R. DEDUCTION OF DAMAGES FROM THE PRICE: 2-717.

No revisions are recommended in the text of § 2-717.

SECTION 2-717

The Task Force agrees with the Study Group that no revision of section 2-717 is necessary.

S. LIQUIDATION OR LIMITATION OF DAMAGES; DEPOSITS: § 2-718.

1. Section 2-718(1).

The Study Group concluded that commercial parties, at least, should have more power to fix by agreement the amount or method of calculation of damages in advance of breach. Their agreement should be enforceable regardless of whether the actual damages exceed or are less than the amount fixed in the agreement.54

Rec. A2.7 (15).

(A) The Study Group recommends that the test in § 2-718(1) for determining the reasonableness, ex ante breach, of the damages be retained.55 The last sentence of § 2-718(1), however, should be deleted. This appears to give a court power, ex post breach, to reject damages that were a reasonable forecast at the time of contracting. Furthermore, the last sentence says nothing about the treatment of damages that are unreasonably small. See Comment 1. If the intention of the parties is indeed to fix damages based upon a reasonable forecast rather than attempting to limit liability regardless of that

54. See generally, Anderson, Liquidated Damages Under the UCC, 41 Sw. L.J. 1083 (1988). The issue has been avoided in so-called “take or pay” disputes, where the clause has been treated as providing for alternative performance of the bargain rather than a remedy for breach. See Universal Resources Corp. v. Panhandle Eastern Pipe Line Co., 813 F.2d 77 (5th Cir. 1987).

55. Accord § 2A-504(1).
forecast, all deviations of the agreed damages from actual damages should be validated under the reasonable forecast test.\textsuperscript{56}

The Study Group also recommends that the comments be revised to clarify that an agreed formula or method for calculating damages that survives the reasonable forecast test should also be enforced.

2. Other Subsections of § 2-718.

Section 2-711(1) provides that where the seller has breached, the buyer, in addition to other remedies, may recover "so much of the price as has been paid." Section 2-718(2)(a) establishes a limited right to restitution by a breaching buyer who has pre-paid an amount which exceeds the seller's rights under an enforceable liquidated damage clause, and § 2-718(3) provides other grounds for the seller to further reduce the buyer's restitution claim. These sections virtually exhaust the buyer's explicit restitution rights under Article 2.\textsuperscript{57}

The discordant note is § 2-718(2)(b), which establishes, in effect, a statutory liquidated damage clause for the seller. Even though there is no enforceable liquidated damage clause, the buyer can only recover in restitution an "amount by which the sum of his payments exceeds . . . twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller." The history of this subsection is murky (it was part of the New York Sale of Goods Act)\textsuperscript{58} and its current utility is dubious.

(B) The Study Group recommends the deletion of § 2-718(2)(b) and the integration of § 2-718(2) and (3) into one subsection.

(C) Although no other revisions in § 2-718 are recommended, we suggest that the Drafting Committee consider the desirability of drafting a separate section dealing with the restitution claims of both seller and buyer and the recoupments that might be available.

56. This approach was taken in California & Hawaiian Sugar Co. v. Sun Ship, Inc., 794 F.2d 1433 (9th Cir. 1986)(enforcing a clause liquidating damages for delay at $4,000,000 where the net actual damages amounted to only $368,000.

57. See Barco Auto Leasing Corp. v. House, 202 Conn. 106, 520 A.2d 162 (1987), where Justice Peters, in dictum, suggested that a breaching seller might, by analogy, use § 2-718(3)(b) to reduce the buyer's claim for a price refund by the value to the buyer of the use of the goods between rejection and return.

SECTION 2-718

Although the Task Force agrees with recommendations A2.7(15)(B)&(C) regarding "other Subsections of section 2-718," we strongly disagree with recommendation A2.7(15)(A). We believe that a court should have the "power, ex post breach, to reject damages that were a reasonable forecast at the time of contracting." The recommendation of the Study Group would make liquidated damages provisions risk allocators similar to warranty disclaimers and remedy limitations. This, in many cases, would be contrary to the intention of the parties who did not intend to allocate risks, but merely estimated damages that they assumed would be uncertain in amount and difficult to calculate. If damages do turn out to be readily ascertainable, the parties were mistaken in their assumption. In such cases, performance of liquidated damage provisions should be excused as in any other case involving fundamental, unforeseen circumstances.467

Further, by allowing a reasonable forecast to control over readily calculable actual damages, the Study Group's recommendation would allow the parties to contract for penal damages in contravention of the compensation mandate of section 1-106. Most commentators who have argued in favor of such a rule have suggested that it is justified because aggrieved parties are rarely fully compensated by standard remedies. Particular concern is often expressed for the fact that, in most states, the aggrieved party is not compensated for attorney fees and cost of litigation. We suggest that if this is a primary concern, the Drafting Committee might consider a provision allowing a prevailing party to recover such fees and costs. A few states have statutes which allow this type of recovery for the prevailing party in a breach of contract action.468

467 See 5A Corbin on Contracts § 1063, at 362-64 (1964). See also Restatement of Contracts § 339 comment e (1932):
If the parties honestly but mistakenly suppose that a breach will cause harm that will be incapable or very difficult of accurate estimation, when in fact the breach causes no harm at all or none that is incapable of accurate estimation without difficulty, their advance agreement fixing the amount to be paid as damages for the breach is within the rule stated in Subsection (1) and is not enforceable.

We further suggest that the Study Group’s recommendation would have the unfortunate effect of encouraging wider use of liquidated damage provisions in goods transactions, thereby increasing litigation under section 2-718. There have been comparatively few appellate level liquidated damage cases under the present version of section 2-718(1). This is no doubt because most goods have regularized markets, and a breach of contract for their sale rarely produces uncertain actual damages. There is concern that implementation of the Study Group’s recommendation would encourage the argument in a large number of cases that the forecast of liquidated damages was reasonable, regardless of the certainty of the actual damages.

If the Drafting Committee agrees with the Study Group, however, that liquidated damage provisions should be treated as risk allocators, we suggest that this result can be better accomplished by a provision stating simply that damages may be liquidated by the parties in any amount that is not unconscionable. Although somewhat iconoclastic, such a provision would more clearly accomplish the objective and would, in all probability, produce less litigation.

Finally, we note that the Study Group’s recommendation makes no exception for consumer transactions. We suggest that if the Study Group’s recommendation is implemented, an exception should be made for consumer transactions. Otherwise, there is the risk that consumers will regularly become subjected to penal damages by standardized contract terms over which they have no real bargaining leverage.

Instead of the Study Group’s recommendation, the Task Force recommends that section 2-718(1) be revised by deleting the words “the anticipated or” from the provision. The enforcement of liquidated damage provisions would thereby be restricted to situations in which the assumptions of the parties at the time of contracting turn out to be true, i.e., when actual damages caused by the breach are uncertain in amount and difficult to calculate.

[PRELIMINARY REPORT - 2-719]

T. CONTRACTUAL MODIFICATION OR LIMITATION OF REMEDY: § 2-719.

Rec. A2.7 (16).

The following revisions are recommended in the text of and comments to § 2-719.
1. Scope of agreed limitation.

Section 2-719(1), which is expressly subject to § 2-718 and subsections (2) and (3) of § 2-719, states that the agreement may "provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article." but does not state how far the parties may go to "contract out" of all remedies. 59

Assuming that the limited or modified remedy is agreed to be exclusive, § 2-719(1)(b), § 2-718(1) would apply only if the agreement was intended to liquidate rather than to limit damages. The controls in other subsections to § 2-719 are limited and do not answer the "how far" question. The only hint of an answer is language in Comment 1 that the parties are entitled to "minimum adequate" remedies or a "fair quantum" of remedy.

(A) The Study Group recommends that the Drafting Committee consider whether more precision can be given to the "fair quantum" limitation and whether that should be expressed in the statute rather than the comment. 60

2. Failure of Essential Purpose: § 2-719(2).

Assuming that the parties have agreed to an exclusive remedy, § 2-719(2) has been the subject of frequent litigation and commentary. 61 The subsection provides: "Where the circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided by this Act." The principal issues in the cases are (1) when does the remedy "fail of its essential purpose" and (2) if the remedy fails, is the aggrieved party permitted to pursue all or just some of the remedies "as provided by this Act."

Issue (1) must be decided on the facts of each case, e.g., what was the agreed remedy, what purpose did the parties intend for that remedy, what

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59. Agreement may be used to limit liability in three ways: (1) To limit the duty of one party to perform and, thus, the potential scope of breach. See § 2-316(2) permitting the "disclaimer" of implied warranties. (2) To liquidate the actual damages expected to arise from a breach, § 2-718(1). (3) To limit the remedy for any breach, regardless of the actual damages caused, § 2-719.


circumstances impaired or caused that purpose to fail. Most courts have done a good job in applying § 2-719(2).

No clarification is required in the text of the statute.

Issue (2) arises most frequently where, under the agreement, a seller has made a limited express warranty that the goods are free from defects in material and workmanship and agreed to repair or replace defective parts during a stated period as an exclusive remedy and, also, has disclaimed all other warranties, express or implied and excluded consequential damages. A defect within the express warranty occurs and the seller is unwilling or unable to "cure." This, of course, is a breach and most courts have concluded that the limited remedy has "failed of its essential purpose." Invariably, the buyer has argued that the failure entitles it to recover direct and consequential damages under Article 2 as if the agreement had not been made.

The courts have disagreed on the answer. But that disagreement depends upon the answers to three sub-questions:

(1) Did the parties intend that other agreed, limited remedies, such as the exclusion of consequential damages, were an integral part of the overall package of limitation? If so, the failure of the "cure" remedy means that other agreed limitations automatically drop out. If one remedy in an integrated package fails, the others fail with it.

(2) If the other limited remedies were not intended to be part of an integrated package, the question is whether the other remedies can stand on their own. Thus, if the other limited remedy was an independent exclusion of consequential damages, the question is whether that clause was unconscionable at the time of contracting. § 2-719(3). In a commercial context, most courts have answered that question in the negative. In this setting, the buyer assumes the risk of consequential damages during the period that the seller tried and failed to "cure," and must be content with "direct" damages, if any.

(3) Even if the "other" limited remedies are independent of the failed package, other courts have asked whether the denial of consequential damages is "fair." The case for unfairness is best made where the seller failed to make a honest and reasonable effort to "cure," the loss to the buyer was substantial and no adequate remedies for direct damages were provided. In this setting, the court might conclude that the buyer has not been given a

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63. Section 2A-503(2) specifically provides: "If circumstances cause an exclusive or limited remedy to fail or its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this Article." (Emphasis added).
"minimum adequate" remedy and provide the full panoply of Article 2 remedies. The focus here is not on the time of contracting, but on the effect of the failure and the seller's conduct on the buyer's legitimate interests.

(B) The Study Group recommends that efforts be made to clarify § 2-719(2), either in the text or comments. One possibility is to provide that after a "failure of essential purpose," remedies as "provided by this Act" do not preempt other agreed remedies intended by the parties to be apart from the failed package and that are enforceable on independent grounds. At the maximum, a revision might clarify when the failure of an agreed remedy is so fundamental that the aggrieved party is entitled to a "minimum adequate" remedy regardless of an independent agreement. At stake are the consequences of agreed risk allocation in commercial transactions. Obviously, the clearer the agreement that limits remedies or the more the buyer is involved in the cause of the failure of the goods, the greater the chance that the seller will prevail.


Apart from the relationship of an exclusion of consequential damages to § 2-719(2), only one revision in § 2-719(3) is recommended.

(C) The Study Group recommends the deletion the language of § 2-719(3) that declares a limitation of consequential damages prima facie unconscionable where there is injury to person "in the case of consumer goods." Our recommendation is that plaintiffs injured in person from a breach of warranty should be held to the same standards as those who suffer only economic loss if they sue under Article 2.

[TASK FORCE - 2-719]

SECTION 2-719

The Task Force agrees with the observations and recommendations of the Study Group.

In response to the suggested revision posed in the Report at footnote 64, we recommend that the Drafting Committee consider in what situations, if any, a consequential damages exclusion should fail because of the occurrence of unanticipated circumstances when

64. See Waters v. Massey-Ferguson, Inc., 775 F.2d 587 (4th Cir. 1985)(holding that parties did not intend to exclude consequential damages from a lost soy bean crop where seller, despite promises to cure, did not repair a tractor in time).
the seller is unable to honor a limited remedy of repair or replacement. We suggest that in some situations, unanticipated circumstances might give rise to an "intervening unconscionability" that would invalidate a provision excluding liability for consequential damages.\footnote{Anderson, \textit{Contractual Limitations on Remedies}, 67 Neb. L. Rev. 548, 581-94, 603-08 (1988) (exploring suggestion).}

[\textit{PRELIMINARY REPORT} - 2-720]

\textbf{U. EFFECT OF "CANCELLATION" OR "RESCISSION" ON CLAIMS FOR ANTECEDENT BREACH: § 2-720.}

\textit{No revisions are recommended in the text of § 2-720.}

[\textit{TASK FORCE} - 2-720]

\textbf{SECTION 2-720}

The Task Force agrees with the Study Group that no revisions of section 2-720 are necessary.

[\textit{PRELIMINARY REPORT} - 2-721]

\textbf{V. REMEDIES FOR FRAUD: § 2-721.}

\textit{No revisions are recommended in the text of § 2-721.}

[\textit{TASK FORCE} - 2-721]

\textbf{SECTION 2-721}

The Task Force agrees with the Study Group that no revisions of section 2-721 are necessary.

[\textit{PRELIMINARY REPORT} - 2-722]

\textbf{W. WHO CAN SUE THIRD PARTIES FOR INJURY TO GOODS: § 2-722.}

\textit{Rec. A2.7 (17).}

\textit{No revisions are recommended in the text of § 2-722. The comment, however, should be revised to clarify that a buyer cannot}
accomplish indirectly through a conversion remedy what cannot be accomplished directly under § 2-716, i.e., specific performance.65

[TASK FORCE - 2-722]

SECTION 2-722

The Task Force agrees with the Study Group’s recommendation A2.7(17).

[PRELIMINARY REPORT - 2-723]

X. PROOF OF MARKET PRICE; TIME AND PLACE: § 2-723.

§§ 2-723(2) and (3), which deal with the nature and admissibility of evidence of alternative market prices, have produced no problems of substance.

No revisions are recommended in the text of these subsections. § 2-723(1) deals with an important problem in longer term contracts: How to measure damages under § 2-708(1) and § 2-713(1) when one party repudiates and the case “comes to trial before the time for performance with respect to some or all of the goods.” The current solution is to use the “price of such goods prevailing at the time when the aggrieved party learned of the repudiation.” This eliminates the uncertainty in attempting to prove what the price would have been at some future time and place of tender. There are, however, some omissions that have caused problems.

Rec. A2.7 (18).

The Study Group recommends two revisions in the text of § 2-723(1).

(A) The time for measurement should be when the aggrieved party elects or should have elected to treat the repudiation as final, rather than at the time he learned of the repudiation. This recognizes the fact that the aggrieved party can wait for a “commercially reasonable” time after he learns of the repudiation, § 2-610(a), and fixes the time at the point when, if the aggrieved party has not already canceled, the reasonable time period has expired.

Second, it should be clear that the market price of “such goods” must be a reasonable substitute for the contractual conditions under which “such goods” were sold. Thus, if the goods were promised

65. See Ross Cattle Co. v. Lewis, 415 So.2d 1029 (Miss. 1982).
under a long-term contract, the price should be that available for goods under a similar contract, not the price on the "spot" market. At least, the aggrieved party should have the opportunity to prove the long-price with reasonable certainty before prices for shorter terms are admitted.\textsuperscript{66}

[**TASK FORCE - 2-723**]

SECTION 2-723

The Task Force generally agrees with the observations and recommendations of the Study Group regarding section 2-723. Consistent with our recommendations regarding the time for measuring damages under sections 2-708(1) and 2-723, however, we recommend that section 2-723(1) be revised so as to apply only when damages under sections 2-708(1) and 2-713 are to be measured at the time of the seller’s tender of delivery. There would be no need for the application of section 2-723(1) when damages are to be measured at the time the aggrieved party should have elected to treat the repudiation as final.

[**PRELIMINARY REPORT - NONE**]

[**TASK FORCE - 2-724**]

SECTION 2-724

We assume that the Study Group makes no recommendations regarding section 2-724.

[**PRELIMINARY REPORT - 2-725**]

Y. **STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE:** § 2-725.

The Study Group did not reach any conclusions about § 2-725. At least one member would leave "well enough alone." Another member feels

\textsuperscript{66} A case supporting this recommendation is Manchester Pipeline Corp. v. Peoples Natural Gas Co., 862 F.2d 1439, 1446-48 (10th Cir. 1988). In long-term contracts between producers and pipelines for the supply of natural gas, the contract price will probably be lower than the "spot" market in a rising market and higher than the "spot" market in a falling market. The long-term price mechanism both evens out the risk of fluctuations over time and signals that the commitment to sell gas is backed by reserves.
strongly that § 2-725 should be limited to claims for loss of bargain and that injustice results when § 2-725 is invoked in a products liability case. Still another member argues that since uniform laws generally do not have a statute of limitations, § 2-725 may be inappropriate for Article 2.

Given the fact that these and other questions about § 2-725 will be before the Drafting Committee, we have listed below some of the issues fairly raised by the presence of § 2-725 and some possible solutions. None of these solutions, however, has been endorsed by the Study Group.

(1) The scope of § 2-725 is frequently litigated. It applies to an action “for breach of any contract for sale.” The “mixed” transaction gives the courts problems here as elsewhere. Also, some courts have concluded that if a breach of warranty causes personal injuries, the “tort” limitation rather than § 2-725 applies. Other scope issues have also been raised.

Do these scope disputes justify a revision for clarity? Arguably not, but this depends upon some agreement on the scope of “contract for sale” and the understanding that if you sue for breach of warranty you are burdened with § 2-725 regardless of the type of injury suffered.

(2) The versions of § 2-725 vary from state to state. This non-uniformity is accentuated by problems of mesh with other statutes of limitations in the state. The result is more choice of law problems for the courts. A careful study of these problems in variation and mesh would be useful.

(3) The limitation (repose?) period may be too short, especially in breach of warranty cases. The action must be commenced “within four years after the cause of action has accrued.” § 2-725(1). The cause of action accrues “when the breach occurs,” regardless of whether the aggrieved party had knowledge. A breach of warranty “occurs when the tender of delivery [presumably a non-conforming tender] is made” unless the warranty “explicitly extends to future performance of the goods.” § 2-725(2).

In most cases, an aggrieved party will know or have reason to know of a breach within a short time after it occurs. In warranty disputes, however, the aggrieved party may not have knowledge of the non-conforming tender until after the four year period has passed. To aggregate the problem, the parties have no power to extend the limitations by agreement, although it can be shortened to “not less than one year.” These constraints have contributed to the increasing pressure on the courts to expand the scope of tort, with its “discovery” statute of limitations.

A simple solution is to implement the difference between a statute of limitations and a statute of repose. In the former, the statute begins to run for a stated period when the aggrieved party knows or has reason to know of the breach. In the latter, the statute of limitations runs after the expiration of a longer, stated period without regard to when the aggrieved party knew of the breach. Thus, the limitation might be two years after the aggrieved
party knew of the breach and the repose might be 8 years after the cause of action accrued.

This simple solution would take considerable pressure off § 2-725, without seriously affecting interests of the breaching party. Compare § 2A-506(2).

(4) Other problems that require clarification include exactly when “a warranty explicitly extends to future performance,” § 2-725(2), and when the statute of limitations is tolled because of representations or the like by the breaching party.67

[TASK FORCE - 2-725]

SECTION 2-725

The Task Force has concluded that section 2-725 should be revised for greater clarity and simplicity. Even a cursory survey of existing case law reveals that the section has been rendered non-uniform in more than one respect. [cite?] In assessing the cases, the bulk of inconsistent decisions involve confusion over one of two policy related issues: (1) the applicability of section 2-725 to personal injury claims, and (2) determining when a warranty “explicitly extends to future performance.”470

The root cause of the different results in the cases is the perceived injustice caused by the drafters’ decision to choose tender of delivery as the time when a breach of warranty occurs and a cause of action accrues (a date-of-delivery rule). Thus, it is possible that a breach of warranty action will be barred before the breach is actually discovered. One way to extend the limitations period is to find that the tort statute, not section 2-725, is the controlling statute. Under the typical statute, the accrual date is when the breach is or should have been discovered (a date-of-discovery rule). Another way to achieve the same result is to hold that the claim arises out of a warranty that “explicitly extends to future performance.”471 Because not all courts feel the same compulsion to apply a date-of-discovery rule, the cases are impossible to reconcile.

Section 2-725 should be revised in such a way that the statutory language becomes clear, and courts and legislatures no longer have

471 Id.
the incentive to circumvent its application. To this end, the Task Force recommends adoption of a two-year statute of limitations that begins to run in all cases when the aggrieved party knows or has reason to know of the breach. The statute should specify that it shall govern even if a case properly under the Code is plead in tort. This should, as the Study Group suggests, decrease the pressure on courts to expand the scope of tort, with its "discovery" statute of limitations.

Most members of the Task Force disagree, however, with the suggestion that the section should include a provision similar to a statute of repose. There should be no outside limit on the right to bring an action. To include such a provision would necessitate the continuation of a hopelessly ambiguous future performance warranty exception. Otherwise, the value of an express or implied warranty may be threatened when the repose period is shorter than the duration of the express warranty, or the expected useful life of the good.\footnote{472}

Furthermore, evidentiary considerations do not justify a period of repose. One rationale underlying such a period, that the seller should not have to maintain its documents indefinitely, has limited persuasive value. If the alleged breach is unrelated to warranty, the probability that it will be discovered shortly after delivery is great. Therefore, the repose interest of the seller is adequately protected by a two-year statute of limitations. If the breach is warranty related, and is discovered several years after delivery, most of the relevant evidence will come not from the seller’s records, but rather from the good itself and from experts who will testify as to how the good should have performed.

A second rationale, that sound financial decisions cannot be made without knowing when potential liability will end, is equally unpersuasive. At all times, the limitations period will be tied to the duration of the express warranty and, if not disclaimed, the implied warranty of merchantability. Thus, the period of substantive liability, which is presumably known by the seller, will set the outside limit for suits.\footnote{473} If it is finally decided by the Drafting

\footnote{472} Suppose the product has a normal life of twenty years and the repose period is ten years. If a latent defect appears during the fourteenth year, this may constitute a breach of the implied warranty of merchantability, but absent a statutory exception to the repose period the claim would be barred.

\footnote{473} More exactly, the outside limit will be the period of substantive liability plus two years.
Committee that a repose period should be incorporated into the statute, it should not begin to run until the first purchase for use or consumption. This modification should go a long way towards alleviating some of the difficulties faced by consumers in their actions against manufacturers, and by retailers in their indemnification actions against manufacturers.

The Task Force favors the retention of subsections (3) and (4) without change. It is anticipated that, with the adoption of a discovery rule, the need to resort to extra-Code tolling law will greatly diminish.


APPENDICES TO TASK FORCE REPORT*

APPENDIX A**

GENERAL COMMENT ON PARTS II AND IV: FORMATION AND CONSTRUCTION

Underlying every sales contract are the basic principles of good faith, the elimination of surprise and technical traps, and the interpretation of all phases of the formation and performance of the contract in the light of reasonable behaviour under the existing circumstances. When the parties to a sales contract are commercial men, the reasonable meaning of either language or actions is the commercial meaning in the commercial circumstances, and commercial good faith calls for observance of commercial standards by men of commerce. As the bulk of modern decisions apply to commercial agreements illustrative cases tend to focus upon these, but the same principles apply with equal force to non-commercial sales and contracts for sale. This Act rests firmly on the recognition of these principles and its specific provisions are drawn to further the application of these standards to sales agreements.

These principles have been developed in the holdings, case by case and point by point, but have not been explicitly phrased or consistently applied. This general comment on the formation and construction of the contract is supplied therefore to illuminate the case law recognition of these basic principles which are the underlying lines of guidance running throughout the whole body of better cases. This Comment is of necessity technical in nature rather than merely "introductory" to Parts II and IV of this Act. The best "introduction" to the meaning of these parts lies in the reading of the text of the Act itself. When specific problems of

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** Llewellyn Papers, file J(IX)(2)(a).
application arise, however, requiring the reading of one or more sections in the light of the whole plan of this Act, that plan must be made available with sufficient elaboration and detail of background, reason, and purpose to fill the particular need of court or counsel. That is the function of this Comment. More specific details are discussed in the Comments to the individual sections. Those comments both depend upon and supplement this General Comment.

1. Good faith, commercial standards, avoidance of surprise are pervasive principles of this Act. The principles of good faith, protection of commercially reasonable conduct, reading of language and conduct against the background of the commercial sense of the contract, avoidance of surprise and technical traps run throughout this Act applying both to the formation and the construction of the contract. They are made express in specific instance after specific instance in which a conflict, confusion or lag in the case law has indicated that such explicit reference is necessary but whether or not they are expressed specifically in any particular passage they [p. 2] pervade each section and group of sections. To these principles, particularly, the full language of Section 1 directly application of the whole Act in terms of its underlying principles and purposes, must be applied.

[1] See Section 17 and comment, which rejects any legalistic test of definiteness whenever the intention to close the agreement is clear; Section 29, Section 30, Section 33, recognizing "open" terms as to price, quantity and time; Section 29, Section 82, Section 86, Section 122, on failure of agreed terms as to price, inspection, delivery or payment and remedy; Section 18, Section 24, Section 123, dispensing with the requirement of consideration in the case of firm offers, modifications and renunciations made in good faith and not subject to attack for mistake or over-reaching; Section 30 imposing an obligation of due diligence to assure validity of an exclusive dealing agreement; Section 33 requiring reasonable notice for termination at will, Section 83 on right to a signed receipt, Section 77, and Section 80, providing for the avoidance of bad faith by surprise at the time of tender of delivery or payment; Section 21 and Section 126, requiring avoidance of surprise in offering proof of a usage of trade or a market price.

The application of these principles in matters not directly involved in the contract between the parties thereto but as involving third parties may be seen in the enlargement of the powers to transfer goods to good faith purchasers whenever the circumstances are such as to mislead him [Section 70 postamble abolishing "cash sale" reservation; Section 57 broadening the older rules on merchant's possession; Comment on Section 76 pointing out that reservation by delivery on condition is limited]. The purchaser is not protected however, unless he takes in current course of trade [Section 57 and Section 59] and the good faith of a merchant purchaser calls for reasonable observance of commercial standards [Section 10].
Nowhere is this more obvious than in the matter of reading the language of the agreement and conduct of the parties together to determine the respective rights and obligations of the parties. In their application and use, indeed, various of the particular provisions of this Act of necessity flow together. Thus, it is frequently impossible to say whether a course of conduct under a written agreement interprets the parties’ original meaning or represents a subsequent standing waiver of some term or terms of the agreement. “Sometimes distinction between a waiver of default, or an extension of the time for performance, and acts which enlarge definition of a ‘reasonable time’ as contemplated by the parties beyond limits which might otherwise be set, is tenuous.” A. B. Murray Co. Inc. v. Lidgerwood Mfg. Co. (1926) 241 NY 455; 150 NE 514, Lehman, J. The same holds true in regard to terms which, though explicit in form, are [p. 3] shown by the parties’ conduct not to have been meant as written. “The contract appears to be wholly embodied in the writing. Notwithstanding this both parties seem to have treated the contract as partly oral and partly in writing . . .” Niblett Ltd. v. Confectioners’ Materials Co. (CA) (1921 CA) 3KB 387 (written contract for 3000 cases of “condensed milk;” oral agreement that milk should be one of three named brands). Similarly, it is often impossible to determine whether a term added without words represents a tacit agreement resting in the circumstances or a rule derived from those same circumstances and imposed by law. [Compare Section 39 on the implied warranty of fitness for a particular purpose.] But without reaching a conclusion as to these questions, the obligations of the parties are made clear when good faith, the level of commercial understanding of the parties and avoidance of surprise are applied to the particular circumstances of the case.

2. Explicit dickered terms are the foundation of the contract; Usage of trade read into explicit terms. This Act accepts as of course the general law under which the parties control the terms of the contract (always subject to qualifications based on public policy). Without such terms duly agreed upon, there can be no contract within this Act. “Agreement” of course includes the terms of “the bargain in fact as found” not only “in the language of the parties” but also “in course of dealing, usage of trade or course of performance” as well as those terms or meaning of language which rest in ‘implication from other circumstances;’ (Section 9 defining agreement). These matters, together with the bearing of waiver, trade understanding and the like are further developed in the following. But
the case in which the agreement is not built upon language is a rare one. The explicit terms which the parties have joined in dickering out are the foundation and frame of the contract under this Act. Running throughout the following discussion of the interpretation of language in the light of the commercial background, of modification of the agreed terms by later action and the like, is the fundamental fact that it is the parties’ own explicit, dickered terms, chosen for their own reasons which make and shape the deal.

First, then, words are used which must be read as they are understood in the trade. Whatever their meaning in the trade is the meaning which the agreement incorporates either between merchants or as against a merchant. This the better cases have long recognized. The warranty of merchantability, Section 38 for instance, rests on this assumption, as does the recognition of an unwritten usage of trade and course of dealing under the parol evidence rule, Section 15. This does not contemplate merely the introduction of usage to resolve an “ambiguity” patent even to an outsider, such as whether “ton” means 2000 or 2240 pounds. It may be that a quantity term refers to a measure accepted in the trade but which would not even suggest itself to a layman. (See Fairmount Glass Works v. Cruden-Martin Wooden Ware Co. (1899) 106 Ky. 659; 51 SW 196, where it developed that a “car-load” of Mason jars equalled 100 gross of pints, quarters of half gallons.) A usage may incorporate a meaning seemingly contradictory to the language used as in Dixon, Irmao & Cia. v. Chase National Bank (1944, CCA 2d) 144 F. 2d. 759, where the rule of Section 47 of this Act, requiring payment against an adequate indemnity and a single part of a stipulated “full set of bills of lading” was recognized as current usage and incorporated by implication in [p. 4] the agreement to explain “the meaning of the technical phrase ‘full set of bills of lading’.”

A local usage may also be incorporated in regard to a contemplated local performance when it is reasonable that the local circumstances even though it is at variance with the expectation of a centrally located firm which ought to have informed itself as to local practice. So, under Section 21, on usage of trade, this Act rejects on this point the otherwise valuable case of Finlay & Co. v. N.J. Kwik Hoo Tong (1928) 2 KB 604, which involved a local usage in Java of treating shipment under CIF contracts as made within the month when steamer arrived if goods were then ready on lighters and were promptly loaded. Under this Act, unlike that
holding, a bill of lading dated "September" would not be held false where loading began October 1 and the vessel sailed October 3. Rather, this Act adopts by contrast the ruling of Ronaasen & Co. v. Arcos, Ltd. (1932 CA) 43 L. L. Rep. 1, which recognized a usage in the Russian timber trade that a "summer shipment" was satisfied by October shipment.[2]

3. Strict construction in overseas documentary shipment contracts. The mercantile evidence of the mercantile meaning of terms as employed in the better cases is responsible for the generalized statements as to strict construction of overseas shipment contracts. In those cases it has long been the custom and practice of merchants to demand strict compliance with certain of the contract terms particularly as to time and place. Thus, in Bowes v. Shand (1877, HL) 2 App. Cas. 455, the leading case on the strict construction of the time term for shipment (and, by dictum, also of the place term), the contract called for rice "to be shipped at Madras or Coast", "March and/or April," and 296 out of 300 tons were put aboard the ship in February. Evidence was introduced that in the trade such time stipulations were intended to be literally performed. Because of the earlier loading the entire shipment was held to be rejectable.

In the case of all documentary contracts trade usage has now crystallized beyond challenge the requirement that all necessary documents be both in correct form and unimpeachable for falsity whether they are presented under a letter of credit as in Laudisi v. American Ex. Ntl. Bank (1924) 239 N.Y. 234; 146 NE 347, or directly to the buyer as in Finlay & Co. v. Kwik Hoo Tong (1928) 2 KB 604, discussed above. The requirement as to correct form has been incorporated in this Act in Section 72 on manner of tender of delivery, and Section 44 on CIF and CAF terms, and the effects of falsity of documents are set forth in Section 67 on excuse of financing agency. However, even strict construction is controlled by the commercial [p. 5] meaning of language, as for example, under Section 47 in the case of a stipulation as to a "full

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[2] See also Guillon v. Earnshaw (1895) 169 Pa. 463; 32 At. 545, permitting evidence of trade custom of Spain as to acceptable quality of ore where vendors were to perform their part of the agreement in Spain; Star Glass Co. v. Morly (1871) 108 Mass. 570, where sizes of glass to be manufactured in Philadelphia were held to be determined by Philadelphia standards; Moore v. United States (1905) 196 US 157, holding that the customary mode of discharge at Honolulu controls in contract for delivery of coal there.
set” of bills of lading, or where a designation not properly within a third party’s knowledge is allowed to be shown by invoice. (Laudisi v. American Ex. Natl. Bk. (1924) 239 NY 234; 156 NE 347, where a rail bill of lading covered grapes “condition and contents unknown” and the invoice supplied the needed term “Alicante Bouchez”; O’Meara Co. v. National Park Bank (1925) 239 NY 396; 146 NE 636, where the details of the merchandise were held to be adequately evidenced by the invoice.)

4. Destination and domestic contracts: Time term. In destination contracts, as opposed to shipment contracts discussed above, where the time of shipment serves chiefly as a rough indication of the prospective time of arrival and has no bearing upon the buyer’s risk, a broader construction of the time term is indicated by trade usage which has readily been admitted for this purpose. So, in National Importing Co. v. E.A. Bear & Co. (1927) 324 Ill. 346; 155 NE 343, under a contract calling for shipment “from the Orient, 75 cases in April”, the goods were put aboard on March 31. The buyer was not permitted to reject the shipment partly because of a trade usage sustaining the variation and partly because a term permitting such a wide range of shipping points left no reason for the application of a strict rule. So also have the circumstances of the case been recognized as affecting the meaning of a term in a destination contract. Thus, in Lamborn v. National Bank of Commerce (1928) 276 US 469; 48 Sup. Ct. 378, where the contract called for shipment by steamer “from java” to Philadelphia, a shipment by a steamer which was diverted to Philadelphia from its original destination was held good.

A fortiori, in domestic contracts, a time term must be given, the meaning which comes to it in the trade although it is seemingly precise or fixed by case-law in its general effect. This Act, therefore, approves the holding of such cases as Colonial Iron Co. v. Workman (1923) 81 Pa. Super. 51, which treated a clause requiring deliveries “during the last half of year” as subject to interpretation by a usage requiring periodical deliveries; and rejects such cases as Clifton Shirting Co. Inc. v. Bronne Shirt Co. Inc. (1925) 213 App. Div. 239; 209 NYS 709, which refused to admit evidence of a usage that “delivery June, July, August” called for deliveries in each month.[3]

[3] For other cases involving flexible construction of the time term in
The circumstances of the case, as well as trade usage, can affect the meaning of the time term as in Beck & Pauli Lithographic Co. v. Colorado Milling & Elevator Co. (1892, CCA 8) 52 Fed. 700, in which an eight day delivery in delivery of specially manufactured advertising stationery was held justified by the circumstances of the case, and in Second National Bank of Alleghany v. Cash (1924, CCA 3) 299 Fed. 371, in which it was held that a contract calling for goods to be “shipped immediately” meant that they were to be shipped as soon as possible under the circumstances known to both parties.

Thus, when courts remark in regard to the alleged rule that “time is of the essence of a mercantile contract” that “the tendency of modern law is to relax the strictness of this rule” (Kieckhefor Box Co. v. John Strange Paper Co. (1923) 180 Wis. 367; 193 NW 487, they are actually noting the current recognition of usage and the circumstances of the case as interpretive of the time term except in those contracts which are truly “mercantile” in the original sense, the overseas documentary shipment contracts. In those cases the trade practice of strict compliance has allowed no broadening of the terms, but even so cancellation of the whole contract for deficiencies in an installment is subject to the rule of reason indicated in Section 101 permitting cancellation only where the breach substantially impairs the value of the entire contract.

5. The quantity term is also subject to usage of trade. Both the English Sale of Goods Act, Section 30(4) and the Original Sales Act, Section 44(4) sought by explicit provision to forestall that type of literal interpretation of sales contracts which would bar proof of a trade usage as to quantity terms. These Acts proceeded on the assumption that dickered terms are likely to be shorthand trade expressions which in the case of quantity might require acceptance of a reasonable quantity, more or less, or allow replacement of a nonconforming portion or require the buyer to take reasonable (as
contrasted with burdensome) action to sever the contract goods from a larger amount. Thus, the conditions of bulk shipment are such that the contract may envisage a 5, 10 or 15% variation by trade usage without the use of an explicit term to that effect or even the inclusion of the words “about” or “approximately”. (See Beals v. Hirsch (1925) 214 App. Div. 86; 211 NYS 293, involving evidence of a trade usage requiring acceptance of pieces 6 to 7 yards short under contracts calling for 60 yard pieces."

The courts, unfortunately, have tended to be singularly strict in regard to any usage offered to explain quantity terms and have practically disregarded the explicit rules of both the English and our Original Act treating the figures in quantity terms almost as if they had magic value. "The commercial man says: 'I have undertaken to deliver a particular size, but it is reasonable that I should be allowed to deliver a certain percentage which is not that size.' If he says that he must put it in the contract." (Scrutton, L.J., in [p. 7] Ronaasen & Co. v. Arcos, Ltd. (1932 CA) 43 Ll. L. Rep. 1.[4]

This Act intends to reject and change this uncommercial current of cases and to reestablish on this point the purpose of the Original Act, Section 44 (4). No particular mention of the quantity term is made in the text of Section 21 on usage of trade because the matter set forth in that section is addressed equally to all contract terms of any character. Instead this Act makes clear its intention to restore the quantity term to the same treatment as other terms by omitting the special and detailed provisions as to discrepancies in quantity found in the Original Act, Section 44, so as to remove that over-emphasis on the quantity term which has misled courts into viewing with disfavor the introduction of usages to explain the meaning of such terms.

[4] Compare Harland & Wolff, Ltd. v. J. Burstall & Co. (1901 KBD) 84 L.T.N.S. 324, holding that a reasonable usage permitting a 10 per cent variation was not established and that tender was inadequate where contract called for 500 loads of timber and 470 were shipped; Mutual Chemical Co. v. Marden, Orth & Hasting Co. (1923) 235 NY 145; 139 NE 221, which painfully recognized a usage which made a tender of 36,418 lbs. of potash acceptable under a contract calling for 36,000 and actually placed the holding on a "de minimis" basis; Burros & Kenyon Inc. v. Warren (1925 CCA) 9 F (2d) 1, holding lumber trade usage permitting 10 percent variation in an order and the filling of smaller sizes by shipping half the quantity in their doubles "not established" and of dubious admissibility to "vary" the written terms.
Where usage incorporates limits of tolerance into a quantity term (whether a flat term or stated as “about” or “approximately”) a commercial pattern of acceptability within these recognized tolerances but with price adjustment for the variation from the stated standard where the price is fixed per unit, has been established. This pattern is a general one and covers quality or other discrepancies as well as quantity. Thus, in Peabody & Co. v. Ralli Bros. (1921 KB) 9 Ll. L. Rep. 201, a solid trade usage existed making delivery acceptable with allowance up to a ten percent variation where sugar was impaired by discoloration. The arbitrators awarded accordingly since only 125 out of 2000 bags were not up to the stated standard in that case. The usage was entirely reasonable and this Act rejects the absurd holding of the court which vacated the award because the “custom” was supposed to be “directly against the law.”

6. Contracting out of trade usage, course of dealing or the interpretation indicated by the circumstances of the case: Avoidance of surprise. The preceding paragraphs have emphasized the role of trade usages in the construction of sales agreements but the background of meaning to be read into terms or into gaps in terms shows as clearly in a fixed course of dealing between the parties and the circumstances of the case as in usage of trade. (See Section 9 defining “agreement,” Section 21 on course of dealing and usage of trade, and Section 15 on the parol evidence rule; See also Paddleford v. Lane & Co. Inc. (1916) 223 Mass. 113; 111 NE 769, where an alleged contractual right to inspect cabbages before payment against bill of lading was based on fact that “in all previous dealings” between parties such inspection was permitted.)

[p. 8] The background of circumstances against which the agreement is entered into and performed may supply terms not explicitly agreed upon as in those instances in which “reasonableness” is read into time and method of inspection terms (Section 82) or as to facilities to be provided for receiving delivery (Section 72). What is “reasonable” will be determined by the particular circumstances. Or, circumstances can add to the explicitly agreed terms as in the case where a warranty of fitness for a particular purpose is added to that of description because of the circumstances of the transaction and particularly the buyer’s reliance on the seller’s skill and judgment. [See Section 39 on warranty of fitness, Section 40 on exclusion of warranties, and Section 41 on cumulation of warranties.] Finally, the circumstances may qualify the meaning of an explicit term as in Syzmonowski & Co. v. Beck & Co. (1923 CA) 1 KB
457, where goods intended for export shipment were stored in a warehouse during a trade depression and it was held that a fourteen day clause limiting time for notice of defects did not prevent the buyer from claiming damages when shortages of yardage was discovered after ultimate shipment to buyer’s customer.\[5\] It is plain that in the matters of reading agreements in the light of trade usage, course of dealing or the circumstances of the case, the problems of \textit{formation} (i.e., of incorporating material into the agreement) and of \textit{construction} (i.e., determining the meaning of the agreement) overlap and even coincide. These problems are here discussed in this manner, therefore, even though the relevant sections of this Act have been arranged in the more familiar traditional fashion under the two separate headings.

When the express language used in the agreement conflicts with the applicable trade usage, course of dealing or circumstantial background, a vital question is raised by Section 21 on course of dealing and usage of trade which provides that the express terms shall control usage and course of dealing in such a case. By implication the express language would also, of course, control any inference from the circumstances. That section, however, makes clear that the express terms shall dominate only when such construction is reasonable. The office of the language of that section and of Section 15 on the parol evidence rule is to negate and reject that line of cases which has been misled into a literalistic reading of commercial language. Under the same principle a liberal approach to any problem of \textit{latent ambiguity} revealed by the circumstances is also called for. This is the “supplementary principle” saved without specific mention under [p. 9] Section 2 whenever it is unreasonable to construe all the sources of meaning consistently.

No inconsistency of language and background exists merely because the words used mean something different to an outsider.

\[5\] For an example of circumstances qualifying a time term, see Coyne v. Avery (1901) 189 Ill. 378; 59 NE 788, involving five cases of eggs deliverable in Chicago to be shipped on named days from points in Kansas or Nebraska where no rejection was permitted for one day’s delay in shipment because the wide range of shipping points made it immaterial. Circumstances qualified a term of description in Schmoll Fils & Co. v. L.S. Agoos Tanning Co. (1926) 236 Mass. 195; 152 NE 630, where a delivery of “12/20” hides was held effective under a contract calling for “13/20” hides as being recognized as equally good in the leather trade so that shipment of “12/20” hides were interchangeably made on contracts calling for “13/20” hides.
than they do to the merchants who used that language in the light of the commercial background against which they contracted. This is the necessary result of applying commercial standards and principles of good faith to the agreement under Section 26. Moreover, where the commercial background normally gives to a term in question some breadth of meaning so that it describes a range of acceptable tolerances rather than a sharp-edged single line of action, any attempted narrowing of this meaning by one party is so unusual as not likely to be expected or perceived by the other. Therefore, attention must be called to a desire to contract at material variance from the accepted commercial pattern of contract or use of language. Thus, this Act rejects any “surprise” variation from the fair and normal meaning of the agreement. (See, for example, Section 19) requiring “unambiguous indication” of any peculiar variation from the normal meaning of an offer; Section 40 on exclusion or modification of the normal warranties; Section 20 on the additional proposed terms which may be read into an agreement by failure to object.)

7. The principle of reasonable construction and against surprise. There lies in this “attention-calling” requirement a key to much which is puzzling in the sound cases when explicit terms are under construction. “Explicit” terms are of two types which have strikingly diverse significance. On the one hand are those terms which are consciously dickered out by the parties and which are usually represented by their telegrams, interchange of correspondence or by the typed or handwritten fill-ins on a form. On the other hand are those clauses contained in a form or inserted by one party in a lengthy contract which the parties never consciously bargain out and to which the attention of the other party is never directed.

The “dickered” terms of the agreement are, of course, always to be read against the commercial background but they must also be read as terms to which both parties’ attention was in fact addressed. How exclusively the parties tend to concentrate on such terms, often ignoring entirely the form clauses, is shown sharply in those cases in which the courts have been forced to disregard inapposite or repugnant form clauses which would have been stricken out or modified had the parties given the form any attention. [See Great Eastern Oil Co. v. DeMert & Dougherty (1943) 350 Mo. 535; 166 SW 2d 490, where an order was given in 1931 on a form providing for monthly deliveries during 1930; Alison v. Wallsend Slipway & Engineering Co. (1927 CA) 27 Li. L. Rep. 285, where a letter contract for the purchase of one cylinder referred to “our usual strike and guarantee clauses” which were contained in a
form contract for a complete engine; Finkelstein v. Morgenstern (1924) 144 Md. 387; 124 Atl. 872, involving a contract containing an elaborate clause for termination of credit at any time "with respect to undelivered merchandise" which was held inoperative where the contract called for delivery "at once" since clause applied only to merchandise properly undelivered and not where the seller was [p. 10] in default on delivery.[6] Thus, the familiar rule that "writing controls printing" is actually a recognition of the fact that the parties' minds, in the process of dicker, are directed primarily to the terms under actual negotiation and not to the clauses on the form.

This practice of ignoring those clauses not actually bargained out may frequently work hardship through surprise on one party if the form terms which he does not specifically consider at the time of contracting prove unfair or unreasonable. Hence, another familiar rule which calls for "construction most strongly against the party preparing the document" has arisen and rests upon this strong likelihood that the party who merely "adheres" to a prepared contract has given its form portions no careful consideration. Yet this generalization of law is inaccurate and misleading, representing neither the rule as applied by the better cases nor the sound method for construing commercial agreements under this Act. For if the clause in question makes commercial sense and is commercially fair, the courts should not construe it "most strongly against the party who prepared it" but, rather, should interpret it in a manner fair and reasonable to both parties. There is nothing novel in this proposition. Thus, in St. Regis Paper Co. v. The Santa Clara Lumber Co. (1906) 186 NY 89; 78 NE 701, a reasonable agreement in regard to lumbering advances was reasonably and liberally construed so as to permit the buyer to require specific performance of the contract although he had failed to make the required advances because of his misinterpretation of the contract. See similarly, Pottash v. Herman Reach & Co. (1921 CCA 3) 272 Fed. 658,

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[6] Contrast the parties' unusual attention to the forms in American Sugar Refining Co. v. Page & Shaw, Inc. (1927, CCA 1) 16 F (2d) 662, where the court gave full effect to a difficult but "not unusual" delivery clause obviously retained by parties for a purpose when many other clauses of the form were stricken out; and in Lipschitz v. Napa Fruit Co. (1915, CCA 2) 223 Fed. 698, where the parties used a "rail" form but wrote in: "All other conditions to be those embodied in regular water contract," which was a familiar and balanced standard form worked out between an organization of buyers and one of sellers.
which contains a vigorously favorable interpretation of sellers' clauses for forced acceptance despite delay and shortage where parties obviously contracted with reference to war conditions of overseas trade which made the clause reasonable in the circumstances; and Dery v. Blate (1924) 239 NY 203; 146 NE 204, in which credit revocation clauses were given their full needed effect, duly limited by commercial sense and understanding and the "most strongly against" rule was invoked not against the clause but against the seller's effort to extent artificially the meaning of the clause.

So, whether the language used be ambiguous or otherwise in need of interpretation, a blind application of contra proferentem construction which throws out or emasculates a reasonable clause runs counter to commercial sense and to this Act. Reasonable clauses are to receive a reasonable construction whoever may have prepared them. This Act adopts and approves the holdings of such cases as McAndrews & Forbes Co. v. The Mechanical Mfg. Co. (1927) 367 Ill. 288; 11 NE (2d) 382, where a clause printed at the foot of the seller's letterhead on [p. 11] which the agreement was typed made "all agreements contingent on causes beyond our control." The court held that such clauses usually refer to strikes and the like and were not intended to override a warranty that the machine sold would operate continuously for 24 hours although the seller claimed at trial that it was impossible to construct such a machine. (See also American Almond Products Co. v. Consolidated Pecan Sales Co. Inc. (1944 CCA 2) 144 F. (2d) 448, in which L. Hand, J. gave a commercial construction to a single party's statement of issues for a commercial arbitration.) As always, under this Act, the test of reasonableness in such cases is consonance with the general commercial background or with the perceptible commercial needs of the particular trade or case.

Reasonable clauses take no man by surprise and indeed are the clauses which are expected to be included in a form which one party has not read or studied. But when a clause or set of clauses is so unfair or so one-sided that it is not to be expected either between decent merchants or from a decent dealer, their contents enter by surprise. It is in such cases that the courts have insisted upon some type of special warning of the presence of such surprise clauses by refusing otherwise to give the clause its full scope and breadth, as in H.C.Smith v. Oscar H. Will & Co. (1924) 51 ND 357; 199 NW 861, where the court held that a general non-warranty clause appearing in the seller's catalog, invoices and letterheads did not preclude the buyer from recovering where clover seed was
mistakenly delivered instead of alfalfa seed. Similarly, in the Newhall Land & Farming Co. v. Hogue-Kellogg Co. (1922) 56 Cal. App. 90, the court held that the warranty of identity of the variety of lima bean seed ordered was not excluded by a disclaimer printed in small type on the vendor's letterhead. In contrast in Hogue-Kellogg, Inc. v. G. L. Webster Canning Co. (1927 CCA 4) 22 F (2d) 384, which involved a Virginia statute providing that "no printed form contract . . . shall be binding" unless the clauses for the vendor's benefit are in type of described minimum size, the court construed the statute so as to let in a full set of fair and reasonable clauses following the principle of this Act that reasonable clauses are entitled to be given their reasonable effect.

8. Unconscionability. Frequently the courts have adopted other lines of approach to this same problem of unfair surprise clauses. They have called upon the rule against trick, artifice or strategem, have eviscerated the unfair clause by adverse construction, have manipulated the rules of offer and acceptance to keep the clauses out, or have knocked it out as contrary to public policy or to [p. 12] the dominant sense of the contract.[7] Despite the inconsistent

[7] For examples of judicial policing of contracts for unconscionable clauses, see: Kansas City Wholesale Grocery Co. v. Weber Packing Co. (1937) 93 Utah 414; 73 P (2d) 1272, where a clause limiting time for complaints was held inapplicable to latent defects in a shipment of catsup which could be discovered only by microscopic analysis; Hardy v. General Motors Acceptance Corp. (1928) 38 Ga. App. 463; 144 SE 327, holding that a disclaimer of warranty clause applied only to express warranties thus letting in a fair implied warranty; Andrews Bros. v. Singer & Co. (1934 CA) 1 KB 17, holding that where a car with substantial mileage was delivered instead of a "new" car, a disclaimer of warranties, including those "implied," left unaffected an "express obligation" on the description even though the Sale of Goods Act called such an implied warranty; New Prague Flouring Mill Co. v. G.A.Spears (1922) 194 la. 417; 189 NW 815, holding that a clause permitting the seller, upon the buyer's failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction does not indefinitely postpone the date of measuring damages for the buyer's breach to the seller's advantage; and Kansas Flour Mills Co. v. Kirks (1917) 100 Kan. 376; 164 P 273, where under a similar clause in a rising market the court permitted the buyer to measure his damages for non-delivery at the end of only one 30 day postponement; Green v. Arcos, Ltd. (1931 CA) 47 TLR 336, where a blanket clause prohibiting rejection of shipments by the buyer was restricted to apply to shipments where discrepancies represented merely mercantile variations; Meyer v. Packard Cleveland Motor Co. (1922) 106 Oh. St. 328; 140 NE 118, in which the court held that a "waiver" of all agreements not specified did not preclude implied warranty of fitness of a rebuilt dump truck for ordinary use as dump truck; Austin Co. v. Tillman Co. (1922) 104 Or. 541; 209 P. 131, where a
lines of rationale upon which these holdings have rested, they have a single and sound result and they are based upon a single principle: they deliberately disregard or misconstrue the language of one party in order to make effective the actual bargain made by both parties, eliminating as unconscionable those elements which rest on unfair surprise. But the cases have been uncertain in application of this principle and the diversity of the reasoning has kept them from [p. 13] providing consistent and accessible lines of guidance for the draftsman or the court which has led to much unnecessary litigation.

This Act brings the principles of formation and construction together into a simple and consistent working structure. All language is to be given its fair commercial meaning against the background of the trade and the situation and the temptation to misread the language for justice's sake (which runs through so much of the case law) is removed by Section 23 which provides for the striking out of unconscionable clauses or sets of clauses. Unconscionability may be found in the pure content of a clause or set of clauses as applied to a given situation. [For example, see Section 33 on arbitrary termination by one party, Section 11 on arbitrary time fixing, and Section 121 on arbitrary fixing or limitation of damages.] On the other hand, unconscionability can also be found, when the facts about making deals on forms are viewed realistically, in the combination of an unfair (although less extreme) clause or set of clauses with the element of surprise.

9. Avoiding surprise, in practice, when terms are varied from the expected background. It is clear that no problem of surprise is present when the background of the trade itself or the circumstances require

clause limiting the buyer's remedy to return was held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description; Beckkevold v. Potts (1927) 173 Minn. 87; 216 NW 790, refusing to allow warranty of fitness for purpose imposed by law to be negated by clause excluding all warranties "made" by the seller; Robert A. Munroe & Co. v. Meyer (1932) 2 KB 312, holding that the warranty of description overrides a clause reading "with all faults and defects" where adulterated meat not up to the contract description was delivered; Lumbrazo v. Woodruff (1931) 256 NY 92; 175 NE 525, in which even "recognition" of a total non-warranty and non-remedy clause regarding seeds was limited to excluding consequential damages for loss of crop "provided of course that the defendants had resorted to no fraud, unfair dealing or negligence amounting to undue enrichment." [Compare Section 37 and 41 of the Act and Comments which show that once the real subject matter of the bargain has been determined, no printed clause can change it although the remedies for breach can be limited within reason (Section 40).]
the particular term or interpretation of language. Thus, in the case of overseas documentary shipment contracts discussed in paragraph 3, above, strict compliance with time and place of shipment terms is dictated by the trade usage. Similarly, the circumstances of the transaction call for strict reading of the quality requirements of a contract for chemicals to manufacture gas masks, of a contract for precision parts, or of the time of delivery of a machine needed for a particular construction job or for harvesting machinery during the pending season. Thus, this Act approves such holdings as Nelson v. Imperial Trading Co. (1912) 69 Wash. 442; 125 P 777, where an order given in mid-November for two tons of turkeys was properly recognized by the court as directed to the Thanksgiving trade and a duty imposed upon the seller to ship in time to meet the needs of that commercial situation. And this Act rejects such a construction as made in Kemper-Thomas Co. v. Deitz (1918) 204 Mich. 84; 169 NW 826, where a Christmas order for frame purses calling for shipment on or about December 1 was filled by shipment on December 19 "in abundant time to reach Ann Arbor several days before Christmas," and the court directed a verdict for the seller for the price.

Where, however, the background of trade or circumstances does not make it entirely clear to both parties that performance above and beyond the usual commercial pattern will be necessary, attention must be called to this fact. The simple commercial means of calling attention to what is being demanded lies in the use of language which both raises the point and then settles it. In those frequent cases where form contracts are used the points must be raised in those specially dickered portions of the agreement which are filled in for the particular deal and thus always noted. Thus, notice of intended general strictness would be given by such terms as appeared in the Commonwealth Title Ins. & Trust Co. v. Gregson (1922) 303 Ill. 458; 135 NE 715, where the contract read: "Specification - Strictly new cure, strictly choice quality, new cooperage, heavily salted, proper salitage allowance, packed suitable for export, for arrival at New [p. 14] York not later than June 19."[8]

[8] The actual holding of the Gregson case in regard to the unforeseen supervening difficulty is not approved by this Act under Section 87 and Comment on substituted performance.
Similarly, the language may make unmistakable that the requirement of quality is more exact than ordinary trade usage would call for. So, in Rosenbaum Hardware Co. v. Paxton Lumber Co. (1919) 124 Va. 346; 97 SE 784, the following language gave adequate notice of the requirement of strict compliance where oak was being procured to fill a government contract. "Quality: To be selected white oak, straight grained and free from knots, heart centers, shake, wormholes, sap and other defects except as noted below . . . Defects allowed: Some pineworm will be allowed providing it does not damage the piece for the purpose for which it is intended." Or, in Powers v. Dodgson (1917) 194 Mich. 133; 160 NW 432, where after assurance by the seller that there was not more than 300 lbs. of fine wool in a certain lot, the buyer agreed to purchase the wool at a stipulated price "If there ain't over 300 pounds" of the fine wool in the lot; the presence of over 2000 lbs. of fine wool entitled the buyer to reject the goods.

The language of the dickered terms may likewise call attention to the fact that precise performance as to time of delivery is essential, as in Deming Co. v. Bryan (1911) 2 Ala. App. 317; 56 So. 754, where an order for a spraying machine directed the seller to "ship quick", as there would be damage to the crop by delay. Similarly, in Green Duck Co. v. Patterson & Hoffman (1912) 36 Okla. 392; 128 P 703, where a statute provided that time is not of the essence unless otherwise agreed and the contract called for 2000 watch fobs, "must reach [buyer] not later than February 25," the court held that goods shipped in March were rejectable. (See to same effect Augusta Factory v. Mente & Company (1909) 132 Ga. 503; 64 SE 553, where time became of essence of contract for sale of cloth to be resold as sugar bags to buyer's customer when buyer expressly stipulated dates of delivery.)

Normal credit practice may be similarly narrowed as in Weyerhauser Timber Co. v. First National Bank of Portland (1938) 150 Or. 172; 43 P (2d) 1078, where in the face of a custom that a "cash sale" meant a short credit period, the contract expressly provided for cash upon receipt of documents after the buyer had requested a 15 day credit period and been refused, the express language was properly held to override the trade usage.

10. The flexible character of commercial contracts. Some difficulty arises from the ambiguous character of the common practice among merchants who have or expect to have continuing relations of accepting "with an adjustment" usable but slightly deficient merchandise or materials for further manufacture. The question is
immediately raised as to whether such conduct represents a favor, through a [p. 15] unilateral waiver of a term, or a right implicit in the contract and being recognized in the course of performance. Good faith forbids that favors should be turned into unalterable rights and certainty demands that fair doubts should be resolved in favor of explicit terms. But the evil of literal or rigid reading of commercial language so as to require what is commercially impractical must be avoided as must the possibility that one party be permitted to take the other by surprise by a sudden and unexpected withdrawal of a "waiver" of an explicit term.

Actually most commercial obligations have a flexible character which our legal vocabulary has had some trouble in grasping but which has always been reflected in the spirit of the better commercial cases. They represent a going relationship not rigidly defined at the moment of contracting but changing in shape and structure in the process of performance or of getting ready to perform or to fit supervening circumstances. The available legal concepts tend to flow into one another: the use of the circumstances and the parties' actions to interpret the terms; the exercise of an option within an agreed range; waiver in any of its aspects and even modification of a term. (Compare paragraph 1 of this Comment.)

Thus, if in confirming a contract the buyer adds "Rush the January delivery," it is certain that he is only calling for such speed as is commercially practicable to the seller. It is not clear, however, whether the case is one involving an additional term proposed under Section 20, or a reflection of the general commercial understanding that the "seller's legal option to deliver at any time up to the last day" is subject to modification on buyer's initiative, or the beginning of a course of performance which followed by a request to "Hold February delivery till Mar. 15," duly acted on, will show that the stated time term contains leeways.

Similarly, the buyer's failure to raise any objection because of a delay or deficiency patent on the face of the delivery not only bars him from any remedy therefore under Section 96 on the effects of acceptance, but may also constitute part of a course of performance under Section 22 which can help to determine the meaning of the contract. Indeed, the policy of Section 96, although phrased in terms of notice of breach, rests substantially on the commercial fact that acceptance plus silence for an unreasonable time most likely spell acceptance not only in legal satisfaction but in actual satisfaction of the contract as understood by the parties. So
the buyer's actions upon delivery under an installment contract may show that the terms were meant to be strictly adhered to, or that complying units making up the bulk of a delivery are acceptable with replacement of the non-complying ones; or that a whole non-complying delivery is subject to replacement; or, in general, an understanding between the parties as to permissable leeways in time, quality or quantity within which any delivery is acceptable with or without appropriate allowances.

Even with regard to single deliveries the courts have dealt in the same way with the behaviour of the parties and Section 26 of this Act on good faith and commercial standards calls for continuation of such treatment. Thus, unstated variations from stated terms have been held "waived" by the buyer's statement of other objections at the time of rejection when his rejection has been in patent commercial bad faith and due not to the nature of the performance but to a [p. 16] drop in the market or other similar circumstances which has made the contract unprofitable to him. In result, the courts in such cases have thus soundly used the buyer's conduct as a clear indication that literal compliance with the terms as written had no more been understood by the buyer to be of the essence than it had been by the seller and in consequence have made difficult a surprise rejection in commercial bad faith. So in Second National Bank of Allegheny v. Lash Corp. (1924 CCA 3) 299 Fed. 371, involving a contract made on July 8 for "immediate shipment," the letter of credit was not secured by the buyer until July 20. The first car was loaded on July 23 and the second, due to a car shortage, on July 27. After a severe market drop the buyer attempted unsuccessfully to cancel the contract and then refused to accept the shipments "for undue delay." The court permitted the seller to recover holding that defects in the bill of lading later claimed by the buyer had been waived by failure to state them at the time of rejection and, moreover, read the term "immediate shipment" as "leaving some latitude with respect to performance" in view of the known circumstances. Under this Act, in fact, the buyer's delay in opening the credit would be enough as against him to show such latitude on time of delivery (See Section 49 plus Section 11).[9] However, where the buyer's can-
cellation is in good faith and because a non-conforming delivery is not acceptable to him under his understanding of the contract terms, neither a drop in market price nor his failure to state a particular defect in his rejection should operate automatically as a waiver of the unstated defect. [See Dexter Yarn Co. v. American Fabrics Co. (1925) 102 Conn. 529; 129 Atl. 527, where the buyer's cancellation of a whole contract for yarn was held justified as a matter of law despite a severe drop in the market when he had given the seller an opportunity to cure a defective installment and the latter had failed to do so.] Indeed, Section 94 on statement of defects is carefully drawn to prevent such automatic waiver by mere failure to state defects in order to protect the normal informality of commercial communications. The same section, however, must and does protect a seller who is misled to his prejudice by the buyer's expressions or silence. It also affords the [p. 17] seller a means of procuring from the buyer a full and final statement of objections. But that section, like every similar section of this Act, presupposes good faith, and therefore leaves untouched the results of that line of cases discussed in footnote 9 in which the buyer has acted in commercial bad faith. It flatly rejects, however, those cases which have applied a blind rule of automatic "waiver," by non-statement such as Ginn v. W.C. Clark Coal Co. (1906) 143 Mich. 84; 106 NW 867, where the buyer having rejected coal because it was not of the type ordered was not permitted upon the trial to prove that it was not of merchantable quality.

In the same way and for the same reasons the rule of Section 90, which allows and encourages partial acceptance of a delivery in good faith is entirely consistent with those cases which have

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rule in the jurisdiction the court disregarded a 10 percent shortage holding that the bill of lading showed a full shipment and requiring the buyer, if shortage developed en route, to complain and permit reasonable opportunity to cure; Nathew v. George A. Moore & Co. (1925 ND Calif.) 4 F (2d) 251, Affd. (1926 CCA 9) 13F. (2d) 747, where sugar was shipped on May 31 and July 27 under a "May-June" Saigon term during the 1920 scramble and price drop and was rejected by the buyer "account quality and single bags" which causes were held to be untenable and the delay then held to be no justification since "it had nothing whatever to do with the rejection"; Toledo Furnace Co. v. Lansing Co. (1922) 220 Mich. 207; 189 NW 864, where a technical defect by invoicing pig iron under one contract rather than another was disregarded by the court during a market drop; Daniels v. Morris (1913) 65 Ore. 289; 130 Pac. 397; 132 Pac. 958, in which during a severe market decline the buyer was required to select 20,000 conforming pounds of hops out of a larger quantity ready and tendered for delivery, the court disregarding the excess weight of some bags.
rightly seen in the circumstances of a particular partial acceptance a clear indication that the entire delivery was actually up to the parties' understanding of the acceptable. Thus, in Lyon v. Bertram (1857 US) 20 Howard 149, one of two standard brands of flour equally acceptable to merchants in the area was tendered exship under a contract calling for the other. Two partial deliveries to sub-purchasers of the buyer were made and no objection was raised by the buyer. The buyer's general rejection then followed only when the market suddenly dropped and the court held him liable for the purchase price. Similarly, in Wrenn v. Lafayette Furniture Co. (1933) 151 So. 148, 30 bedroom suites were delivered, short 7 chifforobes and with alleged patent defects. Three or four suites were resold at 200 percent mark-up and without complaint by subbuyers. The buyer's attempted rejection or rescission of the remainder of the shipment for the shortage and for the defects was then held unjustifiable.

A single action of rejection or acceptance does not of course fall strictly within the language of Section 22 on course of performance since these are not "repeated occasions for performance." The policy of the case law is nevertheless left unchanged by this Act because the circumstances of the cases involved interpret the agreement as understood by the buyer, and show bad faith on his part in the attempted rejection. This Act protects only the reasonable actions and reasonable expectations of both parties, as contrasted with sudden objection in bad faith by one which is akin to a penalty or forfeiture imposed on the other.

Where practical construction of a flexible commercial contract results in a *departure* from the literal language of the original agreement which has been shaped and changed by the course of the parties' performance or by a single crucial act of one party, two basic principles must be remembered. In the first place the commercial leeway recognized by the parties in their performance extends only to limiting the privilege of rejection or cancellation and leaves open claims for damages or adjustment for the discrepancy from the literal terms. Secondly, the original agreement can be recurred to and the performance required can be tightened up upon due notice. When there is doubt as to the meaning and effect of the parties' actions in the course of performance, this Act favors that interpretation which stresses the concept of a *waiver of a term* under Section 22. For Section 24 further provides that unless reliance on such a waiver makes its retraction unjust, it is open to retraction with regard to all executory portions of the contract.
Good faith action [p. 18] and expectation are thus protected while flexibility is preserved, not only in the direction of leeway (by action and acquiescence) but also in the direction of tightening up (by due notice given). Thus, while this Act recognizes the right of the parties to reinstate the original terms, it rejects those blinder cases which proceed under the written terms as if there had been no intervening practical construction and therefore no need for notice of an intention to demand stricter performance in the future. [See Republic Coal Co. v. W.G.Block Co. (1922) 195 Ia. 321; 190 NW 530, in which parties had dealt loosely with contract terms as to ordering out deliveries and making payments for a lengthy period. The court sustained the seller’s sudden cancellation because of one late payment on the ground that prior waivers of late performance had no bearing on this particular late payment which the seller didn’t choose to waive. And compare the equally unsound holding in Southern Coal Co. v. Searcy Transfer Co. (1922) 152 Ark. 471; 238 SW 624, where during long course of prior dealing between parties under contracts similar to the one in question, extra credit had been extended by the seller. In a rising market the seller’s sudden cancellation without notice for the buyer’s failure to make prompt payment was held justified by the court despite prior course of dealing.]

Finally, it is important to note that practical construction in the direction of commercial leeway goes not alone to a particular term but to the meaning of agreement as a whole: it is not a single term which the parties are reading liberally but the general terms of the entire agreement. Thus, in the case of Dow Chemical Co. v. Detroit Chemical Works (1919) 208 Mich. 157; 175 NW 269, the contract called for monthly deliveries to be spread over the year. The market rose. The first month’s deliveries were not called for until January 20, and there shipment was not completed until February 3, both parties being satisfied with this. Then the seller, on the basis of a particular clause, undertook to announce sudden cancellation because of the buyer’s failure to pay for the first delivery on the exact day and as upheld in this position by the court. Under this Act, and apart from all other considerations, the loose course of performance in regard to delivery would have required notice from the seller before such drastic remedy could be applied to a negligible delay in payment. Similarly, in the frequent case of successive breaches on both sides, each duly acquiesced in, this Act rejects that line of analysis which sees only breach and waiver, or breach and “holding open,” with all ob-
llications still read as originally written, and with the whole brunt of repudiation resting on whichever party first makes a technical slip without subsequent forgiveness. Under this Act when breach and forgiveness on both sides show general loose construction by the parties, seasonable notice of intention to tighten up is needed in order to justify cancellation for action which in the past was acceptable. (See also Sections 98 through 101 and Comments.)

11. The pattern of acceptance with adjustment; the consumer exception. As has been pointed out above, usage of trade, course of dealing and course of performance all tend to indicate that tolerances in deliveries with replacement for partially or wholly unacceptable deliveries or adjustment for goods defective or delayed, are widely recognized in commerce and form the usual pattern rather than absolute rejection, revocation of acceptance, or cancellation. There are, however, lines of trade in which strict compliance with certain [p. 19] terms is insisted upon, as discussed in paragraphs 3 and 7 above, and there are types of purchase in which minor defects go so clearly to the essence that the rightfulness of the rejection is beyond question. This is particularly true in the case of consumer purchases looking to lasting use, for value-in-use to a particular buyer can be seriously impaired by defects which scarcely affect value-in-exchange. So, in the ordinary consumer purchase, matters of taste, discrepancy of color, irritation from the noisy operation of a machine, and the like, make exact compliance with the terms essential and justify rejection or revocation of acceptance for minor defects. [Compare also Williams Transportation Line v. Cole Transportation Co. (1901) 129 Mich. 209; 88 NW 473, which involved a breach of warranty that a steamer would have a minimum speed and the older rule which limited the remedy to damages was applied. This general rule is rejected by the Original Act, Section 69(1) and by this Act, Section 90 on buyer's rights on improper delivery, and Section 97 on revocation of acceptance.]

Of course, in any event, a rejection is not justified unless there has been a departure from what the contract calls for and that is to be determined not only from the literal language of the agreement but also from usages of trade, the surrounding circumstances, the course of performance and prior dealings under the tests and standards laid down in the foregoing. Frequently, however, the authoritative determination of what the contract actually calls for under these principles lies in the future and the seller, at the time of the announced rejection, is never free from the hazard of an unforeseeable adverse judgment by a court and jury. This
Act seeks both to reduce the uncertainty of this situation and to provide the parties with the means of going forward with performance of the remainder of the contract pending settlement of a dispute. Section 77 on cure of tender looks not only to protecting a good faith seller against being caught flat-footed by a surprise rejection but also entitles and enables him to protect himself against the hazards of litigation. For now warned that a possible lawsuit impends, he can make a new tender which he can be certain will comply with the contract in its most technical sense even though the one rejected may have been adequate under the above rules. Section 84 expressly provides that either party may go forward with performance under a reservation of rights which will prevent such further performance from prejudicing his position in any way.

This Act does not adopt, however, any general doctrine of "substantial performance" and any discrepancy from what the contract [i.e., the agreement as read in the light of this Act and the law generally, Section 9] calls for is ground for rejection if the rejection is made in good faith because of the discrepancy. The principle is two-fold. In the first place, leeways and tolerances in performance are frequently built into the contract itself under the policies discussed above and therefore the so-called discrepancy does not justify rejection because it does not actually represent a departure from the contract terms. In the second place, neither party may be permitted to reject on the alleged basis of a minor defect which is actually of no significance to him when the true reason for his rejection is a change in the market or some similar circumstance which has made the contract unprofitable to him. Such action is clearly in commercial bad faith and not to be tolerated by this Act. [Section 26 (2)]

[p. 20] The better cases have long followed this principle, recognizing that the obligations of a seller under a contract for sale are not all of a single piece. "From a very early period of our law it has been recognized that such obligations are not all of equal importance." Wallis & Wells v. Pratt & Haynes (1910 CA) 2 KB 1003. The courts have thus distinguished "dependent" from "independent" promises, "total" breaches which "go to the essence" from mere "partial" breaches; they have often turned to the concept of "collateral" promises or to a distinction between non-compliance which goes to the "identity of the thing" from those which go only to "incidental" attributes. (Compare the results in the cases on "waiver" of unstated defects and of some type of partial acceptance, supra, paragraph 9.)
This Act, in Section 101 on rejection of one delivery out of several and Section 97 on revocation of acceptance cuts through all the tortured technicalities of these distinctions but maintains the essence for which these various lines of doctrine have been striving by permitting a *good faith* rejection to be made for any discrepancy. Thus, either party may demand and expect the most exact compliance with the terms where the circumstances of the case or the inclusion of express provisions in the agreement indicate that such compliance is of importance to him. So in the case of the ordinary purchase by the family consumer mentioned above. Neither is a merchant-buyer required to spread the internal details of his business before a jury to be bound by their unpredictable judgment of whether something he did not order is "just as good" or "substantially as good" as what he did order. However, just as this Act recognizes that the buyer's obligation of payment on the due day is more vital when it is due in advance of or against delivery than when it is due after credit (Section 104 on seller's remedies), so it recognizes that there are occasions when certain non-compliance with the seller's obligations do not warrant a rejection. In a few situations the testing of good faith in rejection have been standardized, on the one side, as the case of defect in the form of documents under an overseas shipment contract which is regularly treated as material (Section 44 and paragraph 3 above) and, on the other side, a failure to make a proper contract with a carrier or to give notice of shipment which does not warrant rejection unless material trouble ensues [Section 73 (1) (c)].

In general, however, the application of the principle is left to the particular case. Thus, for instance, where the form of shipment is such as to require the buyer to make a non-burdensome advance of freight charges or to undertake a simple separation of contractual goods from accompanying goods, this Act rejects the bald doctrine of such cases as Rock Glen Salt Co. v. Segal (1917) 229 Mass. 115; 118 NE 239, in which the fact that 15 barrels of salt for another person were added to fill up a car of sacks for the buyer was held sufficient to warrant rejection under Section 44 of the Original Act. On the [p. 21] other hand, this Act approves the contrary expressions in Pepper v. Rosen (1928) 292 Pa. 122; 140

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[10] On the facts that case was actually well decided, since the seller had not given the buyer appropriate notice of the form of shipment and a fire supervened before the buyer understood the situation.
Atl. 774, in which the buyer was called upon to pay freight charges in excess of amount stipulated in the contract, but this was not held enough to justify rejection; in William Barker Jr. & Co. v. Edward T. Aguis, Ltd. (1927 KB 11) 33 Com. Cas. 120, in which the court discussed the distinction between goods "accompanying" a shipment and goods so "mixed with" contractual goods as to cause undue trouble and expense in sorting; and Daniels v. Morris (1913) 65 Or. 289; 130 Pac. 397, in which the buyer was required to make a non-burdensome selection from a larger quantity in the warehouse of delivery and the tender was held good.

12. "Codified" trade usage; balanced and unbalanced expressions thereof.

These are days in which the usage of various lines of trade is frequently forced to reshape itself rapidly in order to fit new conditions. Often, the practices developed to meet these new problems compete for a while for general acceptance. Frequently, too, "chiseling" corner cutting practices or lopsided, oppressive usages which are unfair to one side of the bargain develop. Under these circumstances businessmen are more and more resorting to "codified" statements of practice in order to achieve certainty of result, convenient speed in doing business, and to get the benefit of cumulative experience and interpretation. Thus, the "rules" of trade association "standard contracts" prepared and endorsed by a trade association or bargained out by two or more associations, agreed and published definitions or statements of standard grades or terms, association inspection to settle disputes as to the conformity of a delivery to the contract are playing an increasingly important role upon the commercial scene. [See, for example, the standard contracts bargained out between the National Wholesale Grocers' Assn. and the Dried Fruit Association of California for the Pacific dried fruit trade and the consciously favorable interpretation of this balanced and well adjusted contract by the courts in Rosenberg & Co. v. F.S.Buffem Co., Inc. (1922) 234 NY 338; 137 NE 609; and Higgins v. California Prune & Apricot Growers (1926 CCA 2) 16 F. (2d) 190. See also the Revised American Foreign Trade Definitions cited in the Comments on the sections on Special Mercantile Terms.]

No legal difficulties of incorporation of such codified usage are presented when both parties are members of the association concerned and have agreed to be bound by the published statement. Problems of interpretation do arise as has been demonstrated by the long series of English cases. Under this Act it is recognized that a balanced and reasonable set of provisions of this kind "makes
law” for the members and refines the more general rules of this Act to meet effectively the specialized needs of a particular commodity and a particular organization of the market. Such provisions must be interpreted as favorably and reasonably as possible and the resistance which some courts have set up to the recognition and favorable reading either of trade association “rules” or “standard contracts” is not justified. Thus, in the matter of [p. 22] interpreting standard clause used in the Scandinavian timber trade requiring the buyer to accept deliveries with allowances for discrepancies, this Act approves the approach of Scrutton, L.J., in Meyer v. Kivesto (1929 CA) 35 L.L.R. 265, requiring the buyer to accept when delivery was in commercially reasonable fulfillment of the contract and of Rowlatt, J., in Green v. Arcos, Ltd. (1931 KBD) 39 L.L.R. 84, who declared that “some margin is necessary as a matter of business;” and expressly rejects that of the House of Lords in Arcas, Ltd. v. Ronassen (1933) 49 TLR 251, which stated, “If the article they have purchased is not the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of what they have bought.”

However, the insistence of the courts on the power and duty of the law to police against the unbalanced and the unreasonable remains as sound in regard to “rules” and standard contract clauses as it does in regard to non-codified usages of trade and the basic principle of this Act against surprise and unconscionability contained in Section 23 and discussed in paragraphs 7 and 8 above, recognizes this power explicitly in the case of contract terms and a fortiori in the case of non-codified usage. For standard clauses while giving certainty to many usages which are still in a state of flux may also legitimately slant their provisions in favor of one of the parties. This does not negate a real assent to the clause on the part of the other party since in using another’s form one agrees to a somewhat favorable slicing of the cake in the other’s favor. Even a non-professional who signs up on the professional’s form without reading it, or indeed without the ability to understand its legal implications if he did read it, must be held to have given a real blanket assent to any fair example of the type of contract concerned. But fair dealing goes to the attributes not only of the goods but of the transaction and when clauses are drawn with more onesidedness than is to be expected from a decent dealer, then they enter by surprise and become only in form a subject of agreement. It is such clauses which the courts in the exercise of their police power are justified in striking out.
Two indices are available as a primary indication as to whether a set of standard provisions call for sympathetic and expansive application or for a hostile attitude. The first index is found in the provisions of this Act itself. A large number of the protections hitherto commonly sought by clauses are now made available without the need for clauses by this Act which sets forth a body of rights and duties whose prime characteristic is a balanced adjustment of the rights and interests of both the buyer and the seller. Thus, in Sections 87 and 88, the seller is granted an exemption for the normal run of supervening casualty and also the privilege of proportion among his customers under such circumstances, but at the same time this protection is limited to what is commercially reasonable and this Act does not recognize any indefinite privilege on the seller's part to renew deliveries at his option after the delay. Again in Section 98 either party is protected against the need for performance or preparing to perform if the prospect of counter-performance has become insecure by exercising the privilege of demanding adequate assurances, but sudden termination without notice and without giving the other party an opportunity to provide such assurances is barred. Similarly, this Act recognizes any reasonable limitation of remedies but expressly refuses to recognize unreasonable or unconscionable ones [Sections 121 and 122]; it recognizes any reasonable limitation on the time for any performance under the contract but insists that the limitation must be "in fact" reasonable [Section 11]. The seller's action for the price under Section 110 may be replaced by the agreement by the right of resale and loss of profit under Section 107 but not by such a clause as "on cancellation by the buyer the seller may at its [p. 23] option mark and hold the goods for the buyer, or ship, and in either case revoke any credit term." Any one or any few of the rules of this Act may be properly modified "by agreement otherwise" in one direction or the other, as the circumstances of the trade or of the parties may seem to require. But cumulative modifications in a single direction raise the suspicion that what they are seeking is not an adjustment of the deal to the needs of the trade or of the particular situation, but rather an overreaching by one party to the contract. True, what seems to an outsider lopsidedness may have warrant in the situation. Thus, a large mail order house ordering radio cabinets on specification may require the most rigorous compliance, piece by piece, and may wish to reject a whole shipment if the single piece that is broken up for testing in detail does not conform; but it is not difficult either to
bring this manner of inspection to the manufacturing seller’s attention specifically at the time of contracting or to persuade a court of the reasonableness of the procedure and result in the circumstances.

The second index is found in the origin of the “rules” or standard form. Where, as in the dried fruit contracts or the lumber usages, both sides have been effectively represented in the building of the “codification,” the results are rarely unbalanced, and what may seem to be queer provisions to the outsider usually have a fair and good reason within the particular trade. In most cases, indeed, the balance in standard terms thus arrived at shows on their face.

In view of the difficulty of distinguishing in terse statutory language between such balanced contracts and those contracts built up wholly from and for one side of the bargain, or between statements of practice or “rules” which like those on bankers’ letters of credit work a fair balance between issuers of credits and purchasers of drafts under credits and statements of practice drawn for one side only, this Act contains no explicit provision furthering the incorporation of “balanced codifications” into agreements in the absence of special reference to them in the contract, membership of both parties in the associations whose rules or contracts are involved, or the like. Plainly a general section giving prima facie weight to such codified usage in the manner of Section 128 on third party documents would open the door to partisan manipulation. Even a provision for their general admissibility subject to showing “the circumstances of preparation” in the manner of Section 127 on published market quotations, would unduly widen and confuse the issues in a trial. Yet the policy of this Act is clear that an agreement must be read in the light of any common basis of understanding of the parties and of what is currently recognized as established in the place or trade [Section 21]. And where “codified usage” is balanced and reasonable, the existence of the codification tends not only to standardize practice in fact but also to standardize the background of expectation and understanding against which men in the trade use language. This Act therefore in no manner interferes with the wise use which courts have made of such “codifications” as giving strong evidence of the currency of reasonable usages, understandings, and details with which the parties may reasonably be considered to have intended to supplement their own brief expressions in the agreement. It rejects, moreover, such narrow holdings as Hart v. Hammett Grocer Co. (1918) 132 Ark. 197; 200 SW 795, in which a sale of beans was made by an
exchange of telegrams. The [p. 24] seller's letter confirming the sale stated that it was subject to rules of the bean jobbers' association whose contract specifically defined "delivered" price as used in that trade. The court held that this standard contract was inadmissible to explain the meaning of "delivered" price as used in the telegrams of the parties.
APPENDIX B*

DRAFT FOR A "UNIFORM SALES ACT, 1940" § 69

SECTION 69. (NEW IN SALES ACT). ARBITRATION OF MERCANTILE ISSUES OF FACT.

Before or after the institution of any litigation involving a contract to sell or a sale of goods between merchants, any issue as to usage of trade, or as to the conformity of goods to what the contract or sale requires and the amount of proper allowance for discrepancy, if any, or as to the substantiality of a breach, or as to the adequacy of assurance of future performance, or as to the mercantilely reasonable character of action taken in cover, may be agreement of the parties be submitted to arbitration, and the results of such arbitration, if duly had, shall be conclusive upon the point or points submitted.

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[p. 73c]

COMMENT ON SECTION 69. (NEW.)

One cannot follow the course of actual Sales disputes without being struck by the frequency with which single issues of fact of essentially mercantile character become crucial, and interfere with adjustment of the whole. And one cannot follow the course of actual Sales litigation without being struck by the expense and uncertainty of litigating just such issues, especially before a jury, but also before most courts. Our political system does not afford an effective way out by way of experts or expert tribunals appointed by the courts; the guaranty is lacking that patronage may not over-balance the needed combination of competence, impartiality, speed and inexpensiveness.

But the submission of narrow points of fact to arbitration, especially those narrow points on which competence makes possible speedy and accurate judgment, has never as yet been at all fully exploited, and an Act can properly suggest the possibility to the parties to a mercantile dispute, and should further the effectiveness of such procedure.

As is developed with cogency by Phillips, A Lawyer's Approach to Commercial Arbitration (1934) 44 Yale L. J. 31, the least satisfactory aspect of lay arbitration of whole disputes is the handling of implications, reconciliations, constructive conditions and the like in a complex agreement: this, under use of the Section, is left in the expert hands of the court. * * *

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In Review it will now be possible to estimate the degree to which the Draft approaches true expression of the five major lines of a "Uniform Sales Act, 1940," in combination. The Sections which follow contain only relatively minor changes.

Mercantile standards are to be set up throughout, and made explicit, being laid down, however, only for mercantile cases; and rights on breach are to be sufficiently sharpened to let lines of safe and business-like action be determined. Mercantile procedures for adjustment are to be initiated by mercantile admeasurement of obligation, and then carried through to give every drive to minimize dispute, ease negotiation, and avoid risk of loss or prejudice by offering negotiation. In full consonance with both these lines of attack, the integration of theory undertaken in the original Uniform Sales Act is to be worked into full expression, and the best case-law around and under it is to be worked with it into a harmonious whole. Finally, points of legal remedy are to be sharpened somewhat, and the alternative remedy of cover is to be inserted to substitute mercantile clarity for the obscurity and non-conformity of the law of damages. And an even balance of buyer's rights and seller's is vital.
It is essential to emphasize again that so much of this as has been achieved would have been unthinkable without the impetus and labors of the Merchants Association and Hiram Thomas, and without the critical work done on the Federal Bill, to say nothing of the literature of the last fifteen years.
APPENDIX C*

REVISED UNIFORM SALES ACT, SECOND DRAFT (DEC. 1941) §§ 59-59D

MERCHANT EXPERTS ON MERCANTILE FACTS

Introductory Comment to Sections 59-59-D.

A. General. The need for speedy, reliable, and therefore reasonable and reckonable, determination of questions of mercantile fact underlies all Sales law. The unspecialized character of our Courts brings it about that few judges have the specialized skill in such matters of a Kennedy, Hamilton, or Scrutton, of the English Bench; and juries are notoriously out of touch with such matters.

Yet the Act of 1906 made the effect of the transaction subject at every turn to the usage of trade: the only proof of which is by experts. And such questions as conformity of textiles to a requirement of merchantability can take three weeks merely to prepare for trial.

[p. 532]

The present Draft opens the transaction still more to questions of mercantile fact. That is needed. But certainty in transactions, certainty in negotiations, and reasonable insurance against the mercantile tricks of the business chiseler and the jury tricks of the legal chiseler, are not to be had without a sound and workable procedural device to get such questions of mercantile fact settled competently. Incidentally, competent settlement means settlement which is also (1) speedy; (2) inexpensive; (3) reckonable.

That this is workable, is demonstrated by the work of the arbitration committees of particular trades. That it has been workable in court, was demonstrated as early as Mansfield, with his recourse to a special merchants' "jury"; and in a somewhat different fashion by the satisfactory work of experienced commercial judges when passing on either law or fact in a commercial case.