THE UNIFORM COMMERCIAL CODE AND THE LAW OF CONTRACT

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I

In 1942 in response to indications of inadequacies in the Uniform Sales Act and other commercial legislation, the American National Conference of Commissioners on Uniform State Laws and the American Law Institute undertook the task of preparing a uniform commercial code which would modernize and replace with one integrated statute the various uniform Acts in the field of commercial law, including the Sales Act, Negotiable Instruments Law, Bills of Lading Act, and Warehouse Receipts Act. The chief architect of the project was Professor K. N. Llewellyn of the University of Chicago Law School, and between 1945 and 1952 a number of drafts and redrafts of parts of the proposed Code were prepared by a staff of reporters and considered by advisory groups of judges, practising lawyers, and law teachers. Individuals and organisations in business and banking circles were consulted and the drafts were commented on and criticised in legal periodicals and by various bar association groups and other interested bodies. It has been said that "the Code has probably had a wider review by the informed public than any other piece of legislation which has been proposed in the United States". The final text of the Code, endorsed by the American Bar Association, was published as the Official Text and Comments Edition in 1952, and was described then as representing "the sum total of an immense amount of time and thought from a great many people well-informed in both the business and the legal sides of the fields covered by the Code".

The Code, without the comments, was enacted in Pennsylvania almost immediately, but other states were not disposed to act so precipitately, and in a number of jurisdictions the Code was referred to special committees for investigation. Thus, Massachusetts appointed a special interim Commission to study the Code, while in New York the question of the enactment of the Code was referred to the Law Revision Commission for its consideration. As a result of the criticisms and suggestions contained in such investigations, a revised edition of the Code containing many of the suggestions made was promulgated in 1957. Further amendments were made the following year and the Code was repromulgated as the 1958 Official Text. In this form it was immediately adopted by some sixteen States but in almost every case with some variation from the Official Text. This tendency imperilled the aim of uniformity which was the whole basis for the Code's existence, and a permanent Editorial Board was set up to examine the departures from the Official Text which had already been made in the State enactments and to

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consider proposed amendments from time to time (but not less often than once in every five years).[1] As a result of the Board's investigations, certain amendments to the Code were proposed and the 1962 Official Text with Comments was issued, superseding the 1958 version of the Code. Its popularity can be gauged from the fact that, by the end of 1966, 49 jurisdictions in the United States had enacted it, with or without modification. This is in marked contrast to the reception accorded the Uniform Sales Act which, since its promulgation in 1906, had become law in only 37 jurisdictions.

The basic principle of the Code is that, nothwithstanding its many aspects, a commercial transaction is a single subject of the law. In the case of a sale of goods, for instance, there may be a contract (with problems of offer and acceptance), followed by a sale, the giving of a cheque or draft in part payment of the price, and the acceptance of some form of security for the balance. This brings in the problems associated with the negotiation of cheques or drafts and other commercial paper and the various forms of financing the transaction, such as by letter of credit, trust receipt or bill of sale. If the goods have to be shifted to the buyer, or happen to be stored, delivery may be effected by handing over a bill of lading or warehouse receipt or both, and hence documents of title must be covered. If the transaction is what is known as a "bulk sale" where there are opportunities for fraud, an attempt is made to limit these opportunities. Finally, if instead of goods the transaction involves so-called long term investments such as stocks or bonds, certain aspects of the matter have to be treated differently and certain additional formalities observed.

Hence in the Code there are Articles (or Chapters) on sales, commercial paper, bank deposits and collections, letters of credit, bulk sales, documents of title, investment securities, and personal property security transactions. The sales Article has the same general scope as the Uniform Sales Act it replaces but it effects some major changes in the existing law; the commercial paper provision has substantially the same coverage as the Uniform Negotiable Instruments Act, with investment securities deleted; the Article on bank deposits and collections is intended to replace the American Bankers' Association Bank Collection Code promulgated in 1929 and adopted in a number of States; Article 5 on documentary letters of credit is the first codification of the law on this subject; the sixth Article on bulk transfers attempts to simplify and make uniform the bulk sales laws enacted in most jurisdictions; the Article on documents of title substantially continues the Uniform Bills of Lading and Warehouse Receipts Acts and the pertinent portions of the Uniform Sales Act; the Investment Securities Article covers the matters dealt with in the Uniform Stock Transfer Act, but much more elaborately and with application not only to stock certificates but to all kinds of investment securities; and, finally, the secured transactions Article works some important changes in the field of security transactions touching personal property, the basic concept being that legal consequences should depend not on the *form* that the security interest takes but on the *function* it serves. The traditional differentiation of security transactions according to their form is abandoned, and in its place

[1] The jurisdiction of the Board to amend the Code is limited. Its policy is "to assist in attaining and maintaining uniformity in State Statutes governing commercial transactions and to this end to approve a minimum number of amendments to the Code". In October 1966 the Board was directed to review the fourteen sections of the Code which had been non-uniformly amended by ten or more jurisdictions each.

appears the classification of a security in the light of the purpose it serves. The important matters now are the status of the person whose property secures the debt and the kind of property (or "collateral") put up as security.

This, then, is a broad outline of the scope of the Uniform Commercial Code (hereinafter termed the "U.C.C."). It is not a complete codification, but it forms a statutory basis for the entire spectrum of commercial operations and purports to deal with all the phases which may ordinarily arise in the handling of a commercial transaction. It attempts to fuse into one comprehensive whole several bodies of law, correlating them in such a way that their similarities and variations and their impact on each other can be seen. It combines up-to-date revisions of prior Uniform Acts (in Articles 2, 3, 7 and 8) with new codifications of related subjects previously governed extensively by statute but not heretofore promulgated as Uniform Acts (see Articles 4, 5, 6, 9). New statutory language (an innovation which has not received universal approval) and considerable modification of general doctrine especially in the field of the law of contract are to be found in the Article on Sales, while elsewhere throughout the Code are to be found changes in theory and policy and innovations aimed at removing uncertainty, obscurity, or defects in the law. Another feature is the extent to which general concepts such as "commercial reasonableness", "the observance of reasonable commercial standards of fair dealing in the trade" and unconscionability are used. The meaning to be given to such phrases must depend on the particular commercial context to which the provision embodying them applies, that is, the facts of a case are all-important, but the use of these terms does give a considerable degree of flexibility to the Code and thus enables it to adapt to future trends. The inevitable loss in precision may not be too high a price to pay to ensure that it can meet the challenge of future mercantile development.

A further feature of the Code is the extent to which official comments are included to explain the purpose of each provision. The idea is not new; it has been used frequently by the Commissioner on Uniform State Laws to explain the terms of uniform laws promulgated by them, and it is to be found in the Restatements brought out by the American Law Institute. The reason for the comments is to promote uniformity of construction, this uniformity being one of the main objectives of such legislative activity.[2] It was originally provided by s. 1-102(3)(f) of the U.C.C. that the comments might be consulted in the construction and application of the Code, but that if text and comment conflicted the text should prevail. This sanction was explicable only on the basis that such comments were to be regarded as part of the "legislative history" of the Code so as to show the intention of those who drafted it in any situation where the meaning was not clear. On a similar basis would appear to rest the practice in New York and elsewhere of referring to the notes and reports of state agencies and commissions to aid in the interpretation of statutes enacted upon the recommendation of such agencies and commission.[3] The New York State Law Revision Commission, however, recommended the deletion of s. 1-102(3)(f) as unnecessary and likely to lead to unprecedented

[2] In the words of one of the reporters of the U.C.C. the drafting concept rested on the belief that certainty and uniformity of construction depended on a court's perception of the situation represented by the rule and the reason the rule was adopted. The rules were drafted accordingly. See S. Mentschikoff, "Highlights of the U.C.C." (1964) 27 *Mod. L.R.* 167, 170.

[3] See Report of New York Law Revision Commission on the U.C.C.: *N.Y. Legis. Doc.* (1955) No. 65(B) Vol. I, 31-37 (157-163), hereafter "N.Y.L.R.C. Report (1955)".

use of the comments to expand and qualify the text.[4] The provision was dropped from the 1957 Official Text ostensibly on the ground that the old comments were out of date and it was not known when new ones could be prepared.[5] The comments themselves have not been enacted as law along with the text in any jurisdiction, but this has not prevented frequent reference to them by the courts as guide lines for the interpretation of the provisions. In *Burchett* v. *Allied Concord Financial Corp. (Delaware)*[6] the comments were described as persuasive and as representing the opinion of the draftsmen of the Code. It seems clear that, in view of the general nature of much of the language of the U.C.C., frequent recourse would have to be made to the explanatory comments to ascertain the purpose behind the various sections.

II

Reference has been made above to the considerable modifications in the law of contract which are to be found in the Article on sales. It is proposed to examine in some detail the impact which the U.C.C. had on the law of contract in the area of sales. This impact extends to the formation, effect, and modification of agreements for the sale of goods and to the operation of the Statute of Frauds in this field.

Formation of Contract in General

The basic approach to the formation of a contract adopted by the U.C.C. is to ascertain if the parties have intended to make a contract. If they have, and there is a reasonably certain basis for giving an appropriate remedy,[7] the contract will not fail for indefiniteness even though one or more terms are left open.[8] Guidelines to assist the court in determining whether such an intention to make a contract exists are provided by s. 2-204(1) and s. 2-204(2). The former subsection stipulates that a contract may be made in any manner sufficient to show agreement, including conduct by both parties which recognises the existence of such a contract,[9] while the latter subsection provides that there may be a contract even though the moment of its making is undetermined. The notion that offer and acceptance must be clearly identified is thus rejected so long as it is clear that an agreement has been reached.

What may be called a corollary to these provisions is to be found in s. 2-207(3) whereby conduct by both parties which recognises the existence of a contract is deemed sufficient to establish a contract although the writings of the parties are by themselves inadequate in this regard. This subsection, however, is aimed primarily at the situation where offer and acceptance do not correspond in terms and the exchange of writings do not establish a

[4] See N.Y.L.R.C. Report (1956) *Legis. Doc.* No. 65 15-17; R. Braucher, "The Legislative History of the U.C.C." (1958) 58 *Col. L.R.* 798, 809. Opposition to the comments was probably due to the extent of the detail and the elaboration given in the comments to the text itself. Many comments appear to add to the text or qualify it and in some instances to alter the purport of the text.

[5] See 1956 Recommendations of Editorial Board for U.C.C. 3.

[6] (1964) 356 P. 2d. 186 (N. Mex. S.C.). *Cf. Zinni* v. *One Township Line Corpn.* (1965) 36 D. & C. 2d. 297 (Pa.) (refusal to follow comments in the face of contrary authority.)

[7] The test is not certainty as to what the parties were to do nor as to the exact amount of damages.

[8] See s. 2-204(3).

[9] *Cf* s. 8 Sale of Goods Act 1923 (N.S.W.) (hereinafter referred to as S.G.A.).

contract, despite the provisions of s. 2-207(1) and s. 2-207(2). In this event, conduct may suffice to establish the fact of agreement.

The general purpose of s. 2-204 seems to be to dispense with formality in contracting and to give legal consequences to the roughly drafted and imprecise transactions of business men. It is true, as the comment to the section points out, that the more terms left open by the parties, the less likely it is that they intended to make a contract, but their actions might be conclusive in this regard despite the omissions, in which case the Code makes provision to fill in the gaps. The problem of indefiniteness will be considered further below, but the important thing to remember at this stage is that, given an intention on the part of the parties to contract, failure to specify terms such as price, place or time of the delivery or time of performance will not affect the validity of the contract. The harsh rule that failure to specify a particular term is *per se* fatal to the existence of a contract is rejected. The court cannot find an intention to contract where none exists but, once such an intention is clearly established,[10] the court is enjoined to utilise every possible aid in order to make an apparently indefinite agreement sufficiently definite to allow it to give an appropriate remedy. Taken in conjunction with the other provisions in Article 2 designed to implement the policy of enforcing agreements even though terms are left open, s. 2-204(3) appears to extend the scope of enforceable contracts for the sale of goods to agreements that would be of doubtful validity under traditional common law principles notwithstanding the well-known maxim that the courts should not be astute to upset the bargains of business-men.[11]

The "Firm" Offer

Orthodox legal principle is abandoned by the U.C.C. with its provision upholding the validity of a "firm" offer in writing signed by a merchant even though there is no consideration therefor. Section 2-205 provides that a signed written offer by a merchant to buy or sell goods which by its terms gives assurance that it will be held open, is not revocable for lack of consideration during the stated time, or if none is stated, for a reasonable time, but any period of irrevocability is not to exceed three months. If the assurance to hold the offer open is contained in a form supplied by the *offeree*, the offeror must separately sign it. This last provision is a precautionary measure to ensure that an offeror does not inadvertently bring himself within the Section. He is not bound unless he has signed the assurance, but any symbol intended as an authentication, be it printed, stamped or written, will suffice. Thus mere initials will do.[12]

At common law a promise to keep an offer open for a certain length of time is only binding if consideration is given therefor or if the promise is incorporated in a document under seal. Many jurisdictions in the U.S.A.

[10] In *Pennsylvania Co.* v. *Wilmington Trust Co.* (1960) 166 A. 2d. 726 it was held that an intention to contract was not necessarily destroyed because the parties contemplated the subsequent execution of a formal contract.

[11] See, e.g., *Hillas & Co.* v. *Arcos Ltd.* (1932) All E.R. 494. The tentative draft of No. 1 of the *Second Restatement of Contracts* follows the U.C.C. in this respect. See R. Braucher, "Offer and Acceptance in the Second Restatement" (1964) 74 *Yale L.J.* 302, 308.

[12] See the definition of "signed" in s. 1-201(39) and the comment thereto. Commonsense and commercial experience must be used to decide whether the symbol relied on was executed or adopted by the party with the intention to authenticate the writing. Writing itself includes printing, typewriting, or other intentional reduction to tangible form. See s. 1-201(46).

have abolished the efficacy of the seal in this regard.[13] This policy is perpetuated by the Code which provides that the law with respect to sealed instruments does not apply to a written contract for the sale of goods or to an offer to buy or sell goods to which a seal has been affixed.[14] To fill the gap thus created, the Uniform Written Obligations Act was promulgated as early as 1925 to make signed written promises, containing a statement of intention to be bound in any form of language, enforceable without consideration, but this met with a very poor response.[15] So far as firm offers are concerned, attempts have been made from time to time to invoke the principle of promissory estoppel to hold the offeror to his promise, with mixed success.[16] The Code now provides a clear-cut statutory rule whereby a firm offer can be held irrevocable in the absence of consideration, if the formality of a signed writing is observed. In substituting the written signed promise for the seal of consideration the Code followed the lead given by legislation in New York. Section 33(5) of the New York Personal Property Law and s. 279(4) of the New York Real Property Law provided that a written offer signed by the offeror which stated that it was irrevocable for a certain time (or a reasonable time in the absence of a stipulated period) was not to be revoked during that time on the ground of want of consideration.[17] These statutory provisions were, of course, of general application and were not limited to offers made by a merchant as is s. 2-205, but they have now been consolidated in s. 5-1109 New York General Obligations Law (1963) and made subject to the Code provision.

By inserting s. 2-205 in the U.C.C. the draftsmen aimed to bring the law into line with commercial practice where a "firm" offer is regarded as incapable of withdrawal for a certain time.[18] Hence the limitation of the provision to the transactions of merchants. The merchant is regarded as a professional as opposed to the casual and inexperienced seller or buyer, and there is, therefore, every reason to hold him to his word. There will, of course, be difficulties in the application of the section. It will not always be easy to decide when the offer "by its terms gives assurance that it will be held open",[19] and only litigation will determine the precise limits to be given to the definition of a merchant. The Code defines a merchant as a person who (a) deals in goods of the kind or (b) otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction, or (c) to whom such knowledge or skill may be attributed by his employment of an agent or broker who by his occupation holds himself out as having such knowledge or skill.[20] "Between merchants" refers to any

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[13] See A. L. Corbin, *Contracts* (1950) s. 254.

[14] S. 2-203. This provision may have unintended results in abolishing certain collateral effects of the use of a seal: see *Commonwealth Bank & Trust Co.* v. *Keech* (1963) 192 A.2d. 133 (undisclosed principal liable on a contract executed by an agent under seal as it was not a sealed instrument). Comment 2 to the section indicates that a seal may still be effective as an authentication or a signature.

[15] Since its promulgation only Pennsylvania and Utah have adopted the Act and it has since been repealed in the latter State.

[16] See e.g., *James Baird Co.* v. *Gimbel Bros. Inc.* (1933) 64 F. 2d. 344; *Robert Gordon Inc.* v. *Ingersoll-Rand Co.* (1941) 117 F. 2d. 654; *Northwestern Engineering Co.* v. *Ellerman* (1943) 10 N.W. 2d. 879; *Drennan* v. *Star Paving Co.* (1958) 333 P. 2d. 757.

[17] See (1943) 43 *Col. L.R.* 487.

[18] See A. L. Corbin, "U.C.C. — Sales: Should it be enacted?" (1950) 59 *Yale L.J.* 821, 827.

[19] What for instance is the effect of a statement that "this offer is for acceptance within ten days"?

[20] S. 2-104(1).

transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.[21] Presumably this simply embraces any transaction in which the parties are merchants as defined.

Throughout Article 2 the merchant is singled out as having special duties and obligations placed upon him. Good faith in his case is not just the "honesty in fact" that it generally means throughout the Code, but it is defined to include both honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.[22] It has been said that this approach is a novel departure in the common law where the effects of a transaction are said to depend on the circumstances of the particular case and not on the category into which a person may fit. But this is only partially true (as witness for instance the necessity for distinguishing between servants and independent contractors in the field of torts). In any event the law merchant was originally a special body of law applicable only among traders which later became of general application in commercial transactions. Further, the recognition given to custom and trade usage in the S.G.A. indicates that professionals in various trades have continued to develop special rules to meet altered business conditions.

Comment 2 to s. 2-104 attempts to classify the specialised rules applicable to merchants into three classes. The first class embraces those rules predicated on normal business practices in any type of business with which every person engaged in commercial activities should be familiar, such as the rules relating to "firm" offers, requirements of Statute of Frauds, acceptances with additional terms, and the modification of a contract. On this basis, almost everyone in business would be a merchant as he would hold himself out by his occupation as having knowledge of normal business practices.

The second class comprises those rules where the person is considered a professional in dealing in the type of goods and/or practices involved and hence is a merchant in respect of those transactions. Into this category come the rules as to mechantability, the retention of goods by a merchant-seller for a reasonable time after sale, and the entrusting of possession of goods to a merchant who deals in goods of that kind. Obviously the type of business the person is engaged in and the purpose for which he obtains the goods will be vital in deciding whether he is a merchant or not. Thus a secondhand car dealer who sells his television set will not be bound by the merchantability provisions of the Code as he is not a professional in that type of transaction. The test is very close to the requirement in s. 19(2) S.G.A. whereby the seller must deal in goods of that description before a condition as to merchantability will be implied. But on the other hand, the secondhand car dealer may well be a merchant for the purpose of giving a firm offer. The question really amounts to this—whether the dealer, as a man of business, holds himself out as knowing of the general business practice of giving "firm" offers, or whether he merely holds himself out as having knowledge of the normal business practices in respect of the goods he usually deals in, that is motor-

[21] S. 2-104(2).

[22] S. 2-103(1)(b). A similar test is imposed by s. 7-404 on a bailee of goods who in good faith delivers the goods to another. Diligence and prudence seem to be implicit in this definition. When the general definition of good faith in s. 1-201(19) was originally drafted, it included not only honesty in fact, but also the observance of the reasonable commercial standards of any business or trade in which the party was engaged. This objective standard of fair dealing was removed in response to pressure. See E. A. Farnsworth, "Good Faith Performance and Commercial Reasonableness under the . . . Code" (1963) 30 *Univ. Chicago L.R.* 666, 673-4.

vehicles, which may not include the practice of giving "firm" offers.

The third class includes those rules where the predominant feature is the observance of reasonable commercial standards of fair dealing in the trade, such as the merchant buyer's responsibility to follow the seller's instructions for disposal where he has rightfully rejected the goods or has elected to return them in the case of sale on approval.

What authority there is on the meaning of "merchant" indicates that a restrictive interpretation will be placed on the definition. In *Cook Grains Inc.* v. *Fallis*[23] the Arkansas Supreme Court had to consider the applicability of s. 2-201(2) (which relaxes the requirements of the Statute of Frauds in transactions between merchants in certain circumstances) to the case of a farmer who had orally sold his produce to a dealer and then refused to deliver. It was held that a farmer who undertook to sell the commodities he had raised was not a merchant within the meaning of the Code. The provision in the Act was meant to apply to professional trades and a farmer was not a dealer in goods but was acting as a farmer when he tried to sell his produce. On this finding it could be maintained that a manufacturer who endeavoured to sell the goods he had produced was not a merchant either.

Again, the judgment in *Wilmington Trust Co.* v. *Coulter*[24] suggests that a trustee company handling an estate is not a merchant to make a firm offer to sell shares as an estate asset so as to render applicable s. 2-205. It would seem that the "professional dealer" aspect as opposed to the "normal business practice" approach is being adopted in respect even of those rules included in the first category above which comment 2 would regard as applicable to all business-men.

This examination of the concept of the merchant has been a necessary digression to ascertain the scope of the "firm" offer provision in s. 2-205. From what has been said it is obvious that the section is somewhat circumscribed in its application, being limited to an offer by a *merchant* in respect of *goods* only if the offer is in *writing* and *signed*, only if there is something to indicate that it will be *held open*, and even then the maximum period of irrevocability is three months. The effect of the provision is to bind the offeror while leaving the offeree free to look around to see if he can obtain a better offer elsewhere, and this failure to protect the offeror's expectations has led to some criticism. The feeling is that if the offeror is bound the offeree should not be free to "shop around" for better terms knowing that he has the former committed.[25] Of course, the former will be committed only if his offer is a "firm" one and is in respect of goods as opposed to services.[26]

Offer and Acceptance

Drastic alterations to the general principles of the law of contract in the field of offer and acceptance are made by the U.C.C. in relation to contracts

[23] (1965) 239 Ark. 962.

[24] (1964) 200 A. 2d. 441, 454. The Supreme Court of Delaware assumed that the U.C.C. was applicable to the sale of stock.

[25] See e.g., L. Lederman in (1964) 39 *N.Y.U.L.R.* 816. He suggests that in the building industry the head contractor should be regarded as accepting the sub-contractor's bid when he uses the bid to formulate his tender. Presumably the contract would be subject to the condition that the tender is successful.

[26] In *Coronis Associates* v. *Gordon Construction Co.* (1966) 216 A. 2d. 246, s. 2-205 was held inapplicable to the sub-contractor's bid because the offer contained no assurance that it would be kept open. However the head contractor had relied on the bid and the promissory estoppel principle contained in s. 90 Restatement of Contracts was regarded as applicable.

for the sale of goods. Section 2-206 and s. 2-207 are the relevant sections. Section 2-206(1)(a) does not, however, make any change but in fact is declaratory of the existing law when it provides that, unless otherwise unambiguously indicated by the language or circumstances, an offer is to be construed as inviting acceptance in any manner or medium reasonable in the circumstances. It will be recalled that under the general rules of offer and acceptance the offeror is "master of his offer" and can dictate the precise method of acceptance that the offeree must adopt if he wishes to take advantage of the offer. But in the absence of any such stipulation by the offeror, the offeree can adopt any medium of acceptance which is reasonable in the circumstances. Section 2-206(1)(a) simply reiterates the common law position on this point. Difficulties might arise, however, on the interpretation to be placed on the words "unless otherwise unambiguously indicated by the language or circumstances" which qualifies not only s. 2-206(1)(a) but also s. 2-206(1)(b). For instance, does a buyer who sends a written order for goods on an order form which contains a space for the seller's written acceptance, thereby unambiguously indicate the method of acceptance he requires?[27]

Where there is an offer to buy goods "for prompt or current shipment" and it is not clearly indicated whether the offeror desires a return promise of acceptance or merely prompt shipment, s. 2-206(1)(b) permits an acceptance to be made in either way. This provision is from one point of view a particular application of the rule in subsection (a) allowing acceptance in any reasonable manner when the offer is ambiguous as to the kind of acceptance called for. However, it reflects the current attitude towards the "great dichotomy" between unilateral and bilateral contracts which was emphasized in the Restatement of Contracts and which, as indicated below, has been rejected by the U.C.C.[28] In future, nice decisions as to whether the offeror was calling for an acceptance by performance or by a promise will not have to made, as either will do in the absence of a clear indication to the contrary.

Section 2-206(1)(b) also provides that where the offeree does not accept by giving a prompt promise to ship, but accepts by prompt shipment of the goods, a shipment of non-conforming goods will be an acceptance (and also a breach of contract for the purposes of the buyer's remedies) unless the seller gives notice that the goods are offered only as an accommodation to the buyer, in which case the offeror knows that no acceptance is intended and that the shipment will operate as a counter-offer. Hence the act of shipping non-conforming goods is at the same time an acceptance of the offer which obliges the seller to dispatch conforming goods and also a breach of the contract thereby formed which entitles the buyer to claim damages. If the seller neglects to advise the buyer that the goods are offered only as a substitute to suit his convenience, the buyer can reject the goods under s. 2-601 as failing to conform to the contract and at the same time hold the seller to his bargain to supply the exact goods ordered. The extent to which a shipment may vary from the contractual description and still amount to an acceptance instead of a counter offer is not indicated in the subsection,

[27] See *Barber-Green Co.* v. *M. F. Dollard Jr. Inc.* (1935) 196 N.E. 571 (C.A.N.Y.).

[28] S. 31 *Restatement of Contracts* created a presumption that an offer invited the formation of a bilateral contract, i.e. that the offeror looked to a promise rather than acceptance by performance. The tentative draft No. 1 of the *Second Restatement* (1964) follows U.C.C. s. 2-206(1) by stating a presumption that the offeror is indifferent whether acceptance takes the form of words of promise or acts of performance. See R. Braucher, "Offer and Acceptance in the Second Restatement" (1964) 74 *Yale L.J.* 302, 304, 306.

but the shipment must be made with reference to the purchase order and accordingly the extent of non-conformity is limited.

Any discussion of acceptance must include the problem of the beginning of a requested performance in the case of the so-called unilateral contract, that is where there is no return promise of acceptance. The traditional common law view is to regard the offer as not accepted and therefore as capable of withdrawal until the time of tender of the *complete* performance, which was the requested return for the offer. Full performance is both acceptance and consideration. Attempts to mitigate the rigour of this rule have been made by finding an acceptance and sufficient consideration in the part performance of the requested act. Thus, in *Abbott* v. *Lance*[29] there was, in effect, a promise to keep an offer to sell land open for two months if the offeree would go and "inspect the land" some 500 miles distant, the offeror undertaking to pay £100 if he sold elsewhere within that period and the offeree was still willing to buy. After the offeree had gone some distance on his journey to inspect the land, the offeror advised him that the property had been sold elsewhere. In an action to recover the £100 the Supreme Court of New South Wales held that the part-performance of the journey constituted a sufficient consideration (and presumably acceptance) to entitle the offeree to the £100. In the U.S.A. Courts have found a bilateral contract to exist where the circumstances would indicate otherwise, or have said that a unilateral contract took on a bilateral character when performance was begun, or have prayed in aid the doctrine of promissory estoppel to prevent the offeror from revoking his offer, while not binding the offeree to complete.[30] Section 45 of the Restatement of Contracts provided in effect that the offeror could not revoke his offer once the offeree had begun the requested performance, subject to a condition that full performance be given within the time required in the offer.

Now the U.C.C., by s. 2-206, abandons the distinction between bilateral and unilateral contracts as having little relation to the facts of business life,[31] and states instead the presumption that an offer can be accepted in any manner reasonable in the circumstances. But even if the offeror unambiguously indicates that he wants his offer accepted by performance, s. 2-206(2) appears to recognise that the beginning of a requested performance may be a reasonable mode of acceptance. The subsection states that where the beginning of a requested performance is a reasonable mode of acceptance, there must be notice of such acceptance sent to the offeror within a reasonable time, otherwise the offer may be treated as having lapsed before acceptance.[32] The problem in this approach is to find the consideration for the contract. If in the circumstances it is reasonable to accept the offer by beginning the requested performance, is there an implied promise to complete the performance which

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[29] (1860) 2 Legge 1283.

[30] See e.g., *Davis* v. *Jacoby* (1934) 34 P. 2d. 1026; *Los Angeles Traction Co.* v. *Wilshire* (1902) 67 p. 1086; H. W. Ballantine, "Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested" (1921) 5 *Minn. L.R.* 94.

[31] See K. N. Llewellyn, "On Our Case-Law of Contract: Offer and Acceptance" (1939) 48 *Yale L.J.* 1, 32, and 779 *et seq.*

[32] W. D. Hawkland, *Sales and Bulk Sales Under the U.C.C.* (1958) at 7-8 takes the view that s. 2-206(2) is intended to prevent an offeree from taking advantage of the rule that performance begun may bar the offeror's power of revocation while not binding the offeree to complete (as would be the case under s. 45 of *Restatement of Contracts*), thus letting the offeree delay while he decides whether to proceed on the contract or not. Henceforth, if he wishes to bind the offeror he must give notice of acceptance within a reasonable time and he himself is bound at that point.

furnishes the consideration at that point of time so as to create a contract—subject, of course, to the giving of due notice?[33] It is surely too artificial to say that all the offeror requests in return for his promise is the commencement of performance, so that there is a contract but with a condition that performance be completed.

The comment to s. 2-206(2) states that the beginning of performance must unambiguously express the offeree's intention to engage himself. This may not always be easy to determine as, for instance, in the situation where A places an order with B for the supply of 10,000 bottles and B, who has a number of similar orders, begins manufacture to meet these orders. The comment also indicates that failure to give the requisite notice that performance has begun will not affect any common law rule whereby revocation of the offer is barred whether temporarily or otherwise. In other words, it appears that s. 45 Restatement of Contracts may still apply where s. 2-206(2) has no effect through failure to notify the offeror as required.

The U.C.C. deals also with the problem of the conditional acceptance. It is trite law that any acceptance which departs from the terms of the offer in any material respect is not an acceptance of the offer but is in effect a counter-proposal, unless the purported variation sought to be introduced is meaningless and can, therefore, be ignored in accordance with the principle in *Nicolene Ltd.* v. *Simmons*.[34] Thus, if an offer to sell fifty washing machines for $5000 is accepted with the reply: "Offer accepted. Ship Monday, will send cheque on Tuesday", such acceptance is conditional because it specifies payment by cheque instead of cash and departs from the general rule that the place of delivery is the seller's place of business. It is in fact a counter-offer. An extreme example of this occurred in *Poel* v. *Brunswick-Balke-Collender Co.*[35] where, in response to the seller's offer, the buyer sent a printed order form containing the conspicuously printed statement that the acceptance of the order must be promptly acknowledged. It was held that this qualified the acceptance and made it only a counter offer.

The commercial world today makes widespread use of printed forms in the buying and selling of goods, and in the typical situation there is no one document called a contract but an exchange of forms between the parties.[36] The buyer sends the seller his printed purchase order on which are clearly shown a number of protective clauses most beneficial from the buyer's point of view. The seller responds either with a printed acknowledgment-of-order form which similarly contains protective terms most beneficial from the seller's point of view, or he stamps on a copy of the purchase order the words "Accepted subject to our standard terms and conditions of sale" and attaches a copy of these to the purchase order, and forwards both documents to the buyer. The respective clauses are almost inevitably in conflict and the question is which set of terms governs the transaction. At common law there is no contract but simply an offer and a counter-offer, although the parties may think that a contract has been made. If, however, the goods are shipped by the seller and received by the

[33] Protagonists of the promissory estoppel principle would find a "consideration" in the fact that the offeror invites action by the offeree in reliance on the offer, i.e., there is a detriment incurred as soon as performance is begun. See e.g. H. W. Ballantine *op. cit.* at 97.

[34] (1953) 1 Q.B. 543.

[35] (1915) 216 N.Y. 310; 110 N.E. 619.

[36] While this is certainly true in the U.S.A., see e.g., L. L. Fuller & R. Braucher, *Basic Contract Law* (1964) 276-7; C. H. Resnick, "Effect of the Code on Business Contracts" (1963) 18 *Bus. Lawyer* 401; the same situation may not as yet exist in Australia.

buyer before the seller's acknowledgment of order form arrives, the seller by making delivery has accepted the buyer's terms and the late arrival of the acknowledgment has no effect. Conversely, if the buyer receives the counter-offer contained in the acknowledgment and then accepts the goods, he is deemed to have contracted on the seller's terms. But in the absence of something like this, there is no contractual relation, and there is, therefore, a loophole for a party wishing to extricate himself from an unfavourable transaction which in commercial understanding has been closed.[37] In an endeavour to bring the law into line with commercial practice and understanding and to curb "the battle of the forms", s. 2-207 was included in the U.C.C.

The section abrogates the common law requirement of the precise matching of the terms of acceptance with those of the offer. It provides, in effect, that assuming an offer to buy or sell goods:

(i) if the offeree seasonably[38] manifests a definite expression of acceptance it will be effective as an acceptance and not as a counter-offer even though it states different or additional terms from those contained in the offer, *unless* the acceptance expressly states that it is conditional on the offeror's assent to such terms. The same is true of a written confirmation of agreement sent by the offeree which includes other terms than those agreed upon.

(ii) The additional terms are to be regarded as proposals for addition to the contract, unless the offeree makes it clear that he is rejecting the offeror's terms and insisting on his own conditions.

(iii) Between *merchants* the additional terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; or (b) they materially alter it; or (c) notification of objection to the additional terms has already been given or is given within a reasonable time after notice of them is received.[39]

The comment to the section makes it clear that it was intended to deal with two situations: (a) where a contract of sale had been made orally or informally and was followed by a formal confirmation which embodied the terms agreed upon but added further terms; and (b) where an acceptance intended to close the transaction added further minor suggestions or proposals. It is clear that the section was drafted primarily with the "battle of the forms" in mind,[40] but there is no warrant in its language for restricting its application to the use of business forms.

The section is not the easiest to apply and leaves a lot to the discretion of the court. The first question to decide is what is "a definite and seasonable expression of acceptance". This comes down in the last analysis to asking whether the offeree intended to enter into that particular contractual relation

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[37] It is true that in the majority of cases the discrepancy between the forms is either ignored by the parties or settled during the course of performance. But while a seller will supply the goods if he can, even on a rising market, if only to preserve his business reputation, there will be disputes over matters of quality, the right to return the goods, etc. Generally speaking, that party who has the stronger bargaining power (be it a large manufacturer or a super-market chain) will be able to foist his terms on the other side. In practice, this usually means that the supplier's terms prevail. The best solution is for trade associations to work out standard forms which are fair to both parties.

[38] Within the time agreed, or in the absence of agreement within a reasonable time. See s. 1-204(3).

[39] *Cf.* the New York provision enacted in 1960 as s. 84a *Personal Property Law* which is substantially similar. See Note, (1960) 46 *Cornell L.Q.* 308 and discussion in text *infra*.

[40] See the section as re-drafted in (1955) supplement No. 1 to 1952 official text. It was rewritten again in 1957 in its present form.

at all, and on this basis the controlling section is s. 2-204 which is considered above. If there is an intention to make a contract, that is, the parties have in commercial understanding reached agreement, then s. 2-207(1) merely says that the inclusion of additional or other terms does not render the acceptance nugatory. Obviously, if the offer is one to sell 100 washing machines at $100 each, that is not accepted by the offeree saying that he will take 50 of the machines at that price. It must follow from this that the additional terms put forward must be relatively minor proposals as the comment to the section indicates.[41] If there is a major departure from the terms of the offer, then obviously there is no intention to accept the offer as it stands. The degree of variance with the offer, the phrasing of the offeree's response, the course of dealing between the parties, and whether the variance was due to the use of printed standard form clauses or not, are all factors which should be taken into account in deciding whether the offeree intended to be bound.

Section 2-207 was considered by the Federal Court of Appeals in *Roto-Lith Ltd.* v. *Bartlett & Co. Inc.*[42] where the plaintiff, a manufacturer of cellophane bags, had placed an order with the defendant seller for the purchase of a quantity of cellophane adhesive manufactured by the latter. The written purchase order made no mention of warranties but the defendant's acknowledgment of order form contained a printed clause conspicuous in size and placement, stating that all goods were sold without warranties either express or implied and that if the terms were not acceptable, the buyer must notify the seller at once. The goods were shipped to the plaintiff and used by it without question but the adhesive proved defective and the plaintiff claimed damages for breach of warranty. The argument put forward by the plaintiff offeror was that the disclaimer of warranty contained in the seller's acceptance was a material variance, that it nevertheless operated as an acceptance of the offer without the additional term by virtue of s. 2-207(1), and that the disclaimer never became part of the contract since, although the parties were merchants, the added term was a material alteration. Hence the defendant was bound by a contract concluded on the buyer's terms.

While conceding that the disclaimer was a material alteration,[43] the Court of Appeals rejected the remainder of the plaintiff's argument, holding that s. 2-207 did not change the law to this extent. The section had to be given a practical construction to avoid an absurd result, and the Court characterised as absurd the notion that an offeree, proposing additional terms which materially altered the agreement and were unilaterally burdensome to the offeror, should be held to have made a binding acceptance of the original offer.

So to hold would be to have him bound by a contract which the additional terms in his reply being solely to the offeror's disadvantage indicated that he did not intend. The offeree's response was to be construed rather as an acceptance "expressly conditional" on the offeror's assent to the additional terms and was, therefore, a counter-offer. By receiving and using the adhesive with knowledge of the disclaimer the plaintiff had accepted the counter-offer and a contract was thereby created on the defendant's terms.

[41] But if there is already an agreement it would not seem to matter how far a written confirmation departed from the terms of the agreement unless it tended to show that there had been no agreement in the first place.

[42] (1962) 297 F. 2d. 497.

[43] The comment to s. 2-207 gives examples of clauses which should be regarded as material alterations, including exemption clauses excluding warranties of merchantability or fitness for the purpose. The test of materiality appears to be whether any element of unreasonable surprise is involved or not.

This decision has been criticised on the ground that the Court should have considered whether or not there had been an acceptance of the offer, instead of assuming an acceptance and then finding that such acceptance was expressly made conditional on assent to the added terms.[44] Such a finding involves the adoption of the principle that whenever an acceptance includes additional terms which are material alterations solely to the offeror's disadvantage, the acceptance is expressly made conditional on the other party's assent.

It would have been more logical for the Court to have found that in fact there had been no acceptance of the offer at all in view of the material variance in the seller's response, but simply a counter-offer. The end result would, of course, have been the same. In the light of this decision it seems that the operation of s. 2-207 must be restricted to situations where the additional terms are of a minor nature, as the draftsmen of the Code intended. If any additional terms which are to be classified as material alterations are included in an acceptance, then under the *Roto-Lith Ltd.* v. *Bartlett & Co. Inc.* decision the acceptance is a conditional one and the offeree is not bound, while on the alternative view there has been no acceptance at all but simply a counter-offer. The analogy of such an approach to s. 84A New York Personal Property Law promulgated in 1960 is apparent. Under that section the presence of additional or different terms in the acceptance of an offer to sell goods *which do not materially vary* the terms of the offer will not of itself prevent the formation of a contract, unless the acceptance is expressly made conditional on assent to such additional or different terms.

If the foregoing analysis is correct, the operation of s. 2-207 would be a limited one, since it will frequently be the case that the formal acknowledgment of order by the offeree will contain clauses which will be held to be material alterations. In *Application of Doughboy Industries Inc.*[45] the writings used by the parties were described in the judgment as "a legal equivalent to the irresistible force colliding with the immovable object". The buyer sent the seller a purchase order containing a "grand defensive clause" whereby none of the terms contained in the order could be altered except by a signed consent of the buyer and each shipment of goods received was deemed to be only on the terms of the order, notwithstanding any terms contained in any commercial form of the seller. The seller's acknowledgment form contained a clause in conspicuous type that the buyer agreed he had full knowledge of the conditions printed thereon, that the same were part of the agreement and were binding if the goods were accepted by the buyer or if he did not within ten days object in writing to the conditions. These conditions contained an arbitration clause and the buyer made no objection to it as he was required to do. A dispute arose and the seller endeavoured to enforce the arbitration clause. It was held that he could not do so.

The Court relied on the comments to s. 2-207[46] to hold that the conflicting clauses in the documents of each party amounted to an objection by each party to the terms of the other, and hence the clauses did not become part of the contract; and alternatively that the arbitration clause was a material alteration which had not been agreed to and was therefore not binding.

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[44] See "Nonconforming Acceptances Under s. 2-207 of U.C.C." (1963) 30 *Univ. Chicago L.R.* 540, 545-6.

[45] (1962) 233 N.Y.S. 2d. 488.

[46] The Court applied s. 84a New York Personal Property Law and then went on to consider the effect of s. 2-207 although the U.C.C. was not yet in force in New York.

However, the goods had been dispatched to the buyer and the Court applied s. 2-207(3) to establish that a contract had been made based on the terms on which the parties were agreed plus any applicable supplementary terms. It will be recalled that this subsection provides that "conduct by both parties which recognises the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act". This would bring in such terms as warranties of quality and terms implied by course of dealing and usage of trade.[47]

Thus, it would appear that s. 2-207(1) and (2) must be restricted to those cases where there is agreement by the parties on all major points and they think that a contract exists, but in fact there are minor discrepancies between offer and acceptance. The section is a useful device to curb overzealous use of the common law rule that acceptance must match the offer in terms exactly, but it is clear that the courts will not permit it to be used to foist on the offeree a contract based on the offeror's terms, where the former neglects to state clearly that his acceptance is conditional on assent to the additional terms put forward by him and those terms depart materially from the terms of the offer.

The Doctrine of Consideration

The abandonment of the doctrine of consideration in relation to the "firm" offer has already been discussed. The doctrine is likewise abandoned so far as the modification or discharge of a contract is concerned.[48] Section 1-107 (which applies to all contracts caught by the U.C.C. and not just a contract for the sale of goods) allows any claim arising out of an alleged breach to be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the injured party. In other words, the formality of writing, signature, and delivery replaces that of consideration. This section extends the principle contained in s. 122. Uniform Negotiable Instruments Law, allowing the gratuitous renunciation by a holder of an instrument of his rights against a party,[49] to the situation where there has been an alleged breach of an obligation under any provision of the Code.

Writing is not, however, essential when it comes to a modification of a contract for the sale of goods. Under s. 2-209 an agreement modifying a contract needs no consideration to be binding, that is an oral modification will be effective.[50] However, writing will be required if the contract as *modified*

[47] "Contract" is defined in s. 1-201(11) as the total legal obligation resulting from the parties' agreement, and "agreement" means (by virtue of s. 1-201(3)) the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing, usage of trade, or course of performance. These latter terms are defined in s. 1-205 and s. 2-208.

[48] The Code also provides that no consideration is required to establish a letter of credit or to enlarge or otherwise modify its terms. See s. 5-105. See, too, s. 3-408 (no consideration required for an instrument given in respect of an antecedent obligation).

[49] See now U.C.C. s. 3-605 (1) (b). *Cf.* the Uniform Written Obligations Law already referred to upholding the validity of a written signed release or promise if the writing contained an additional express statement in any form or language that the signer intended to be legally bound.

[50] *Cf.* s. 5-1103 New York General Obligations Law 1963 rendering valid without consideration a written signed modification or discharge of a contract. This consolidated the law previously contained in s. 33(2) N.Y. Personal Property Law and s. 279(1) N.Y. Real Property Law.

is within the Statute of Frauds or if it is a term of a written agreement that modification or rescission thereof can only be effected by a signed writing. In the latter case, unless the parties are both merchants, such a requirement on a form supplied by the merchant must be separately signed by the other party to be enforceable against him. It is possible, however, that the requirement of writing might be circumvented if the conduct of the parties was such as to amount to a waiver of the clause,[51] for s. 2-209(4) expressly provides that an attempt at modification or rescission which does not satisfy the necessary requirements may yet operate as a waiver.[52] Section 2-209(5) allows a waiver to be retracted on giving reasonable notice, unless such retraction would be unjust in view of a material change of position in reliance on the waiver, and this seems to be substantially in accord with the common law position.[53]

The Code, by permitting the modification of a contract without consideration, has sought to keep abreast of current business practices and the expectations of business-men without regard to the "technicalities" of the doctrine of consideration. But in so doing, it may have opened the door to pressure tactics and to economic duress whereby a modification of the contract is extorted by one party from the other, such as was attempted in *Sundell & Sons Pty. Ltd.* v. *Yannoulatos*.[54] The comment to the section indicates that the extortion of a modification without legitimate commercial reason would be ineffective as a violation of the duty of good faith imposed by the U.C.C. This duty in the case of a merchant includes the "observance of reasonable commercial standards of fair dealing in the trade" which would probably embrace the type of coercion referred to, but it may be doubted if the same is true of the general definition of good faith as "honesty in fact" contained in s. 1-201 (19) which applies outside the area of operation of the merchant.[55]

Section 2-209 was considered in *Asco Mining Co. Inc.* v. *Gross Contracting Co. Inc.*,[56] where machinery taken under a bailment lease (that is hire-purchase agreement) was repossessed on default being made in payment of rent. The hirer alleged an oral modification of the written contract whereby an extension of time for payment of rent had been granted. The Pennsylvania Court of Common Pleas held that the transaction was not intended to operate only as a security transaction, that Article 2 of the U.C.C. accordingly regulated the sales aspects of the arrangement and s. 2-209 applied. No consideration was, therefore, required for the modification, but the contract as modified

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[51] A course of performance may be used to show a waiver or modification of a contract as well as to interpret its terms. See s. 2-208(3).

[52] In *Inwood Knitting Mills Inc.* v. *Budge Mfg. Co. Inc.* (15th October, 1962. Pa. C.P.) 1 U.C.C. Rep. 84 (*Uniform Commercial Code Reporting Service*, Ed. Fisher & Willis Callaghan & Co., Mundelein, Ill.) the contract excluded modification of the contract except by a signed writing and the Court thought that a subsequent oral agreement of modification should be excluded, but refused so to rule on a preliminary objection in view of doubts as to the construction and effect of s. 2-209(4). *Cf. C.I.T. Corpn.* v. *Jonnet* (18th October 1965 Pa. C.P.) 3 U.C.C. Rep. 323 where the contract excluded any waiver or change in the contract not in writing and signed, and it was held that there could be no oral waiver under s. 2-209(4) in the absence of consideration. On appeal, (1965) 214 A. 2d. 620, the U.C.C. was not mentioned, the Supreme Court holding that no waiver of the written exclusion clause had been proved.

[53] See e.g., *Charles Rickards Ltd.* v. *Oppenhaim* (1950) 1 K.B. 616.

[54] (1956) S.R. (N.S.W.) 323.

[55] The doctrine of consideration affords no real protection in this sort of situation either, as an astute extortioner can satisfy the doctrine by ensuring that he furnishes something more than he is already bound to do, however small, in return for the concession wrung from the other party. The answer to the problem may lie in the development of the concept of duress as a vitiating factor. See *infra*.

[56] (28th December 1965 Pa. C.P.) 3 U.C.C. Rep. 293. See, too, *Skinner* v. *Tober Foreign Motors Inc.* (1963) 187 N.E. 2d. 669. (Mass. Sup. Jud. Ct.)

did not comply with the Statute of Frauds. That did not, however, prevent the modification from operating as a waiver under s. 2-209(4).

Finally, it should be noted that the abolition of consideration for the modification of a contract has apparently been carried over into the field of warranty. In the view of the draftsmen of the Code, if a warranty is expressly given by the seller after the sale has been made, it will be enforceable without consideration as a modification of the contract. The comment to s. 2-313 expressly cites s. 2-209 in support of the statement that "if language is used after the closing of the deal . . . the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order . . . ."

The Statute of Frauds

The U.C.C. has a special Statute of Frauds provision for contracts for the sale of goods for the price of $500 or more, the general provision in s. 1-206 having no application to Article 2.[57] Section 2-201 considerably modifies the previous law as to formalities,[58] the main alteration being that the essential terms of the contract no longer have all to be set out in writing. It is sufficient if there is a signed memorandum which indicates that a contract has been made, but the contract is not enforceable beyond the quantity of goods shown in the writing. In effect then, the one essential term which must be included in the memorandum is a statement of the quantity of goods involved,[59] although the writing itself must evidence the existence of a contract for the sale of goods[60] and it must be "signed" that is authenticated by the party to be charged. As thus formulated, the section makes it less possible for a dishonest contracting party to admit the existence of the contract and at the same time plead the statute as a defence. Indeed, s. 2-201(3)(b) expressly provides that if that party admits, in his pleading or in court, that a contract was made, it is enforceable to the extent of the quantity of goods admitted.[61]

An important exception to the general rule, which takes into account the established business practice of sending written confirmations of oral agreements, is the provision in s. 2-201(2) whereby, as between merchants, a written confirmation effective as against the sender will be deemed effective as against the receiver unless he gives written notice of objection within ten days of its receipt. This eliminates the previous advantage enjoyed by the party who put nothing in writing. It is to be noted that the only effect of this clause is to take away the defence of the statute; the party alleging the contract still has to prove that there was a prior oral agreement which was confirmed by the writing. Because of the very general definition of "merchant" contained in s. 2-104, this provision may have a wider application than might at first glance be anticipated, and may embrace a person who is not a merchant

[57] The general Statute of Frauds provision in Article I does not apply to the sale of securities or to security agreements either. See ss. 8-319 and 9-203 which have their own special requirements as to writing.

[58] The provisions of the section have been called "iconoclastic". See *Cohen Salvage Corpn.* v. *Eastern Electric Sales Co.* (1965) 206 A. 2d. 331. (Pa. Super.).

[59] Thus, omission of the price from the memorandum is immaterial. See *Cohen Salvage Corporation* v. *Eastern Electric Sales Co.* (1965) 206 A. 2d. 331 (Pa. Super.).

[60] In *Arcuri* v. *Weiss* (1962) 184 A. 2d. 24 (Pa. Super.) a cheque described as being a "tentative deposit on a tentative purchase" was held not to indicate that a contract of sale had been made.

[61] But a demurrer is not the sort of pleading contemplated, otherwise the Statute of Frauds could never be raised as a defence by way of preliminary objection. See *Beter* v. *Helman* (1958) 41 *West. L.J.* 7 (Pa. C.P.).

in the strict sense, but who is familiar with the business practice of sending written confirmations. There is one restriction to be noted: the receiver must have reason to know of the contents of the writing before the subsection will be applicable and in this connection the provisions of s. 1-201(27) defining "notice" by an "organisation" are relevant.

The Uniform Sales Act had a clause disallowing the Statute of Frauds as a defence in the case where goods were to be specially manufactured for the buyer and were not suitable for sale to others in the ordinary course. This provision is continued in the U.C.C. but is restricted to the situation where the seller has made either a substantial beginning of manufacture or has entered into commitments for procurement of the goods before the buyer repudiates. This restriction seems consonant with common-sense as there is no justification for special treatment of the seller where there has been no substantial change of position by him.

Not so laudable, however, is the restriction of the former provision allowing the contract to be enforced where there was acceptance and receipt of part of the goods or part payment therefor. Under the U.C.C., payment or acceptance and receipt are effective to validate the contract only to the extent of the goods that have been actually paid for or accepted and received.[62] It is difficult to see the reason for so restricting the former rule, especially in view of the strong case that can be made out for the entire omission of the Statute of Frauds from the area of sale of goods.[63] The results of the restriction have not been entirely happy: it has been held, for instance, that payment of less than the full amount of the purchase price in the case of a single object renders that contract unenforceable, since there can be no apportionment in the case of a single chattel.[64]

In discussing the Statute of Frauds provision, brief reference should be made to the parol evidence rule contained in s. 2-202 which clarifies the common law position to some extent. It destroys any presumption that a writing complete on its face is an "integration" embodying the entire agreement between the parties. The court must find that the parties intended the writing to be a complete and exclusive statement of the terms of the agreement before evidence of consistent additional terms will be rejected. Where no such intention exists but the written record is intended as a final expression of agreement on such terms as are included therein, these terms may be explained or supplemented by course of dealing or performance or usage of trade, even where no ambiguity exists, and evidence of consistent additional terms can also be given. It would seem that in those jurisdictions where the U.C.C. operates sellers will endeavour to protect themselves by suitably framed "merger" clauses whereby the contract is declared to contain the entire agreement between the parties and it is stated that there are no oral understandings, representations, or agreements relative to the contract which are not fully expressed therein.[65]

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[62] "Acceptance" is not defined specially for the purposes of s. 2-201(3)(c) as it is in s. 9(3) S.G.A. and the reference in the subsection to the definition of acceptance in s. 2-606 (which corresponds to s. 38 S.G.A.) indicates that it is this definition which is applicable. The effect will be further to narrow the application of s. 2-201(3)(c).

[63] Catastrophe has not befallen the commercial world in either England or New Zealand where the Statute of Frauds provision has been repealed from the Sale of Goods Act.

[64] *Williamson* v. *Martz* (1956) 11 Pa. D. & C. 2d. 33.

[65] See "Contract Draftsmanship under Article 2 of U.C.C." (1964) 112 *Univ. Pa. L.R.* 564, 565-6.

Unconscionable Contracts

Another section of the U.C.C. which involves a considerable departure from previous law is the provision in s. 2-302 allowing a court to refuse the enforcement of a sales contract where it finds *as a matter of law* that the contract or any clause therein was unconscionable at the time it was made. The court has a discretion in that it may refuse to enforce the contract or may strike out the offending clause and enforce the contract as amended, or it may limit the application of the clause so as to avoid any unconscionable result. Where it appears that the contract or clause thereof may be unconscionable, the parties must be given a reasonable opportunity to show its commercial setting, purpose and effect, and so aid the court in deciding the point.

This section has been described as "undoubtedly the most controversial provision in the entire Code".[66] Criticism of it has rested mainly on the grounds that it violates the principle of freedom of contract and strikes at the security of transactions by allowing the court to "remake" a contract. On the other hand, its protagonists have asserted that it does neither, that it applies only where the element of free choice is absent, and that it will contribute to freedom of contract in that the "private autonomy" of contracting parties will be kept within bounds.[67] So far as the charge of commercial instability is concerned, there is no evidence to support this[68] and little litigation has to date arisen over the application of the section.

It has been argued that s. 2-302 does not introduce a novel concept into the law but merely brings an established practice out in the open.[69] The suggestion is that the common law has in the past avoided the enforcement of unconscionable contracts by the manipulation of the rules of offer and acceptance, fraud, duress, mistake, public policy, and the like, and by the strained construction of the terms of the agreement. The distinction drawn by the common law between liquidated damages and penalty clauses and the setting aside of a contract as unconscionable under the Money-Lenders Act have a common basis. A further basis for s. 2-302 may be found in the doctrine of economic duress with its overtones of inequality of bargaining power which has been developed over recent years in the U.S.A.[70] Equity, of course, has always used unconscionability as a ground for refusing to grant equitable relief.

The point that s. 2-302 did not break new ground but enabled the court to do directly what hitherto had been done indirectly is made in the comment to the section. The original comment to the 1949 draft of the Code referred to standard form contract clauses, and it was stated that the section was intended to apply equity's policy of policing contracts for unconscionability or unreasonableness to the unbargained agreement where the unconscionable

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[66] W. D. Hawkland, *Transactional Guide to the U.C.C.* (1964) 44.

[67] See "Unconscionable Contracts Under U.C.C." (1961) 109 *Univ. Pa. L.R.* 401, 421, citing F. Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract" (1943) 43 *Col. L.R.* 629, 640.

[68] It was, however, the fear of commercial instability that prompted California to refuse to enact the section. See (1962) 37 *S. Bar. J.* 119, 136. North Carolina has also omitted the section in its entirety. However, in *Steven* v. *Fidelity & Cas. Co. of N.Y.* (1962) 377 P. 2d. 284, 295-8 the Californian Supreme Court pointed out that exclusion or limitation clauses would not be enforced where there was unequal bargaining power and the contract was unconscionable.

[69] See W. D. Hawkland, "Amending the U.C.C." (1955) 28 *Temple L.Q.* 512.

[70] See J P. Dawson, "Economic Duress—An Essay in Perspective" (1947) 45 *Mich. L.R.* 253.

clause had never been discussed as one party's attention had never been specifically drawn to it; and also to oppressive bargains.[71] The reference to equity was later dropped, but the continued reference to standard form contract cases in the comment and the language employed therein indicate that the substance of the original conception has been retained.

While "unconscionable" is not defined, the comment to s. 2-302 states that the basic test is "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract". The comment goes on to state that the principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power. Thus, two concepts are included in the notion of what is unconscionable. First, there is unfair surprise where there is in fact no assent to the terms of the contract, as in the standard form contracts with their exemption clauses in fine print. Such terms are not likely to be read or, if read, to be understood. Under this section any advantage won by sharp practice will be rejected by the court. Thus, in *Williams* v. *Walker-Thomas Furniture Co.*[72] an instalment contract of sale made between a trader and a woman of limited education contained an "add-on" clause whereby payments were to be prorated to all outstanding balances. This had the effect of keeping a balance due on every item until all accounts were paid in full, and the majority of the U.S. Courts of Appeals were prepared to reject the clause as unconscionable. So, too, in *Frostifresh Corporation* v. *Reynoso*,[73] an instalment contract of sale in English completed by Spanish-speaking buyers without its being translated or explained to them, was held to drive too hard a bargain where the amount payable was nearly three times its cost to the seller. It was set aside as unconscionable and the seller held entitled only to the cost price of the goods.

Secondly, there is the one-sided and oppressive contract where oppression will exist even though the buyer's attention is called to the objectional terms. In effect, the buyer has no choice. He must accept the contract as it stands or go without. This is particularly the case where standard terms are offered on an industry-wide basis. The element of free choice by the purchaser is precluded, regardless of his awareness of their existence or their meaning. In *Henningsen* v. *Bloomfield Motors Inc.*[74] the contract of sale of a motor-car contained the standard manufacturer's warranty used almost universally in the automobile industry, whereby liability was limited to the replacement of defective parts. The New Jersey Supreme Court, in an exhaustive survey of the topic, referred to s. 2-302 (although the U.C.C. was not then in force) in rejecting on the grounds of public policy a defence based on this clause. The decision seemed to rest not only on the gross inequality of the bargaining position between the parties but also on the unfair surprise to the buyer in not having his attention drawn to the clause or being told what it meant.

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[71] See "Unconscionable Contracts Under the U.C.C." (1961) 109 *Univ. Pa. L.R.* 401, 402-3; "Unconscionable Sales Contracts and the U.C.C." (1959) 45 *Va. L.R.* 583.

[72] (1965) 350 F. 2d. 445. The U.C.C. was not in force at the relevant time but s. 2-302 was regarded as persuasive authority and was applied.

[73] (1966) 274 N.Y.S. 2d. 757. In *In re State of New York (ITM Inc.)* (1966) 3 U.C.C. Rep. 774 the Supreme Court of New York held unconscionable retail instalment contract for the sale of household appliances at excessively high prices. The whole transaction was, however, tainted with fraud and dishonesty.

[74] (1960) 161 A. 2d. 69.

Oppression, then, will exist where there is actual assent to the terms of the contract, but the agreement itself, the circumstances, and the positions of the parties indicate a gross over-reaching by one party in a very much superior bargaining position. This inequality of bargaining power must be accompanied by other factors to sustain a finding of unconscionability, as otherwise it runs counter to the avowed principle that s. 2-302 is not designed to upset the terms of a contract dictated by superior bargaining strength alone. But superior bargaining power may lead to an oppressive contract and hence bring in the section. The court is directed to look at the commercial setting of the transaction before deciding the issue. Thus, in *In re Dorset Steel Equipment Co.*[75] the U.S. District Court, while expressly refusing to decide whether s. 2-302 should be extended to agreements other than sales contracts, held that the issue of unconscionability was relevant in bankruptcy proceedings concerning a loan transaction, and that all the circumstances of the case, and not only the harsh terms of the contract, must be looked at to decide whether there was an imposition on the debtor in acute financial distress, or merely justified precautions on the part of the creditor. To prove unconscionability there must be a showing, not only that the terms of the contract were onerous, but also that the terms bore no reasonable relation to the business risk. This depended on the comercial environment and not on the contract alone.

Mere inadequacy of consideration is not by itself a test of unconscionability, although the *obiter* remarks of the New Hampshire Supreme Court in *American Home Improvement Inc.* v. *MacIver*[76] would seem to extend the test of unconscionability to almost that length. As well as unfair exchange there must be improper dealing in the nature of unfair surprise or oppression. Unconscionability contemplates something more than mere unfairness.

Provisions related to s. 2-302 are to be found in other parts of Article 2[77] such as s. 2-309(3) declaring an agreement to terminate a contract without notice as invalid if its operation would be unconscionable,[78] and Ss. 2-718 and 2-719 whereby the limitation of damages by agreement may be set aside as unconscionable. There may be an overlap in the area of operation of s. 2-302 and s. 2-316 dealing with the exclusion or modification of warranties in that a seller may comply with the latter section so as to exclude or modify an implied warranty and yet may have the agreement declared unconscionable under the former section. The two sections are concurrent in their operation and it does not necessarily follow that, because a seller complies with s. 2-316, s. 2-302 is inapplicable. In *Williams* v. *American Motor Sales Co.*[79] a disclaimer clause was held to be ineffective as the requirements of s. 2-316 had not been met, but the Court in a dictum stated that even if those requirements had been satisfied the clause might still have been struck down as being

[75] (1966) 253 F. Suppl. 864.

[76] (1964) 201 A. 2d. 886. The actual decision was based on failure to observe the requirements of a local financing statute.

[77] S. 2-302 has its counterpart in the Civil Law where the "unbargained-for" contract has to meet broad flexible provisions aimed at transactions against good morals or in bad faith. See "Unconscionable Contracts Under the U.C.C." (1961) 109 *Univ. Pa. L.R.* 401, 415-18.

[78] In *Sinkoff Beverage Co. Inc.* v. *Schlitz Brewing Co.* (1966) 273 N.Y.S. 364 the New York Supreme Court construed s. 2-309(3) as relating back to s. 2-302 with the consequence that the unconscionability in respect of an agreement dispensing with notice must exist at the time when the contract was made. *Sed. quaere.*

[79] (1961) 44 *Erie Co. L.J.* 51 (Pa.)

unconscionable. It would seem, however, that few disclaimer clauses will be held unconscionable, at least on the ground of unfair surprise, since s. 2-316 calls for the use of conspicuous language to draw the buyer's attention to them. But this may not be enough. Decisions like *Henningsen* v. *Bloomfield Motors Inc.* and *Williams* v. *Walker-Thomas Furniture Co.* may be interpreted as imposing on the seller a duty to advise the buyer clearly of the risks he is being asked to assume; otherwise there may be unfair surprise.[80]

It seems that in future s. 2-302 will be a potent weapon in the hands of the court when it comes to deal with standard form contracts and disclaimer or exemption clauses. Devices such as the doctrine of fundamental breach will not be needed to curb the effect of such clauses. The section recognises that a contract is not merely a signature affixed to a long printed form but is a mutual understanding reached through a process of bargaining, and it is to be welcomed as giving the court flexibility in an area where it was badly needed. Safeguards built in to the section are that the time for testing for unconscionability is the time when the contract was made, that is, subsequent events are irrelevant in this regard, that the parties must be given a chance to adduce evidence on the issue of unconscionability in the light of the commercial setting, purpose and effect of the contract, and that the court is not bound to treat the contract or offending clause as invalid but may "so limit the application of any unconscionable clause as to avoid any unconscionable result".

It remains to be seen whether this approach by the U.C.C. will be extended beyond the confines of Article 2 into the non-sales areas of contract law. A possible indication of the future judicial attitude is given by the recent decision of the New York Supreme Court in *Fairfield Lease Corporation* v. *Colonial Aluminium Sales Inc.*[81] where it was prepared to extend s. 2-302 to the lease for rental of a coffee-vending machine.

Indefiniteness in the Contract of Sale

This topic has already been touched upon and it will be recalled that the omission of, or failure to agree upon, important terms may indicate that the parties did not intend to contract. But if there is an intention to contract (and s. 2-204(1) and (2) provide guide-lines in determining this) then the fact that important terms are left open does not mean that the contract will fail for indefiniteness so long as there is a reasonably certain basis for giving an appropriate remedy.[82] Resort may be had to course of dealing or course of performance or the usage of the trade to resolve the problem, but if this fails the Code makes provision for filling in the gaps by applying certain objective reasonable standards. In a sense it is making a contract for the parties but the hypothesis is that it is better to do this than to cause an agreement intended to be binding to fail.

There are, of course, some gaps which the Code cannot fill. If there is no agreement on the quantity of goods to be bought, for instance, the court

[80] In *In re State of New York* (ITM Inc.) (1966) 3 U.C.C. Rep. 774, 793 it was suggested by the Supreme Court of New York that the law had progressed to the stage where the consumer was entitled to be told what he was entering into in language which he could understand. The Court was investigating a series of transactions of which it said it was "difficult to conceive of a more deliberately fraudulent and maliciously dishonest pattern of doing business with the public".

[81] (1966) 3 U.C.C. Rep. 858.

[82] S. 2-204 (3).

cannot supply a figure unless the previous course of conduct of the parties affords a basis for so doing. As far as "output" and "requirements" contracts are concerned, where the quantity is measured by the output of the seller or the requirements of the buyer, there is a yardstick for ascertaining the amount of goods involved. Section 2-306(1) provides that in a contract where the quantity is measured in this way, it means such actual output or requirements as may occur in good faith, and this seems to be in accord with the previous law on the matter.[83] As the parties will usually be merchants, the yardstick of reasonable commercial standards of fair dealing in the trade will be included in the concept of good faith.[84] Any delay by a buyer in seeking his requirements or in establishing a business and thus to have requirements will be examined in the light of this good faith test. The same test will be applied should the buyer decide to go out of business during the contract period.[85]

But superimposed on this good faith test is the limitation in s. 2-306(1) that any variation in requirements must not be unreasonably disproportionate to any stated estimate, or in the absence of this, to any normal or otherwise comparable prior output or requirements. While this is obviously desirable from a seller's point of view in that he cannot be called upon to supply the buyer's actual requirements greatly in excess of the estimated amount, it may work hardship on the buyer who suddenly finds his requirements are but a fraction of what they have been previously. Commentators have, however, taken the view that the section is not intended to limit decreases in requirements made in good faith, especially since the comment to the section recognises that total discontinuance by the buyer might be possible.[86]

If the agreement between the parties leaves the question of price open, the Code will fill the gap. However, the basic requirement is that the parties must intend to be bound although no price is fixed. Should the parties intend not to be bound unless the price is agreed and it is not so fixed, there is no contract. The question that has to be determined is whether the parties intend to consummate a transaction regardless of a final fixing of the price, or whether they intend not to be bound until the price is fixed, and their intent in this respect will depend upon all the circumstances of the case other than the mere fact that the matter of price has been left open. Where there is no contract, the buyer must return any goods already received or, if unable to do so, pay their reasonable value at the time of delivery, while the seller must return any part payment of the price.[87]

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[83] See *H.M.L. Corpn.* v. *General Foods Corpn.* (1966) 365 F. 2d. 77; "Requirements Contracts" (1965) 78 *Harv. L.R.* 1212, 1217.

[84] S. 2-103(1)(b).

[85] In *H.M.L. Corpn.* v. *General Foods Corpn. (supra)* the agreement was for defendant to purchase at least 85% of his requirements of salad dressing from the plaintiff for a certain period. After conducting market tests the defendant decided not to market any of this product, and it was held that the defendant was under no duty to promote or to continue to distribute the product. He must exercise good faith, and the seller assumed all the risk of good faith variations in the buyer's requirements even to the extent of the decision to discontinue business. The U.C.C. was not in force at the date of the agreement, but the Court held that the Code was not intended to establish any new doctrine in this regard. But had the agreement amounted to a contract for the exclusive dealing in the kind of goods concerned, then under the Code unless otherwise agreed, both seller and buyer would have been under an obligation to use their best efforts to supply and promote the sale of the goods respectively. See s. 2-306(2). See, too, *Neofotistos* v. *Harvard Brewing Co.* (1961) 171 N.E. 2d. 865 (a pre-Code case).

[86] See: "Requirements Contracts under the U.C.C." (1954) 102 *Univ. Pa. L.R.* 654, 663-6; "Requirements Contracts" (1965) 78 *Harv. L.R.* 1212, 1220.

[87] S. 2-305(4). The buyer is *required* to make specific restitution if able to do so. Price is defined in terms of money, goods, realty, or otherwise. See s. 2-304. In *Mortimer*

Section 2-305(1) says that a reasonable price at the time for delivery is payable if: (a) nothing is said as to price; or (b) the price is left to be agreed by the parties and they fail to agree; or (c) the price is to be fixed in terms of some agreed market or other standard as set by a third person and it is not so set.

So far as (a) is concerned, this is in accord with s. 13(2) S.G.A.; there is an agreement with the price term not mentioned. The situation in (b) pre-supposes an intention to contract but the price is to be fixed by agreement. If decisions like *May & Butcher* v. *R.*[88] can be regarded as cases where there was no intention to be bound in the first place unless and until the price was fixed, there seems to be no conflict between the "agreement to agree" cases and s. 2-305(1)(b). The latter pre-supposes an intention to conclude a contract for sale with the price term not settled but to be agreed by the parties in the future, [89] and on failure to agree a reasonable price is substituted. Section 13(2) S.G.A. seems to lay down a similar rule. If the price in the contract is not fixed the buyer must pay a reasonable price.[90] The situation in (c) seems to go further than s. 14 S.G.A. in that, if a third party who is to set the price does not do so, a reasonable price is substituted, while under the S.G.A. the agreement is avoided. If the failure to fix the price (otherwise than by agreement of the parties) is due to the fault of one party, the other has the option of cancelling the contract or fixing a reasonable price himself.[91] Under s. 14(2) S.G.A. the injured party is limited to an action for damages against the guilty party. Finally, under s. 2-305(2) the price may be left by the agreement for one of the parties to fix, and in this event he must act in good faith in so doing.

There are other provisions for filling in the gaps left by the parties in coming to an agreement. In s. 2-308 the U.C.C. follows s. 32(1) S.G.A. in providing for the situation where there is no specific agreement as to the place of delivery, while s. 2-309 adopts the standard of a reasonable time where the parties are not agreed on the time for shipment or delivery, or the duration of a contract calling for successive performances, or the extent of notice required to terminate a contract. What is a reasonable time depends on the nature, purpose and circumstances of the action concerned.[92] Section 2-310 has detailed provisions for the time and place of payment in the absence of agreement. Of course, an implied agreement as to any of these provisions may be found from the circumstances of the case, the usage of trade, or the course of dealing or performance,[93] and in such a situation the term will be

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B. Burnside & Co. Inc. v. *Havener Securities Corpn.* (1966) 269 N.Y.S. 2d. 724 the majority of the Appellate Division of the Supreme Court of New York held that the words "or otherwise" meant that "price" could include any consideration sufficient to support a contract. In the instant case, the promise to purchase stock from a third party was held to constitute a price.

[88] (1934) 2 K.B. 17 N.

[89] In Williston's view, where so vital a term as the price is left to be agreed upon by the parties later, it is wrong to hold that a contract has been formed. See "Law of Sales in Proposed U.C.C." (1950) 63 *Harv. L.R.* 561, 578. But the Code recognises that in the vast majority of cases where the parties willingly agree to an arrangement for sale without setting a definite price, the price is not the predominant inducement to the bargain. There is an intention to be bound in spite of the omission.

[90] Insofar as this analysis is open to question it is clear that the U.C.C. has gone further than the S.G.A. in rendering enforceable transactions which would previously have been invalid as mere "agreements to agree".

[91] S. 2-305(3). [92] S. 1-204(2).

[93] S. 1-205 deals with course of dealing and usage of trade as aids in the interpretation of an agreement, and s. 2-208 provides that course of performance is likewise relevant in this regard and indeed prevails over the other two in the case of inconsistency.

an "agreed" one and the court will not need to have recourse to the above sections to fill in the gaps.

There remains to be considered s. 2-311 which permits the parties to leave details of performance to be filled in by either of the parties provided the agreement is sufficiently definite to be held a contract under s. 2-204(3). The fact that the agreement leaves particulars of performance to be specified by one of the parties does not make it invalid. Any specification must be made in good faith and within limits set by commercial reasonableness, that is, honestly in accordance with commercial standards and also in accordance with the permissible limits set by the contract.

This provision is a recognition that commercial transactions often require a degree of flexibility, and a typical transaction within the section would be an agreement to purchase a total quantity of merchandise with the buyer having power to specify certain stated sizes, styles, or qualities which would vary from a basic price according to a certain formula. In *Wilhelm Lubrication Co.* v. *Brattrud*,[94] for instance, there was a written agreement whereby the defendant promised to purchase definite quantities of oil. The buyer had the opportunity to select which weight of oil he wanted after the agreement was made, each weight having a different price. The defendant later repudiated the transaction and the seller's action for damages failed on the ground that it was impossible to measure damages accurately as the buyer had not exercised his option as to the weight of oil, and the seller's loss depended upon his selection. The actual decision has been criticised, as the seller could surely have been allowed the profit he would have made on the least profitable product, and the majority of cases take a contrary view to the decision, reasoning either that the buyer has bound himself to a certain minimum performance, or that he is under a duty to specify.[95]

The U.C.C. in s. 2-311 attempts to provide a solution to the problems raised by such contracts. Apart from upholding the validity of these transactions, the Code stipulates that, in the absence of agreement, specifications relating to assortment of the goods are at the buyer's option and arrangements relating to shipment are at the seller's option. It then goes on to provide for the situation where a party has failed or refused to exercise an option given to him under the contract. Under s. 2-311(3) where a necessary selection is not seasonably made or where one party's co-operation is necessary to the agreed performance of the other but is not seasonably forthcoming, the innocent party in addition to all other remedies:[96]

(a) is excused for delay in his own performance; and
(b) may either proceed to perform in any reasonable manner; or
(c) after the time for a material part of his own performance, treat the failure to specify or to co-operate as a breach by failure to deliver of accept the goods.

It would seem from this that in such a situation as arose in *Wilhelm Lubrication Co.* v. *Brattrud* the seller, faced with the buyer's intransigence,

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[94] (1936) 268 N.W. 634 (Minn. S. Ct.) discussed in (1937) 37 *Col. L.R.* 309.

[95] See "Specification and Apportionment Contracts: Common Law and U.C.C." (1956) 23 *Univ. Chicago L.R.* 499; Annotations (1936) 105 A.L.R. 1100 and (1937) 106 A.L.R. 1284.

[96] The reservation to the innocent party of all his other remedies will make available to him the right to demand adequate assurance of performance as provided for in s. 2-609. Failure to furnish such assurance within a reasonable time amounts to a repudiation of the contract.

could make a selection for him in a reasonable manner and then dispatch the goods. Refusal of the goods by the buyer would then amount to an actionable breach. Alternatively, the seller could wait until the time for a material part of his own performance had arrived and then sue for breach of contract. The measure of damages would probably be based on that selection of goods upon which the seller's profit would be the smallest.[97] From the seller's point of view, it is obviously in his interests to proceed to perform by selecting those goods upon which his profit will be the greatest, but as a counter to this there is the requirement that he must perform in a reasonable manner and he is also subject to the general obligation of good faith in performance imposed by s. 1-203 on every contract or duty within the Code. Good faith in the case of a merchant will include the observance of reasonable commercial standards.

III

The above account does not exhaust the changes made in the law of contract by Article 2 of the U.C.C. so far as contracts for the sale of goods are concerned. There are, for instance, the relaxation of the doctrine of privity of contract contained in s. 2-318 and the extension of remedies available to the aggrieved party on breach, but these are more properly considered in relation to the specific provisions of the S.G.A. and the Uniform Sales Act which Article 2 supersedes. To the lawyer trained in the Anglo-Australian common law tradition there are some radical changes to the pre-existing law relating to formation of contracts to be found in the Code, but his American counterpart may not consider these changes so drastic in the light of modifications to the law of contracts made in recent years by legislation and judicial decisions in some of the leading commercial States of the Union. On the other hand, some commentators have not hesitated to label the innovations contained in the U.C.C. as revolutionary.[98]

Other commentators have suggested that the changes in the law of contract to be found in the Code are not piecemeal alterations in areas where reform was most needed to keep pace with current business practice, but represent in fact a major jurisprudential shift in the structure of contract theory. The orthodox offer-acceptance-consideration approach, with its emphasis on obligation based on promise, is replaced by the concept of agreement with obligation based on transaction as its key-note. The moment of the making of the contract and of the precise matching of offer and acceptance are no longer essential. The very manner in which a contract has been made becomes less important. The dichotomy between bilateral and unilaterial contracts is swept aside as meaningless when tested by the facts of everyday life, and the basic belief is seen to be that contract should be grounded on agreement in fact and not on any so-called distinction between promises and acts of acceptance. The parties in the light of the overall circumstances, and because of a certain relationship to each other, which evinces an agreement of a very general nature, are considered to have established a contractual relationship. Given this relationship, the court will, if necessary, supply terms to give meaning to and make workable the general agreement arrived at

[97] See Note (*supra*) (1956) 23 *Univ. Chicago L.R.* 499, 506.
[98] See e.g. G. Williston, "The Law of Sales in the Proposed U.C.C." (1950) 63 *Harv. L.R.* 561.

by the parties. The new approach is to fill in the important details of the more general relationship in order to achieve its fulfilment, as opposed to the former view that there must exist certain essential elements before there can be an entity known as a contract. Basic to the whole conceptualism of the Code are the ideas propounded by Llewellyn as early as 1938 and incorporated by him in Articles 1 and 2, namely that the legal obligation of contract arises from the agreement in fact of the parties and not their promises; that the Code as a whole and each of its parts are predicated on modern credit-orientated methods of production and distribution of goods and not on abstractions of the law of contract; and that the ultimate basis for judicial decision on commercial contract matters under the Code rests on mercantile good faith and fair dealing.[99]

[99] See D. B. King "The New Conceptualism of the U.C.C." (1965) 10 *St. Louis Univ. L.J.* 30, 48-9; E. F. Mooney "Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law" (1966) 11 *Villanova L.R.* 213.