing to complain. And an installment contract would increase the range of complaint to encompass the whole relationship with the buyer.

Limitation of the seller's power to cancel poses greater problems. There is no expressly relevant invitation to modify in either 2-703 or 2-719. However, the incongruity of the "seller's perfect tender rule" under 2-612 suggests that buyers might well be permitted to restrict seller's rights under the section to substantial defaults by the buyer. And certainly express contractual grace periods for payment, analogous to cure, are customary and useful to forestall default.

THE RIGHT TO FULL PERFORMANCE

When the subject matter of a contract of sale is a chattel, the power to compel completion of performance of the contract, despite breach, has always been limited under Anglo-American law. Specific performance, or its analogue, the seller's price action, is generally thought of as the other end of the line from the right to reject or cancel, considered above. Of course, it is self-evident that coercion of performance is not identical with the right to discontinue performance. Yet the two remedies have this much in common, that neither depends, at least in the first instance, upon a demonstration of actual damages of any specified amount. It is the probability of injury under specified circumstances, rather than its extent, which invokes these remedies. In this sense, both full performance and full abrogation of the contract are absolute remedies, whose availability turns upon issues of law rather than of fact to a degree much more marked than recovery in damages.

93. The seller would have to obtain a security agreement, signed by the buyer, describing the goods. Section 9-203. And, unless he wished to rely on the special protection afforded to consumer goods and farm equipment by § 9-302, he would ordinarily file a financing statement, describing the collateral and containing the signatures and addresses of both buyer and seller. Section 9-402.

94. Section 9-307.

The Buyer's Power over Contract Goods

The buyer's right to compel the seller to deliver contract goods arises out of two sections of Article 2. Of these, the more important is 2-716,[95] defining generally the buyer's right to specific performance or replevin. This section is supplemented by 2-502,[96] which gives to a prepaying buyer a special right of retrieval from an insolvent seller.

A. *Specific Performance*

The buyer may get specific performance, according to 2-716(1), whenever "the goods are unique or in other proper circumstances." The term "unique" is nowhere defined; the parallel right to replevin turns instead on inability to "cover," to procure substitutes in the market. The relationship between uniqueness and cover is not spelled out. Can goods be unique if cover is possible? Are goods always unique when cover is impossible? Comment 2 to 2-716 suggests only that:

> The test of uniqueness under this section must be made in terms of the total situation which characterized the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases.

But a reference to the "total situation" does not indicate what issue we are so to refer. One resolution would be to read "unique" as going to the unavailability of substitutes, measured not objectively, as cover is, which looks to the existence or non-existence of comparable goods in the market place, but subjectively, taking into account the resources and commitments of the party

95. Section 2-716 provides:

Buyer's Right to Specific Performance or Replevin

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

96. Section 2-502 provides:

Buyer's Right to Goods on Seller's Insolvency

(1) Subject to subsection (2) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

seeking specific performance. Thus the requirements buyer who had cut off his channels to the market in reliance upon a long term contract might fare better than the ordinary long term installment buyer, and the installment buyer, particularly if he had made substantial prepayments, might fare better than an ordinary buyer who had invested only his expectations of gain.[97] Read thus the category of "unique" goods will take in most of the circumstances which would otherwise "properly" invoke specific performance. The section gives no guidance to a court interested in exploring such other possible bases for specific performance as insolvency.[98] Nor does the section attempt to formulate the rules by which a court of equity having jurisdiction to act should exercise its discretionary power.[99]

B. *Replevin*

Whereas a buyer must persuade a court of equity to grant him specific performance, he has, apparently, a right to replevy goods "identified to the contract" under three different sets of circumstances: (1) if he cannot effect cover (2-716(3)); (2) if he has paid or tendered payment for goods shipped to him "under reservation" (2-716(3)); or (3) if he has ordered goods from a seller who becomes insolvent within 10 days of receipt of prepayment by the buyer, if the buyer then offers to pay immediately the rest of the purchase price (2-502). Broadly speaking then, the buyer gets contract goods from the seller if he cannot get substitutes elsewhere or if he cannot effectively retrieve moneys he has already paid the seller. Each of these aspects of the buyer's rights warrants further scrutiny.

The contract goods over which the buyer has some power must either be "identified to the contract" in the language of 2-716, or the buyer must have a "special property" in the goods for purposes of 2-502. But it turns out that "special property" follows only from "identification,"[100] so that the

97. *Cf.* Eastern Rolling Mill Co. v. Michlovitz, 157 Md. 51, 145 Atl. 378 (1929).

98. See, *e.g.*, Jamison Coal & Coke Co. v. Goltra, 143 F.2d 889 (8th Cir. 1944). The question whether insolvency should, in and of itself, be a basis for equitable intervention is discussed in Horack, *Insolvency and Specific Performance*, 31 HARV. L. REV. 702 (1918); and Newman, *The Effect of Insolvency on Equitable Relief*, 13 ST. JOHN'S L. REV. 44 (1938).

For a comprehensive survey of the recent case law on specific performance, see Van Hecke, *Changing Emphases in Specific Performance*, 40 N.C.L. REV. 1 (1961).

99. Remedies in equity are always discretionary with the court, and may be denied whenever a court feels unmoved to enforce a particular contract. A court of equity may refuse to act if it feels that the contract was unfairly overdrafted so as to give too many rights to one of the contracting parties. See, *e.g.*, Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948). Alternatively, a court may deny equitable enforcement of a contract unfairly procured or used by the party seeking relief, relying on the so-called clean hands doctrine. See, *e.g.*, New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 (5th Cir. 1961). See generally CHAFEE, SOME PROBLEMS OF EQUITY, chs. 1 and 2 (1950).

100. Section 2-501(1).

latter is the central theme. Identification can be made, at any time, by either party acting alone, or by the parties acting jointly. In the absence of overt action, identification of existing goods is deemed to have occurred at the time of contract, a formulation easy enough to apply. The presumptive rule for future goods, contained in 2-501(1) (b),[101] is more ambiguous, positing identification (other than for crops or growing animals) at the time when "goods are shipped, marked or otherwise designated by the seller as the goods to which the contract refers." If the seller must crate and then deliver, does identification depend on which point the seller chooses for "identification," or does crating and labelling automatically (and presumably irrevocably) give the buyer "special property"? If, as seems likely, the process of identification occurs substantially at the seller's option, the buyer's replevin action will be severely limited, since early identification is rarely in the seller's interest.[102]

The other substantive conditions on the buyer's replevin action are easier to assess. Replevin will most often be sought by a buyer who alleges that he could not "cover." In most cases, the presence or absence of a market is readily demonstrable. The ability to "effect cover" is likely to be litigated in only one situation — when the seller refuses to deliver at the contract price, but offers to sell at a substantial advance, *e.g.* 10%, over the amount originally agreed upon. Does this offer by the seller create a market and a market price in the absence of other comparable goods elsewhere, or is the seller by the fact of his breach to be excluded from the relevant market? Section 2-712's definition of "cover" sheds no light on this problem — a problem on which the analogous pre-Code case law is divided.[103] Presumably, a good deal would depend upon the degree of bad faith involved in the seller's offer, whether it was motivated simply by the wish to exercise economic duress or whether it was compelled by market conditions drastically altering the cost of the seller's tender.[104]

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101. Section 2-501(1) provides in part:

> The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs
>
> * * *
>
> (b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

102. Identification can be made by the seller even after the buyer's breach, if necessary to enable the seller to calculate his damages. Section 2-704. The only risk the seller takes by postponing identification is to postpone the passage of risk of loss to the buyer. Section 2-510(3).

103. The case-law is described in 5 CORBIN, CONTRACTS § 1043 (1951).

104. It is possible that the Code may make the buyer's temporary acceptance of a tender at an advanced price more hazardous for the buyer than it was under earlier law. The common law clearly posited the buyer's duty to accept the tender on his correlative

The buyer's alternate right, upon tender of payment, to retrieve goods which have been shipped under reservation, depends merely upon a proper characterization of the underlying contract. A shipment under reservation involves a seller's retention of a temporary security interest through appropriate documents of title.[105] Since the only purpose of the reservation is to secure payment, it seems fair enough that the buyer, upon tender of the price, receive the goods.

If the buyer's replevin action must rest on seller's insolvency, however, he will have substantial problems of proof. To establish the insolvency of another is, under any circumstances, not the easiest task in the world, but 2-502 requires the buyer not only to demonstrate the accuracy of the diagnosis but also to pinpoint the onset "within ten days after [the seller's] receipt of the first installment [of the price of the goods]." By negative implication, a buyer will not be able to get contract goods from a seller whose insolvency either antedated the payment, or followed it by more than ten days. And a careful reading of the section suggests that the unfortunate buyer who pays on the precise date that the seller goes under is also debarred from recovery. It seems safe to assume that buyers with any inkling of financial instability in their sellers will prefer to withhold payments on the ground of insecurity, under 2-609, rather than to rely on the meager protective mantle of 2-502.

The most likely case, then, for a buyer's successful action in replevin is the case of a buyer unable to procure contract goods elsewhere, who relies on the unavailability of cover, rather than on the seller's financial straits, as the basis for judicial procurement of "his" goods. Under these circumstances, the buyer, in the language of the statute has "a right to replevin."

This "right" is, however, subject to certain difficulties in enforcement. Any action in replevin depends on a sheriff's ability to find and to seize the property described in the writ. The seller can defeat the seizure either by concealing the goods in some place that the sheriff cannot reach, or by so commingling the goods with the rest of his chattels as to render their isolation impossible. Replevin differs in this important respect from an action for specific performance, that in replevin there is no way to compel cooperation by the seller.[106]

The risk of direct interference by the seller to defeat replevin is, however, minor compared to the risk of subordination to third parties who can claim statutory priority over the buyer because of their dealings with the seller. Two different third party claimants must be considered: another buyer who has bought the same goods from the seller ignorant of the prior sale; and a

right to recoup overpayments thus made; under § 2-209 on modifications, the buyer must be careful to avoid giving the impression that he has agreed to an alteration of the contract at the higher price level.

105. Such characterization may emerge either from the express terms of the contract or from the conduct of a seller expressly authorized to ship the goods via a carrier. See § 2-310(b).

106. *Cf.* Burton v. Rex Oil & Gas Co., 324 Mich. 426, 36 N.W.2d 731 (1949).

creditor from the seller who levies on the goods in accordance with local rules for the collection of unpaid debts.

Competing purchasers from the seller derive their rights from 2-403 [107] of the Code. If the seller is a merchant, a buyer in the ordinary course of business routinely prevails over the first buyer who has entrusted the seller with the goods. If the seller is not a merchant, or the buyer for some reason is not "in ordinary course," the picture is more clouded. A seller who has sold and identified goods to the contract perhaps has "voidable title," so that a subsequent purchaser in good faith is protected by 2-403(1); such a characterization of the seller's interest would have to be derived out of the Code's distinction between identification and title. Section 2-401 [108] indicates that

107. Section 2-403 provides:

Power to Transfer; Good Faith Purchase of Goods; "Entrusting"

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale," or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

108. Section 2-401 states:

Passing of Title; Reservation for Security; Limited Application of This Section

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

identification is a necessary, but not always a sufficient, condition to the passage of title from seller to buyer. In the gap between identification and passage of title, the statute gives the buyer a "special property" in the goods, without characterizing the contemporaneous interest of the seller as voidable title or anything else.[109] This is not the kind of situation in which title has been thought in the past to be "voidable," but pre-Code law never visualized a buyer asserting replevin rights to goods in which he had no title.[110] The Code's ambiguity makes it possible, though perhaps not too likely, that a second purchaser who takes in the gap between identification and title can argue "voidable title" to prevail over the original buyer. Once title has passed to the original buyer, his position vis à vis a second purchaser is almost invincible. The second purchaser must convince a court that his claim is analo-

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading.

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale."

109. Until the 1957 revision, § 2-401(1)(a) provided that "any reservation by the seller of the title (property) in goods . . . identified to a contract for sale is limited in effect to reservation of a security interest." U.C.C. Official Draft 1952 at 143. This language was deleted at the instance of the New York Law Revision Commission, with the following cryptic comment:

> The principal substantive change in this section is the revision of former subsection (1)(a) so that the seller's interest after identification and before delivery is no longer limited to a security interest. This change conforms to subsection (2), under which the seller normally retains title until delivery, and to Section 2-501, under which identification may be postponed by agreement and the seller may in some circumstances substitute other goods even after identification. Section 1-201(37), defining "security interest," was revised to conform.

110. Pre-Code law never faced this particular priority problem since subsequent purchasers, regardless of the state of seller's title, were protected by the doctrine of ostensible ownership so long as the seller remained in possession of the contract goods. See U.S.A. § 25 and, *e.g.*, Coburn v. Drown, 114 Vt. 158, 40 A.2d 528 (1945). Presumably this doctrine, for purchasers, has been displaced by the provisions of § 2-403. The parallel rights of creditors under U.S.A. § 26 have been preserved in § 2-402(2), discussed at text accompanying note 114 *infra*.

gous in spirit and virtue to the four enumerated cases, all protecting purchasers from sellers without title, which close subsection (1). Alternatively, the second purchaser might seek to invoke 2-403(4) and the protection of Article 9 by arguing that the original buyer is, in fact, asserting a security interest which, unperfected, is subordinate to good faith purchasers.[111] The definition of "security interest" in 1-201 (37), expressly excluding "the special property interest of a buyer of goods on identification of such goods to the contract of sale," makes the success of this contention unlikely. The second purchaser would have to persuade the court that the draftsmen meant to limit their exclusion to the buyer's special property interest upon identification, so that the buyer's subsequent acquisition of title without possession would qualify him as the holder of a security interest. But such a reading of the definition, while plausible as a matter of grammatical construction, overlooks the fundamental distinction between buyers and secured parties, that the buyer's primary concern is to get goods, while the secured party's primary concern is to get moneys owed.

Creditors of the seller have opportunities equal to, if not greater than, those of subpurchasers to interfere with the buyer's attempt to replevy. If the buyer could be described as acting pursuant to an unperfected security interest, he would routinely lose to a creditor who levied on the goods without notice of the buyer's rights. If such a characterization were accepted, the levying creditor would be protected by Article 9,[112] to which 2-402(3) expressly refers.[113] A more plausible basis for intervention by seller's creditors can be found in the affirmative provisions of 2-402 restating the common-law doctrine of ostensible ownership.[114] Under that doctrine, a seller retaining possession of goods after sale is said to radiate a misleading and fraudulent aura of affluence. Since the buyer is deemed to have participated in the seller's fraud by acquiescing in the latter's continued possession, seller's creditors, even with notice, have been allowed to levy on the goods so long as the seller

111. Section 9-113 provides that a security interest arising solely under Article 2 is governed by the validation and perfection requirements of Article 9 once the collateral comes into the hands of the debtor, in this case the seller. Purchasers take priority over unperfected security interests by virtue of § 9-301(1)(c).

112. Section 9-301(1)(b).

113. Section 2-402(3)(a) states in part:

> Nothing in this Article shall be deemed to impair the rights of creditors of the seller
>
> (a) under the provisions of the Article on Secured Transactions (Article 9)....

114. Section 2-402(2) provides:

> A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

Except for the final clause, § 2-402(2) closely parallels § 26 of the Uniform Sales Act.

retained them. The Code continues this state law, with its local divergencies, most of which center on the extent to which the presumption of fraud is rebuttable; it creates only one exception, the short-term, good faith retention of possession by a merchant. Unfortunately, neither text nor comment indicates the range of this exception, whether a merchant's retention of possession is to be considered prima facie in good faith, or whether additional support for possession must be found in such circumstances as the need for adjustments or repairs. One other problem arises out of the reference to "unsecured creditors" in the first sub-section of 2-402.[115] This is a term undefined and otherwise unused in the Code. Perhaps it can be ignored entirely, since the operative section, sub-section (2), simply refers to creditors, without qualification. More likely, however, what the draftsmen intended was to limit subsection (2) not by insisting that protected creditors be initially unsecured, but rather by requiring creditors seeking to treat a transfer as void to assert themselves by obtaining a levy on the goods in question rather than by obtaining a mortgage or some other security interest. Such a construction, although hardly obvious on the face of the section, is consistent with pre-Code and Code distinctions between purchasers (which include mortgagees and pledgees) and creditors.[116] A creditor can of course take a perfectly valid security interest, with the consent of his debtor, even though the debt secured be antecedent; but his priority position is then determined by the rules which govern purchasers, which require a "purchase" for value in good faith, and without notice of the earlier sale, limitations not imposed upon levying creditors by 2-402 or by state law.

C. *Contractual Modifications*

The buyer with a deep and abiding interest in the receipt of contract goods cannot, then, rely with any assurance on the rights apparently afforded him by the various provisions of Article 2. At best, his action is subject to obstruction, in fact and in law, by the many opportunities afforded to other interests to argue his subordination. No satisfactory solution to this problem can be achieved without the use of Article 9. The very definition, in 1-201(37), which excludes the buyer of identified goods from mandatory coverage as a security interest, invites optional recourse to Article 9 techniques for validation and perfection against third parties. This invitation may, of course, be more appealing to buyers than sellers, particularly in industries in which security arrangements for buyers have been uncustomary in the past. This reluctance to use security arrangements to strengthen the buyer's rights to

115. Section 2-402(1) reads:

> Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this Article (Sections 2-502 and 2-716).

116. See, *e.g.*, McGann v. Capital Sav. Bank & Trust Co., 117 Vt. 179, 89 A.2d 123 (1952).

contract goods may disappear as merchants come to realize how minimal the restraints and formalities of an Article 9 security interest are as compared with prior law.

The difficulties of extending the buyer's rights to contract goods rest, then, mainly on unfavorable trade custom. More fundamental reasons stand in the way of contractual restriction of such rights. The buyer's right to replevin is already so limited that its further diminution would seem almost pointless; one possible, although minor, alteration might arise out of postponement of the process of identification. But the buyer's principal avenue to recovery of the goods will be through an action for specific performance, and such an action is not an apt subject for contractual modification: attempts to interfere with the exercise of the jurisdiction of a court of equity will almost certainly fail as unconscionable.

In summary, it seems pertinent to ask what merit there is in providing in Article 2 legal rights to goods which will turn out in most instances to be illusory. A seller who obstinately refuses to deliver contract goods is normally motivated not by a sudden pathological attachment to his chattels but by the prospect of a more remunerative transaction elsewhere, which he can, in fact, consummate with ease. The buyer has, as we shall see, monetary remedies to cope with this situation. But his attempt to use legal process to extract the goods forceably from an unwilling seller is, in fact, as noncommercial as is the seller's own conduct in refusing delivery.

The Seller's Right to the Contract Price

The seller's price action is defined and governed by 2-709 of the Code, which provides:

> (1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price
>
> (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
>
> (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate such effort will be unavailing.

The price may be recovered then, in three contingencies, which merit separate consideration: accepted goods; goods for which the buyer bears risk of loss; and goods for which there is no market. In all three, the action which lies is presumably an action at law, and not an equitable remedy of specific performance.[117]

117. Although the textual description of specific performance in § 2-716 is sufficiently broad to encompass sellers as well as buyers, the caption "Buyer's Right to Specific Performance or Replevin" is restrictive. Section 1-109 makes captions "parts" of the act. The seller's only basis for equitable relief is the saving clause of § 1-103, which provides:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract,

A. *Accepted Goods: Conforming Tenders*

The buyer's liability for the purchase price of goods accepted appears on its face to be obvious. But what constitutes the necessary "acceptance"? Various sections in Article 2 stipulate arrival at the buyer's place of business as the occasion for acceptance,[118] even though the seller's performance may have been completed earlier, at the time of shipment. Upon arrival, the buyer has an opportunity to inspect the goods, not only for their conformity, but also as to whether he wants to take them at all.[119] Rejection of a totally conforming tender is of course wrongful, and gives rise to non-price remedies for the seller, but it does not amount to an acceptance so long as the statutory procedural requisites for an "effective" rejection have been met.[120] Thus far the various sections are perfectly clear. But what of the buyer who instead of rejecting wrongfully, wrongfully seeks to revoke his acceptance? Is he liable as an acceptor or a rejector? Section 2-607(2) states that "Acceptance . . . if made with knowledge of non-conformity *cannot* be revoked . . ." (emphasis added). If that is the case, certainly acceptance of a conforming tender should be equally irrevocable. And 2-709's Comment 5, which states "Goods accepted by the buyer include only goods as to which there has been no justified revocation of acceptance, for such a revocation means that there has been a default . . .", could be read to imply that an *unjustified* revocation leaves goods "accepted." On the other hand, 2-608(3) states that a buyer who revokes his acceptance "has the same rights and duties with regard to the goods involved as if he had rejected them," and 2-703[121] and 2-709(3)[122] talk jointly and without distinction of buyers who have wrongfully rejected or wrongfully revoked acceptance. Since there is no reason of policy to distinguish between immediate and belated wrongful rejections, the text of the remedial sections should be read to override the language of 2-607: the

principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

The difficulty with reliance upon § 1-103 is that the Code's comprehensive provisions for remedies may well be thought to be exclusive and hence to displace otherwise applicable equitable principles. Furthermore, the instances cited in § 1-103 refer to substantive grounds for relief, rather than to the form in which relief should be granted.

118. See § 2-606(1).

119. *Ibid.*

120. Section 2-606(1)(b) stipulates that failure to make an "effective rejection" pursuant to § 2-602(1) results in an acceptance, if the buyer has had a reasonable opportunity to inspect.

121. Section 2-703's introductory words are: "where the buyer wrongfully rejects or revokes acceptance of goods . . ."

122. Section 2-709(3) reads:

> *After the buyer has wrongfully rejected or revoked acceptance of the goods* or has failed to make a payment due or has repudiated (Section 2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section. (Emphasis added.)

buyer who has wrongfully revoked his acceptance should be considered a rejector.[123] But further statutory clarification of this issue would be helfpul.

B. *Accepted Goods: Non-conforming Tenders*

The buyer's liability for the purchase price of goods accepted is not limited, however, to tenders which are conforming. A tender may deviate from contract standards because of the seller's default or because of the occurrence of some supervening event which makes exact performance impracticable. In either event, the buyer is privileged, without penalty, to reject, but if he does not, he is liable at the contract rate for the goods he accepts. If the non-conformity arises out of breach, the buyer may, however, diminish his payment to the seller by deducting therefrom any proximately related damages which he has suffered.[124] If the nonconformity is excused, a limited set-off may, at least under some circumstances, be available. What these circumstances are, and how the set-off is then to be calculated, are questions remarkably obscured by the series of related sections which close part 6 of Article 2.

The source of the difficulty in arriving at a clear picture of such a buyer's liability is that the Code has two separate sections excusing sellers from liability for nonperformance. Under Section 2-613,[125] the seller is excused upon accidental casualty to identified goods; under Section 2-615 [126] (im-

123. *Cf.* § 2-401(4) which states:

> A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale."

124. The buyer is entitled to recover damages arising out of the non-conformity of the goods he has accepted, § 2-714, if he gives the seller timely notice, § 2-607(3). He may assert his right to damages either as a set-off against any outstanding liability for the purchase price, § 2-717, or by an independent action.

125. Section 2-613 provides:

> *Casualty to Identified Goods*
>
> Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2-324) then
>
> (a) if the loss is total the contract is avoided; and
>
> (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

126. Section 2-615 states:

> *Excuse by Failure of Presupposed Conditions*
>
> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith

plemented, procedurally, by Section 2-616),[127] he is excused whenever his performance "has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made." It is hard to understand why the former section was retained once the broad scope of the latter section was accepted.[128] But the

with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

127. Section 2-616 states:

Procedure on Notice Claiming Excuse

(1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2-612), then also as to the whole,

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

128. The Code's elaborate sections for excuse from onerous contracts emerged relatively late in the process of drafting Article 2. The first versions of the Uniform Revised Sales Act contain only verbal modifications of Uniform Sales Act §§ 7 and 8. UNIFORM REVISED SALES ACT § 7 (1941). The section as then drafted was limited to the destruction of ascertained goods. By 1948, this problem was dealt with in a new section, entitled "Casualty to Unique Goods," CODE OF COMMERCIAL LAW § 85 (1948), and a further section was added to excuse merchants upon failure of presupposed conditions. *Id.* § 87. Except for the limitation that the last cited section was to apply only to contracts between merchants, it corresponded closely to the present § 2-615. In fact, when the present numbering of the Code was first adopted, § 2-615 was still restricted to contracts "between merchants." U.C.C., May, 1949 draft. The following year, the merchant limitation was dropped, and § 2-615 appeared in substantially its present form. U.C.C., Spring, 1950 draft.

Section 2-615 as it now stands is notable principally for two reasons. It states a highly expansible criterion of the conditons under which sellers may be excused from performance; and it excuses only sellers, not buyers. This drafting may reflect the feeling that sellers increasingly burdened by expanding liability in warranty need a compensating reduction of responsibility for risks outside of their control. Comment 9 to § 2-615 suggests that the buyer seeking excuse from burdensome contracts look to his rights under a requirements contract, see § 2-306; but surely that cannot be a sufficient basis for the section's lopsided drafting, since the seller could also, by appropriate contracting devices, avoid liability. Comment 9 to § 2-615 indicates further that,

> where the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement

fact of duplication would be trivial, were it not for the conflict in the two sections' implementation of the seller's excused nonperformance. Each section visualizes the possibility that the event excusing the seller may not totally destroy all the contract goods, and each allows the buyer an option to reject or to accept the remaining goods upon tender. But the sections do not speak in identical terms of the liability of the buyer for the goods he chooses to take, whether he will be liable for them at contract rates or at some diminished amount taking into account the fact of partial nonconformity of the tender.

Section 2-616, implementing the broader "impracticability" section, allows the buyer either to "terminate" or to "modify the contract by agreeing to take his available quota in substitution." The text does not define the scope of the contemplated modification. The accompanying comment indicates only that a modification need not be supported by independent consideration; since such consideration would in any case be obviated by 2-209 on modifications,[129] the comment is probably gratuitous. If any independent weight is to be attached to it, it would lean in the direction of requiring the buyer to pay the full contract price, since any diminution in his liability would furnish consideration under even the most rigorous common law standards. Yet the text is certainly open to a contrary reading.

Section 2-613, the "casualty" section, uses conspicuously different language to describe the buyer's option:

> the buyer may . . . either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further rights against the seller.

This set-off may not be a model of clarity,[130] but it is a set-off: under 2-613 the buyer is not necessarily obligated for the full purchase price. What remains unclear is the relationship between the generality of 2-616's "modification" and the specifics of 2-613's "allowance." It seems equally plausible to argue that (1) 2-613 defines the permissible scope of modification under 2-616; (2) 2-613 indicates, without limitation, permissible types of set-off; and (3) 2-613 indicates that the draftsmen knew how to specify set-offs if they wanted them, and their absence in 2-616 was a deliberate omission requiring the buyer to pay (a) at contract rates, (b) in quantum meruit, for

> subcontract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption.

It is perhaps important to note that nothing in the text of § 2-615 supports this part of the comment. The buyer's only recourse would be to look back to the preservation of supplementary principles of law under § 1-103 and to argue that relief for "frustration" of contracts is not inconsistent, as indeed it is not, with § 2-615.

129. Under § 2-209(1), "an agreement modifying a contract within this Article needs no consideration to be binding."

130. For example, does the section contemplate an allowance for losses arising out of the unavailability of the goods not delivered, or is the allowance limited to diminution in value of the goods actually tendered? Can the buyer demand compensation on the basis of "deterioration" for the delay frequently encountered by unforeseen casualties to the goods?

value received, or (c) at rates agreed upon by both parties at the time of tender. This confusion is particularly unfortunate because the Code's expansive statement of what is normally called the "impossibility doctrine" invites frequent recourse thereto. And the definition of the price action, including as it does a correlative right to recover incidental damages, obliquely raises, but fails to resolve, issues about allocation of reliance costs which are central to the whole impossibility problem.[131]

C. *Goods for Which Buyer Bears Risk of Loss*

Consideration of the seller's price action when he tenders goods as to which he bears the risk of loss leads naturally into the seller's rights when risk has passed to the buyer. Whatever the uncertainties between the time of contract and the time of risk-passage, the statute is clear that the buyer is fully liable "for conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed" to him.[132] And risk of loss passes, in the absence of special contract or breach, according to the rules of 2-509.[133] These provide for the buyer to take on risk

(1) in a shipment contract, either upon delivery to the carrier or upon tender, by the carrier, at destination;
(2) in a bailment situation, upon receipt of an appropriate negotiable or non-negotiable document, or upon "acknowledgement" of duty to to the buyer by the bailee;

131. See Comment, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution*, 69 YALE L.J. 1054 (1960).

132. Section 2-709(1)(a).

133. Section 2-509 provides:

Risk of Loss in the Absence of Breach

(1) Where the contract requires or authorizes the seller to ship the goods by carrier
  (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but
  (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer
  (a) on his receipt of a negotiable document of title covering the goods; or
  (b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or
  (c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).

(3) in all other cases, upon receipt if the seller is a merchant, upon tender of delivery if he is not a merchant.

These guidelines are, in themselves, perhaps a worthy object for re-study. The total absence of reference to insurance and the variance of rule under case (2) without regard to the commercial situation of the buyer raise issues of policy which might well warrant further consideration. For the present, however, it is important to note particularly the incidents which shift risk under the statute as it stands. In no instance do the rules contemplate the kind of consent after inspection for risk shifting which is involved in acceptance. The governing criteria are principally delivery or tender of delivery, unilateral acts by the seller or the carrier. Even the rare case involving receipt requires, by the definition of 2-103(1),[134] no more than that the buyer be put in physical custody of the goods or documents. In contradistinction to acceptance, receipt involves only possession; perhaps even involuntary possession would do.

The only direct limitation on the seller's price action for goods accidentally destroyed is that the goods must have been conforming at the time that risk of loss was to pass to the buyer. Technically, the seller bears the burden of establishing the necessary conformity, at least until the buyer has accepted the goods.[135] Yet it will be a rare buyer who can dispute the seller's assurances of conformity on the basis of the charred remains which survive an accident.[136] If conformity can not be factually established, 2-510 usually leaves risk of loss in the seller.[137] Although the section is exceptionally clear in limiting

134. Under § 2-103(1)(c), "receipt" of goods means "taking" physical possession of them. "Taking" is not defined; the definition might well cover the deposit of goods at the buyer's place of business.

135. Section 2-607(4) indicates that the burden of proof with regard to conformity shifts at the time of acceptance. Thus, if goods are destroyed in transit to the buyer, the seller in order to recover the purchase price must prove that they were conforming at the time of tender to the carrier in the ordinary case of shipment envisaged by § 2-509(1)(a). But if the goods are once taken in by the buyer, and he does not reject them, he will be deemed to have accepted them, whether they are conforming or not. At that point, if they are destroyed, the buyer must prove lack of conformity in order to defeat the seller's price action.

136. This is one instance in which a buyer may be protected by a contract of sale cast in documentary form. Although risk has passed to him, he can still reject—and thus defeat price liability—for any defect in the documents tendered, whether that defect is related to the risk or not. Furthermore, the documents themselves may give warning of possible visible deficiencies, in order to protect the issuing bailee from liability. The qualifications thus noted on the documents may assist a buyer's argument of nonconformity.

137. Section 2-510 provides:

Effect of Breach on Risk of Loss

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

the buyer's immunity only to those nonconformities which would privilege rejection, there is no requirement that the nonconformity augment in any fashion a potential risk of loss or the actual risk which occurred. Thus the seller who invoices and ships 90 rather than 100 crates of widgets has in effect converted his obligation into that of a no arrival — no sale contract. The seller's situation is markedly improved, however, if the nonconforming goods are not destroyed until after the buyer has taken them into custody. Even though the buyer then rightfully revokes acceptance because of the deviance of the tender, the buyer still continues to bear the risk of loss to the extent of his insurance coverage.[138]

The buyer cannot, of course, prevent or undo the passage of risk of loss and its attendant price liability for goods accidentally destroyed, simply by refusing to honor the contract of sale. Yet the timing of the buyer's repudiation may affect the seller's ability to recover the full purchase price, since the buyer's repudiation may occur before risk of loss was ever to have passed to him. In that event, 2-510(3) provides:

> Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

The use of "already identified" presumably excludes the power otherwise granted to the seller by 2-704[139] to identify after breach. The remedy of 2-510(3) turns then upon the fortuity of the time of the seller's identification

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

138. This obligation puts no out-of-pocket burden on the buyer. If he carries no insurance, he has no liability. If he does carry insurance, the seller is its beneficiary, and the insurance company is held to pay for the risk which it has received a premium to assume. This is one instance in which the language of the section is felicitous; by placing the risk of loss on the buyer to the extent of his insurance coverage, the Code avoids an argument by the insurance company that it should be entitled under a theory of subrogation to assert the buyer's contract rights against the seller in breach.

139. Section 2-704 states:

Seller's Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods

(1) An aggrieved seller under the preceding section may

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

of the goods to the contract; the seller has a price claim if the goods are identified before destruction, but is relegated to a claim for ordinary remedies in damages if they are not. It is perhaps not excessively cynical to observe that the buyer will be in a poor position to rebut seller's assertion of prior identification after the goods have been destroyed. The issue is not likely to arise with any frequency, however, since the seller is likely to carry insurance adequate to cover goods in his possession.

At the other extreme, the buyer who *after* risk of loss has passed to him attempts to repudiate, reject, or revoke his acceptance is held fully liable by 2-709(1)(a) for accidents occurring "for a commercially reasonable period of time" after passage of risk. This formulation, though appealing in its simplicity, has certain built-in difficulties. On the one hand, it would appear to exact full payment from a buyer to whom goods have been tendered by a non-merchant seller, despite the seller's continuing custody and despite the possible availability of insurance carried by the seller to cover all or part of the loss. In view of the protection given to the seller by 2-510(2)[140] in essentially similar circumstances, parity of treatment dictates an offset to the buyer at least to the extent that insurance was actually outstanding. On the other hand, the governing language may jeopardize the seller's recovery in cases in which he is most in need of protection. Today, commercial sales are typically consummated by the seller's tender of goods to a carrier for transmission to a geographically distant buyer. Risk of loss shifts at the time of delivery to the carrier, so that the buyer, absent contract provisions to the contrary, must pay for goods lost or impaired in transit. This much follows readily from the basic risk-of-loss section 2-509(1) read in conjunction with the price section 2-709(1). But destruction may occur after the goods have arrived, while the rejected goods are in the buyer's warehouse awaiting disposition by the seller. Suppose that the goods perish on a date only three days after their rejection by the buyer but three months after their delivery to the carrier. It will take an extremely open-ended reading of "reasonable period of time *after passage of risk*" to hold the buyer liable, as he should be, for such an accident.[141] It would be helpful for the achievement of an

140. Under § 2-510(2), the seller is given the benefit of the buyer's insurance, even though the seller's breach is sufficiently material so that the buyer could rightfully revoke acceptance. There is no comparable provision anywhere in the Code giving to the buyer the protection of insurance carried by the seller although risk of loss had passed to the buyer. There is common law support for the allocation of seller's insurance to the buyer in such circumstances. See, *e.g.*, Exton & Co. v. Home Fire & Marine Ins. Co., 249 N.Y. 258, 164 N.E. 43 (1928); for a discussion of comparable problems in executory sales of real property see VANCE, INSURANCE § 131 (3d ed. 1951).

141. *Cf.* § 2-401(4) providing:

> A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale."

Apparently, once the "reasonable period of time" has run out, title and risk revest in the seller.

equitable distribution of risk of loss, particularly in the context of price liability, for the draftsmen of the Code to study further the possible variations in custody and insurance which may affect the position of the parties.

D. *Goods Without a Market*

The final basis for the seller's price action is the absence of a market in which goods identified to the contract can be resold at a reasonable price.[142] The most obvious example arises out of the special manufacture of goods which have, except to the contract buyer, only salvage value. As to such goods, the requirement of identification is relaxed by the provisions of 2-704 which permit post-breach completion and identification of goods in the possession of the vendor.[143] The right to finish manufacture is limited only by the requirement that the seller exercise "reasonable commercial judgment for the purposes of avoiding loss and of effective realization"; late identification of existing chattels occurs simply at the seller's option. Thus, the one way a buyer can be sure to avoid price liability for goods to be specially processed is to repudiate before production has begun. Although the beginning of manufacture may be difficult to pinpoint, presumably the introductory language of the section that "the goods are unfinished" requires that the seller show more than the mere acquisition of necessary materials.

The seller's rights to recover the full contract price are more problematical when contract goods are somewhat, but not entirely, unmarketable. Two related and recurrent situations illustrate the ambiguity of 2-709, which requires the seller to make a "reasonable effort to resell . . . at a reasonable price." Consider first the case of a seller who, in reliance upon a long-term output contract, has dismissed his sales force and severed all relationships with his normal market outlets. From the point of view of the seller, such a contract is not very different from a contract for special manufacture, for the expenses of re-entering the market, not all of which would be legally attributable to this particular contract, may make his net gain on resale just as minimal as in the case of a typical salvage operation. Should such a seller's "reasonable effort" be measured objectively by the existence, in geographic proximity, of buyers willing to buy comparable goods from other sellers;[144] or should the individual seller's access to the market be determi-

142. Section 2-709(1) provides in part:

> When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price
>
> * * *
>
> (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

143. See note 139 *supra* and accompanying text.

144. Comment 3 to Section 2-709 suggests:

> This section substitutes an objective test by action for the former "not readily resalable" standard. An action for the price under subsection (1)(b) can be sustained only after a "reasonable effort to resell" the goods "at reasonable price" has

native? What the seller needs, clearly, is a flexible, equitable standard, akin to the buyer's recourse to specific performance when technical "cover" standards are too confining. Yet the Code provides the seller no affirmative basis for such equitable intervention.[145] Another commercial situation where resalability is likely to be troublesome involves goods whose market is seasonal. If the buyer's breach occurs at a time when the seller's resale would require recourse to a completely different price structure, or a completely different type of sales outlet, can the seller choose instead to hold the buyer for the full purchase price? Like the output seller, the seller of seasonal goods would prefer to have reasonableness of price and effort measured by the normal range of his own commercial enterprise, and not by the objective state of the market. And although, in the case of an output seller, re-entry into the market must be accomplished at some time, and may therefore be considered an economic desideratum, the seasonal seller may argue, in addition, that his future contract relationships with existing customers might be impaired by recourse to unfavored outlets. In both of these cases the language of the statute is neutral. It does not stand in the way of a court willing to employ a subjective standard, but it certainly does not compel it. Such neutrality invites litigation.

E. *Contractual Modifications*

To what extent can the buyer and seller by contract modify the seller's price action? The parties can readily limit the seller's right to price by postponing the time for acceptance and for passage of risk of loss; different sections of the Code propose a variety of trade terms designed to accomplish such an object.[146] It is a great deal more doubtful whether the contract could exclude entirely the seller's right to collect the purchase price. The modification section, 2-719,[147] seems to require that complete exclusion of any one

actually been made or where the circumstances "reasonably indicate" that such an effort will be unavailing.

145. See note 117 *supra*.

146. The buyer may bargain for a contract requiring delivery of goods at the buyer's place of business, which would postpone passage of risk of loss until they are duly tendered at the place designated. Section 2-509(1)(b). The buyer may have a "no arrival, no sale" contract, under which the seller bears the risk of loss during transit. Section 2-324. Finally, the sale may be either "on approval" or a "sale or return"; in either case, the buyer is privileged to reject even conforming goods, and presumably bears no risk of loss until he has decided to keep the goods. Section 2-326. A more limited variation of the normal passage of risk upon delivery to the carrier arises out of contracting for adjustment of the contract price according to "net landed weights" or "delivered weights"; such a contract places upon the seller the risk of shrinkage or deterioration, but not of total destruction. Section 2-321.

147. Section 2-719 states:

Contractual Modification or Limitation of Remedy

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of

remedy be supported by substitution of another; the only possible substitute would be a liquidated damages clause sufficiently well drafted to survive an otherwise certain finding of unconscionability.[148]

Correlative problems attend efforts on behalf of the seller to increase the availability of a price action. Here the language of 2-719 is more encouraging: "The agreement may provide for remedies in addition to . . . those provided in this Article." But in the only reported case to date in which the seller sought to rely on this statutory invitation, he too foundered on the rock of unconscionability.

The facts of the case, *Denkin v. Sterner*,[149] are instructive. Seller agreed to deliver $35,500 worth of refrigerated cases and equipment to a buyer in the process of erecting a food market. The agreement contained several interesting provisions: (1) the seller reserved a right to cancel at any time prior to delivery; (2) the seller was given authority to enter judgment in replevin in case of buyer's default; and (3) the seller had authority to enter judgment for the full amount of the unpaid purchase price plus interest and costs, with 15% added for attorney's fees. The buyer repudiated the contract two months later, before delivery of any of the equipment had begun, when it found cheaper and better substitutes elsewhere. In the face of an argument addressed to the effect of the unilateral cancellation clause, the court went out of its way to strike down the price stipulation. Relying on the policy of 2-709, the supposedly limiting language of 2-719's cross-reference to liquidated damages, and 2-719(2)'s invalidation of a limited or exclusive remedy which has failed of its essential purpose, the court held:

> While there seems little doubt from the depositions taken under the rule issued in this case that plaintiff is entitled to damages, for defendants admit that they canceled the agreement because they found out after checking that they could buy more equipment for less money elsewhere, yet it also seems evident under all the circumstances that to permit

damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of customer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

148. The criteria for a valid liquidated damages clause are set out in § 2-718(1):

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

149. 10 Pa. D. & C.2d 203, 70 York 105 (C.P. 1956).

> plaintiff to recover the full amount of the purchase price without showing what goods, if any, have been identified to the contract, what goods were standard items and readily salable and what goods had actually been specially manufactured prior to the cancellation by defendants, as well as what goods have been or can be readily resold, would be in effect "unreasonably large liquidated damages" and, therefore, unconscionable and void.[150]

Denkin v. Sterner was of course the decision of a lower court, and may be limited by subsequent decisions. But it is important to note what the case was not: it was not an instance of overreaching of a beleaguered consumer,[151] and there was no question in the mind of the court about the reality and extent of the buyer's breach. That an agreement for price under these circumstances should be denominated either a liquidated damages clause or unconscionable is surprising. The court's holding suggests that similar agreements in the future had better be supported by some statement, preferably in the contract itself, of the seller's special needs, such as the seasonal production discussed above. Except as provided by the statute itself, *Denkin v. Sterner* may be a warning that the seller's price action, like the buyer's action for replevin, has become uncommercial and suspect. Such a result will, incidentally, undercut one of a seller's favorite collateral remedies, the contractual power of attorney to confess judgment upon default, since, if a seller must prove his damages, there is no specific sum for which judgment can be docketed. But cognovit clauses have never been favorites of the courts and their limitation is not likely to be judicially lamented.

Denkin v. Sterner of course does not affect contracts which require early prepayment of all or part of the contract price. Although such provisions are not invalid, they do not permanently guarantee collection. The buyer may, in breach of such a contract, refuse to pay at the appointed time. Such a breach would not make him liable for the full price but only for the normal damages attributable to his nonperformance.[152] Even the buyer who initially pays may, in the event of his own subsequent breach, recover in restitution the payments previously made if they exceed the seller's damages.[153]

The Code's treatment of absolute remedies of both buyers and sellers is reasonably uniform, overall. Rejection or cancellation, replevin or price, are, on the whole, disfavored actions, to be allowed only under circumstances of special need, buttressed by special forms. Although the parties by express contractual provisions may indicate the existence of facts sufficiently close to statutory principles to warrant their extension by analogy, contracts attempting to restore pre-Code approval of absolute remedies are likely to fail. The thrust of the Code is to compensate for breach whenever possible by a compensatory award of damages in which the extent and proximity of injury

150. 10 Pa. D. & C.2d at 208.

151. *Cf.* the definition of consumer goods in § 9-109(1).

152. See Comments 1 and 4 to § 2-709.

153. See §§ 2-718(2) and (3), discussed at text accompanying note 207 *infra*.

can be fully examined case by case. It is time then to turn to the Code's many provisions relating to the measurement of damages.

Recovery of Damages

The Code has multiple rules governing the assessment of damages arising out of breach of a contract for the sale of goods. There are, first, a whole series of formulae designed to measure losses in terms of actual or hypothetical market alternatives. These formulae are supplemented by a number of sections describing remedies to compensate for specific types of consequential losses. Finally, monetary remedies drafted by the contracting parties may be available to supplement or modify the statutory liability standards.

Damages Measured by Market-Based Formulae

The Code's basic rule of compensation for those directly aggrieved by breach of a contract of sale is to measure injury in relationship to market opportunities.[154] Damages so calculated are available to a seller pursuant to 2-703:

> Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole then with respect to any goods directly affected and if the breach is of the whole contract (Section 2-612), then also with respect to the whole undelivered balance, the aggrieved seller may
>
> . . .
>
> (d) resell and recover damages as hereafter provided (Section 2-706);
>
> (e) recover damages for non-acceptance (Section 2-708) . . .

The other remedies of 2-703 have already been discussed: the right to withhold deliveries does not in itself provide a measure of damages, and the right to recover the contract price or to cancel is severely curtailed by other sections of the Code. This means that a seller of non-accepted contract goods must in most cases look for recovery to resale or "damages for non-acceptance," and both of these are market-based standards. The situation of the injured buyer is notably similar. Although a buyer is invited by 2-711(2)[155]

154. *Cf.* § 1-106, stating the general remedial philosophy of the Code:

> *Remedies to Be Liberally Administered*
>
> (1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.
>
> (2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

155. Section 2-711(2) provides in part:

> 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 (Section 2-502); or
>
> (b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716).

to consider the possibility of using judicial process to acquire contract goods wrongfully withheld, in fact he will usually be left to rely upon the less drastic remedies of 2-711(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 (Section 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 (Section 2-713).

The principal limitation on 2-711(1) is the requirement that the buyer make out a proper case for rejection or revocation of acceptance; if the circumstances compel acceptance or retention of the goods tendered, or if the buyer chooses, despite substantial defects, to accept the tender, his damages are measured differently, by 2-714.[156] Thus 2-711's provisions for "cover" and "damages for non-delivery" apply, as do 2-703's, only to non-accepted goods. This is but one example of the striking parallelism, certainly part of the draftsmen's conscious design, which is evident throughout the Code's treatment of remedy by damages. Such parallelism compels analysis of the Code's various damages sections in terms of sets of remedies, rather than party by party.

A. *Substitute Transactions and Market-Contract Formulae*

The Code most directly fosters recourse to the market in case of breach by those sections which protect actual substitute transactions designed to replace the contract in default. With leeway unknown to prior law, the Code allows the injured party to find a new buyer or seller, as the case may be, and to claim as damages whatever additional costs over contract price are thus incurred. Damages may be measured by the difference between substitute and contract price, under 2-706 and 2-712, provided the substitute transaction is made in a reasonable manner, in good faith, and without undue delay.[157] On the buyer's side, there is no further elaboration of the standards

156. Section 2-714 is discussed at text accompanying notes 186-93 *infra*. It is worth noting that all the remedies listed are available without regard to the type of breach in the seller's tender. Thus, in contradistinction to earlier law, the remedies of Article 2 are available for breach of warranty of title as well as for breach of warranty of quality, for breach relating to the manner of tender as well as for breach relating to the substantive aspects of the tender. The same over-all limitations, relating to the materiality of the breach, and to the possibility of cure by the seller, apply uniformly to all defects of which the buyer is privileged to complain.

157. The various governing sections provide for a measurement of the difference between substitute and contract which will take into account not only the amounts spent or received on the market, but also the cost of entry into the market. These are denominated

for "cover," whose precise content will presumably vary somewhat with the resources and capabilities of the particular complainant.[158] On the seller's side, 2-706 offers further guidance, subject to private variation, on the qualifications which make a resale "commercially reasonable."[159] Subsections (2)

"incidental damages," and are preserved by specific reference in §§ 2-706 and 2-712 to §§ 2-710 and 2-715 respectively. In addition, the buyer is entitled to adjustments arising out of possible prepayment of any or all of the purchase price. Section 2-711(1). Finally, both sellers and buyers are cautioned that their recovery may be diminished to the extent that "expenses" have been "saved" "in consequence of" the breach. Sections 2-706(1) and 2-712(2). There is no further definition of "expenses saved," which may be read merely to require accounting for otherwise required out-of-pocket costs, but which might alternatively be deemed to open up the whole problem of remedies for losing contracts. See text following note 202 *infra*.

158. Section 2-712 on cover provides:

"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 (Section 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.

159. Section 2-706 on "resale" provides:

Seller's Resale Including Contract for Resale

(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

and (3) discuss types of sale, notice requirements, and the seller's option to buy in at public sales. It is important to emphasize that the overall thrust of a criterion of good faith is to validate, not to upset, choices exercised by the aggrieved party; much of 2-706 should therefore be evidentiary rather than directory, a possible but not a necessary reading of the section as now drafted.

Only one situation comes to mind in which courts may be called upon to police in a determined fashion the calculation of damages by the substitute-contract formula. The buyer or seller who, by the nature of his business enterprise, constantly enters into new contracts for related goods and services in a market where prices fluctuate broadly and abruptly, will have a wide range of alternatives to substitute for the contract in default. It is only realistic to expect injured claimants to allocate as a substitute contract that which gives rise to the largest amount by way of damages. The general obligation of good faith seems as adequate as any statutory standard could be to limit the possibility of such manipulations. Unfortunately, some of the specific details of 2-706 may in fact interfere with a good faith resolution of this problem in the case of the aggrieved seller. For the seller is expressly privileged to choose between three methods of sale: private, public, or identification to an outstanding contract. And although the defaulting buyer is entitled to some notice of resale, in the event of private sale all he needs to be told is that the seller intends to resell, without access to the time or place for the sale. The subject matter of the sale can be, by virtue of 2-704,[160] goods neither identified nor existing at the time of breach. It would be a most unusual seller who could not use these openings to create a number of alternative substitutes with which to play. Despite this inevitable weakness, the substitute-contract differential will probably be the damages formula most heavily relied on in Code states. In contradistinction to other remedies which require proof of injury, the necessary evidence is readily available to the aggrieved party, and difficult for the party in breach to con-

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2-711).

160. Section 2-704(1) provides:

An aggrieved seller under the preceding section may

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

test. And, as we shall see, it is the one formula which survives without limitation in juxtaposition with other remedial provisions of the Code.

Though the Code favors substitute transactions, it does not compel them.[161] In their absence, the Code reconstructs, with some variations, the time-honored

161. In the earliest versions of Article 2, the thought is expressed that the substitute be made compulsory. The substitute transaction, described as "cover" whether entered into by buyer or seller, was originally a remedy for contracts between merchants. UNIFORM REVISED SALES ACT § 58 (2d draft 1941). The text of § 58-A provided that cover be optional unless made compulsory by contract. But Professor Llewellyn's comment to § 58-A, contrariwise, advanced a strong argument that the text be amended to require cover whenever possible:

> Cover being new in name, and unfamiliar in current American case-law, provision that the procedure be optional has, thus far, seemed desirable. And the fact that most merchants in most cases will, in fact, resort to cover, makes the option accomplish the bulk of the desired work.
>
> The matter is not, however, free from doubt.
>
> * * *
>
> (a) *Open breach.* If there should be real desire to give effect to the principle frequently announced by the Courts, that "one party to a contract will not be allowed to speculate upon the other," the measure for the purpose would be a provision, in regard at least to anticipatory breach, whereby the party in breach could require the aggrieved party, by demand, to resort to cover or cancel without liability, within a reasonable time after such demand. Inability to effect cover after reasonable effort would, of course, not in any manner impair the common remedies of the aggrieved party.
>
> If it be felt that the contract-keeper is entitled to speculate, when there is a reasonable mercantile doubt as to which way the market will go, then one meets a serious administrative difficulty. For to allow him to show the doubt, and thus to avoid the effect of the demand (even though the market has later gone against his guess)—that is to be thrown back into the litigation of an hypothetical market. On the other hand, to force him by mere demand into a ruinous market may be to increase the loss; and also decrease a justified seller's security from the goods; and it has the unpleasant "feel" of letting the contract-breaker give orders to the contract-keeper. Where the breach is clear, a practicable way out might be found by resort to a "reasonable security" provision akin to that in Section 45, requiring the party in default to provide reasonable security in regard to the damage due, as a condition to effectively demanding immediate resort to cover.
>
> (b) *Disputed breach.* In addition, there is the troublesome case of dispute as to what the contract requires, with each party ready to perform under his own interpretation, but not under the other party's interpretation. Yet even where the claim or interpretation raised on one side is not in good faith, there is much to be said for allowing a demand to force resort to cover, so as to minimize the stake in dispute if that be possible by ordinary mercantile measures. And here, too, demand by either party that the other resort to cover, or cancel without liability, could feasibly be conditioned, for its effect, on affording reasonable security that the demander would, if found to have been in default, promptly make good the resultant damage.
>
> * * *
>
> The following observation deserves note: without exception, persons who have thus far studied the "cover" provisions and who have expressed themselves thereon, have moved from initial insistence that it be optional into canvassing whether it

market-contract differentials as bases for recovery. The seller's damages for non-acceptance are measured, according to 2-708(1), by "the difference between the market price at the time and place for tender and the unpaid contract price . . . ."[162] Section 2-713 calculates the buyer's damages for non-delivery as "the difference between the market price at the time when the buyer learned of the breach and the contract price," the market place being either "the place for tender, or, in cases of rejection after arrival or revocation of acceptance, . . . the place of arrival."[163] Both sections provide for adjustments for incidental costs or savings.[164] But despite their surface similarities, the two sections illustrate markedly different approaches to the market-contract formula. The buyer's section looks to notice of breach as the time and place for the measurement of the appropriate market, while the seller's section looks only to the final acts of the seller's own, presumably conforming, performance. Consider, for example, the sale of goods to be shipped f.o.b. from California to New York. If the buyer rightfully rejects the goods, after inspection, in New York, certainly the typical place to reject, the relevant market under 2-713 is New York at that time, a market to which the buyer would presumably have gone had he chosen to cover. The 2-713 calculation reflects market prices at a date earlier than that at which actual cover could readily have been accomplished, but it at least bears some relationship thereto. Suppose now that the buyer's rejection is wrongful. The goods are still in New York. But the seller's formula turns back the clock to measure damages in California at the time of their delivery to the carrier, long before the buyer's breach. Damages so calculated bear, of course, no visible relationship to damages after resale, which

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does not require, under proper safeguard, to be made compulsory. At least half have already come to the view that it should.

Evidently Professor Llewellyn never persuaded his fellow draftsmen on this point, since no affirmative requirement for cover or resale appears in any version of Article 2 or its precursors.

162. Section 2-708(1) provides:

> Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

163. Section 2-713 provides:

> *Buyer's Damages for Non-Delivery or Repudiation*
>
> (1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery 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 (Section 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.

164. See note 157 *supra*.

would take into account the market in New York at the later date. And the chances are that the delay will be highly prejudicial to the seller since buyers are most likely to breach in a falling market. Nowhere do the Code draftsmen indicate why the buyer's market-contract formula should be breach-oriented, and the seller's market-contract formula performance-oriented.

The difference leads one to speculate about the true import of the market-contract principle. Perhaps it is misleading to think of the market-contract formula as a device for the measurement of damages. Although the statutory market certainly "exists" and must be proven,[165] it is a market which, to the parties involved, is purely theoretical, since under neither formulation could it be employed to provide a substitute. Even under the more favorable buyer's version, it would be exceedingly rare for the buyer to find a substitute "at the time" that he learned of the breach. And since other sections of the Code are explicit in allowing a reasonable time interval to act, when this is contemplated, these sections must be read as imposing a rigid timetable. While substitute-contract calculations may bear some relationship to actual injury, it is obvious that the market-contract formulae, especially in the seller's version, can do so only by the sheerest of accidents. For the same reason, the market-contract standard has nothing to do with any supposed duty to mitigate damages, since the formulae do not reproduce the conditions under which mitigation could have occurred. An alternative way of looking at market-contract is to view this differential as a statutory liquidated damages clause, rather than as an effort to calculate actual losses. If it is useful in every case to hold the party in breach to some baseline liability, in order to encourage faithful adherence to contractual obligations, perhaps market fluctuations furnish as good a standard as any. Such a theory does not make the Code's discrepant treatment of buyers and sellers more helpful but it does make the discrepancy less important.

Proper interpretation of the market-contract formula is confusing enough when the aggrieved party premises recovery on that basis alone, having foregone the opportunity to enter into substitute transactions. What happens, however, if the seller has in fact resold, or the buyer covered? Does the existence of the substitute preclude reliance on the market-contract standard, or does the complainant have a free option to choose whichever measure turns out to be the more favorable? To permit the option is to allow speculation at the expense of the party in breach; forbidding it allows the party in breach to profit from a substitute transaction which he can neither compel nor control. On this conflict of policy, the Code speaks expressly only in Comment 5 to 2-713, the buyer's market-contract formula:

> The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered.

165. The Code in fact goes out of its way, in §§ 2-723 and 2-724, to facilitate the necessary proof. Of course, any market-oriented formula raises the problem of defining the relevant area of inquiry, discussed at note 103 *supra* and accompanying text.

Comment 5 is clear enough; but nothing supporting this position can be found in the text of 2-713. However, 2-711, which lists the buyer's rights upon rightful rejection, states its alternatives in a sequence consistent with Comment 5: "the buyer may . . . 'cover' and have damages under the next section [which contains the cover-contract formula] . . . ; or . . . recover damages for non-delivery [the market-contract formula]." Section 2-711 is clear that a buyer need not cover unless he so chooses,[166] but seemingly requires damages to be measured by cover if cover has been effectuated. In the case of a seller suing for non-acceptance, there is no parallel limitation, either in comment or text. The only possible explanation for such a difference in the treatment of buyers and sellers would have to be derived from inequalities in the statements of the other half of the option, the market-contract formulae. Perhaps the seller needs a freer hand when he resells than the buyer who covers because the seller's market-contract formula is so erratic a measure of damages.

But the history of the development of these remedies over the various drafts of the Uniform Commercial Code suggests a quite different explanation. Until the 1957 version, 2-703 on seller's remedies prefaced his right to recover damages for non-acceptance with "so far as any goods have not been resold."[167] At that point then, the market-contract formula was equally conditional for both buyers and sellers, the buyer's rights then being identical in text and comment to their present 1962 statement. The 1957 amendment, deleting this language, was promulgated, according to the Report of the 1956 Recommendations of the Editorial Board, at the suggestion of the New York Law Revision Commission "to make it clear that the aggrieved seller was not required to elect between damages under Section 2-706 and damages under Section 2-708."[168] This comment is instructive on two counts: it indicates a purpose to safeguard alternative remedies, and, more important, it characterizes the amendment as a clarification rather than as a change. The latter point might be dismissed as mere face-saving on the part of the revision committee but for the fact that changes are called changes in other comments.[169] If the committee's characterization is correct, the reference to resale, even in the old 2-703 on seller's remedies, was addressed not to the existence of a resale but to whether the resale was being relied upon to measure damages. But if this is an accurate reading of the old 2-703, it is equally appropriate to a free choice among the buyer's remedies under 2-711.

A non-restrictive reading of the various remedies sections to preserve full options to use or to ignore substitute transactions as a measure of damages makes more sense than Comment 5 for a number of reasons. It preserves a

166. The fact that cover in itself is optional is also made express in § 2-712(3).

167. This is the wording consistently found in the drafts from 1948 through 1955.

168. AMERICAN LAW INSTITUTE AND NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 73 (1957). The suggested amendment was accepted and the section has appeared without the qualifying clause since 1957.

169. See, *e.g.*, the recommended revision of § 2-702. *Id.* at 72.

parity of remedy for buyers and sellers. It is consistent with a number of other Code sections which frown on premature election of remedies.[170] It is a good deal easier to administer, since it would be most difficult to ferret out from a reluctant complainant information about transactions sufficiently related to the contract in breach to qualify as cover or resale. Finally, preservation of the option encourages recourse to actual market substitutes, since it guarantees to the injured party that he will not lose all remedy in the event of an unusually favorable substitute contract. It is thus consistent with the Code's overall interest in keeping goods moving in commerce as rapidly as possible.

B. *Tort—Contract Formulae*

The Code's substitute-contract and market-contract formulae do not, at least in theory, exhaust the market-based differentials on which an injured party may premise his recovery. The breach of a sales contract, insofar as it involves mishandling of property, can give rise to remedies in tort as well as in contract. Section 1-103 saves all general principles of law and equity not displaced by particular provisions of the Code, and although the examples cited do not expressly mention tort remedies, there is no reason to suppose that such alternatives are to be excluded.[171] In fact 2-716[172] invites the buyer under stated conditions to invoke replevin to pursue contract goods, and that invitation certainly should be read to include a monetary remedy if recovery in kind is impracticable. Replevin measures damages by the difference between market and contract at the time of wrongful detention, certainly a standard not necessarily identical with that of 2-713. And a buyer particularly outraged by non-delivery may even sue his seller in conversion, which would allow him to pick a market

170. See note 16 *supra.*

171. Section 1-103 provides:

> *Supplementary General Principles of Law Applicable*
>
> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

See also § 2-721 providing remedies for fraud co-extensive with the Code's express remedies for breach. It is noteworthy that this latter section may give considerably broader remedies, particularly for innocent misrepresentation, than the existing case-law has permitted. *Cf.* DRAFT RESTATEMENT (SECOND), TORTS § 524A(2), discussed in AMERICAN LAW INSTITUTE COUNCIL, PROCEEDINGS OF THE 103RD MEETING 70-94 (Mar. 12, 1958).

172. Section 2-716(3) provides:

> The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

The action in replevin, so far as it is possessory in intent, has numerous difficulties when the interests of third parties intervene. See text accompanying notes 106-15 *supra.* These difficulties do not, however, affect a buyer seeking only a monetary standard for measuring damages flowing from non-delivery.

time ranging from the date of conversion to an indefinite time thereafter, perhaps as much as the filing of suit.[173] Both replevin and conversion at common law required the plaintiff to prove his title; in the case of replevin this prerequisite may have been cut back by 2-716 to identification of conforming goods, but nothing in the Code alters the title rule for conversion.

These additional elements of the buyer's burden of proof, which are in no way involved in damages measured by cover or non-delivery, mean that the buyer will only rarely invoke his remedies in tort. This holds true on the seller's side as well. The seller will have few opportunities, even fewer than the buyer, to claim tortious interference with his goods. The one situation with which the Code deals in some detail arises out of improper conduct by a rejecting buyer. Rejection, whether rightful or wrongful, automatically revests title in the seller under 2-401(4),[174] thus laying the necessary groundwork for rights based in tort. The buyer in custody after rejection is a bailee of contract goods and must treat them accordingly. Two sections, 2-603 and 2-604,[175] spell out what this requires of a buyer who has rightfully rejected a nonconforming tender. Such a buyer, unless he is a merchant under special circumstances, is provided with statutory safeguards against liability in conversion so long as he sits tight and does nothing. If, however, in advance of, or contrary to instructions from

173. See McCORMICK, DAMAGES §§ 48 and 123 (1935).

174. Section 2-401(4) provides:

> A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale."

175. Sections 2-603 and 2-604 provide:

Section 2-603. *Merchant Buyer's Duties as to Rightfully Rejected Goods*

> (1) Subject to any security interest in the buyer (subsection (3) of Section 2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.
>
> (2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.
>
> (3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

Section 2-604. *Buyer's Options as to Salvage of Rightfully Rejected Goods*

> Subject to the provisions of the immediately preceding section on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

the seller, he precipitately disposes of the goods, by storage, reshipment or resale, he must reimburse the seller for any losses which occur. Oddly enough, the Code has no comparable provisions to indicate the buyer's rights and duties in the event of a wrongful rejection. A court might treat this as a mere oversight in the scope of the sections governing rightful rejection, and hold the wrongful rejector to the same standards. On the other hand, a court might well impose a higher standard of care upon the buyer under such circumstances, requiring, for example, that any such buyer, merchant or not, await and follow reasonable instructions from the seller for disposition of the goods.[176]

C. *Anticipatory Repudiation*

The Code, then, gives to the injured party a choice of formulary standards by which to measure his damages: substitute-contract, market-contract, or tort-contract. How do these various alternatives work out in the event of an anticipatory repudiation? The Code offers the following guidelines in 2-610:

> 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 (Section 2-703 or 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 (Section 2-704).

The following section, 2-611, spells out the operation of retraction of repudiation:

> (1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.
>
> (2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609).

176. One other situation can give to the seller a hypothetical claim in tort. The seller who has delivered goods to an insolvent buyer has classically been described as the victim of a fraud; upon discovery of the fraud, he is permitted to revest title in himself and thus to recover the goods. Of course, the revesting of title would give rise to a monetary remedy for conversion in the event of non-redelivery of goods by the buyer. But such a remedy would be the height of futility—the buyer is already, by virtue of his acceptance, liable for the full purchase price, but this, or any other amount is, by virtue of the buyer's insolvency, uncollectible. Section 2-702(3) suggests obliquely that other remedies might coexist with the retaking of the contract goods, but on the whole such remedies would be of little utility to the seller.

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

These sections contain one omission which should be noted at the outset: they fail to define the central term, repudiation. It may well be sensible to require repudiation to relate to a performance material to the contract, but that does not indicate what conduct, so directed, will qualify as repudiation. Section 2-609(4) [177] provides that repudiation may arise out of failure to respond to a reasonable request for adequate assurance of performance. Certainly any conduct which is potentially repudiatory will be sufficient to give reasonable grounds for insecurity so as to invoke the procedure of 2-609. What is not clear is whether repudiation must always go through the channels of 2-609, or whether there may be occasions so unambiguously indicative of intent to default as to invoke forthwith the rights and remedies of 2-610 and 2-611 without the delay implicit in requesting assurance.

One of the options given by these sections to the aggrieved party upon material repudiation is the right to treat the repudiation as immediately final, and thereupon to pursue any of the normal remedies for breach. An injured party may, for example, enter into a substitute transaction in the market and measure his damages accordingly. Such a substitute will constitute a material change of position which, even without express notice, forecloses any attempt to retract the repudiation.[178] Remedies premised upon substitute transactions thus pose no particular problems even when the breach is anticipatory.

The situation is markedly different, however, if the complainant chooses instead to measure his damages by the market-contract differential. The buyer's formula,[179] although not designed for anticipatory breach, can be slightly modified to remain workable. The time of repudiation is, by the buyer's choice, the time of breach, and the place can, by implication, become the place where tender should have been made. On the seller's side, the governing formula looks, however, to time and place for *tender*.[180] If the buyer's repudiation comes sufficiently early in the life of the contract, antedating tender, the seller's formula will have no relationship whatsoever to damages measured by a hypothetical resale, or, for that matter, by losses incurred. This muddle follows irreversibly from the odd divergence in the basic description of the buyer's and seller's market-contract formulae, noted above, but the Code is not content to leave it at that. We have, in addition, 2-723(1) which provides:

> If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2-708 or Section 2-713) shall be

177. Section 2-609 is the general insecurity section. See note 81 *supra* and accompanying text.

178. Section 2-611(1).

179. Section 2-713.

180. Section 2-708(1).

> determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

Section 2-723 relates apparently only to evidentiary difficulties and not to any fundamental apprehension of the inappropriateness of measuring losses caused by anticipatory breach at the time of some tender far off in the future. This elevation of problems of proof over policy is rendered even more perplexing in the event of a trial which occurs after some, but not all, of the contemplated performance has become due. Do we then have a bifurcated standard, measuring pre-trial installment losses at the time tender ordinarily would have occurred, and post-trial installment damages, at the earlier time of notice? Probably not; the reference to "all damages" presumably means that the notice rule completely supersedes the tender rule.[181] Section 2-723 may lead to some interesting manipulation in the docketing of trials. Finally, since market-contract involves no overt conduct, does it amount to such a change of position by the aggrieved party as to preclude retraction of repudiation under 2-611? Perhaps this is the kind of "cancellation" which 2-611 indicates will prevent retraction; perhaps some timely notice must be given. Caution would obviously suggest the latter course.

Assessment of remedy becomes even more complex if the aggrieved party elects to await performance "for a commercially reasonable period of time." Apparently the statute does not require that the repudiator be so informed. But since the injured party is waiting for something other than Godot, it would seem reasonable at least to require the acceptance of an appropriate retraction of repudiation made during the waiting period. Section 2-610(2) makes it clear, however, that a decision to wait does not suspend any remedies, so that it is evidently deemed to be perfectly consistent for a seller to await performance from a buyer and, in the meantime, to resell the contract goods. Such a change of position would make subsequent retractions untimely under 2-611. This concurrence of waiting and not waiting may be necessary to protect the freedom of action of the injured party, so long as no one has been actively misled. But the section carries this privilege one step further, permitting recourse to "any remedy" despite an affirmative request for retraction and performance from the repudiator. Surely, in this context, "any remedy" should be cut back to remedies consistent with the pattern of conduct the complainant himself has urged. This would preserve for the seller the right to withhold deliveries, and to stop in transit, but would suspend the right to resell or to cancel; and a buyer similarly situated could suspend payments but could not immediately cover. It is obvious that the section as drafted is not so limited; rather the broad powers of 2-610(b) are strengthened by subsection (c)'s separate approval of suspension of counterperformance. To protect a reasonable retraction of repudiation in a sufficiently aggravated case a court

181. *Cf.* the comment to § 2-723, which reads in part:

> This section is not intended to exclude the use of any other reasonable method of determining market price or of measuring damages if the circumstances of the case make this necessary.

might, however, look to the two sections on waiver, 1-107[182] and 2-209,[183] or even to the general mandate of 2-302[184] to avoid an unconscionable result.

The aggrieved party's decision to await performance may, of course, evoke no satisfactory retraction of repudiation at all. In that event there must be recourse to the general monetary remedies. As is the case upon immediate acceptance of repudiation, the most readily available measure of damages is that which looks to the cost of an appropriate substitute for the contract in default. Here, the effect of the waiting period is simply to extend the reasonable time within which resale or cover must occur. Tying the waiting period into the market-contract formulae is, however, absolutely and completely impossible. On the seller's side, damages will be measured by market price either at the time for tender, or if trial antedates tender, at the time he learned of the repudiation. The first standard ignores the privilege to wait; the second undercuts it. If it is the buyer who is aggrieved, his damages are measured by the time either when he learned of the breach or when he learned of the repudiation, depending again upon the temporal relationship between trial and performance. It is interesting to speculate when and how a buyer "learns of breach" as he sits and waits for a retraction of repudiation which does not come. Under 2-610, repudiation and breach are, at least initially, different, although repudiation can ripen into breach, either actively, at the option of the injured party, or passively, at the expiration of a commercially reasonable period of time. Neither of these methods seem particularly attuned to pinpointing when the fact of breach has been "learned." Yet only the buyer's market-contract formula under 2-711, without the 2-723 modification, comes

182. Section 1-107 provides:

Waiver or Renunciation of Claim or Right After Breach

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

183. Section 2-209 provides:

Modification, Rescission and Waiver

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

184. Text quoted at note 9 *supra*.

even close to translating into operative remedial terms the waiting privilege of 2-610. If the market-contract formulae are to retain even a semblance of relationship to the measurement of losses after breach, some revision of these sections is overdue. The simplest solution would appear to be to offer to the aggrieved party two time periods at which to invoke the market-contract standard, the time of repudiation, if notice of acceptance of repudiation is then communicated to the repudiator, or at a reasonable time thereafter, if no retraction of repudiation has been received.

Anticipatory repudiation is not likely to affect remedies other than those measured by substitute transaction or market-contract.[185] Repudiation in advance of breach will generally prevent the accrual of property interests required for recovery in tort. By the same token, remedies for full performance will normally have been foreclosed, except for such unusual cases as special manufacture, in which an aggrieved seller is privileged to disregard the repudiation entirely, and not just for a commercially reasonable period of time.[186]

D. *Summary*

For its principal remedy, damages, the Code then has a favored method of calculating losses. If the injured party is willing to go out into the market to find a reasonable substitute, damages measured by the cost of such a substitute transaction are readily recoverable, whether breach be past, present or future. The Code goes out of its way to protect under all circumstances reasonable investments actually made in the market. On the other hand, the Code shifts about, erratically and unpredictably, when damages are to be measured by a market to which the complainant has had no recourse. It is almost as if the draftsmen felt that such a remedy was in any case so undeserving that its precise statement became unimportant. It is certainly true that whatever loss-approximating function these formulae can be said to represent has been essentially displaced by the more accurate measurement of substitute-contract. The Code's broad validation of substitute contracts, in itself one of Article 2's most significant achievements, suggests that, if market-contract is to be preserved, an entirely different role should be carved out for it. The draftsmen of the Code ought to consider the appropriateness of providing a base-line sanction to induce maximal compliance with obligations assumed; if such a sanction is to work, it should not be limited exclusively to the provable losses of the party aggrieved by breach. Market-contract, though not an exact measure of expectations or losses at the time of breach, could provide, with suit-

185. Problems arising out of repudiation of uncompleted *losing* contracts will be considered below, in connection with non-market based remedies.

186. See § 2-704(2):

> Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

able modification, a basis for a statutory system of liquidated damages.[187] As the Code now stands, there is already a provision to enable sellers to retain, as liquidated damages, some down payments made by defaulting buyers.[188] It would therefore not be inconsistent with the Code's over-all design to inquire further into minimal sanctions for all parties aggrieved by breach, whether they be buyers or sellers, whether prepayments have been made or not.

Damages Measured By Profits and Losses

There are many cases in which the party aggrieved by nonperformance would prefer to measure damages by his own economic circumstances, rather than by the market. If remedies are thus "personalized" they hold out the promise of more adequate relief for the injured party. But they also raise the problem of dealing with contracts which are unfavorable, whose breach will come to the party "aggrieved" as a pleasant relief. A contract may have been a losing proposition from the beginning, or may have become so later, because of changes in the market. Whatever the reason, the party in breach will seek to cut back his liability to reflect the blessings which his nonperformance has conferred. The Code provides various guidelines for the recovery of non-market based remedies, for profitable and for losing contracts, principally in its section on consequential damages.[189]

A. *Buyer's Damages After Acceptance*

At the outset, it is useful to consider one special case which involves damages not normally thought of as consequential but still not entirely measured by the market. This involves the calculation of damages for a buyer who has accepted a defective tender of goods. Upon proper notice to the seller, his acceptance may be accompanied by a claim for monetary adjustment, a set-off from the contract price,[190] as described by 2-714:

> (1) Where the buyer has accepted goods and gives notification (subsection (3) of Section 2-607) he may recover as damages for any nonconformity 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 war-

187. Such a formulation would avoid the judicial hostility now encountered in liquidated damages clauses inserted by the parties in contracts for the sale of goods. Fixed-sum clauses have been voided, as penalties, on the theory that the existence of a market provided an adequate basis for calculating damages. See, *e.g.*, H. J. McGrath Co. v. Wisner, 189 Md. 260, 55 A.2d 793 (1947).

188. For the seller's statutory liquidated damages clause, see § 2-718(2).

189. See §§ 2-708(2) and 2-714, discussed at text accompanying notes 203-05 *infra*.

190. Section 2-607(1) requires the buyer to "pay at the contract rate for any goods accepted." But § 2-717 allows the buyer, upon proper notification to the seller, to "deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract."

ranted, 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.

The duality of standards between subsection (1) and (2) is taken from pre-Code law,[191] and presumably courts will continue to interpret the more specific rules of subsection (2) as governing where applicable. Thus defects relating to the goods, their quality or their title, rather than to the manner of their delivery, will invoke the "formula" of the latter subsection. This formula is stated in terms not otherwise employed in the Code, looking to a difference in value, and not in price. There is no Code definition of value applicable to 2-714. The general definition of "value" in 1-201(44) obviously has no relevance here since it looks to the characteristics of an entirely different transaction, the minimal attributes of a commercial exchange, such as qualify a purchaser "for value."[192]

The "value" criterion in 2-714 is confusing because it serves two very different functions. One use of value is to measure the utility of the defective goods received. As such, value is a personalized criterion designed to allow the buyer to offer special evidence of the needs of his own enterprise and resources, to show that the goods accepted are less valuable to him than their market price would otherwise indicate. It seems especially appropriate to retain this broad latitude for the buyer's proof of injury in light of the Code's limitations on the buyer's rights of rejection. Any departure from objective standards in the market raises, of course, the possibility that the buyer will be *forced* to make a kind of personalized proof which he may find either distasteful or infeasible. The seller should not be allowed to insist that the buyer prove more than market price unless the buyer so wishes; nor would it seem wise to allow the seller himself to go on a fishing expedition into the buyer's business to prove greater value than the market would have brought. To read "value" as a limitation on the buyer's option to look to the market would be completely inconsistent with the Code's overall philosophy of preserving alternative remedies for the party aggrieved by breach.

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191. See U.S.A. §§ 69(6) and (7).

192. Section 1-201(44) defines "value" as follows:

"Value." Except as otherwise provided with respect to negotiable instruments and bank collections (Sections 3-303, 4-208 and 4-209) a person gives "value" for rights if he acquires them

(a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

(b) as security for or in total or partial satisfaction of a pre-existing claim; or

(c) by accepting delivery pursuant to a pre-existing contract for purchase; or

(d) generally, in return for any consideration sufficient to support a simple contract.

"Value" also serves to define the other component in the compensation equation, "the value of the goods as warranted," with which the goods as delivered are to be compared. At first blush, there seems no need for this complication at all. Why should the buyer be permitted to go behind the contract price to which he has agreed? If all the other formulae speak in terms of contract price, why not this one? A moment's reflection will demonstrate that some sort of adjustment from contract price is needed to preserve for the buyer the benefit of his bargain, whenever the value of the goods as warranted is not the same as the contract price. A seller having sold for $100 widgets worth $110 should not be able to deliver widgets worth only $95 without compensating both for the buyer's lost bargain and for the defective widgets. If the buyer were allowed only a $5 set-off from the contract price of $100 under such circumstances, he would end up paying $95 for $95 widgets, with no allowance of damages for the seller's breach, while a rejecting buyer would receive $10 in damages and therefore would have to allocate only $100 of his own money for $110 widgets. If, however, we take the $110-$95 difference, *i.e.*, $15, as the set-off, the accepting buyer pays $100-15, or $85, for goods worth $95, retaining a parity of treatment with the rejecting buyer. Thus the formula protects the buyer's bargain if "value of the goods as warranted" is translated into "market value of the goods as warranted," but this is quite a different usage of "value" than the personalized connotation noted above.

If "the value of the goods as warranted" is translated into market value, the formula of 2-714 should always result in parity of remedy for accepting and rejecting buyers. This parity can readily be verified for markets which are stable or rising. As an example of the latter, consider the same basic problem as above, a contract for $100 requiring sale of widgets worth $110, with the value at the time of the contract of the nonconforming goods actually delivered being only $95. Section 2-714 cautions us to measure damages at the time and place for acceptance; suppose that at that time the goods as warranted have risen in value to $120, and as delivered to $104. The buyer upon acceptance pays $84 for goods worth $104; had he rejected, he would have had to invest $100 to get goods worth $120. In each case, his net damages are $20.[193]

Unfortunately, parity of treatment between accepting and rejecting buyers is not so readily achieved in the case of a falling market (or a losing contract).

193. The result does not depend upon the selection of any particular set of figures. Damages calculated by § 2-714, for goods accepted, can be represented as follows:

$$Da = Vd - \left[K - (Vw - Vd)\right] = Vw - K$$

In this equation, Da = damages for goods accepted, Vd = value of the goods delivered, K = contract price, and Vw = value of the goods as warranted. If the buyer rightfully rejects, his damages calculated by § 2-712 can be represented as follows:

$$Dr = M - K,$$

where Dr = damages for goods rejected, M = market cost of goods bought in substitution for the goods rejected, and K = contract price. Since in most circumstances the market cost of substitutes will approximate the value of the goods as originally warranted, the two formulae should produce similar if not identical results.

Suppose that by the time of delivery the market value of the goods as warranted had fallen to $95, and as delivered to $80. Now the rejecting buyer would simply cancel and buy in his replacements at $95, without further reference to the contract in breach. But the accepting buyer must still pay for the goods at the contract rate of $100, deducting only the difference between $95 and $80, or $15, and thus ends up with goods worth $80 for which he must pay $85.

This discrepancy between the net damages of accepting and rejecting buyers is obviously troublesome. In one sense, the 2-714 calculation for acceptors can be said to be a more accurate reflection of the true nature of the bargain. If sellers in breach are to be responsible for bad contracts and adverse markets, logic would seem to demand that they be entitled to benefit, even in breach, from good contracts or favorable markets. This logic has however in the past been rejected by courts when its application would have produced what appears to be a "profit" to a party in breach: looking at the market situation at the time of breach, courts have not permitted sellers to retain or to recover moneys representing a valuation of the goods higher than their then current market value.[194] This case-law result cannot be explained merely by judicial reluctance to assist those who have not fulfilled their contract obligations, for today such assistance has become routine. Rather, it represents a compromise—between the preservation of some sanctions for breach, and the requirement that there be some compensation for services rendered. The terms of the compromise are that the services received will be evaluated, after breach, not by the standards of the contract but by their value to the party aggrieved. Hence most courts would not, absent statutory mandate to the contrary, require even the accepting buyer to pay more than $80 for goods then worth only $80.

Although the wording of 2-714 may be read to contain such a contrary mandate, that interpretation would, in the light of the remainder of Article 2, be most unfortunate. The whole thrust of Article 2 is to limit sharply the occasions on which a buyer may choose to reject rather than to accept a nonconforming tender. If there is a sound basis in policy for preferring acceptance, it seems irrational to undercut this policy by affording greater relief by way of damages to the buyer who rejects than to the buyer who accepts. Parity of remedy between the two classes of buyers may perhaps be achieved by a generous reading of the saving clause of 2-714, which permits recourse to "special circumstances [to] show proximate damages of a different amount."

194. The classic case is Bush v. Canfield, 2 Conn. 485 (1818). The cases in which sellers have been permitted to show that buyers were saved expenses by virtue of the seller's non-performance fall into two classes: one involves the saving of incidental costs, which the Code deals with expressly in §§ 2-710 and 2-715; the other involves reduction of the buyer's affirmative recovery for consequential damages, particularly reliance costs. See, *e.g.*, L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182 (2d Cir. 1949), and other cases cited in Fuller & Purdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 75-80 (1936).

But the difficulty with the saving clause as drafted is that the formulary standard is, in this context, an all too accurate calculation of proximate damages. Yet it is certainly arguable that the comparable position of the rejecting buyer constitutes the kind of "special circumstance" of which the draftsmen wished a court to take cognizance.

The buyer who has accepted defective goods may have grounds for complaint in addition to the diminished value of the goods received. If the seller's breach of warranty has resulted in injury to person or property, any damages "proximately resulting" from the breach are recoverable, under 2-715(2).[195] The Code does not define proximate cause, leaving this controversial matter to the realm of local tort law. If the seller's breach relates not to warranty but to some other aspect of his promised performance, the buyer may recover, under 2-714(2), for "the loss resulting in the ordinary course of events from the seller's breach." The looseness of this standard, taken from pre-Code law, may well be inevitable in light of the unforeseeable variety of non-warranty breaches and injuries which may occur. Finally, all remedies of the accepting buyer are subject to enhancement (or perhaps diminution) by any other appropriate incidental or consequential damages.[196] All these remedies have this much in common, that they contain elements of the market and elements of the buyer's individual circumstances. Yet none of these remedies contain any express limitations of notice to the seller such as *Hadley v. Baxendale* has generally been thought to require.[197]

195. In contradistinction to U.S.A. § 69, the Code's special warranty formula applies to all breaches of warranty, breaches relating not only to warranty of quality but also, apparently, to warranty of title. See note 156 *supra*.

196. Section 2-715 provides:

Buyer's Incidental and Consequential Damages

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

197. The Code's expansion of the permissible scope of consequential damages is consistent with the development which Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854), has had elsewhere. Courts have become increasingly receptive to a broad reading of the "first branch" of *Hadley, i.e.*, of those damages which may "fairly and reasonably be considered . . . arising naturally, i.e. according to the usual course of things," from the breach. See Victoria Laundry (Windsor) Ltd. v. Newman Industries, Ltd., [1949] 2 K.B. 528. *Cf.* Murarka v. Bachrack Bros., 215 F.2d 547 (2d Cir. 1954), in which the seller was held liable for profits lost on the buyer's resale contracts, even though the seller had no notice of the existence of such subcontracts, where the buyer could not get substitute goods in the open market.

B. *Seller's Damages for Goods in Process*

There is no parallel on the seller's side for invocation of remedies related both to the market and to the seller's individual needs. The closest analogy arises when damages are to be calculated for a breach by the buyer during the course of the seller's manufacture. Section 2-704(2)[198] gives the seller in such circumstances the option either to complete or to stop production. If he completes, normal market-oriented remedies apply: the seller gets the difference between substitute or market and contract, unless there is no relevant market, in which case he recovers the price.[199] But what if the seller chooses instead to discontinue production? Surprisingly, nothing in the Code indicates how damages are then to be measured.[200] The only provisions remotely applicable are those of 2-708(2),[201] which allow recovery of lost profits when damages measured by market-contract are "inadequate to put the seller in as good a position as performance would have done." The precise ramifications of 2-708 (2) will be considered shortly. For the moment, it suffices to note that its introductory reference to market-contract, if read as a necessary qualification, precludes its applicability to the seller in the midst of production. Such a seller has never been able to measure his losses by the difference between contract and market, since the salvage value of unfinished goods obviously bears no rational relationship to the seller's contemplated investment in the contract.

198. Section 2-704(2) provides:

> Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

Under U.S.A. § 64(4), the seller ran the risk of having to persuade a court that his completion did not enhance the net damages for which the buyer was being held. See Buchman v. Millville Mfg. Co., 17 F.2d 983 (2d Cir. 1927).

199. Section 2-704 allows the seller, in the exercise of reasonable commercial discretion, "for the purposes of avoiding loss and of effective realization" to complete manufacture and then to identify the finished goods to the contract. If the goods as finished have a market, they can then be resold, § 2-706; if they cannot be resold, the buyer is liable for the contract price, § 2-709(1)(b).

200. Pre-Code case law, under U.S.A. § 64(4), awarded to the seller his lost profits. Much of the litigation focused on the method of calculation appropriate to such an award, with particular concern about the propriety of including overhead expenses in the cost to be deducted from the contract price. See, *e.g.*, Jessup & Moore Paper Co. v. Bryant Paper Co., 297 Pa. 483, 147 Atl. 519 (1929), and Note, *Seller's Recovery When Buyer Repudiates Before Completion of Performance*, 99 U. PA. L. REV. 229 (1950).

201. Section 2-708(2) provides:

> If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

On the other hand, no alternative to a lost-profits measure of damages is provided by Article 2, nor does one readily come to mind.

If lost profits, then, must be used as the only available standard, how are they to be calculated? Application of such a standard to a seller in the midst of production presents problems far more difficult than the situation which 2-708(2) in terms contemplates. The fact of interrupted production means that there can be no accurate cost figures derived from costs "incurred."[202] Instead, it is necessary to estimate what such costs might have been. In proving such estimates, where should the seller look: to costs incurred to date on these goods, to costs incurred in the completion of comparable goods, or to costs of comparable producers of comparable goods? A court might well feel it advisable to require some evidence of market standards to check estimates of cost, which, since they need not be incurred in fact, may well be calculated with an eye to recovering the most by way of damages.

Section 2-708(2) at best points a court in the direction of lost profits as the measure of damages for a seller who justifiably stops production. In the case of a potentially profitable contract, the ambiguities in that standard can be managed by resolving doubts against the buyer who is, after all, in breach. What is to be done, however, if the buyer can demonstrate that his breach saved the seller from further expenditures on a contract which would have resulted in a net loss rather than in a net profit to the seller? Suppose the contract called for the seller to deliver goods to the buyer at a price of $100, that the seller has already invested $80 at the time of breach, and that the buyer offers evidence that $30 would be required to complete production. If the goods have a salvage value of $60, what should the seller recover: $20, $10, or some figure in between? Should the seller's award depend upon the reasons for his losses? The seller's unhappy predicament may arise out of a number of quite variant fact situations, some more or less personal to this particular seller than others: a deliberate choice to enter into losing contracts in order to attract future business, poor management, or fundamental changes in the market. Nothing in 2-708 indicates either what damages are to be awarded in this context or whether the variations suggested above are of any relevance. The message which emerges for the seller in production is clear enough: in case of doubt avoid these embarrassing inquiries by completion. But clarification, preferably in text, is needed so as to preserve for the seller the option not to complete which 2-704 provides.

Thus, the buyer in possession of nonconforming goods and the seller in possession of rejected uncompleted goods represent way stations in the calculation of damages. Their remedies cannot entirely ignore either the market or the situation of the injured party. The buyer's valuation of the goods he should have received, the seller's valuation of the goods he has salvaged, must both

202. The only statistic based upon actual experience which will ever be available when production is stopped is the salvage value of the materials already made up. The other elements of the lost-profits equation, cost of completion, and expected profit, must of necessity be speculative.

be tied to the market; but the other part of each relevant formula, the value of goods received, the costs of production, reflect the personal costs of individual enterprises.

C. *General Consequential Damages*

Is it ever possible for either of the parties to get a monetary remedy totally divorced from the actualities of the market? Under what circumstances does the contractor recover losses related only to his individual functioning? This is the realm of orthodox consequential damages—a realm most often entered to recover damages for non-accepted goods, when the seller has refused to tender, or the buyer to accept. For these two related situations the Code offers, surprisingly, two quite different standards. For the injured seller, 2-708(2) stipulates:

> (2) If the measure of damages provided in subsection (1) [the difference between contract and market at the time and place for tender] is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

The aggrieved buyer, on the other hand, may recover as damages, under 2-715(2)(a),

> any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.

Before contrasting these two sections, it may be well to examine separately each section's scope of operations. Section 2-708 applies, it says, whenever the market-contract differential does not provide the equivalent of full performance. It is difficult to know what to make of this qualification, since market-contract never except by accident approximates full performance. Does this mean that 2-708 represents a free option for the seller to measure damages by historical costs of production whenever this is the most favorable calculation of damages under the circumstances? Comment 2 is more restricted,[203] limiting the impact of the section to standard-priced goods, but nothing in text

203. Comment 2 to § 2-708 reads:

> The provision of this section permitting recovery of expected profit including reasonable overhead where the standard measure of damages is inadequate, together with the new requirement that price actions may be sustained only where resale is impractical, are designed to eliminate the unfair and economically wasteful results arising under the older law when fixed price articles were involved. This section permits the recovery of lost profits in all appropriate cases, which would include all standard priced goods. The normal measure there would be list price less cost to the dealer or list price less manufacturing cost to the manufacturer. It is not necessary to a recovery of "profit" to show a history of earnings, especially if a new venture is involved.

supports such a limitation. Indeed, even the substitute-contract formula will only rarely put the injured party in the same position as full performance, because in most cases the fact of breach will have resulted in the substitution of one profitable transaction for two.[204] Such inconsistency is avoided on the buyer's side by the simple expedient of positing as the necessary qualification only that the buyer could not prevent consequential losses, "by cover or otherwise." It is hard to think of two sections more open-ended in their coverage.

Although both sections thus contain a broad invitation to injured parties to seek consequential damages, they are oddly disparate in the standards by which such damages are to be measured. The injured buyer, but only the buyer, must show that his loss results from particular circumstances of which the party in breach had reason to know at the time of contracting. The injured seller has no such obligation to meet *Hadley v. Baxendale* requirements of notice. This discrepancy is not supportable by any general presumptions that buyers have expert knowledge about seller's markets; if anything, since consumers are apt to be buyers, buyers are more apt to be surprised by the sudden imposition of liability for seller's consequential damages. On the other hand, once the notice requirement is satisfied, the injured buyer recovers "any losses," while the seller's recovery is limited to the difference between the contract price and the historical cost of the goods produced, a measure whose relationship to lost profits economists would question.[205] Yet the 2-708 standard may be preferable by the very fact of its limitation. The only case to date under 2-715 illustrates a predictable judicial response to language like "any losses." In *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co. of America*,[206] the buyer sought to recover damages for loss of good will when he could not supply his customers with the plastic hoops he had ordered, but not received, from the seller. This effort was cut off at the pleading stage by the trial court. On appeal, the Pennsylvania Supreme Court affirmed:

> Our research fails to reveal any judicial authority in Pennsylvania which sustains, under the Sales Act, a recovery for a loss of good will occasioned either by nondelivery or by the delivery of defective goods. . . . There is no indication that the Uniform Commercial Code was intended to enlarge the scope of buyer's damages to include a loss of good will. In the absence of a specific declaration in this respect, we believe that damages of this nature would be entirely too speculative, and that the court below acted properly in sustaining Consolidated-Lustro's objection thereto.[207]

204. Unless the seller was already operating at full capacity, he would ordinarily have entered into and made profits from both the contract in breach and the substitute contract. The statutory rule forces him to lose one profitable sale.

205. Historical cost is in most instances a less accurate index of lost profits than opportunity cost. Opportunity cost looks to the cost of alternative use of resources committed to the contract; it is thus more related to market alternatives than to the seller's input by way of production costs. See DEAN, MANAGERIAL ECONOMICS 257-60 (1951).

206. 396 Pa. 506, 153 A.2d 472 (1959).

207. 396 Pa. at 512-13, 153 A.2d at 476.

The most noteworthy feature of the *Rubin* case is the court's conclusion that the Code was not intended to enlarge the scope of damages. Any court following *Rubin*'s lead will soon cut 2-715 down to size, and a similar fate is likely to overtake 2-708. The *Rubin* result may well be desirable, for an overly rapid expansion of relief particularly for consequential losses may unduly increase the scope of risk to be assumed by the parties to a contract for the sale of goods. Yet as a reading of the intent of the draftsmen of the Code, *Rubin* is surely wrong. The Code is dedicated to the expansion of all damages, of all kinds; yet such expansion cannot take place without an orderly and consistent framework within which to develop.

Contractual Provisions for Damages

The overall impact of Article 2 is clearly to broaden and to facilitate calculation of losses through damages. It is natural that the damages provisions should move in this direction, for they must compensate for the Code's diminished rights of cancellation or full performance. But a precise measurement of loss by standards other than those afforded by substitute contracts is often hard to elicit from the various relevant sections of Article 2. Under these circumstances, it is especially important to investigate the extent to which the Code permits the contracting parties to narrow, augment or simply clarify their statutory options. Pre-Code law suggests numerous techniques for modifying remedies in damages: clauses fixing the amount of damages recoverable upon breach; clauses limiting or excluding some kinds of damages; and clauses which substitute new remedies for the statutory methods of compensation. Alternatively, the contracting parties may focus on the truism that the availability of relief depends upon the standards for performance. Since there can be no remedy until breach, adjustments in the substantive terms of the parties' obligations may obviate remedial modifications. Finally, the parties may stipulate a nonjudicial forum for the assessment of performance, breach, injury and remedy, thus bypassing entirely the statutory standards for relief.

A. *Seller's Remedies*

In the nature of things, not all of these options will be available under all circumstances to lawyers drafting contracts for buyers and sellers. The injured seller has in this respect fewer degrees of freedom than the injured buyer, since the buyer's obligation will presumably never be permitted to exceed the contract price he has agreed to pay.[208] The seller may try to enhance his chances of getting a price action by communicating to the buyer special circumstances which make market-oriented standards for recovery inappropriate. In the absence of such special circumstances, the seller may bargain for maximal latitude, consistent with good faith, in executing resale transactions.

Alternatively, the seller may attempt to ease his proof by stipulating in the contract the precise amount of damages which he will need as compensation

208. Of course, the buyer may be liable as seller, if the goods are to be paid for in full or in part by the provision of other goods. *Cf.* § 2-718(4).

in the event of breach by the buyer. The Code, in 2-718(1) permits clauses which liquidate damages,

> at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

This qualified validation of liquidated damages is not likely to be of much comfort to the seller. It is true that the Code is unusually generous in its appraisal of the amount set by the contracting parties. Even if this amount was entirely unreasonable, as of the time of contract, it can apparently be recovered so long as it turns out, purely as a matter of accident, to approximate the harm actually caused by the buyer's breach. This is an interesting reversal of much pre-Code law which cut back initially reasonable clauses in the light of hindsight.[209] It is quite possible that a court will refuse to sanction the enforcement of such a clause, invoking its residual powers over unconscionable contracts under 2-302.[210] But 2-718 contains no cross-reference to 2-302 and may thus be read to provide criteria which, if met, definitively determine conscionability. An alternate interpretation of the "actual harm" language of the section is to use it to save clauses initially unreasonable only in their failure to discriminate between breaches of different gravity; the section would then enforce such a clause in the event of serious breach. In any case, the Code apparently requires no more than reasonable correspondence between stipulated amount and actual or anticipated injury.

The remaining qualifications of 2-718(1) are, however, more troublesome. The injured seller must demonstrate not only his "difficulties of proof" but also "the inconvenience or infeasibility of otherwise obtaining an adequate remedy." What kind of evidence is the seller to bring in to show "inconvenience or infeasibility" other than his difficulties in precisely proving the extent of his injury? Under what circumstances would "difficulties of proof" imply anything other than "inconvenience or infeasibility" in obtaining an adequate remedy? The duality of standard is redundant, unless we take the two criteria as alternatives, redrafting the section to read that damages may be liquidated in an amount "reasonable in the light of . . . harm caused by the

209. For an excellent discussion of the liquidated damages case law, see Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495 (1962).

210. Section 2-302 provides:

> *Unconscionable Contract or Clause*
>
> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

breach, *and* the difficulties *either* in proof of loss *or* in conveniently or feasibly obtaining an adequate remedy." If that is what the statute meant to say, it would open the door to a general attack on the adequacy of such statutory remedies as the contract-market formula, and invite liquidation of damages to an extent unknown to prior law. This might well be a salutory result; but until it is clear that such latitude was intended, reliance on such broad liquidated damages clauses may prove misplaced.

The seller has one final recourse, also founded in 2-718, which will afford him at least some protection. To the extent that the buyer has paid all or part of the purchase price before his breach, 2-718(2)(b)[211] allows a seller to retain at least "twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller." Contractual provisions for early payment automatically allow the seller this amount by way of compensation without actual proof of injury. In effect this provides a statutory alternative to liquidated damages, capable of augmentation under subsection (3) by the proof of greater injury, but not subject to diminution.

Although the seller's remedies can not readily be expanded, it seems equally true that they are not easily to be contracted. From the buyer's standpoint, an advantageous clause might limit the seller's damages to a stipulated amount, say 10 per cent or 5 per cent of the contract price. Even if such a provision were not so totally uncompensatory as to be unconscionable, its validity under the Code is doubtful. Section 2-718 on liquidated damages will not protect the clause unless it approximates injury under circumstances in which post-breach assessment of damages is difficult. Clauses drafted by buyers to cover their own breaches will rarely qualify under these standards. The buyer might fare better if reliance is placed on 2-719,[212] which permits agreements which "limit

211. Section 2-718(2-4) provides:

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

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

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

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

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

212. See note 147 *supra* and accompanying text.

or alter the measure of damages recoverable under this Article." But this language may be limited by the examples which follow it, all of which relate to buyer's and not to seller's remedies, and all of which guarantee a form of recovery that a court might well consider more adequate than limitation of damages to a minimal sum. Furthermore, 2-719 is expressly subordinated, in its opening words, to "the preceding section on liquidation and limitation of damages." This is an odd cross-reference, since nothing in 2-718, other than its heading, speaks of "limitation" of damages. If the "limitation" language is to be taken seriously, 2-718 may contain exclusive criteria for validation of contractual agreements providing damages in a set amount.

A buyer may be more successful if, instead of anticipating the amount of his liability, he seeks to direct the methods by which his liability is to be assessed. Nothing in the Code forecloses limitation of damages by a contract requiring the seller to measure his damages by only one of his statutory options, such as by resale. A mandatory resale provision would have a dual advantage for the buyer. It would prevent the seller from using market-contract as a hedge for market speculations in the event of buyer's breach, and it would save the buyer from the danger of liability for lost profits. Such an agreement should be valid by analogy to 2-719(3) which permits exclusion of consequential damages. Similarly, it may be possible to limit liability to the market-contract differential, although the inadequacies of its formulation, and the recognition of this weakness in 2-708, make this a riskier choice. In either case, however, the buyer would lose the protection of his stipulation if a sudden disappearance of the relevant market caused the "limited remedy to fail of its essential purpose."[213] Except for this unlikely event, limitation by stipulation of remedy should be effective.

In summary, when it is the seller who is aggrieved by a breach of contract, those modifications of remedy which cluster around the statutory right of resale are most likely to succeed. Despite occasional language to the contrary, the Code in fact discourages any attempts to undercut recourse to the market entirely. What it does recognize, however, is that the resale standard need not be a straight-jacket and is subject to expansion or contraction to meet the special needs of individual buyers and sellers.

B. *Buyers' Remedies*

When the situation of the parties is reversed and interest is focused on the remedies of the buyer, there is a much greater opportunity for contractual divergence from statutory calculation of damages. It can hardly be accidental that the language of the Code's principal section on modification of remedies, 2-719, speaks specifically only of buyers' and not of sellers' remedies. This preoccupation reflects the greater incidence in litigation of contractual provisions designed to limit the remedies of buyers.[214] This in turn results not only from

213. Section 2-719(2).

214. See Comment, *Limitations on Freedom to Modify Contract Remedies*, 72 YALE L.J. 723 (1963).

the greater organization of sellers *qua* sellers to draft protective clauses, but also from the legitimate needs of many sellers to limit the ever increasing scope of risk that they have been asked to assume.[215]

One of the most widely used techniques for cutting back the remedies of the buyer of goods is not couched in terms of remedy at all. This is the disclaimer of warranties, which is designed to limit the seller's obligation so as to preclude the likelihood of breach and liability. The Code has two separate provisions regulating such disclaimers. Under 2-312, a warranty of title can be

> excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

The section generally applicable to disclaimers relating to quality is 2-316:

> (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
>
> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
>
> (3) Notwithstanding subsection (2)
>
> (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
>
> (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
>
> (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.
>
> (4) Remedies for breach of warranty can be limited in accordance with the provision of this Article on liquidation or limitation of damages

215. The seller's increased liability in warranty, substantively and remedially, has been noted above. See note 14 *supra* and text accompanying notes 15-17 *supra*.

and on contractual modification of remedy (Sections 2-718 and 2-719).[216]

These sections are designed to regulate and thus to facilitate, rather than to forbid, disclaimers. If the seller follows the statutory forms, he is promised relief from any further judicial scrutiny of the warranty aspects of his bargain. Although criteria of unconscionability may upset modifications of remedy under 2-719, 2-316 contains no reference to such notions in either text or comment.[217] Between merchants, freedom to modify the scope of obligation is desirable, and the validation of particular language provides a useful device for flagging modifications when made.

Whether 2-316 is equally appropriate for sales to consumers is questionable. Read literally, it suggests that an oral disclaimer which "mentions" the magic word "merchantability" is sufficient to preclude liability even for personal injury arising out of defective consumer goods. Recent judicial history casts grave and legitimate doubts upon the enforceability of such a disclaimer.[218] Under the Code, a sufficiently motivated court could disallow the disclaimer by discovering the breach of an undisclaimable express warranty, by finding authority in 2-302 on unconscionable bargains, despite 2-316's silence, or by concluding that the disclaimer had never been brought home to the consumer in such a way as to become an effective part of the contract of sale.

A more forthright treatment of the problem of disclaimers as they relate to consumer goods would, however, be much preferable. At the very least in the consumer context, thought should be given to redrafting the validating language of 2-316 to require that the buyer have "reason to know," as 2-312 puts it, of any disclaimer before he becomes bound by it. Furthermore, even disclaimers sufficiently explicit to bind ordinary buyers for ordinary injuries raise problems of policy if their enforcement deprives the buyer of compensation for consequential injuries. For 2-719(3) protects consumers who have suffered personal injury by providing that "limitation of consequential damages" in such a case is "prima facie unconscionable." There appears to be no sound basis for the distinction the Code has drawn between the seller who has limited damages by disclaiming responsibility for the goods he has sold and the seller

216. In addition, the buyer may not by contract vary the Code's limited protection for third party beneficiaries of a warranty. Section 2-318 (last sentence).

217. In fact, Comment 3 to § 2-719 goes out of its way to preserve the line of distinction between warranty modification and remedy modification:

> Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316.

In addition, § 2-316(4) suggests the applicability of different rules when the seller's liability is to be cut back through limitations of remedy rather than through disclaimers.

218. See, *e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), and the cases which follow it.

who has limited damages by a provision in the contract restricting the consequences of breach.

Although disclaimers are the most effective method for limiting liability to the buyer, the seller can use other contractual devices as well. Liability can be set either at a specified amount approximating foreseeable injury, if the criteria of 2-718 can be met, or at a restitutionary level, by promising return of the purchase price. Such limitations, if made expressly exclusive, will insulate the seller from damages for consequential losses in most cases. Or the seller can restrict his efforts to the express exclusion only of consequential damages, so as to confine his liability to market-based remedies. Each of these alternatives is explicitly validated by 2-719 or its cross-references. But each must be related in some fashion to 2-719(3)'s provision, noted above, that "limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable." A sensible interpretation would make this qualification equally applicable to all contracting-out devices. Yet it was apparently meant not to limit disclaimers, and a case can be made out that it will not affect clauses complying with the requirements of 2-718 on liquidated damages, since the opening words of 2-719 subordinate its rules to those of the preceding section. A final alternative suggested by 2-719 is a provision limiting the buyer to return of defective goods for repair and replacement. This is really no more than a contractual expansion of "cure" designed to extend for an indefinite period of time the seller's opportunity to produce and deliver a conforming tender. Presumably the effect of such a clause will be limited by subsection (2)'s provision allowing the buyer to return to normal statutory remedies whenever "circumstances cause an exclusive or limited remedy to fail of its essential purpose." Such circumstances might be found in the destruction of the contract goods before return became possible,[219] or in repeated failures in the seller's efforts at rehabilitation.

The buyer so fortunate as to encounter no contract provisions limiting his statutory rights to recover will find little more that he can do by contract to enhance his damages in the event of seller's nonperformance. Of course he can extract high performance standards, and multiple and diverse express warranties. Beyond that, he may communicate information about possible business losses to be expected in the event of default. And possibly he may be able to draft a generously compensatory liquidated damages clause. It is interesting that there is no equivalent on the buyer's side to the seller's guarantee of minimal recovery from a defaulting buyer who has made a down payment. And none of the statutory suggestions of 2-719, except its permission to "alter" the measure of damages, are relevant to increase the seller's liability. In context, this language is hardly strong enough to warrant confidence in the validity of clauses doing more than broadening the buyer's recourse to cover purchases or easing the buyer's proof of the value of accepted nonconforming goods. On the whole it is fair to say that this is an issue which the draftsmen of the Code

219. *Cf.* § 2-616(3) forbidding contractual provisions which might undercut the buyer's rights to modify or terminate a contract upon seller's excused nonperformance.

preferred to handle by the provision of sections pervasively describing and widening the seller's obligation in warranty, rather than by developing alternative remedies. This is certainly the line which current commercial practice has taken.

C. *Arbitration*

Finally, one other commercial practice should be mentioned because it plays a role of unknown dimensions affecting any and all remedies available to the parties to a contract for a sale of goods. The relationship between contracts requiring the resolution of disputes through arbitration and the "normal" law of remedies has only in recent years become the focus of judicial and scholarly scrutiny.[220] The customary grant of authority to the arbitrator does not bind him to observe any particular set of rules in fashioning his award.[221] Arbitral awards may therefore differ markedly both in kind and in amount from those which a court would grant either under its own statutory powers or in enforcement of contractually stipulated remedies. Yet arbitral awards are routinely, almost automatically, enforced.[222] The Code takes no note of this alternate route by which the contracting parties can effectively circumvent statutory principles for the allocation of risk of loss from nonperformance. Perhaps the Code's silence is explained by the infrequency of agreements to arbitrate in consumer contracts, which diminishes the need for statutory supervision. In addition, arbitration has one basic similarity to the judicial process which is often overlooked: the arbitrator, like the judge, operates on the basis of hindsight with full view of all the events which have actually transpired upon breach. The chances are that the arbitrator who deviates from statutory standards will give more by way of remedy, rather than less, while contract provisions usually lean the other way. Thus enforcement of arbitral awards will generally move in the same direction as that which the Code tries to implement, toward a more adequate form of remedy.

CONCLUSION

Viewed as a whole, Article 2 appears to provide a formidable array of remedies for parties aggrieved by nonperformance of a contract of sale. The

220. See Fleming, *Arbitrators and the Remedy Power*, 48 VA. L. REV. 1199 (1962).

221. The Commercial Arbitration Rules of the American Arbitration Association provide: "The Arbitrator in his award may grant any remedy or relief which he deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract. The Arbitrator, in his award, may assess the arbitration fees and expenses in favor of any party or of the Administrator." Rule 42, in STURGES, CASES ON ARBITRATION LAW 882 (1953).

222. See, *e.g.*, Grayson-Robinson Stores, Inc. v. Iris Construction Corp., 8 N.Y.2d 133, 202 N.Y.S.2d 303, 168 N.E.2d 377 (1960), in which the majority enforced the order of an arbitrator compelling specific performance of a building construction contract. In the words of Judge Desmond, "arbitration is by consent and those who agree to arbitrate should be made to keep their solemn, written promises." 8 N.Y.2d at 138, 202 N.Y.S.2d at 307, 168 N.E.2d at 379. See also In the Matter of Staklinski, 6 N.Y.2d 159, 188 N.Y.S. 2d 541, 160 N.E.2d 78 (1959).

Code invites the injured buyer or seller to consider a whole network of alternative routes to compensation, a network far broader than that contemplated by either the Uniform Sales Act or the pre-Code common law. In addition, the Code suggests that the parties themselves may construct individualized avenues to recovery designed to supplement or to supplant the basic roads the Code has created.

This breadth of choice is impressive—and misleading. For a closer reading of Article 2 indicates that though some of the choices are available some of the time, all of them are *not* available all of the time to the person aggrieved by breach. The principal source of weakness of the remedies sections is their failure to follow through on one of the Code's significant insights, the recognition of the vast variety of circumstances which may lead to disappointment for one, or both, of the parties to a contract for sale. For example, those parts of Article 2 which define performance distinguish between nonperformance which is excused and nonperformance which is culpable; but the remedies appropriate to excused nonperformance are nowhere developed with any precision. More important, even in the event of culpable nonperformance, the remedies sections do not mesh tightly into the sections discriminating between different types of breach. Breach may vary, first, in its immediacy, for it may be merely potential, or anticipatory, or present; and it may antedate or postdate partial or complete performance by the party aggrieved. Furthermore, breach will vary in its magnitude, for it may be significant or trivial, irremediable or curable; and an appraisal of the extent of deviation from promised performance will often depend upon whether the chosen vantage point is that of the contracting parties themselves or that of the markets in which they normally operate. But the remedies sections characteristically lump all breaches together, with almost complete disregard of timing and insufficient emphasis on the severity of breach. This divergence of approach leads, inevitably, to conflict. Presumably, it is the remedies sections which must be adapted to fit with the nonperformance sections, for otherwise the precise discriminations so carefully evolved in the latter would become, at best, precatory and more likely nugatory. Similarly, the freedom of the contracting parties to stipulate particular kinds of remedies must be exercised consistently with the principles developed in those sections of Article 2 defining performance and nonperformance. These standards for performance are, in turn, capable of expansion or contraction by the parties within the limits set by the Code. In fact, contractual variation of these standards, rather than contractual modification of remedies, is by far the most likely road to success for buyers and sellers intent on altering the normal consequences of a contract of sale.

To give warning of the many instances in which a suggested road to recovery will *not* be available to the party aggrieved by breach, the remedies sections of Article 2 are, then, in urgent need of revision. In fact, the *only* remedial route which is not subject to hidden roadblocks is that which arises out of the injured party's utilization, in good faith, of market opportunities

alternative to those of the contract in breach; the draftsmen of the Code might well have flagged the primacy of this remedy somewhere in the text of Article 2. As the Code stands, it requires the bar or bench in each instance to search through all of Article 2, and for that matter, the rest of the Code, to uncover provisions possibly limiting the effect of the remedies sections. Such an undertaking is unreasonable and onerous, given the length and the complexity of the Code. At the very least, the article needs revision of the existing cross-references and comments to guide the user of the Code to those sections significantly affecting the major remedial choices which arise upon nonperformance.

The process of achieving technical accuracy for Article 2 should clear the road for consideration of those issues of principle upon which the Article is now either unclear or inconsistent. Under what circumstances, if any, should remedies be retained which will be available only under the most unusual and then often in the most undeserving instances? What, in the light of the Code's overall restrictions, should be the proper ambit for the perfect tender rule and the right to cancel, and of the right to compel delivery or redelivery of contract goods? What should be done about remedies where performance is excused; and should not such excuse be available even to buyers whose contracts are not in requirements form? What should be the role of the Code in the encouragement of faithful compliance with contract obligations: should the Code provide some sanctions for all breaches, or is it sufficient to sanction only those defaults which lead to demonstrable losses, generously calculated, for the party aggrieved? Finally, to what extent should the Code allow the contracting parties to alter the Code's own standards for performance and remedies; should validity turn upon the particular contractual technique employed or upon its probable end-results; are further distinctions between merchants and consumers necessary to buttress the Code's boundaries of unconscionability on the one hand and good faith on the other? None of these issues is urgent, and none can or should be resolved without careful study and considered evaluation of alternative solutions. Yet this much is clear. If, without any further scrutiny of these and other problems as they arise, Article 2 were to be treated as a definitive masterpiece, incapable of improvement, the only result would be to weaken its force and thus to undercut its many significant achievements.

Fortunately the sponsors of the Code have foreseen the inevitability of further critique and suggested amendments. Aware of the lamentable tendency of uniform acts to become non-uniform through state-by-state variations, the American Law Institute and the National Conference of Commissioners on Uniform State Laws set up in 1961 a Permanent Editorial Board through which "approved" uniform amendments might be promulgated.[223] To date, the

223. Report No. 1 of the Permanent Editorial Board for the Uniform Commercial Code, appears as a preface to the 1962 OFFICIAL TEXT WITH COMMENTS OF THE UNIFORM COMMERCIAL CODE at vii-xv. The Report's Appendix, at xi-xv, contains the agreement authorizing the creation of the committee and defining the scope of its authority.

Board has taken an exceedingly conservative view of its role, considering only amendments already enacted or known to be pending in the various state legislatures, and sanctioning no changes of any substance.[224] Unless the Board takes further initiative, it will force needed amendments to originate in the least desirable forum, the single statehouse. And, more important, it will fail to provide the Code with that thorough systematic review which any codification of its dimension, and particularly Article 2, must have to realize its potential impact on modern commercial law.

224. *Id.* at ix. The work of the Permanent Editorial Board is described in Braucher, *The Uniform Commercial Code— A Third Look?*, 14 W. RES. L. REV. 7 (1962).