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Remedies in Sales Disputes under the Uniform Commercial Code-Notes for the Litigator

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THE practicing attorney will soon face the challenging, if unhappy, prospect of accommodating years of experience, or at least familiarity, with the Uniform Sales Act to the novel approach of the New York Uniform Commercial Code.¹ To aid him, valuable symposia, continuing legal education efforts, the official comments,² research studies commissioned by the legislatures of the adopting states,³ and almost as large an assortment of texts, monographs, and law review studies⁴ as could be desired are regularly put at his disposal. Although it is well organized,⁵ the sales article of the Code presents a formidable obstacle to respectable facility in solving even garden variety disputes between the parties. Surely one of the greatest tasks will be to integrate manageable the many general and specific, constant and variable rules in the new law. Because with respect to duty, breach and remedy the Code eschews "lump

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² The effective date of the Uniform Commercial Code in New York is September 27, 1964. New York Uniform Commercial Code § 10-105 [hereinafter cited as N.Y.U.C.C.]. All cites to the New York Uniform Commercial Code in the text are by article and section number only.
³ In an attempt to clarify its meaning, the draftsmen of the Uniform Commercial Code provided comments to each section. Although these have been enacted with the Code in some states, they have not been in New York. One of the main objectives of the Code is uniformity in the laws of the states. N.Y.U.C.C. § 1-102(2)(c). It is for this reason that the comments will, no doubt, be an important source for the New York courts in determining the intention of the legislature.
⁶ The Code as written is well organized, and one of its outstanding organizational virtues is its indices of buyers (N.Y.U.C.C. § 2-711) and seller's (N.Y.U.C.C. § 2-703) remedies. Even chance perusal of its table of contents will reveal the sales article's logical progression. Reading it in the light of Article 1, one moves from definitions (Part 1), general contractual provisions (Part 2) and rules of construction (Part 3), through itemization of the parties' respective duties (Part 5), considerations concerning breach and excuse (Part 6), to the allowance of remedies (Part 7). Part 4 contains rules surely among those most familiar to any attorney who ever brought or defended a suit for the purchase price and now, unfortunately, least important in a buyer-seller dispute—the Code's equivalents of the old rules of presumption on appropriation.
concept thinking” in favor of a “narrow issue approach,” this study deals with the important duties and remedies relevant at each successive stage of an ordinary sale by description, first from an aggrieved seller’s view, then from the buyer’s, all preceded by an introductory summary of some of the more general provisions of the sales article (Article 2).

I. INTRODUCTION
A. Clients and Contracts Affected

As enacted in New York, Article 2 applies only to contracts made on and after September 27, 1964, for the sale of “goods” as defined by it, but its provisions affect banks, creditors and others besides the seller and the buyer.

1. Clients Affected by the Sales Article

First and foremost, Article 2 is comprised of rules to govern the relationship between buyers and sellers or their delegates and assignees (2-210). Moreover, the obligations and liabilities of buyers and sellers will vary in certain cases depending upon whether they are “merchants.” (2-104; Comment 2 collects and classifies the cases.) The seller’s remedies may be available to “persons in the position of seller,” such as a bank which discounts a seller’s draft on a buyer (2-506) or a buyer’s agent who becomes liable to a seller for the price (2-707). Persons who buy goods from bailees without authority to sell are given rights (2-403), and there is provision for liability of strangers who convert or injure the goods involved in an executory sales contract (2-722). There are also rules directly or indirectly concerning creditors of a buyer (2-326 (2)-(3); 2-507(2); 2-511(3); 2-702(2)) and seller (2-402; 2-502). Reference to Article 7 must be had for additional requirements concerning carriers and warehousemen who handle the goods and, of course, transferees of documents of title representing the goods.

2. Goods Covered by the Article

Goods can be either identified goods or future goods. “Future goods” includes goods which are in existence but which are not yet identified as those to which the contract relates, or neither existing nor identified (2-105(2)). Identification, for purposes of this discussion, may be accepted merely as meaning selection of particular goods to which the

6. Warranty issues, the rules on substituted performance, excuse, liquidated damages and contractual modification of remedies, which do not involve similar integration difficulties, are not discussed. Save only peripherally, the rights of creditors are avoided as well as the entire problem of documents of title which is a matter for analysis under Article 7.
contract of sale by description applies. It can be made (a) by the buyer, or by the seller and the buyer, only if "explicitly" agreed upon, or (b) by the seller in any manner "explicitly" agreed upon, or, (c) in the absence of any such agreement, by any unilateral designation by the seller. In the two latter instances, identification is not final so as to prohibit a subsequent substitution of other goods until the seller defaults, becomes insolvent or notifies the buyer of the existing identification (2-501).

Goods may be anything movable, that is, not attached to realty at the time of identification, except money (unless sold as a commodity), investment securities and choses in action (2-105(1)). However, certain things attached to, but to be removed from, realty are specifically defined as goods. Thus, Article 2 applies to sales of "timber, minerals or the like or a structure or its materials" if the seller is to sever them from the realty (2-107(1)). If the buyer must sever, the contract is one for the sale of an interest in realty, not goods. But, regardless of who is to sever them, any other things attached to realty but "capable of severance without material harm" are goods, sales of which are governed by the article (2-107(2)). Speaking loosely, this latter class of goods is meant to include what are commonly called "fixtures."

It should be noted, finally, that even in an exchange of realty for goods or for goods plus something else, the transfer of the goods is regulated by this article (2-304(2)).

B. Validity and Enforcement of Contracts

1. Bare Essentials

Generally, any facts, including conduct, sufficient to show agreement under contract law will suffice under Article 2 (2-204; 2-207(3)).

2. Offer and Acceptance

Unless otherwise unambiguously indicated by language or circumstances, an offer to buy or sell may be accepted in any reasonable medium or manner. Thus, a telegraphed offer may in some cases be accepted by ordinary mail (2-206(1)). Where a communicated promissory acceptance, as distinguished from immediate performance, is reasonable, within the above rule, a clear and "seasonable" (1-204(3)) acceptance will bind even though it contains new or different terms, unless it is expressly made conditional on assent to such terms (2-207(1)), which are otherwise construed as mere proposals (2-207(2)). Those proposals will not defeat the contract which, although it cannot be established by the writings alone, can be proved by the conduct
of both parties recognizing the existence of a contract. The contract in such case will consist of written terms (2-207(3)) to the extent they agree or are explained by the parol evidence rule (2-202(a)) plus any supplementary terms incorporated under that doctrine (2-202(b)). The same rules apply where the terms are included in a written confirmation of an existing agreement (2-207(1)).

In either case, if both the buyer and the seller are merchants, the terms are not always mere proposals. They become part of the contract unless the offer expressly limited acceptance to its terms, or the terms materially alter the offer, or the offeror sends notice of objection to such terms in a reasonable time after he learns of them (2-207(2)(a)-(c)). In addition, conflicting terms in the parties' forms constitute for each such notice of objection (Comment 6, 2-207).7

Where beginning performance is a reasonable way to accept an offer, notice of acceptance must be sent within a reasonable time (2-206(2)). To protect a seller who seeks only to accommodate a buyer, prompt shipment of nonconforming goods in response to an order for prompt or current shipment will not operate as an acceptance which would, because of the nonconformity, put the seller in immediate breach. In such a case, however, the seller must seasonably notify the buyer that the shipment is only an accommodation (2-206(1)(b)).

Finally, there is a provision making firm offers written by merchants irrevocable for a reasonable time (up to three months) notwithstanding lack of consideration, with a built-in protection for inadvertent signing of an offeree's form containing such an offer (2-205). Similar considerations are relevant on the issue of modification of contracts (2-209).

3. Statute of Frauds

If the price is five hundred dollars or more, the contract is not enforceable by action or defense unless there is some writing sufficient to show that a contract has been made and was signed by the party charged or his authorized agent or broker. The fact that material or immaterial terms have been omitted from or incorrectly stated in the signed writing will not bar enforcement, but it will be limited, where the quantity is incorrectly stated, to the quantity stated (2-201(1)). Moreover, any "sale or return" provision must appear in the writing where it is required. Such a term may not be proved under the parol evidence rule

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(2-326(4); see subdivision 4 infra). Since the "or return" term is considered to be a "separate contract" (2-326(4)), the balance of the agreement may be enforced. Presumably, this would be so even though such enforcement, if there were no writing at all, were based on one of the exceptions to the rule denying enforcement. There are several such exceptions.

(a) **Two Merchants**: If both the buyer and the seller are merchants, the contract can be enforced against the nonsigner if there exists a written confirmation of the deal, signed by the sender, which was received within a reasonable time by the other party who had reason to know its contents and who failed to make written protest to them within ten days after his receipt (2-201(2)).

(b) **Specially Manufactured Goods**: If the seller has either himself substantially begun or procured another to manufacture the goods before hearing of the buyer's repudiation, the contract will be enforceable unless the seller can resell the goods in the ordinary course of his business. There must be some basis in fact for arguing that the goods were intended for the buyer's contract (2-201(3)(a)).

(c) **Judicial Admission**: An admission by pleading, testimony or otherwise in court by the party charged that a contract was made renders the contract enforceable to the extent of the quantity term so admitted (2-201(3)(b)).

(d) **Part Performance**: The contract is enforceable to the extent the buyer makes payment, or, failing payment, to the extent the buyer receives and accepts (2-606) the goods (2-201(3)(c)). In either case a just and ratable apportionment of goods and price must be possible (Comment 2, 2-201(3)(c)).

4. Parol Evidence Rule

The terms contained in a final written expression of agreement or in confirmatory memoranda, to the extent that they agree, may not be contradicted, but may be explained (2-202(a)) by a course of dealing and trade usage (1-205) or a course of performance (2-208). The terms may also be supplemented in some cases by consistent additional terms (2-202(b)). A "sale or return" provision not appearing in the writing will in every case be deemed a contradictory term (2-326(4)).

5. Statute of Limitations

An action must be commenced within four years after breach without regard to the time plaintiff learned of it. Specific rules govern
breach of warranty and termination of actions. The agreement may reduce the period to one year, but may not extend it (2-725).

C. Construction of Contracts and the Role of the Draftsman

Scattered through Parts 2 and 3 of Article 2 are various rules of construction. A variety of common trade terms such as “F.O.B.” (2-319), and “C.I.F.” (2-320) is defined by the statute as having particular significance when expressly used in a contract. To avoid their defined effect or that of other rules allocating burdens and risks, the contract must itself do so (2-303) expressly, or as explained by relevant trade usage and a course of dealing (1-205) or a course of performance (2-208). In case of conflict, the rules are to be applied in order of a stated priority (2-208(2)).

As an example of how Article 2's definitions operate, under an “F.O.B.” term the seller has certain specified delivery obligations (2-319(1)) and, depending upon whether it is an F.O.B. shipment or destination contract, the statute allocates risk of loss or damage en route to the buyer either upon the seller's conforming delivery to the carrier or upon the carrier’s tender to the buyer at the destination (2-509(1)). Just as the contract draftsman can differently determine the seller’s delivery obligations in an F.O.B. contract, so can he differently allocate the risks (2-303). Even if he does not do so, the fact of breach may (2-510). As would be expected, Article 2 also defines rights and obligations with respect to matters concerning which no terms have been included in the contract, either expressly or by implication from prior dealings, or otherwise. Thus, rules are provided to operate in lieu of an agreed price (2-305), payment (2-310, 2-319(4), 2-320(4), 2-321(3)) and delivery terms (2-307, 2-308, 2-309, 2-311(2)), as well as to define obligations under output, requirements and exclusive dealing contracts (2-306).

A review, therefore, of the standard forms used by an attorney's client in light of the “unless otherwise agreed” rules of construction is clearly appropriate.

II. SELLER'S REMEDIES ON BUYER'S BREACH

The following suggestions presuppose an ordinary contract to sell goods ordered by description. A sufficient variety of possible breaches by a party will be assumed to afford opportunity to plot the most useful remedy available to the other at most stages of the transaction, from

8. Remedies are to be liberally administered so that “the aggrieved party may be put in as good a position as if the other party had fully performed,” but the damages awarded are not to include consequential, special or penal damages unless specifically
formation of a "C.O.D." contract to the buyer's final acceptance of goods sold on credit.

A. Buyer's Breach or Repudiation Before Seller Identifies

1. Existing but not Identified Conforming Goods

If, before the seller has identified existing goods to the contract (2-501), the buyer breaches, e.g., by failing to pay where the contract requires advance payment, or if he repudiates the contract (2-610), the seller can proceed to identify goods (2-610(c)), if they conform to the description and were already finished and in his possession or control when he learned of the breach or repudiation (2-704(1)(a)). According to the facts, the identification may be of the total amount or merely that part which the buyer repudiated (2-703 "goods directly affected"), and this might be the case as to a second or later installment delivery (2-612(1)). The seller's primary Code remedy, the right to resell (2-706), then becomes available (Comment 1, 2-704). After resale the seller may retain a profit (2-706(6)), or recover a loss and incidental damages (2-706(1) but note the limitation in Comment 2). If resale at a reasonable price is impossible, or even reasonably unlikely, the seller may sue for the price (2-709(1)(b)).

allowed by the Code or other rule of law. N.Y.U.C.C. § 1-105. The Code rejects any doctrine that damages must be calculable with mathematical accuracy. Uniform Commercial Code § 1-106, Comment 1. In addition, it takes an entirely new approach in its prescription of the rights, obligations and remedies of a seller and a buyer. For example, the passage of title to goods is no longer an alternative condition to a price action, in line with the Code's general approach that "issues between seller and buyer" are not dealt with "in terms of whether or not 'title' to the goods has passed." Uniform Commercial Code § 2-401, Comment 1.

9. Present law allows an unpaid seller, notwithstanding that the property in the goods may have passed to the buyer, to resell the goods where the buyer has been in default in the payment of the price for an unreasonable time, or has a right of lien or has stopped the goods in transit. N.Y. Pers. Prop. Law §§ 133-34, 141. Having resold, the unpaid seller might bring an action for the price, or for damages for nonacceptance. N.Y. Pers. Prop. Law §§ 144-45.

10. The Code permits recovery of the price in three instances: where the goods have been accepted by the buyer; where conforming goods are lost or damaged within a "commercially reasonable" time after the risk of loss has passed to the buyer; and where the seller is unable to resell goods identified to the contract. N.Y.U.C.C. § 709(1). This section effects a substantial limitation on the seller's existing right to the price. Under N.Y. Pers. Prop. Law § 144, the price is recoverable where title has passed to the buyer, or where a price is "payable on a day certain," or where the goods cannot be readily resold. The Code eliminates the price action based on the passage of title which has always involved consideration of the subjective intention of the parties. N.Y. Pers. Prop. Law § 103. Again, the Code entirely omits the seller's existing right to the price when it is
Apparently, if finished conforming goods are on order and hence not in his possession or control, the seller may continue with procurement, identification and so forth in limited cases (Comment 2, 2-704).

2. Unfinished Goods

Under more limited circumstances the seller may be able to complete manufacture of unfinished goods and identify to the contract notwithstanding the breach. Considerations of unreasonable commercial judgment and incurrence of material increase in damages will be crucial (2-704(1)(b)-(2) and Comment 2).

3. General Rules

Whenever the price action referred to in subdivision A(1) supra is based on the inutility of the available resale remedy, the seller is entitled to take advantage of new opportunities for resale arising prior to collection of the judgment (2-709(2)). Otherwise he must hold the goods for the buyer and will receive, in addition to the price, his handling and storage expenses (2-710). If the price action fails, e.g., because of an inadequate effort to resell, he can recover damages for nonacceptance or repudiation (2-708) in the same action (2-709(3)).

Of course, if the seller was not entitled to identify in the first instance, his immediately available and proper remedy is a damage action (2-708).

B. Buyer Repudiates After Identification

If the seller has already identified goods to the contract before the buyer's breach, the resale, price and damage remedies become available in that order.

C. Buyer Fails To Cooperate in Implementing the Contract

1. Price

Where the price is intentionally left open in the contract and the buyer prevents an agreed price-fixing method from working, the seller may either cancel (2-305(3)) and sue for breach (2-720) or fix a reasonable price by himself (2-305(3)). Where the buyer has received goods under an open price term contract and there is proved a mutual intention not to be bound unless a price is fixed or later agreed upon, the seller can recover the goods or their reasonable value at delivery (2-305(4)).

payable on a "day certain" irrespective of passage of title. The existing allowance of a price action when the goods are not "readily resalable" is substantially unchanged by the Code, except that the requirement of notice to the buyer that the goods are thereafter held by the seller as bailee is omitted.
2. Specifications

Where the contract expressly or by implication from the circumstances requires the buyer to cooperate in the seller's performance, e.g., by specifying colors, size, assortment or delivery instructions, the buyer's failure "seasonably" to do so entitles the seller, if the specification is necessary or would materially affect his performance, to delay his own performance without liability for breach, or to proceed to perform in any reasonable manner (e.g., making his own reasonable good faith (1-203) assortment) or to treat the failure as a breach (2-311(3)(a)-(b); 2-319(3)). Such failure would also be an appropriate case in which to demand adequate assurance of performance (2-609). If assurance is not given within a reasonable time, i.e., not exceeding thirty days, the seller can resort to remedies for repudiation (2-609(4)). Whether or not assurance is demanded, all remedies for breach become available (2-311(3)) including identification notwithstanding breach (2-704), with subsequent resale or price-damage actions. However, the limitations on completion of manufacture may apply in such a case (2-704(2)), and the buyer's failure to specify will not give rise to the seller's remedies under this section, if it is attributable to failure to specify a substitute made necessary by the stated events permitting substitution (2-614; Comment 4, 2-311).

D. Buyer Delegates His Performance

Any assignment by the buyer which involves a delegation of performance entitles the seller to demand assurance that performance will be forthcoming (2-210(5)), and failure to provide such assurance may be a repudiation (2-609).

E. Buyer Insolvent Before Delivery to Carrier

If the buyer is insolvent as defined by the Code (1-201(23)), the seller may refuse to deliver except for cash notwithstanding a credit term (2-702(1)).

If the seller is reasonably suspicious of the buyer's solvency he may make a written demand for assurance and suspend his own performance (2-609). The buyer's failure to provide adequate assurance within a reasonable time, i.e., not exceeding thirty days from receipt of the demand, is a repudiation of the contract giving rise to the seller's remedies. If insolvency is the fact in such case, resale may well be first in utility as well as in appearance. Because failure to give assurance is a repudiation, the buyer's right to retract his repudiation, in this case by giving assurance, if properly exercised (2-611(2)) will bar the seller's right to resell and leave him to his rights under the retraction section (2-611(3)).
F. Buyer Insolvent After Delivery to Carrier, Warehouseman or Other Bailee

If by the time the seller learns of the buyer's insolvency the goods are en route, he may stop the goods in transit and, of course, refuse to deliver except for cash (2-702(1)). Such stoppage is a function of the unpaid seller's lien (2-703(a)) which will be destroyed by a proper tender of the price (2-716(3)).

Where stoppage is based on insolvency, as distinguished from the grounds discussed below, the right extends to any quantity of goods in the bailee's possession, be it only a peppercorn in a carload of diamonds (2-705(1)). The statute prescribes in detail when (2-705(2)) and how (2-705(3)) the right must be exercised. Where the right to stop is exercised, the seller becomes directly liable to the carrier for all ensuing charges (2-705(3)(b)). The carrier has a lien, moreover, for all charges respecting the goods (7-307). A seller's improper stoppage constitutes a breach entitling the buyer to reject (Comment 1, 2-705). No rule is provided to allow or deny a right of stoppage of goods still en route directly to the buyer's subvendee, but local recognition of such a right is said to be "entirely proper" (Comment 2, 2-705).

G. Buyer Repudiates, Fails To Prepay or Otherwise Breaches After Delivery to Carrier, Warehouseman or Other Bailee

Repudiation, including that which follows the buyer's failure to give assurances discussed above, is qualified by the limited right to make a retraction and cut off the remedies discussed below.

The seller's remedies on these events begin with stoppage (2-705(1)) to protect his lien (2-703(a)) and may run through resale to a price or damage action. Of course, a proper tender of the outstanding price will terminate his lien (2-716(3)). The first qualification, which may cause sellers serious difficulty, is that the right to stop on events other than insolvency is limited to stoppage of carload, planeload, truckload or larger shipments (2-705(1)). Moreover, even where a successful stoppage is based on a suspension pending a demand for assurance (2-609(3)), the seller is not entitled to resell or divert, as he otherwise might, until failure to reassure becomes repudiation (Comment 1, 2-705).

The seller or a financing agency (2-605), who successfully overcomes the initial obstacles to stoppage, may resort to the resale and price or damage actions in that order.
II. Risk of Loss After Identification

1. Neither Party in Breach

As noted earlier, the contract can allocate the risks of loss, damage and destruction (2-203; 2-509(4)). Failing such allocation, either by express terms or by implication from circumstances, trade usage, course of dealing or performance (Comment 5, 2-509), the risks are allocated as follows: in shipment contracts, to the buyer on the seller’s proper delivery of conforming goods (2-503(1)-(2); 2-504) to the carrier (2-509(1)(a)); in destination contracts, to the buyer on the carrier’s proper tender of conforming goods at destination (2-503(3); 2-509(1)(b)); when delivery is to be made at a warehouse, to the buyer on his receipt of a negotiable document of title, an attornment or, in limited cases, on receipt of a nonnegotiable document or written direction to deliver (2-509(2)); in any other case, excepting a “delivery ex-ship” (2-322), “sale or return” and “sale on approval,” but including delivery at the seller’s or buyer’s place of business, to the buyer on his receipt of the goods, if the seller is a merchant (and therefore likely to be insured)—if the seller is not a merchant, risk passes on mere tender of delivery (2-509(3)); in a “sale or return” (2-236(1)), to the buyer under one of the preceding applicable rules (2-509(4)), and, in case of election to return, back to the seller when the return is effected (2-237(2)(b)). If the return is based on defects in the goods, it is in effect a return for breach and is governed by the rules relating to the buyer’s revocation of acceptance (Comment 2, 2-327; 2-608) which will shift the risk of loss to the seller retroactively, but only to the extent the buyer was uninsured (2-510(2)). In a sale on approval (2-326(1)), without regard to delivery terms, the risk passes to the buyer on acceptance (2-327(1); 2-509(4)).

The seller can recover the price of any conforming goods lost or damaged within a commercially reasonable time after risk of loss passed to the buyer (2-709(1)(a)).

2. Seller in Breach

The general rule is that if there is any defect in the seller’s tender or delivery (2-503), either in respect of time, manner, documents, or

11. Absent a breach, the Code retains the effect of the old rule that in shipment contracts the risk of loss passes (with title where it is relevant) on delivery to the carrier, but if the goods are resalable and undamaged, and the buyer wrongfully rejects them while they are being shipped, the seller has no action for the price. This is true even though “title,” were it relevant, would be said to pass to the buyer on shipment. N.Y.U.C.C. § 2-401.

12. Allocation of risk in defective installment deliveries is not clear. Where a tender
goods and so forth, the buyer is entitled to reject (2-601). Therefore, until cure (2-508) or acceptance (2-606), the risk remains on seller (2-510(1)).

Damage to goods, occurring en route in F.O.B. or C.I.F. shipment contracts, takes place after the seller has discharged his tender and delivery obligations (2-504 and Comment 1), and hence neither justifies rejection, no postpones transfer of the risk. Cure or waiver of defects in documents will not shift the risk to the buyer if the goods were destroyed prior to such cure or waiver (Comment 2, 2-510). Moreover, where the buyer is entitled to revoke his acceptance (2-608) of a non-conforming tender, his exercise of the right retroactively shifts to the seller the risk of any loss not covered by the buyer's insurance.

Where loss occurs while the risk is on the seller, he may be liable for nondelivery (2-711) unless he effects a timely cure (2-508) or the buyer accepts (2-606).

3. Buyer in Breach

If the buyer breaches or repudiates after the seller has identified conforming goods, but before risk of loss has passed to him under the rules in subdivision H(1) supra, the risk of any loss not covered by the seller's insurance is on the buyer for a commercially reasonable time (2-510(3)).

"so fails to conform . . . as to give a right of rejection," risk remains on the seller until cure or acceptance. N.Y.U.C.C. § 510(1). It is difficult to reconcile the standard of nonconformity entitling the buyer to reject installment deliveries ("substantially") (N.Y.U.C.C. § 2-612) with the language of Comment 1 to Uniform Commercial Code § 2-509 ("Where for any reason his delivery or tender fails to conform to the contract, the present section does not apply. . . . "). The answer probably lies in the Code's distinction between "contract" and "agreement."

13. In "F.O.B." shipment cases, a defect in the contract of carriage or failure to give notice of actual shipment will justify rejection only if material delay or loss "ensues." Thus, even though the goods arguably will not have been "duly delivered" to the carrier (N.Y.U.C.C. § 2-509(1)(a)), failure to do either will not be a breach sufficient to have the risk remain with the seller (N.Y.U.C.C. § 2-510(1)) unless such delay or loss does ensue. This is because retention of the risk depends upon a right of rejection. If an F.O.B. or C.I.F. contract is silent on the form of the bill of lading, the seller may procure a bill to his own order, thereby reserving a security interest in the goods (N.Y.U.C.C. § 2-505(1)). Transfer of risk will not be affected (N.Y.U.C.C. § 2-509(1)(a)). However, if the contract requires a buyer's order bill, procurement of a seller's order bill constitutes an improper contract with the carrier (N.Y.U.C.C. § 2-505(2)). Nonetheless, there is again no right of rejection unless damage or delay ensues (N.Y.U.C.C. § 2-504). Therefore, transfer of risk will be unaffected unless damage or delay ensues (Comment 6, Uniform Commercial Code 2-504; N.Y.U.C.C. 2-510(1)).
4. Loss Caused by Stranger

Losses occurring before identification are actionable by the seller—the buyer not yet having any interest in the goods (2-501; Comment, 2-722). Losses occurring after identification (2-722) are actionable by the seller, in that he, at least, retains an insurable interest (2-501); by the buyer because he has, at least, a "special property" in the goods (2-501) and perhaps also because having paid part of the price, he has a "security interest" in certain instances (2-711(3)); and by "a person in the position of seller" who holds a security interest in the goods (2-707). Regardless of who sues, the party who bore the risk of loss receives the award (2-722(b)).

5. The Casualty Exception

Since a sale by description was assumed, the above exception (2-613), easily read and understood, is not relevant to this discussion.

I. Buyer Wrongfully Rejects

If the tender or delivery is conforming in every respect (2-319; 2-320; 2-503; 2-504), or if the nonconformity is owing to loss, damage or other casualty after those risks had passed to the buyer (2-509; 2-510), he has no right to reject the goods (2-601). In an F.O.B. shipment case, the seller's failure to make a proper carriage contract or to notify the buyer when the goods are shipped (and risk of loss shifts) will justify rejection only if material delay or loss "ensues" (2-504).

On wrongful rejection the seller can resort to resale (2-706) and, if appropriate, the price action (2-709(1)(b)). Note also the stricter test for rejection of installment deliveries (2-612).

J. Buyer Rightfully Rejects but Ineffectively

Since the seller may be entitled to cure the defects which made the rejection rightful (2-508), rejection for the seller's breach (2-601) must be made within a reasonable time after delivery or tender, and notice thereof must be sent seasonably, i.e., within the time fixed by the contract, if any, or a reasonable time (2-602(1)). If by failing to give notice of rejection, the buyer denies the seller an opportunity to cure the defect by a new tender within the contract time, perhaps hoping to take advantage of a falling market, the rejection will be ineffective (2-602(1)) and constitutes acceptance of the goods (2-606(1)(b)) making an action for the price immediately available under section 2-709(1)(a).

14. Ibid.
The buyer who fails in his notice of rejection to state defects which a reasonable inspection would reveal will not be allowed to rely on such defects by way of an action or defense (2-605(1)) with stated exceptions.

If due to their prior dealings or general trade usage the seller reasonably expected the buyer to accept a nonconforming tender with or without a price allowance, and the buyer rejects instead, the seller is given a reasonable time beyond the contract date for tender to make a second, conforming tender—if he gives notice to the buyer of such intention seasonably, i.e., within any post-rejection time fixed by the contract for such a contingency or a reasonable time after the contract date for tender (2-508(2)).

Wrongful rejection of a validly substituted tender, or an ineffective rightful rejection of such tender will be handled as a rejection would have been in the first instance (Comment 1, 2-711).

K. Buyer's Breach of Duties With Respect to Rightfully Rejected Goods

If after an effective rightful rejection of a defective tender and after a rightful revocation of acceptance (2-608(3)), the buyer remains in possession of the goods, he must hold them at the seller's disposition, with reasonable care, for a sufficient time to allow the seller an opportunity to pick them up (2-602(1)(b)). In the meanwhile, any "exercise of ownership" by the buyer, or action "inconsistent with the seller's ownership" which would be wrongful as against the seller because it is not permitted by Article 2 (see below regarding perishables and so forth) will constitute an acceptance if the seller elects so to consider it (2-606(1)(c)). If the buyer has paid part of their price or borne compensable expenses in their inspection, storage and so forth, he has a security interest in the rejected goods in his possession (2-711(3)) which the seller must discharge before he can demand return of the goods. The buyer is entitled to foreclose his lien by resale (2-706) but must account to the seller for the excess over his security interest (2-706(6)). Since such conduct is authorized, however, it is not "wrongful as against the seller," and hence is not an acceptance within section 2-606(1)(c).

Specific exception is made for two other situations in which there might otherwise be found an action "wrongful as against the seller," and hence an acceptance within section 2-606(1)(c). The first concerns only a merchant buyer's resale of rightfully and effectively rejected perishable goods, and the second concerns any buyer's resale of any rightfully and effectively rejected goods for whose disposition the
seller gives no instruction within a reasonable time after notice of rejection.

In the first case, after an effective rightful rejection of *perishable* goods, the buyer, if he is a merchant *and* if the seller has no representative or place of business in the market of rejection, *must* follow the seller's reasonable instructions concerning the goods, if the seller provides an indemnity for incidental expenses demanded by the buyer in connection therewith.

In addition, if the seller gives no instructions and the goods are perishable or subject to rapid devaluation, the buyer *must* try to resell the goods (2-603(1)). A "good faith" resale is neither an acceptance, a conversion nor the basis of an action for damages. It appears worthy of note in this connection that a seller's bank for collection in the market of rejection will be sufficiently his representative to "lift the burden of salvage resale from the buyer" (Comment 2, 2-603).

However, if the seller gives no instructions to the merchant buyer and if the goods are neither perishable nor subject to rapid devaluation, the buyer *may* store, reship or resell the goods, and such action is neither conversion nor acceptance (2-603(1); 2-604).

Finally, a nonmerchant buyer, who properly rejects goods of any kind, is under no obligation to follow instructions (2-602(2)(c)), but *may* store, reship or resell as above (2-604).

**L. Buyer's Breach of Duties Respecting Goods After Revocation of Acceptance**

The same duties and privileges governing buyers upon effective rightful rejection are applicable when acceptance of goods is rightfully revoked (2-608(3)).

**M. Buyer's Acceptance of Goods on Credit While Insolvent**

Subject to the preferred right of subvendees in the ordinary course of business or other good faith subvendees of the goods from the buyer (2-403), the seller may reclaim goods received on credit by the buyer while insolvent. However, the remedy is severely limited by the requirement that the seller's demand be made within ten days of such receipt. The time limitation does not apply if the buyer directed to the seller a written misrepresentation of solvency within three months before delivery (2-702(2)). If the seller succeeds with this remedy, he has no other (2-702(3)).
N. Buyer's Nonpayment After Acceptance

The seller can recover the price of goods sold on credit and accepted (2-606) by the buyer (2-709(1)(a)) together with incidental damages (2-710). Where a partial delivery has been accepted, the buyer must pay the price at the contract rate (2-607(1)). Such nonpayment may bring into play the seller's right to demand assurance (2-609), his options on the buyer's anticipatory repudiation of future installments (2-610) including (2-703) indentification notwithstanding breach (2-704), resale (2-706) and either a price (2-709(1)(b)) or a damage action (2-708). Future installments already en route may also be stopped (2-703; 2-705). However, the buyer may have a right to deduct damages from the price of an accepted defective delivery (2-717).

O. Buyer's Nonpayment of Price Due on Delivery of Goods

If the contract is silent, payment is due when the buyer actually receives (2-310(a)) the goods regardless of when "delivery" may be said to have occurred for other purposes, e.g., risk of loss in F.O.B. shipment contracts. Since the buyer on receipt will be in possession, he will have an opportunity to inspect before payment. However, where the contract requires payment prior to inspection, expressly or as construed, e.g., C.O.D., whether by a carrier or not, the buyer may not assert a right to inspect prior to payment (2-513(3)(a)), but need not pay first and litigate later if the nonconformity appears without inspection (2-512(1)(a)). If the goods are delivered into the buyer's possession with a demand for payment, the seller is entitled to reclaim the goods for nonpayment (2-507(2)). That conditional delivery, however, and the seller's right to reclaim may be ineffective against persons who have purchased the goods from the buyer in the meanwhile (2-507(2); 2-403).

If on such delivery the buyer tenders payment by check, as he is permitted to do (2-511(2)), the delivery is nonetheless conditional on the check's being honored (2-511(3)). However, once again the seller's right to recover the goods is merely expressed as existing "as between the parties," and probably will not defeat the rights of innocent sub-vendees (2-403). Moreover, the seller's acceptance of a postdated check, in effect a credit instrument, may render his right to reclaim unavailable against any interested third parties, e.g., creditors, except to the extent that it is allowed him under reclamation for the buyer's receipt of goods on credit while insolvent (Comment 6, 2-511).
P. Buyer's Nonpayment of Price Due on Delivery of Documents

Where the contract is silent as to time for payment and authorizes delivery by delivery of documents, the buyer must pay (2-511(2); 2-514) on tender of the documents (2-310(c)) and has no right to inspect the goods prior to payment (2-513(3)(b)) and, with possible exceptions, even in the unlikely case of the goods arriving first (Comment 5, 2-513). Absent contrary agreement, payment is due on tender of documents in "F.O.B. Vessel" contracts and "F.A.S." contracts (2-319(4)). The rule also applies in "C.I.F." contracts (2-320(4)) unless they contain a payment on arrival term (2-321(3)). As in a "C.O.D." delivery of goods, he must pay first and litigate later. Such payment against documents will not constitute an acceptance (2-606) of the goods (Comment 12, 2-320) which the buyer will have had no opportunity to inspect (2-513(3)(b)). However, because he will have had an opportunity to inspect the documents, payment will constitute acceptance of documents defective on their face unless the buyer reserves his rights (1-207; 2-605(2)), but the buyer will not have lost his rights to inspect and reject defective goods behind the accepted defective documents (Comment 4, 2-605).

Dishonor of the seller’s draft sent through banking channels with the documents constitutes nonacceptance or rejection. The seller’s stoppage, resale and price-damage remedies are then available.

Q. Buyer's Breach of Duties Concerning Return of Goods Sold on Approval

If the buyer’s use of the goods is inconsistent with the purpose of trial, or if he fails seasonably to notify the seller of his election to return, he has accepted the goods so used or retained (2-327(1)(b)) and is liable for their purchase price (2-709(1)(a)). If the goods so used or retained are only a part, their acceptance will operate as acceptance of all, if all conform to the contract (2-327(1)(b)). If the goods are non-conforming, such acceptance is limited to the part so used or retained, with only ratable liability for the purchase price (2-607(1)). Note, however, that a voluntary acceptance of part of a defective delivery in a sale on approval is not allowed (Comment 1, 2-327).

Although the buyer need not bear the expense of returning the goods, a merchant buyer must follow reasonable instructions.

R. Seller’s Right To Retract a Repudiation

Where the seller is himself guilty of anticipatory repudiation (2-610), he is entitled to reinstate the contract by a retraction within the time
fixed for his next performance, unless in the meanwhile the buyer has cancelled, materially changed his position or has "otherwise indicated that he considers the repudiation final" (2-611).

S. Buyer's Unreasonable Notice of Termination

The contract may be terminated, i.e., ended otherwise than for breach, only when the contract, itself, or the "law" authorizes it (2-106(3); 2-309(2)). Except where the power is authorized by the happening of an agreed event, the seller has a right to receive reasonable notice of termination (2-309(3)).

III. Buyer's Remedies on Seller's Breach

A. Seller's Repudiation Before Identification

The buyer may cancel (2-106(4)) for breach, subject to the seller's qualified right to retract (2-611). In addition he can either "cover" by purchasing substitute goods and recover both the difference in cost and "incidental" and "consequential" damages (2-712(2)) or sue for damages for nondelivery plus "incidental" and "consequential" damages (2-713). If the buyer chooses not to "cover," he can recover damages for nondelivery and "incidental" damages because failure to "cover" will not bar him from any other remedy (2-712(3)), but his "consequential" damages will not include those which "cover" would have prevented (2-715(2)(b)).

B. Seller's Repudiation After Identification

In addition to the options allowed the buyer in the preceding case, when the seller repudiates after goods are identified, the buyer is given the further option of reaching the goods, themselves, in lieu of monetary damages (2-711(2)). However, the option is limited to four cases: (1) where the buyer has paid at least part of the price to a repudiating seller who becomes "insolvent" (1-201(23)) within ten days after receiving the first payment—but note, the buyer must make and keep good a tender of the balance (2-502; 2-711(2)(a)); (2) where the situation involves the sale of unique goods (2-716(1)), with uniqueness possibly based on nothing more than mere "scarcity" (Comment 3, 2-713); (3) where the "cover" is not in fact, or in reasonable probability, available (2-716(3)); (4) where the buyer tenders the price of goods shipped under a seller's order bill of lading (2-716(3))—here the tender satisfies the security interest reserved by the bill (2-505(1)(a)).

15. Identification gives the buyer an insurable interest in the goods (N.Y.U.C.C. § 2-501).
as well as the unpaid seller's lien (2-703(a)) and entitles the buyer to replevy the bill (Comment 5, 2-716).

C. Seller's Insolvency or Grounds for Buyer's Insecurity

The buyer's limited right to recover the goods on the seller's insolvency is discussed in III B supra. The buyer is entitled to suspend his performance, if any is due, pending receipt of assurance demanded on grounds for insecurity (2-609). If the seller fails to assure, the buyer's rights on repudiation (either III A or III B supra, depending on identification vel non) come into play (2-609(4)), including the remedies discussed above.

D. Seller Delegates His Performance

As noted in connection with a delegation by the buyer, delegation may be treated as a ground for insecurity (2-210(5)) entitling the buyer to suspend pending assurance (2-609) and to resort, in case of repudiation through failure to assure (2-609(4)), to the remedies discussed in III A and III B supra.

E. Seller's Failure To Cooperate in Implementing the Contract

The considerations relevant in such a case are sufficiently discussed in II C supra.

F. Risk of Loss After Identification

The allocations of risk discussed in II H supra are constant in the absence of contractual allocation.

G. Seller's Nondelivery

Nondelivery, presumably including that caused by total loss where the risk was on the seller (2-510(1)) and is unexcused by the casualty exception (2-613), affords the buyer the same remedies, according as the goods have or have not been identified, set out in connection with repudiation before and after identification, discussed above (III A, III B supra) (2-711(1)-(2)). Prepayment is, of course, no bar to his remedies (2-512(2) and Comment 5).

However, nondelivery in a "no arrival, no sale" destination contract is not actionable by the buyer unless the seller either caused the non-arrival, e.g., by not shipping in the first instance, or has agreed to be bound in any case (2-324(a)). If, without the seller's fault, part of the goods do not arrive, or arrive late or damaged (2-324(b)), the buyer has a right to inspect and accept with an allowance (2-613(b)).
A "to arrive" term in a "C.I.F." contract may present serious problems of construction (Comment 4, 2-324).

H. Seller's Defective Delivery or Tender

1. Right of Inspection

If the contract provides that the buyer must pay before inspecting the goods, he must pay first and litigate later unless the nonconformity is obvious (2-512). The provision can be spelled out by the draftsman, but it will also follow on unqualified use of such phrases as "C.O.D." and "payment against documents" (2-513(3)(a)-(b)) as well as "C.I.F." (2-320(4); 2-513(3)(b)) unless limited by an "on arrival" term (2-321(3); 2-513(3)(b)).

Failing such express or implied provision, the buyer has a right to make a reasonable inspection after arrival and before payment (2-513(1)). Reasonableness is the test of proper place, time and manner of inspection (2-513(1)), but the contract may make provision as to an exclusive place and method. If the provision becomes impossible to implement, the right to inspect will survive and be determined as though the contract were silent on the point, unless such inspection term amounts to a condition on failure of which the contract is avoided (2-513(4)).

2. Right of Rejection

Except as qualified below, nonconformity "in any respect" in the goods or the time, manner, and so forth, of their tender (2-503; 2-504), including improper stoppage in transit (Comment 1, 2-705), is sufficient basis for a total rejection (2-601(a)). If he chooses, the buyer may elect instead to accept all or any "commercial unit" (2-105(6)), except in a "sale on approval" (2-327(1)(b)), rejecting the rest (2-601(b)-(c)). In installment deliveries, however, material nonconformity is required (2-612(2)), and in any case the contract can provide an exclusive remedy (2-718; 2-719). Although proper tender in a shipment contract requires the seller to make a proper contract with the carrier and to notify the buyer when the goods are actually shipped, failure does not justify rejection unless delay or loss "ensues" (2-504(c)).

A buyer who elects to reject totally has the optional rights discussed in III A supra, none of which, quite naturally, involves replevy of the goods (2-711(1)(a)-(b)). All remedies are subject to the seller's right to "cure" in appropriate cases (2-508). In addition, the buyer can recover the expenses of inspection (2-513(2)), as incidental damages (2-715) absent contrary agreement (Comment 4, 2-513). The buyer in

16. See note 13 supra.
such a case also has a security interest to the extent of any sums invested in the price or handling and inspection of the goods. The lien may be foreclosed by resale as is that of an unpaid seller (2-711(3); 2-706).

A buyer who elects (2-601(b)) or is held to have accepted (2-606) the whole (as to defects in documents see 2-605(2) and Comment 12, 2-320) may nonetheless recover damages for nonconformity (2-714), if the requisite notice of breach is given to the seller within a reasonable time after discovery was or should have been made (2-607(3)(a)). He may also be entitled to deduct such damage from an outstanding price liability (2-717).

3. Revocation of Acceptance

Where the buyer has elected (2-601) to accept because he reasonably expected a "cure," and the seller does not cure, the buyer may revoke his acceptance (2-607(2); 2-608(1)(a)). The buyer who accepts without knowledge of defects in the goods may also be entitled to revoke his acceptance (2-608(1)(b)). However, in either case, the nonconformity, for purposes of revocation as distinguished from rejection, must be substantial (2-608(1); compare 2-601).

After revocation of acceptance, assuming it was justified, the buyer has all the options in III A supra. He also has all the additional rights of a rejecting buyer within H 2 supra (2-711(1)(a); 2-711(3)).

I. Buyer's Right To Retract a Repudiation

See the brief discussion of the seller's analogue in Part II R supra.

J. Seller's Unreasonable Notice of Termination

See the brief discussion of the buyer's analogue in Part II S supra.

IV. Conclusion

There has been no occasion to discuss the passage of title\(^\text{17}\) vel non as a criterion for any of the remedies cited to either party. Risk of loss, instead of following title, is allocated according to variable rules which, in the absence of breach, still reach familiar results. Just as in all cases, save two, the seller must attempt resale before qualifying for

\(^{17}\) A sale is still defined as a transfer of title (N.Y.U.C.C. § 2-105(1)), and the moment or place of that passage is still important in disputes not adjustable by reference to the specific accommodations the article provides. Thus, whether a sales tax or use tax liability will arise in a particular case will depend on N.Y.U.C.C. § 2-401 in which are contained rules variable only by "explicit" agreement but otherwise similar to the present rules of rebuttable presumption. N.Y. Pers. Prop. Law § 160.
a price action, so should the buyer try to cover lest he suffer damages he cannot be awarded. Appropriation as a concept important to title gives way to identification as a criterion of the seller's resale or the buyer's replevy remedies. Common trade terms are assigned particular meanings in terms of the duties they have over the years come to imply, and practical distinctions between merchants and nonmerchants seek to close loopholes or afford escapes consistent with commercial responsibility and lay inexperience. Progress inevitably counts novelty among its costs and pleasures. By its very design, this study is particularly offered to the attorney whose opinion is or soon will be asked after the fact. Perhaps it enjoys as well some degree of utility for the draftsman. In either case, it is at best a tool of limited functions.