

THE IMPACT OF ARTICLE 2 OF THE U.C.C. ON THE DOCTRINE OF ANTICIPATORY REPUDIATION

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In Anglo-American law, a contract is generally viewed as a promise or series of promises supported by sufficient consideration to render the promise or promises legally obligatory. When a contract is not performed according to its terms it is said to have been breached, and the law requires the breaching party to answer in damages. In some circumstances, a promisor under a contract may communicate to the promisee his intent not to perform his obligation at the time it will be called for by the contract. Such a communication is termed "anticipatory repudiation" of the contract. When an anticipatory repudiation occurs, the question is raised whether the promisee has an immediate claim for breach of the contract. Article 2 of the Uniform Commercial Code¹ contains a number of provisions designed to provide remedies in anticipatory repudiation situations. It is the purpose of this article (1) to examine the antecedents to the Code rules, (2) to isolate a number of problems which existed under pre-Code law, and (3) to assess the impact of the Code in such situations.

I. BACKGROUND—ANTICIPATORY REPUDIATION AT COMMON LAW

At common law, a finding of actual breach prior to the time set for performance is not logically possible, for it is only at that time that the obligor can be said to have legally obligated himself to do or not to do a particular act or set of acts. Thus, if *A* contracts on January 1 to supply goods to *B* on the following December 1, and if on March 1, *A* makes clear to *B* his intent not to perform on December 1, there would be no action for breach of contract. Regardless of his expressions of repudiation, *A* could not be considered in breach until December 1, the time at which he was to deliver the goods. Since *A* did not expressly promise to limit his freedom of action prior to the contract date for performance and his repudiation does not preclude his delivery of the goods, *B* would have to await actual nonperformance on December 1 before he could seek his remedy for breach.

In 1839, in the case of *Phillpotts v. Evans*,² Baron Parke clearly and emphatically rejected the notion that an anticipatory repudiation might constitute a presently actionable breach of contract:

[F]or all that [defendant] stipulates for is, that he will be ready and willing to receive the goods, and pay for them, at

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¹ All references to the Uniform Commercial Code will be to the 1962 Official Text.

² 151 Eng. Rep. 200 (Ex. 1839).

the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them nevertheless; and, vice versâ, the plaintiffs could not sue him before.³

This mechanistic view of a contract, requiring both an expiration of the contract time and a failure to perform before an action for breach, was later relaxed somewhat. In the 1853 landmark case of *Hochster v. De la Tour*,⁴ plaintiff, a courier, contracted to accompany defendant to Europe from June 1 to September 1 for a fixed fee. On May 11, defendant emphatically repudiated. On May 22, plaintiff brought an action for breach and subsequently acquired work beginning on July 4. The defendant argued that his preperformance repudiation was in legal effect an offer to rescind the repudiated contract, an offer which presented to the nonrepudiating party two alternatives: acceptance or rejection. Rejection would necessitate that the nonrepudiating party continue ready, willing and able to perform until the date specified in the contract for performance in order to put the repudiating party in default. Any other course of conduct, it was argued, would amount to an acceptance of the offer to rescind and would free the repudiator from legal liability on the contract.⁵ Lord Chief Justice Campbell refused to accept this argument.

But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which would be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract.⁶

Logically, this argument leads only to the conclusion that the plaintiff ought to be excused from performance. The court nevertheless, without considering the alternatives, allowed plaintiff to recover damages although he had brought his action prior to the time for defendant's performance.

Although the doctrine that an anticipatory repudiation may amount to a presently actionable breach seems thus to have sprung

³ Id. at 202.

⁴ 118 Eng. Rep. 922 (Q.B. 1853).

⁵ Id. at 925.

⁶ Id. at 926.

up by accident, it has taken strong root in English and American law. Several objections have, however, been advanced against the doctrine. The first is conceptual—there cannot be a breach until the promised performance is not forthcoming. The second is that preperformance damages exposes the repudiator to an unbargained-for risk and extends to the nonrepudiating party an unbargained-for windfall. Finally, it is said that the doctrine needlessly complicates the formulation of damages.⁷

The conceptual difficulty can be overcome by recognizing that one of the primary aims of the law of contracts is protection of the parties' reasonable expectations, one of which is that the anticipation of performance when due will not be threatened. Because a contract is essentially a voluntary arrangement, and because a statement by one party that he will not perform must be taken at face value, it is clear that in many situations a substantial threat of nonperformance can be recognized as being the virtual equivalent of ultimate nonperformance of the contract.

The second objection is that the doctrine exposes the defendant to unbargained-for risks. It can also be said, however, that the failure to implement the doctrine would subject the plaintiff to damage for which he did not bargain and might unreasonably delay his obtaining of recompense. Actually, the doctrine is based on an implied term in the contract—that neither party will frustrate the other's bargained-for expectations. It is simply assumed that the parties would have so agreed had they thought of it, and we suppose they could lawfully bargain away the right to sue for an anticipatory breach.

The final objection is that the doctrine complicates the formulation of damages for breach of contract. It should, however, be noted that while the doctrine does complicate the task of measuring damages for breach, it does not make the task more complicated than it is in several other instances where the law allows recovery for a legally recognized wrong. For example, the recovery of future profit lost from the interruption of a going business as a consequence of a breach of contract can be recovered in an action for breach, if the interruption was a foreseeable consequence of breach at the time of entry into the contract.⁸ The law also allows recovery of lost future earnings in an action to recover damages for a disabling tort.⁹ The amount of such losses is, of course, little more than a well-calculated guess. Both these instances, however, are distinguishable from the anticipatory repudiation case, for, in the latter, the problem can be avoided simply by

⁷ See 4 A. Corbin, *Contracts* § 961, at 859-64 (1951).

⁸ See, e.g., *Buxbaum v. G.H.P. Cigar Co.*, 188 Wis. 389, 206 N.W. 59 (1925).

⁹ See, e.g., *Gibraltar Coal Mining Co. v. Miller*, 233 Ky. 129, 25 S.W.2d 38 (1930). See generally C. McCormick, *Damages* § 86 (1935).

requiring that the aggrieved party await the performance date specified in the contract before bringing his action for breach. In light of this, the desirability of the doctrine can be reduced to a simple value judgment: Is the loss of expectation of performance an injury against which the law should offer protection even though to do so creates problems in the precise and accurate ascertainment of damages? The value judgment has apparently been made. The courts have taken the position that the importance of protecting the expectation interest outweighs the magnitude of the problem of lack of certainty in the measurement of damages created by recognition of the doctrine of anticipatory repudiation.¹⁰

II. "DEFINITENESS" AND "SUBSTANTIALITY" OF REPUDIATION

An anticipatory breach of contract occurs when a "definite and unequivocal" repudiation of intent to perform a "substantial" part of the contract at the due date is made, either expressly or impliedly, prior to the time for performance and is communicated, either directly or indirectly, to the party on the other side of the contract.¹¹ The application of this rule has resulted in two major problems: (1) that of determining whether a repudiation is "definite and unequivocal," and (2) that of deciding whether the repudiation is sufficiently "substantial" to amount to a breach.

There is a great deal of precedent on the question of definiteness, not all of it consistent. It is generally said that merely to express doubt as to one's ability to perform is too indefinite to amount to an anticipatory repudiation. A statement of prospective inability to pay the contract price when due and a request for an extension has been held to be not sufficiently definite.¹² So too, a statement by a subcontractor that he is having difficulty obtaining necessary materials, accompanied by a request for help in procuring them, has been held to be too

¹⁰ Only Massachusetts and Nebraska are said not to recognize the doctrine of anticipatory repudiation. See *Daniels v. Newton*, 114 Mass. 530 (1874); *Carstens v. McDonald*, 38 Neb. 858, 57 N.W. 757 (1894). There is, however, considerable doubt as to whether Nebraska continues to refuse recognition to the doctrine. See *Hixson Map Co. v. Nebraska Post Co.*, 98 N.W. 872 (Neb. 1904); *Vold, Repudiation of Contracts*, 5 Neb. L. Bull. 269, 270 (1927).

¹¹ See 4 A. Corbin, *Contracts* § 973 (1951).

The source of the requirement of communication is the statement of Lord Chief Justice Campbell:

The intention of the defendant might be proved by showing that he entered in his diary a memorandum to that effect; and, certainly, no action would lie for entering such a memorandum. But the question is as to the effect of a communication to the other side, made that he might know that intention and act upon it.

Hochster v. De la Tour, 118 Eng. Rep. 922, 925 (Q.B. 1853).

¹² *Salot v. Wershow*, 157 Cal. App. 2d 352, 320 P.2d 926 (1958); *Miller v. McConnell*, 179 Iowa 377, 157 N.W. 943 (1917).

indefinite.¹³ A landlord's statement, following destruction of the leased premises, that he has no funds with which to perform his covenant to erect a new building has also been held not to be an anticipatory breach,¹⁴ and the same result was reached in a case where a corporate buyer stated to the seller that the corporate entity was to be dissolved and that payment could not be made until after the winding up.¹⁵ An expression of prospective inability to perform has, however, been held to amount to a definite and unequivocal repudiation. For example, in *DeForest Radio Tel. & Tel. Co. v. Triangle Radio Supply Co.*¹⁶ one party to a contract informed the other that an injunction obtained by a third party would prevent performance, and this statement was held to be an anticipatory breach.

Even an actual statement of intent not to perform may create difficulty. As a general rule, such a statement is the clearest form of anticipatory repudiation but this is not so in every case. It has often been held that so long as the promisor recognizes the contract as binding he can deny an obligation to perform as demanded by the other party, without this denial amounting to an anticipatory breach.¹⁷ Also a demand for performance in accord with an incorrect interpretation of the contract is not of itself an anticipatory repudiation,¹⁸ unless the party making the demand makes it clear that he will not perform if his demand is not met.¹⁹

Words are not an essential element of anticipatory repudiation, for the breach may be effected by conduct. For example, where one who has contracted to sell specific goods sells them to another, this act may be sufficient, of itself, to amount to an anticipatory repudiation of the contract.²⁰ In fact, as a general proposition, any voluntary act of the parties which renders performance impossible or apparently impossible is an anticipatory repudiation. An adjudication of bankruptcy is equivalent to an anticipatory repudiation whether voluntary or involuntary.²¹ On the other hand the mere insolvency of a party

¹³ *McCloskey & Co. v. Minweld Steel Co.*, 220 F.2d 101 (3d Cir. 1955).

¹⁴ *Johnstone v. Milling*, [1886] 16 Q.B.D. 460.

¹⁵ *Wonalancet Co. v. Banfield*, 116 Conn. 582, 165 A. 785 (1933).

¹⁶ 243 N.Y. 283, 153 N.E. 75 (1926).

¹⁷ See *New York Life Ins. Co. v. Viglas*, 297 U.S. 672 (1936); *Lumbermen's Mut. Cas. Co. v. Klotz*, 251 F.2d 499 (5th Cir. 1958).

¹⁸ See *Kimel v. Missouri State Life Ins. Co.*, 71 F.2d 921 (10th Cir. 1934); *Milton v. H.C. Stone Lumber Co.*, 36 F.2d 583 (D. Ill. 1928), *aff'd*, 36 F.2d 589 (7th Cir. 1929).

¹⁹ See *Michigan Yacht & Power Co. v. Busch*, 143 F. 929 (6th Cir. 1906); *Nichols v. Scranton Steel Co.*, 137 N.Y. 471, 33 N.E. 561 (1893).

²⁰ *Bowdell v. Parsons*, 103 Eng. Rep. 811 (K.B. 1808). See *Synge v. Synge*, [1894] 1 Q.B.D. 466. But the fact that title is in a third party and not placed there by the contracting vendor after entering into the contract to convey, amounts to neither a repudiation nor a present breach. See *Brimmer v. Salisbury*, 167 Cal. 522, 140 P. 30 (1914).

²¹ *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581 (1916). This rule

has generally been held not to be an anticipatory repudiation,²² even though the condition would seem as a practical matter in most cases to make performance an apparent impossibility. These few examples reflect one of the most basic weaknesses in the application of the doctrine of anticipatory repudiation—uncertainty as to when a statement or act ceases to be “equivocal” and becomes a “definite and unequivocal” repudiation.

The second area in which the courts have had difficulty is the determination of when an anticipatory repudiation of part of a contract is sufficiently substantial to amount to a breach of the entire contract. There have been few cases on the point, but the basic test can be said to be essentially the same as the test for determining when a breach of one installment of an installment contract equals a breach of the whole.²³ Repudiation of a part of the contract prior to the due date for performance is an anticipatory breach of the whole if the part repudiated, when considered alone²⁴ or with other repudiated portions of the contract,²⁵ is an “essential part” of the contract.

III. ANTICIPATORY BREACH UNDER THE U.C.C.

Though the Uniform Commercial Code, in sections 2-609, 2-610 and 2-611, sets forth a remedy for anticipatory repudiation, the term “repudiation” is not specifically defined. Some understanding of the word as used in the Code can, however, be gleaned from an understanding of section 2-609. Section 2-609(1) imposes a duty to provide “adequate assurance of due performance” if grounds for insecurity arise and if the assurance is demanded in writing by the party whose right under the contract is threatened. Failure to provide adequate assurance “within a reasonable time not exceeding thirty days . . .”²⁶ is a repudiation of the contract. The anticipatory breach problem may also arise in the context of section 2-612, which deals with breaches

was formulated to facilitate the proving of certain unmatured and unliquidated claims. See generally W. MacLachlan, *Bankruptcy* § 136 (1956).

²² *Minneapolis Iron Store Co. v. E.G. Staude Mfg. Co.*, 153 Minn. 107, 189 N.W. 596 (1922); *Phenix Nat'l Bank v. Waterbury*, 197 N.Y. 161, 90 N.E. 435 (1910); *Pardee v. Kanady*, 100 N.Y. 121 (1885).

²³ See p. 923 *infra*.

²⁴ See, e.g., *J.W. Ellison, Son & Co. v. Flat Top Grocery Co.*, 69 W. Va. 380, 71 S.E. 391 (1911); *Johnstone v. Milling*, [1886] 16 Q.B.D. 460 (repudiation of covenant to rebuild held not to be a repudiation of essential part of lease contract).

²⁵ See, e.g., *Parker v. Russell*, 133 Mass. 74 (1882) (present breach of installment contract plus manifested intent not to perform in the future). It should be noted that *Parker v. Russell* is not inconsistent with *Daniels v. Newton*, 114 Mass. 530 (1874), where the doctrine of anticipatory repudiation was held not to obtain in Massachusetts. In *Parker* there was a present breach of part of the contract which, when taken together with the repudiation, was viewed as a breach of the whole, while in *Daniels* there was no present breach of contract.

²⁶ U.C.C. § 2-609(4).

of installment contracts. This section limits the rights of a buyer who receives nonconforming goods as part performance of a multiperformance contract. The buyer may reject such an installment only if the nonconformity "substantially impairs the value"²⁷ of the installment and cannot be corrected or if the nonconformity lies in the required documents, but in all other cases he must accept it if the seller gives adequate assurance of its cure.

It seems only natural to use the section 2-609 definition of "adequate assurances" in the section 2-612 context. Thus, cure would have to be forthcoming "within a reasonable time not exceeding thirty days" or there would be an immediately actionable repudiation. Though section 2-609 is used for the definition, however, it should not be assumed that a failure to cure would amount to a "repudiation of the contract" under section 2-609(4); it is merely a breach of the installment. Whether this will amount to a breach of the entire contract can be determined only under section 2-612(3), which provides:

Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of can-

²⁷ The text of the Code does not provide a standard for the determination of "substantial impairment." Official Comment 4 to § 2-612 declares: "Substantial impairment of the value of an installment can turn not only on the quality of the goods but also on such factors as time, quantity, assortment, and the like. It must be judged in terms of the normal or specifically known purposes of the contract." The comment also suggests that the parties may in their contract define "substantial impairment," even in very strict terms. The comment does, however, qualify this: "A clause requiring accurate compliance as a condition to the right to acceptance must, however, have some basis in reason, must avoid imposing hardship by surprise and is subject to waiver or to displacement by practical construction."

One important question left open by § 2-612 is whether "substantial impairment" refers to actual subjective impairment of the value of the contract to the buyer or whether it is intended in an objective sense. The comment, when it makes reference to judgment "in terms of normal or specifically known purposes of the contract" suggests an objective standard supplemented by the actual knowledge of the seller as to the buyer's purpose.

A further suggestion of an intended objective standard in § 2-612 can be had by reading § 2-608 and § 2-612 together. Section 2-608 refers specifically to substantial impairment "to him," referring to the buyer. The failure to use this same wording in § 2-612 suggests an intended objective approach.

With regard to this suggested interpretation, it has been said that the better reasoned cases under the analogous provisions of section 45 of the Uniform Sales Act emphasized the personal costs of breach in assessing materiality. It is hoped that the discrepancy in language between 2-612 and 2-608 is not intended to invoke for the installment contract that mythical character, the good faith objective observer, as the reference for the injury, and, hence, the right to abandon.

Peters, Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two, 73 Yale L.J. 199, 225 (1963).

cellation or if he brings an action with respect only to past installments or demands performance as to future installments.

"Substantial impairment," without explanation whether this refers simply to actual impairment in value to the buyer or substantial impairment as judged by the ordinary reasonable man, is made the test of whether it is a breach of one installment or the whole contract. If the breach substantially impairs the value of the whole contract, it is both a present breach and an anticipatory repudiation so long as the contract is not "reinstated" by the aggrieved party.

As noted above, under pre-Code law an insignificant or partial preperformance repudiation would not operate as an anticipatory breach. Neither would a statement or act indicating a lack of intent to perform, if the statement or act were equivocal. Not even insolvency would amount to anticipatory breach unless accompanied by an adjudication of bankruptcy. Under the Code, however, it is possible for any of these occurrences to become an anticipatory breach of a contract, even though some of them will not directly amount to a breach. Since the Code nowhere defines repudiation, we might suppose that general contract principles still govern whether an act is sufficiently "definite and unequivocal" to amount to a breach.²⁸ On the other hand, the substantiality of the breach seems to be governed by new principles geared not to the laying down of general rules but to deciding the individual case. Insolvency though not adjudicated,²⁹ prior default under similar contracts, change in management of a corporate party, statements of doubt of ability to perform and unwarranted demands as conditions to performance are examples of the type of occurrence which can properly be treated as impairing the "other's expectation of receiving due performance." One ought, however, to be cautious in demanding assurance of performance, for substantiality is difficult to gauge.

²⁸ See U.C.C. § 1-103.

²⁹ It should be noted that the Uniform Commercial Code's definition of insolvency differs from that of the federal Bankruptcy Act, 11 U.S.C. §§ 1-1103 (1964).

A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts

11 U.S.C. § 1(19) (1964). This definition has been criticized because a debtor with nonmatured long-term assets not easily liquidated at a theoretically fair valuation cannot generally be forced into bankruptcy until his financial situation has greatly deteriorated. See W. MacLachlan, *Bankruptcy* § 15, at 12 (1956). The Uniform Commercial Code adopts a definition of insolvency virtually the same as the equity definition. It is defined in § 1-201(23): "A person is 'insolvent' who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of federal bankruptcy law."

But, assuming that one party makes a legitimate claim for assurance, how can he determine the "adequacy" of the assurances he receives in return? Section 2-609 offers little help; subsection (2) provides: "Between merchants . . . the adequacy of any assurance offered shall be determined according to commercial standards." The official comments add little clarification; comment 4 offers the following illustration of what the drafters intended:

[W]here the buyer can make use of a defective delivery, a mere promise by a seller of good repute that he is giving the matter his attention and that the defect will not be repeated, is normally sufficient. Under the same circumstances, however, a similar statement by a known corner-cutter might well be considered insufficient without the posting of a guaranty or, if so demanded by the buyer, a speedy replacement of the delivery involved. By the same token where a delivery has defects, even though easily curable, which interfere with easy use by the buyer, no verbal assurance can be deemed adequate which is not accompanied by replacement, repair, money-allowance, or other commercially reasonable cure.

A partial elimination of this lack of certainty can be achieved by including in sales contracts a provision requiring one party to make certain specified assurances of performance on demand and declaring that a failure to do so is a repudiation of the contract. The certainty of such a provision will be limited by the section 1-203 requirement: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Also section 1-208 might well be extended by analogy to cover such provisions. Section 1-208, which covers options to accelerate at will, provides:

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

The basic advantage of this approach of providing in the contract for the effectiveness of a demand for adequate assurance of performance "at will" is indicated in this last sentence of section 1-208. The party of whom the demand is made should have "the burden of establishing lack of good faith. . . ." On the other hand, in the absence

of such an agreement, section 2-609 alone would apply, and it would seem that the party making the demand or rejecting an assurance of performance as inadequate would have the burden of establishing the justification for his position.

The general common law rule has been that the doctrine of anticipatory breach is not applicable when one party has fully performed. Thus, unless the nonrepudiating party is obligated under the contract at the time of the repudiation, the repudiation is not treated as a breach prior to the time specified in the contract for performance.³⁰ The explanation for this is historical. As previously indicated, the primary concern in *Hochster v. De la Tour*³¹ was for the nonrepudiating party—the one who would have had to choose between remaining ready to perform and being treated as having accepted an offer to rescind. Because he need not make this choice in the case of a repudiation after he has performed, many courts have not applied the doctrine to this situation. For example, when goods are sold for credit, a statement by the buyer that he will not pay when payment will become due does not amount to an effective anticipatory breach.³²

It is submitted that this historical aberration should be held to be displaced by the Code. Though no section of the Code expressly rejects the rule and though section 1-103 provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions," the entire Code must be read in light of section 1-102(1): "This Act shall be liberally construed and applied to promote its underlying purposes and policies."

Though none of the "underlying purposes and policies" of the Code specifically stated in section 1-102(2) are particularly applicable, other "purposes and policies" may be found implicit in the Code's express provisions, for the effect of subsection (1) is not only to provide the Code with the force of law, but also to make it a source of law.³³ One of these "purposes and policies" is the recognition of the expectation interest of all parties in their contract rights. Since protection of this interest is the real basis for the doctrine of anticipatory repudiation, it would seem that the Code demands discontinuance of

³⁰ See, e.g., *Operators' Oil Co. v. Barbre*, 65 F.2d 857 (10th Cir. 1933); *Manufacturers' Furniture Co. v. Read*, 172 Ark. 642, 290 S.W. 353 (1927); *Sheketoff v. Prevedine*, 133 Conn. 389, 51 A.2d 922 (1947); *Huffman v. Martin*, 226 Ky. 137, 10 S.W.2d 636 (1928); *Phelps v. Herro*, 215 Md. 223, 137 A.2d 159 (1957); *Leon v. Barnsdall Zinc Co.*, 309 Mo. 276, 274 S.W. 699 (1925).

³¹ 118 Eng. Rep. 922 (Q.B. 1853).

³² See, e.g., *Phelps v. Herro*, 215 Md. 223, 137 A.2d 159 (1957). But note the different rule in bankruptcy cases. See *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581 (1916) (unilateral unmatured money debt held provable in bankruptcy on the ground that adjudication of bankruptcy was an anticipatory breach).

³³ See Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 Law & Contemp. Prob. 330 (1951).

the artificial distinction between contracts which have been fully performed by one party and those which are completely executory.

Even if the Code is not interpreted as rejecting the traditional rule, that rule is undermined to a large extent by the express language of section 2-609(1): "When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return." Section 2-609(4) supplements the above: "After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract." From the wording of these provisions it is clear that repudiation of an obligation, the consideration for which has already been performed, can occur under section 2-609. Section 2-609(1) refers to "the performance of either party," not to the particular type of performance.

At common law, the repudiatee is excused from future performance, the repudiation providing him with a defense.³⁴ This is still the law under section 2-610(c), which gives the nonrepudiating party the right to "suspend his own performance" in case of a preperformance repudiation which substantially impairs the value of the contract. Under general contract law there was, however, a twist: If the nonrepudiating party was not in a position to perform either at the time of repudiation or at sometime thereafter prior to the date for performance, he had no remedy.³⁵ The fact that the repudiation may have been unjustified did not change this result,³⁶ and the burden of proving the necessary ability to perform was on the nonrepudiating plaintiff.³⁷ Where inability to perform in accordance with the terms of the contract exists at the time of repudiation but can be corrected prior to the performance date, this inability does not prevent successful maintenance of a breach of contract action arising from the anticipatory repudiation.³⁸

³⁴ *Torkomian v. Russell*, 90 Conn. 481, 97 A. 760 (1916).

³⁵ *Gerli v. Poidebard Silk Mfg. Co.*, 57 N.J.L. 432, 31 A. 401 (1895) (the fact that the seller did not obtain goods in time to deliver in accordance with contract terms held to preclude recovery for prior anticipatory repudiation of the contract); *Strasbourg v. Leerburger*, 233 N.Y. 55, 134 N.E. 834 (1922) (nonrepudiating party denied recovery because of failure to prove ability to pay purchase price as agreed).

³⁶ *Bertrand v. Jones*, 58 N.J. Super. 273, 156 A.2d 161 (1959).

³⁷ *United States Overseas Airlines v. Compania Aerea Viajes Expressos*, 246 F.2d 951 (2d Cir. 1957); *Strasbourg v. Leerburger*, 233 N.Y. 55, 134 N.E. 834 (1922).

³⁸ E.g., *Scholle v. Cuban-Venezuelan Oil Voting Trust*, 285 F.2d 318 (2d Cir. 1960) (the fact that present financial inability could have been corrected by loan from others shown ready, willing and able to make such loan held sufficient to allow nonrepudiating party to sue for anticipatory breach).

The continued viability of the requirement of ability to perform as a requisite to the successful maintenance of an action for anticipatory breach is in doubt under the Uniform Commercial Code. No section or comment mentions the rule, but this fact alone should not be viewed as a rejection of the principle. For its rejection would allow the nonrepudiating party to recover at least some damages, when, in actuality, he is not damaged. In fact, it can reasonably be said that the repudiation operates to his benefit, for without it he, being unable to perform, would have incurred liability for breach of contract. The principle should be considered to be preserved under section 1-103: "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions." Nor would "liberal construction" under section 1-102 require or even suggest a contrary conclusion, for there seems to be no underlying purpose or policy which such a result would serve. The interest in expectation cannot be said to be preserved by allowing the repudiatee to sue, for absent the repudiation all he could have realistically expected was a lawsuit. Further, it can be said that proper interpretation of section 2-610 itself would demand that the rule continue in effect. Section 2-610 requires that the repudiation "substantially impair" the value of the contract before the provisions of that section become operative. It can be argued persuasively that no repudiation substantially impairs the value of a contract unless the nonrepudiating party could have satisfied his obligations under the contract, for without this ability, the contract had no value to him which could be impaired.

IV. DAMAGES

Under pre-Code law, damages for anticipatory breach were measured by the difference between the contract price and the market price at the time and place for performance. If the action were tried before the performance date, the market price at the time of trial would prevail.³⁹ The Code can be said to follow the former but not the latter rule. Such a statement is, however, oversimplified, and it is necessary

³⁹ *In re New York, N.H. & H.R.R.*, 298 F.2d 761 (2d Cir. 1962); *In re Marshall's Garage*, 63 F.2d 759 (2d Cir. 1933). The reason for the rule was that the market price at the time of trial was the best evidence of the future market price. If, however, the contract specified no performance date and there was thus no distinction between pre- and postperformance actions, the market price at the time of repudiation might be decisive. *McJunkin Corp. v. North Carolina Natural Gas Corp.*, 300 F.2d 794, 803 (4th Cir. 1961), cert. denied, 371 U.S. 830 (1962).

Professor Corbin argued that the reduction in the assignability value of the contract which resulted from the repudiation ought to be the measure of damages. 5 A Corbin, *Contracts* § 1053 (1964). Some courts agreed. See *Chaplin v. Hicks*, [1911] 2 K.B. 786, 791-93. See also *Wachtel v. National Alfalfa Journal Co.*, 190 Iowa 1293, 176 N.W. 801 (1920); *Kansas City, M. & O. Ry. v. Bell*, 197 S.W. 322 (Tex. Civ. App. 1917).

to take a closer look at the Code's provisions to see just what they require in anticipatory breach cases. In the first place, the Code remedies depend entirely on whether it is the buyer or the seller who has repudiated or breached. The sections will be discussed one by one; first, the remedies of a buyer against a breaching seller, and then the reverse.

When the buyer sues on account of an anticipatory breach, the damages equal the difference between "market price at the time when the buyer learned of the breach," and the price specified in the contract.⁴⁰ The phrase which needs interpretation here is "when the buyer learned of the breach." In an ordinary breach situation, this phrase is not hard to apply, for its purpose is quite plain: If a seller breaches on the date for performance, but the buyer does not learn of the default for some time,⁴¹ the later time should be the time for measuring damages. In the anticipatory breach situation the result becomes somewhat puzzling. If the time when the buyer "learns of the breach" is interpreted to mean the time when he hears a "definite and unequivocal" repudiation from the seller, then the Code has given the seller power over the date when market price will be computed, and hence power to keep the amount of damages low. This is not, however, a necessary result. If the buyer decides to wait a "commercially reasonable time," as section 2-610 allows him to, before determining that the seller has really breached, one wonders whether he learns of the breach when the seller repudiates or when he, the buyer, determines that the repudiation is a breach. No matter which line of reasoning is applied, the same objection obtains: In the former case, a seller can issue his repudiation when he wants and thus absolutely control damages; in the latter, the buyer can be "pigheaded" in determining when the repudiation amounts to a breach and thereby to a great extent control the amount of damages.

In this situation the Code seems to force the choice of providing an advantage to one of the two parties, and it seems we must choose the buyer. The seller will always control the time he issues a repudiation. The buyer, on the other hand, is at least limited in his choice by the "commercially reasonable time" of section 2-610. If so, repudiation is automatically converted into a breach after the expiration of a commercially reasonable period for awaiting performance, even though the repudiatee may not treat it as such. For example, on January 1, *A* agrees to sell and *B* to buy specified goods at \$10.00 per unit to be delivered on December 1. The market price at the time the contract is entered into is \$10 per unit. The market price then rises

⁴⁰ U.C.C. § 2-713(1).

⁴¹ He need not be lax. There may be a latent defect which renders the product unmerchantable.

to \$25 on July 1. Assuming that *A* repudiates before July 1 and that July 1 is viewed as the end of a commercially reasonable time for awaiting performance, the buyer should be treated as having "learned of" the breach at that time. Thus if *B* seeks to recover under section 2-713(1) he will be limited to the difference between the contract price and the market price on July 1.

Neither the text of section 2-610 nor the official comments suggest a criterion to be applied in determining what is a "commercially reasonable" time to await performance. Perhaps the most reasonable waiting period in the largest number of cases would be the period up to and including the date when performance is due. The seller should have contemplated that his liability in case of breach would be based upon the market price at the time specified for performance even though he can never foresee precisely what that price will be. This approach can be justified on another ground; by exposing the seller to maximum liability for breach, he is encouraged to perform his contractual obligations.⁴² The buyer should thus have two alternative courses in case of a preperformance repudiation by the seller. First, he can, as in any breach situation, "cover," *i.e.*, within a reasonable time after the breach "purchase . . . or contract to purchase goods in substitution for those due from the seller,"⁴³ and can then recover the cost of cover and the difference between the cover price and the contract price. Alternatively, he can, anytime within a reasonable time after the repudiation, elect to treat the repudiation as a breach and recover from the seller the difference between the market price at that time and the contract price.⁴⁴ The buyer is free to select arbitrarily either theory of recovery and, of course, it should be remembered that in appropriate cases specific performance or replevin might be available to the buyer.⁴⁵

If an anticipatory breach case comes to trial prior to the date specified in the contract for performance, section 2-723(1) becomes

⁴² In cases where the application of such a rule would appear to be too harsh, application of U.C.C. § 2-615 would reverse the result.

⁴³ U.C.C. § 2-712.

⁴⁴ Naturally, each of these remedies includes a right to incidental damages and involves a set-off of expenses saved in consequence of the breach. As to the effects of choosing the market price remedy rather than the cover remedy, see § 2-715(2) (a).

⁴⁵ U.C.C. § 2-716 provides:

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

....

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

operative and, though it still leaves the buyer his choice between cover and ordinary damages, the measure-of-damages rule is somewhat different from the one just discussed. Any damages based on market price are to be measured "according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation."⁴⁶

Thus if the buyer brings his action prior to the contract date of performance and market price, rather than cover price, is used to fix damages, market price is figured as of the date of repudiation. If, however, the aggrieved buyer waits until after the contract date for performance to sue, and market price is used to fix damages, market price is figured as of the date of the buyer's acceptance of the repudiation subject to the commercially reasonable limitation.

Though this pair of rules is definitely worthwhile in that together they produce certainty as to the critical date for determining market price, the very distinction between preperformance and postperformance actions is open to some objection. For instance, if the market price fluctuates but is nevertheless fairly predictable, the distinction may give rise to tactical manipulation in docketing the trial. This can be passed over as a rare occurrence, but there is another objection: If it is the buyer's expectation-interest which is being compensated, then the rule ought to be so structured as to bring the measure of damages as nearly equal as possible to that which would obtain on the "expectation-date," *i.e.*, the date specified in the contract for performance. Instead, the Code utilizes a completely unbargained-for performance date—the date of repudiation. The Code might have afforded the same certainty by figuring market price according to the market price at the time the action is instituted or at the time the action goes to trial rather than at the time of repudiation. Such a delay in the determination of market price would generally better protect the nonrepudiating party's expectation-interest in the contract since the market price at the later date would generally tend to be closer to the market price at the date on which the aggrieved party bargained to receive performance. This objection might be fatal except for the fact that the aggrieved buyer, who is being allowed an opportunity to convert his contract into a direct monetary gain prior to the contract date, should pay a price for this unbargained-for opportunity. The price paid for this premature realization is the requirement of determining market price at an earlier date. Thus, it would seem that the Code rule is quite justifiable. No matter which of the possible times for determining market price had been chosen, the same objections would obtain, and the Code rule, though it is not

⁴⁶ U.C.C. § 2-723(1).

demonstrably better than any other, is also not demonstrably less desirable.

When it is the buyer who repudiates, the seller's remedies are analogous to those just discussed. As is the case when the seller breaches, the measure of damages varies depending upon whether the action goes to trial before or after the performance date. In post-performance trials, the aggrieved seller has open to him the counterpart of the buyer's cover remedy.⁴⁷ In addition to this remedy, section 2-708(1) imposes the pre-Code measure of damage: "the difference between the market price at the time and place for tender and the unpaid contract price." For unusual situations, section 2-708(2) supplements section 2-708(1), providing: "If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance of the buyer" The aggrieved seller is thus allowed to recover lost profit in cases involving the sale of fixed price goods or in other cases where the contract price and the market price are the same, so long as a subsequent sale of the same goods by the seller cannot be treated as a direct consequence of the breach. If such a resale of the subject matter of the contract is a direct consequence of the breach, and if section 2-708(2) recovery is pursued, due credit must be made for the payments or proceeds of the resale.⁴⁸ For example, *A*, an automobile dealer, contracts to sell to *B* for \$3000 an automobile which *A* purchased at a wholesale price of \$2500. If *B* repudiates and the case comes to trial after the date specified in the contract for performance, recovery under section 2-708(1) would consist only of the difference between contract price (\$3000) and market price (which would generally be the same as contract price) plus incidental damages. Incidental damages should include cost of storage of the car after breach, expenses incurred in a credit check on the subsequent purchaser and commission paid by *A* to his salesman on the second sale,⁴⁹ the sum of which we will assume to be \$110. Thus, *A* would recover only \$110.

If, however, *A* is a volume dealer, then the subsequent resale will

⁴⁷ U.C.C. § 2-706(1) provides that "the seller may resell the goods concerned or the undelivered balance thereof . . ." and that "[w]here the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages . . . less expenses saved in consequence of the buyer's breach."

⁴⁸ U.C.C. § 2-708(2).

⁴⁹ U.C.C. § 2-710 provides: "Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach."

most likely not be considered a direct consequence of *B*'s breach. It is simply another in *A*'s total volume of sales and would have occurred whether or not *B* breached.⁵⁰ In this situation, *A* should recover the contract price (\$3000) less cost (\$2500) plus incidental damages (\$110), which results in a total of \$610.

This same dichotomy between the dealer with limited supply and the "volume dealer" will cause the damages under section 2-708(2) to be virtually the same as under section 2-708(1). Assuming a resale at \$3000 the seller would be entitled to recover \$3000 (contract price) less \$2500 cost plus \$110 incidental damages less \$500 profit on the resale, or simply \$110.⁵¹ Under subsection (1) the same figure would be arrived at by determining the difference between the contract price and market price plus incidental expenses. While the result will usually be the same under either subsection, a seller should be chary of seeking his remedy under subsection (2) where the subsequent sale is at a price higher than the price specified in the breached contract, if it is at all possible for the subsequent sale to be viewed as a consequence of the prior breach. For example, under subsection (2), if the subsequent sale is at \$3100 and the sale is held to be a consequence of *B*'s breach, *A* would be entitled to \$3000 (contract price) less \$2500 (cost) plus \$110 (incidental damages) less \$600 (profit realized as a result of *B*'s breach), or simply \$10. On the other hand, an action based on subsection (1) would entitle the seller to \$110. There he could recover the difference between market price (\$3000) and contract price (\$3000) plus incidental damages (\$110), or \$110.

Another unusual remedy is the price remedy contained in section 2-709:

- (1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages . . . the price
 - (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

⁵⁰ In the absence of any authority on the question, it is uncertain whether this or any other illustration will illuminate the distinction between sales that are in consequence of the buyer's breach and those that are not. It is possible to contend that a subsequent sale will not be considered a consequence of the buyer's breach only if the resold goods had not been identified to the contract at the time of the breach, or only if the contract involved goods which could not be traced directly to any particular resale, e.g., white socks sold by a volume maker of white socks.

⁵¹ This, of course, assumes that profit is "proceeds of resale" under U.C.C. § 2-708(2).

- (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

Thus, if the seller cannot resell for a reasonable price within a reasonable time after the repudiation, he will be entitled to recover the contract price. The seller must, however, proceed in accordance with section 2-709(2) which provides:

Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

Where the action comes to trial before the date specified in the contract for performance, the same remedies discussed above are available. The only modification is of the determination of the market price. Section 2-723(1) reaches virtually the same result here as did section 2-706 in the case of the buyer's breach:

If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price . . . shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.⁵²

There is a problem which arises in the case of a buyer's anticipatory repudiation which does not arise anywhere else—the situation in which a seller, when he learns of the breach, is still in the process of making goods specifically for the particular buyer. Section 2-704(2) is the governing section. It provides:

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

⁵² The discussion of this distinction in the context of seller's breach, pp. 929-30 *supra*, is applicable here. When the case comes to trial before the time set for performance, the seller acquires an unbargained-for economic gain, the price for which is adherence to the arbitrary rule of § 2-723(1).

Comment 2 contains an explanation of the drafter's intent:

Under this Article the seller is given express power to complete manufacture or procurement of goods for the contract unless the exercise of reasonable commercial judgment as to the facts as they appear at the time he learns of the breach makes it clear that such action will result in a material increase in damages. The burden is on the buyer to show the commercially unreasonable nature of the seller's action in completing manufacture.⁵³

The aggrieved seller is thus given several options, subject only to the requirement of section 2-704(2) that the option selected not be precluded by reasonable commercial judgment. The options given the seller can be divided into two broad categories: (1) salvage and (2) completion of manufacturing or processing plus identification of the goods to the breached contract.

If the aggrieved seller chooses to salvage he generally has a choice between two measures of damage. First, he may pursue his section 2-706 resale remedy. This is made clear by section 2-704(1)(b) which declares that "an aggrieved seller . . . may . . . treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished." The seller either sells or contracts to sell the unfinished goods, then recovers from the repudiating buyer the difference between the contract price and the resale price plus incidental damages less expenses saved—which in this instance would be the cost of completion of manufacturing or processing. In order to recover, the seller must satisfy the requisites imposed by section 2-706:

(1) "The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach."⁵⁴

(2) If unfinished goods are salvaged the resale cannot be achieved through public sale.⁵⁵

⁵³ This would appear to leave operative the rule of damages commonly called the "avoidable consequences rule." The injured party has an obligation to mitigate damages. He is viewed as not having been damaged to the extent that his own action or inaction contributes to his losses. See 5 A. Corbin, Contracts § 1041 (1964). It is not, of course, required that he incur risks or enter into other contracts to mitigate damages, except as U.C.C. § 2-715(2) (a) may alter that rule. See 5 A. Corbin, Contracts §§ 1042-43 (1964).

⁵⁴ U.C.C. § 2-706(2).

⁵⁵ U.C.C. § 2-706(4)(a) provides: "Where the resale is at public sale . . . only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind . . ." The provision as to futures contemplates a present sale of a good not yet in its final form. Thus completion of the good into its final form is contemplated by the words "identified goods."

(3) "Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell."⁵⁶

(4) "[E]very aspect of the sale including the method, manner, time, place and terms must be commercially reasonable."⁵⁷

The second possible measure of damages in salvage is recovery of the difference between "market price at the time and place for tender and the unpaid contract price . . ."⁵⁸ This measure is of course altered if the seller's suit goes to trial prior to the performance date. Section 2-723(1) then becomes operative:

If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price . . . shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

This market price remedy may be most attractive even if the unfinished goods are sold for salvage. This will be particularly true where the aggrieved seller is able to obtain a favorable resale contract, particularly one for a price better than the market price. For example, assume a contract between *A* and *B*, in which *A* agrees to sell and *B* to buy stated goods for \$100 per unit to be delivered on April 1. *B* repudiates after *A* has invested \$35 per unit in cost of manufacture. The remainder of manufacture would cost \$35 per unit. The market price at the time of repudiation is \$75 per unit. The market price on April 1 is \$50 per unit. The unfinished goods are not completed but instead are sold for salvage at a price of \$65 per unit. If the resale remedy were pursued, this would entitle *A* to recover \$100 per unit, the contract price, less \$65, the resale price, less \$35, the cost of completion saved as a consequence of the breach, leaving a total of \$0. On the other hand, *A* could use the market-price remedy to recover \$100 per unit less \$50, the market price, less \$35, the cost of completion saved as a consequence of the breach, leaving a total of \$15. The seller may resell the goods concerned or the undelivered balance thereof. That he has unbridled choice in the matter is made clear by the permissive language of section 2-706(1), which declares:

Where the resale is made in good faith and in a commercially reasonable manner the seller *may* recover the difference between the resale price and the contract price together with any incidental damages . . . less expenses saved in consequence of the buyer's breach. (Emphasis added.)

⁵⁶ U.C.C. § 2-706(3).

⁵⁷ U.C.C. § 2-706(2).

⁵⁸ U.C.C. § 2-708(1).

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Where the unfinished goods are fixed-price goods, with no difference between contract price and market price, or where they are being specially manufactured and thus lack a market, recovery under 2-708(1) would not be adequate. In the first situation, resale might be satisfactory, but in the second, it would not. Section 2-708(2) recovery should be allowed in both instances and it would seem to be the only possible remedy in the second instance. This section provides that if the measure of damages in 2-708(1) does not result in the seller being put in as good a position as if buyer had performed "then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages . . . due allowance for costs reasonably incurred and due credit for payments or proceeds of resale." Thus, in the example, if the goods being manufactured or processed were fixed-price goods or specially manufactured goods, the aggrieved seller could, under section 2-708(2), simply recover his lost profit, or \$30. This recovery should be possible even if the unfinished goods are subsequently sold as long as that sale is not a direct consequence of the buyer's breach. If the seller commonly sells goods of the same type as the unfinished goods, then the subsequent sale would probably not be considered a direct consequence of the buyer's breach but simply a sale in the regular course of the seller's business.

The second alternative provided the aggrieved seller in case of repudiation prior to completion of manufacture, again subject to the requirement that it be "in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization," is to "complete the manufacture and wholly identify the goods to the contract"⁵⁹ Where this alternative is selected, the aggrieved seller, upon completion of manufacture, has the same remedies as are available to any seller for breach of contract when the goods have been identified.⁶⁰ The seller may not arbitrarily exercise his option to select one of these remedies, for section 2-704(2) requires that he "exercise . . . reasonable commercial judgment for the purposes of avoiding loss and of effective realization" This standard is explained to some extent in official comment 2 to section 2-704. The comment makes clear the fact that the drafters intend reasonableness to be determined according to the facts at the time the aggrieved party learns of the breach. It is indicated that any course of conduct is reasonable unless circumstances make it "clear that such action will result in a material increase in damages," the burden being on the

⁵⁹ U.C.C. § 2-704(2).

⁶⁰ U.C.C. §§ 2-703, Comment 1, -704, Comment 1, -706, Comment 1, -708, Comment 1, -709, Comment 1.

buyer to show any unreasonableness. If the buyer is able to establish the unreasonableness, the seller's recovery is to be based upon an estimate of the damages which would have been suffered had a reasonable course of conduct been selected.

In summary, then, under the provisions of section 2-708(1) the seller could, if his action for breach were brought after the date specified in the contract for performance, recover monetary damages based upon the difference between contract price and market price determined on the basis of the market price at the time and place for tender. If, on the other hand, the action were to go to trial prior to the contract date for performance, section 2-723(1) requires that market price be figured as of the date of repudiation. Where recovery based upon the market price measure is "inadequate to put the seller in as good a position as performance would have done," lost profit can be recovered under section 2-708(2). In addition to the market-price remedy and the alternative, lost-profit remedy, the seller could exercise his right to sell under section 2-706, and then recover the difference between contract price and resale price. Finally, in an appropriate case, where the seller is unable after reasonable effort to resell the finished goods at a reasonable price or where the circumstances reasonably indicate that an attempt to do so will be unavailing, the seller is entitled under section 2-709(1) to recover the price of the goods from the repudiating buyer. Completion of manufacture, followed by an action against the repudiating buyer for the price may well be considered not to be the exercise of "reasonable commercial judgment" for the purpose of avoiding loss. Completion of manufacture would seem appropriate only when the finished goods are reasonably resalable at the time of the decision to complete. If it should happen that the seller miscalculates future demand on the market, this is, of course, no indication of the reasonableness of his original decision.

V. RETRACTION OF REPUDIATION

Sections 2-611(1) and 2-611(3) provide the repudiating party with a limited right to retract his repudiation and thereby reinstate the previously repudiated contract. At any time before his next performance is due he can retract unless the aggrieved party has "cancelled or materially changed his position or otherwise indicated that he considers the repudiation final."⁶¹ Thus, prior to the next performance due under the contract, the repudiating party may elect to withdraw his repudiation unless: (1) the nonrepudiating party materially changes his position in reliance upon the repudiation, which would generally

⁶¹ U.C.C. § 2-611(1).

be either by the institution of legal action against the repudiating party or by the resale of the subject matter of the contract if the aggrieved party is the seller or by the purchase of substitute goods if the aggrieved party is the buyer; (2) the nonrepudiating party has announced a decision to cancel the contract, which could be a step leading to an action for restitution; or (3) the nonrepudiating party has "otherwise indicated that he considers the repudiation final."⁶² The meaning of the third limitation is not altogether clear. When the last two are read together the third seems merely an extension of the second. "Cancellation" seems to presuppose a formal notice to the repudiating party that the nonrepudiating party is treating the contract as having ended because of the repudiation.⁶³ On the other hand, the words "otherwise indicated that he considers the repudiation final" seem to contemplate less formal action. For example, a declaration, "I consider the contract to be terminated because of your repudiation" would be an example of a cancellation, while a statement, "I consider your repudiation final" might not be a cancellation but would be within the third limitation.⁶⁴ Under pre-Code contract law, the repudiating party's power to retract could not be defeated so easily.⁶⁵ The Code's approach is aimed at giving meaning to the basic recognition of the expectation-interest inherent in all sales contracts, the recognition that a damage sufficient to preclude reinstatement of the contract flows from the preperformance repudiation of a contract for the sale of goods. The Code rule extends maximum protection to the expectation-interest inherent in every executory contract and at the same time through the damage measurement rules it acts as a deterrent against anticipatory breaches.

In order for a retraction which satisfies the section 2-611(1) requirements to be effective no formal requisites need be satisfied. All that is required is that the retraction be unequivocal and that it be communicated to the nonrepudiating party before any of the three steps discussed above have been taken. Section 2-611(2) provides that: "Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609)." Thus, as a practical matter,

⁶² The first of these limitations is consistent with the rules of general contract law. The second and third are totally different from the pre-Code law.

⁶³ See U.C.C. § 2-106(4).

⁶⁴ Also it is possible that an aggrieved party may have "otherwise indicated that he considers the repudiation final" by communicating such a decision to a person other than the repudiating party or one acting for him. This interpretation of § 2-611(1) is supportable because that section does not specify to whom the decision must be "indicated," but even so, so informal a means of precluding retraction is questionable.

⁶⁵ See Restatement of Contracts § 319 (1932).

effective retraction of a repudiation may often require something more than a simple oral withdrawal of it.

VI. CONCLUSION

The Uniform Commercial Code through its treatment of the doctrine of anticipatory repudiation should contribute greatly to overcoming some of the basic weaknesses in the application of the doctrine under general contract law. To begin with, section 2-609 and its doctrine of adequate assurance of performance should help alleviate the problems which have existed in determining the existence of sufficient definiteness for a repudiation and the presence of sufficient completeness for a repudiation. Now, through application of section 2-609, a rather mechanical means of determining what constitutes a repudiation is offered. On the other hand, the section 2-609 approach creates a new and virtually unsolvable problem: When is there cause for insecurity, and when is an assurance of performance adequate?

A second major contribution of Article 2 is its aim toward protection of the expectation-interest inherent in every contract calling for future performance. The application of this principle should lead to the conclusion that the Code provides a remedy for anticipatory repudiation of contracts which have been wholly performed by the nonrepudiating party. Even if this result is not directly arrived at, it will be achieved indirectly, for section 2-609 and its provisions regarding adequate assurance of performance apply both to partially executed and wholly executory contracts. Thus a repudiation of a unilateral obligation could, if necessary, be turned into an effective anticipatory breach through an unheeded demand for adequate assurance of performance.

A final contribution made by Article 2 to the application of the doctrine of anticipatory repudiation is the clarification and simplification of measure-of-damage rules in cases which go to trial before the date specified in the contract for performance. Where recovery based upon the difference in market price and contract price is sought, the applicable market price depends upon the time at which the case goes to trial. If it goes to trial prior to the performance date then the applicable market price is the price at the time of the repudiation. The difficulties inherent in proving market price will often be avoided, for the Code allows the aggrieved buyer to recover the difference in contract price and "cover" price, and the aggrieved seller to recover the difference in contract price and resale price.

The Code's treatment of the doctrine is not without weaknesses, weaknesses which lie primarily in a lack of clarity. One of these is the failure to state the date for determining market price in ascer-

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taining damages when an action is brought by a buyer after the contract date for performance. In such cases, section 2-713(1) requires that market price be computed at the time the buyer "learn[s] of the breach;" it is not clear whether repudiation is synonymous with breach. Another is lack of explanation of the concept of "substantial impairment" of the value of an installment or a contract, which is the guideline for determining when a defective installment performance can be rejected and when a defective installment amounts to a breach of the whole contract.⁶⁶

Even though not without weaknesses, the Code's approach to anticipatory repudiation should be considered a sound one. Recognition and express announcement of the logical basis for the doctrine will at least result in a greater predictability as to its application by the courts.

⁶⁶ See U.C.C. § 2-612.

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