

Spring 1965

Remedies under Article 2

William C. Jones

Follow this and additional works at: <http://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

William C. Jones, *Remedies under Article 2*, 30 MO. L. REV. (1965)
Available at: <http://scholarship.law.missouri.edu/mlr/vol30/iss2/4>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.

REMEDIES UNDER ARTICLE 2

WILLIAM C. JONES*

This article is designed to serve only as an introduction to the subject. Obviously no text treatment can substitute for a reading of the Code itself, and particular problems may make desirable the use of the treatises that are beginning to come out or the law review articles that have been written on most aspects of the Code. There is not, however, anything at this stage in the Code's development that takes the place of that document itself.

Perhaps the most important thing to bear in mind in connection with the remedies provided in Article 2 is that there is nothing very unusual about them. Despite somewhat different terminology and an unfamiliar organization, they are simply an adaptation to sales of goods of the familiar remedies for breach of contract. If one answers any problem by reference to general principles of contract law without considering the Code, he will usually arrive at the answer which the Code gives. And indeed it could scarcely have been any other way. The entire approach of Article 2 is to shift sales law from property concepts to those of contract. Accordingly, the normal remedies in Article 2 are the normal contract remedies: self-help and damages.

I. THE BASIC REMEDIES: SELF-HELP AND DAMAGES

The most common breaches of contracts for the sale of goods are, on the part of the seller, non-delivery and faulty delivery—faulty because of delay or defects in quality or quantity. The buyer's normal breach is a failure to pay, possibly a failure to pay on time, or a failure to accept the goods. In the event of any of these things happening, the aggrieved party has the right under the Code to refuse to perform or to continue with his performance if he has begun (*exceptio non adimpleti contractus*).¹

*Professor of Law, Washington University, St. Louis, Missouri.

1. No treatment is given here to the problem of whether there has been a breach, and, if so, when it occurred, since these subjects are dealt with in another part of this symposium. This separation of the two subjects—breach and remedy—while necessary for purposes of organization and study is nevertheless artificial, and a thorough consideration of one must include the other. Thus in

Thus, if he is the buyer he may refuse to pay, in whole or in part;² if he is the seller he may refuse to deliver, or deliver further if he has already delivered part.³ If by some chance the goods are in his hands and he has paid some portion of the price, he has a security interest in them to that extent and can sell the goods in order to satisfy it.⁴

This right to refuse to perform is perhaps the basic remedy, and it may be the only one a party needs. It requires, of course, no judicial assistance. If this is not sufficient to compensate him, and he seeks judicial assistance, his basic remedy will be money damages.⁵ Their amount will be computed in accordance with the familiar rule of contract damages: the damages will be an amount sufficient to put the party in the position he would have been in if the contract had been performed.⁶ Normally, this will be the difference between the contract and the market price, or if the goods have been accepted the difference between what was promised and what was in fact delivered. Thus, in the case of a contract for the sale of wheat at \$1 per bushel, if the market price at the time of the buyer's refusal to pay is \$0.75, then the damages are \$0.25 per bushel plus any incidental expenses of the seller. Contrariwise, if the seller breached and the price had risen to \$1.25, the buyer could collect \$0.25 plus inci-

the case of anticipatory repudiation, the aggrieved party may await performance for a reasonable time or immediately exercise his remedies for breach (§ 400.2-610, RSMo 1963 Supp.). If he chooses to sue for damages and wins, the amount of his recovery may vary considerably according to which alternative he chose (because of a rapid and considerable price fluctuation for example). On the other hand, if the buyer revokes acceptance, his remedies under § 400.2-711, RSMo 1963 Supp. are somewhat different (notably as to cancellation) than if he seeks damages for breach in regard to accepted goods (§ 400.2-714, RSMo 1963 Supp.). And there are the special problems in connection with instalment contracts (does the breach substantially impair the value of the whole?). None of these problems is considered here. It is simply assumed that there is a breach which entitles the aggrieved party to his remedies.

2. The buyer's remedies, when the seller fails to deliver or repudiates, or where the buyer justifiably rejects or repudiates, are in § 400.2-711, RSMo 1963 Supp. Subsection (1) gives him the right to cancel. Section 400.2-714, RSMo 1963 Supp. gives him damages when the goods are accepted and does not include any right to cancel, but § 400.2-717, RSMo 1963 Supp. gives him the right to deduct any damages from the price which thus permits a form of self-help in the case provided for by § 400.2-714, RSMo 1963 Supp. when the entire price has not been paid.

3. The seller's remedies are summarized in § 400.2-703, RSMo 1963 Supp., subsections (a) and (b) of which give him the right to stop delivery. Subsection (f) gives him the right to cancel, which would, of course, include refusal to deliver.

4. § 400.2-711(3), RSMo 1963 Supp.

5. For the seller: §§ 400.2-703(d) and (e), .2-706, .2-708, RSMo 1963 Supp.; for the buyer: §§ 400.2-711(1)(a) and (b), .2-712-2-714, .2-717, RSMo 1963 Supp.

6. RESTATEMENT, CONTRACTS § 329 (1932); 5 CORBIN, CONTRACTS § 992 (rev. ed. 1964).

dentials. If the price remained at \$1.00 neither party could collect anything, except possibly incidentals such as storage, advertising expense for a resale, etc. The theory is, of course, that this is what the damage consisted of: the loss of the anticipated profit.⁷

This remedy is the primary judicial remedy under the Code, and the apparent peculiarities of the Code such as "cover"⁸ are primarily directed toward problems of proof. The reason for this is that the principal problem with this remedy of damages—apart from the necessity of bringing an action—is proof of damages. With some goods, such as those traded on exchanges, there is little difficulty in proving the market price at any given time and place. Unfortunately, this is frequently not the case, and, especially with manufactured goods, it can be very difficult to prove what the market price was at the time and place of breach. Moreover, this time and place may be difficult to determine, and, when determined, may be disadvantageous to the aggrieved party. So, in the case of a contract providing for shipment from San Francisco to New York, in which it is determined that breach occurred when the seller failed to deliver to the carrier in San Francisco. The buyer does not learn about this immediately, and when he does, for various reasons, including efforts to get the seller to perform, he does not replace the goods immediately. When he does make the purchase, he buys some that are already in New York. By this time the price is seventy-five per cent above the contract price. At the moment when the goods were supposed to have been loaded the price was not appreciably above the contract price, although it was on the point of rising (because of a freeze, say) which is the reason that the seller breached. The buyer may be in serious difficulties if he attempts to collect damages to cover what he really suffered. Under the Code, however, his remedy is clear. He can purchase the replacement goods, or "cover" to use the Code terminology, and, so long as his purchase of the goods was in good faith (which he need not prove—that would be a defense for the seller), his damages will be the difference between what he actually paid and the contract price.⁹ In the reverse situation, when

7. For the seller, see § 400.2-708, RSMo 1963 Supp. See also, for the situation where the seller sells and sues for the difference between the resale price and the contract price, § 400.2-706(1), RSMo 1963 Supp. For the buyer, see § 400.2-713(1), RSMo 1963 Supp. See also § 400.2-712, RSMo 1963 Supp. if the buyer elects to cover and sue for damages, and § 400.2-714, RSMo 1963 Supp. for the case where he has accepted the goods.

8. § 400.2-714, RSMo 1963 Supp.

9. § 400.2-712(2), RSMo 1963 Supp.

the buyer breaches while the goods are still in the possession of the seller, the seller can sell the goods to someone else and then recover as damages the difference between what he actually got and the contract price.¹⁰ These provisions are not really new rights; they are, rather, rules which ease the proof of damages computed under the standard rule. I should add that if neither of these remedies is used—if, for example, the buyer does not cover but rather decides just to sue for damages—, then the Code also makes proof of market price easier in several particulars including permitting the use of market quotations.¹¹ It does not, however, substantially change the rule as to where and when market price is measured, (the place of tender usually)¹² and thus, in effect, puts pressure on the buyer to cover, and on the seller to sell to someone else. The reason is that it was the belief of the drafters of the Code that this is precisely what buyers and sellers would do in the normal course of events, and hence the differences between this price and the contract price is all they were entitled to receive.¹³ On the other hand, they were entitled to receive all of it.

II. CONSEQUENTIAL DAMAGES

There are, however, situations in which this does not fully compensate the parties for their loss. The most striking and familiar case is, doubtless, the case of consequential injuries suffered by the consumer buyer as the result of a breach of warranty. Suppose, for instance, the purchaser of lipstick is poisoned and permanently injured as the result of defects in the product. Her medical expenses total \$20,000, she is permanently disfigured, her digestion is ruined, and she would like to get \$100,000 as some small compensation for her injuries (and her attorney).

10. § 400.2-706(1), RSMo 1963 Supp.

11. For admissibility of market quotations published in trade journals and the like, see § 400.2-724, RSMo 1963 Supp. Section 400.2-723(2), RSMo 1963 Supp. provides that if evidence of market price at the necessary time or place is not readily available, the price prevailing within any reasonable time before or after that time, or at any other place which is reasonable, may be used instead.

12. For the seller: § 400.2-708(1), RSMo 1963 Supp.; for the buyer: § 400.2-713(1), RSMo 1963 Supp. This last is a change from UNIFORM SALES ACT § 67(3), which provides that the market price is to be measured at the time and place where performance was to have occurred. Section 400.2-713, RSMo 1963 Supp. measures it at the time when the buyer learned of the breach though at the place of tender or arrival if rejection occurs after arrival. Of course, in most, but not all cases, the result would be the same.

13. This intention must be inferred from the provisions, but see the fairly explicit language in Comment 3 to § 2-712, UNIFORM COMMERCIAL CODE, 1962 OFFICIAL TEXT WITH COMMENTS, published by the American Law Institute and the National Conference of Commissioners on Uniform State Laws [hereinafter cited UCC (1962) with a section number, e.g., UCC § 2-712 (1962)].

Under a negligence theory, she could get just that type of damages. Can she under a warranty theory (assuming the court holds the defendant liable for breach of warranty)? The answer is, of course, yes, under section 400.2-715.

This section is not limited, it may be noted, to physical injuries and they are not the only types of possible consequential damages. One has only to consider the case that established (or at any rate is generally cited for) the Anglo-American rule of contract damages, *Hadley v. Baxendale*.¹⁴ What would be the result of that case under the Code? The case involved, it may be recalled, a miller, *A*, who gave a crankshaft from a steam engine to a carrier *B* to be taken to the manufacturer of the steam engine *C*, to serve as a model for a new one. The crankshaft was absolutely essential to the operation of *A*'s plant. Hence, when *B* delayed its delivery to *C*, *A*'s plant was shut down, and he lost profits and the like for which he sued *B*. (He lost.) Obviously this is not a transaction that is subject to the *Uniform Commercial Code* since it is not a sale of goods, but comparable situations are common, such as the contract for the sale of an ingredient which is essential to the manufacture of a product—strawberry flavor in the manufacture of a gelatine dessert, for example—which does not arrive, or which is defective and causes an entire shipment to be defective. (One can extend the consequences further and imagine hundreds of purchasers suffering torments from the poisoned gelatine as a result of which they recover enormous sums for breach of warranty from the manufacturer.) Can the buyer (or *A* in the summary of *Hadley v. Baxendale* as stated) recover for all this? Only if the seller at the time of making the contract had reason to know of all the buyer's general or particular needs and requirements, and provided the buyer could not prevent the damage by cover.¹⁵ Of course the buyer can also recover any incidental expenses such as inspection, storage, and the like in any case.¹⁶

The situation with the seller is more difficult. In one sense, he can recover no consequential damages, since the greatest advantage he can get out of any contract is the entire contract price, and therefore, the ceiling on his recovery is that same price since that is his maximum injury, and the Code excludes him from the consequential damages section,

14. 1 H. & N. 341, 156 Eng. Rep. 145 (Ex. 1854).

15. § 400.2-715(2)(a), RSMo 1963 Supp. The qualification of cover, made much of in the comments, is, of course, only an application of the principle of mitigation of damages which was always a part of the basic contract principle of damages. See RESTATEMENT, CONTRACTS § 336(1), comments *a* and *b* (1932).

16. § 400.2-715, RSMo 1963 Supp.

although it allows him incidental damages.¹⁷ This is practically true, however, only for single sales of completed goods: 100 bales of cotton, the ten automobiles in the warehouse, and the like. Whenever there is an instalment contract, or whenever the goods are to be manufactured or processed, this is not the case. Suppose, for instance, a contract for delivery over a three year period of all the waitresses', cooks' and busboys' uniforms required by a large catering and restaurant chain. Thousands of uniforms will be required. The material will not all be purchased in advance, and some of it may have to be ordered specially. If the contract is breached after six months by the buyer, what are the seller's damages? He obviously cannot claim the price of all the goods for the three year term, nor the difference between the contract price and the market price because most of the goods are not manufactured yet, nor is it clear how many would have been sold. In addition there may be no market. The Code in such a situation offers two remedies. It permits him to recover the profits he would have made.¹⁸ It also permits him to continue manufacturing and identify goods to the contract or to sell them for scrap, if this seems reasonable to avoid loss under the circumstances.¹⁹ Looked at in one way this gives him consequential damages. One could also say that it is an adaptation of the rule for mitigation of damages since this reduces the injury for which he must be compensated. But all of this is just another way of saying that he must be compensated for what he actually lost and this is the basic structure of the Code, as it is of the American law of contracts. The injured party should be compensated for what he actually suffered as a result of breach subject to his having kept this injury to a reasonable minimum.

III. REMEDIES OF AN EQUITABLE TYPE

I have emphasized this remedy of damages because it is, it seems to me, far and away the most important, both because it is the remedy which the Code favors and because it is the one which most parties are apt to seek. But there are other remedies, most of which can perhaps be described as remedies of an equitable type, particularly specific performance, replevin, and rescission. The buyer's remedies are not appreciably

17. See § 400.2-710, RSMo 1963 Supp. which is the equivalent for the seller of § 400.2-715, RSMo 1963 Supp. for the buyer and which provides only "incidental not "consequential" damages.

18. § 400.2-708(2), RSMo 1963 Supp.

19. § 400.2-704(2), RSMo 1963 Supp.

different under the Code so far as specific performance is concerned, since he is given power to get goods which are unique or in "other proper circumstances."²⁰ The uniqueness test is the traditional one for the inadequacy of the legal remedy in the sale of chattels but the drafters of the Code had high hopes that the second clause "other . . . circumstances" would result in broadened use of this power as, for example, in output and requirement contracts. However, a somewhat similar clause in the *Uniform Sales Act* had little effect, and there is no reason to suppose the courts will change particularly under the Code. The courts exercising equitable jurisdiction have always had the power to grant specific performance whenever they felt the legal remedy was inadequate—normally however they seem to feel it is adequate.²¹

The related legal remedy of replevin is somewhat changed under the Code. The buyer now has this right only for goods identified to the contract, and only then if he cannot effect "cover" unless the goods have been shipped under reservation and the consideration for the goods has been tendered.²² There is no use of a "title" or "right to possession" test. The buyer can also get the goods if they were identified to the contract before the seller went insolvent and he has paid for them, at least in part, providing he makes the tender of the balance within ten days after paying the first instalment of the price.²³ This right is, of course, subject to defeat as a fraudulent conveyance (sold goods left in the possession of the seller), but it is highly unlikely that it would be. The Code permits retention by the seller for a reasonable time after sale without its being deemed fraudulent, and ten days is not likely to be held to be unreasonable.²⁴

20. § 400.2-716, RSMo 1963 Supp.

21. UNIFORM SALES ACT § 68:

Where the seller has broken a contract to deliver specific goods or ascertained goods, a court having the powers of a court of equity may, if it thinks fit on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically. . . .

Professor Williston wrote that this was intended to liberalize the attitude of the courts and pointed to some cases which he felt showed that it had, 3 WILLISTON, SALES § 601 n.11 (rev. ed. 1948). The editors of the Code apparently did not feel that it was very helpful. Comments to UCC § 2-716 (1962).

22. § 400.2-716(3), RSMo 1963 Supp.

23. § 400.2-502, RSMo 1963 Supp.

24. Section 400.2-402(2), RSMo 1963 Supp. provides that sellers of the creditor may treat the sale as void to them when the seller retains the goods, if such a transaction is void under the law of the state where the goods are situated, except that retention for a commercially reasonable time after sale is not fraudulent. In Missouri this sale is fraudulent subject to the same qualification of reasonable retention. § 428.080, RSMo 1959. What constitutes reasonable time is apparently a question for the jury. See *Kane v. Stern*, 13 Mo. App. 581 (St. L. Ct. App. 1883).

The seller can get specific performance—the price—when goods have been accepted or lost within a commercially reasonable time after the risk of loss has passed to the buyer. In addition, he can recover the price of goods identified to the contract if resale is impractical.²⁵ In this connection, one must remember that identification may take place after the buyer's breach.²⁶ This is, of course, a change from the prior law,²⁷ but it fits in with the remedies which the Code gives the buyer—it is, in effect, their counterpart.²⁸

Another important remedy other than damages is rescission and this is a standard remedy under the Code although it has been changed somewhat. Moreover, it is not called rescission but "cancellation." Whenever one party breaches, the other may cancel.²⁹ The difference is that there is no requirement that he return any goods received, that he restore the status quo. The value of any such goods would just be deducted from the price. Nor is there any necessity to elect remedies. One who cancels can also sue for damages.³⁰ Of course, he may be liable for restitution. Cancellation is, in other words, an additional weapon of the injured party whereby he can cut off his own liability under the contract. It is thus similar to the *exceptio non adimpleti contractus*, the difference being that in the case of cancellation, the contract ceases to exist, whereas when one party merely suspends his performance, the contract may well be revived.

While specific performance and rescission are the most common of this type and the only ones dealt with explicitly in the Code, they are

It seems unlikely that in view of the expressed legislative intent in § 400.2-402, RSMo 1963 Supp. a court would hold that ten days was too long.

25. § 400.2-709, RSMo 1963 Supp.

26. § 400.2-704, RSMo 1963 Supp.

27. The UNIFORM SALES ACT § 63 provided that the seller might have an action for the price: (a) where title had passed; (b) when the price was payable on a day certain regardless of title; (c) where the property to the goods had not passed and the goods were not readily resalable.

28. That is, the action for the price is made extraordinary for the situations that are not properly covered by the other remedies, where it is the only thing that will make the seller whole, just as specific performance is for the buyer. Under the *Uniform Sales Act* the action for the price was the standard remedy for the seller.

29. For the seller: § 400.2-703(f), RSMo 1963 Supp.; for the buyer: § 400.2-711(1), RSMo 1963 Supp., and in the case of anticipatory repudiation for either party. For the definition of cancellation, see § 400.2-106, RSMo 1963 Supp.

30. For the seller, see Comment 1 to UCC § 2-703 (1962); for the buyer, see § 400.2-701(1), RSMo 1963 Supp. For the general principle that claims for antecedent breach are retained after cancellation see § 400.2-720, RSMo 1963 Supp., and see, to the same effect, the definition of cancellation in § 400.2-106, RSMo 1963 Supp.

not the only ones possible. The Code has, as is common in statutes of this type, a clause providing that the general principles of law and equity and the like should apply in any case not provided for in the act.³¹ Consequently the courts retain their basic equity powers in dealing with sales cases, and there can be a number of situations in which these would be useful. Reformation is an obvious example but presents no different problems for sales than for other contracts. There are special sales situations that could call for equitable relief, however. So, for example, in the case of a contract for the sale of some article of unusual but unpatentable design, and high but transitory value, such as an advertising give-away, tied into some current craze or event such as a political campaign or a space flight, which the seller manufactured for the buyer according to the latter's instruction, and which was believed to have considerable sales potential if used in connection with the sales of, say, cereal, at the precise time of the event. If the seller simply refused to deliver to the buyer, the buyer might or might not be able to get specific performance. (The granting of this remedy here might mean that the seller would have to be forced to manufacture.) But the buyer could probably get an injunction forbidding the seller to make and sell the items to a competitor. Moreover, he might be able to get an injunction against the competitor, depending on the degree of collusion with the seller. There might also be the occasion for the appointment of a receiver, as, if the seller were on the point of absconding and had funds and other property of the buyer. This remedy might be related to specific performance. Suppose, for example, that the buyer had furnished the design and most of the materials for certain articles which he badly needed. The goods were half made when the seller refused to perform further. It is conceivable, though admittedly not very likely, that the buyer could have a receiver appointed to manage the factory until his goods were made. The important point is that extraordinary remedies of this sort are in no way affected by the Code, and hence one should not in a given case despair merely because the Code does not seem to grant relief. If there is some possibility in the general area of relief in the law outside the Code—under principles of restitution or equity, for example—then the chances are that it still exists.

31. § 400.1-103, RSMo 1963 Supp.

IV. OTHER CODE REMEDIES

There are, finally, a number of miscellaneous remedies given by the Code. The best known is perhaps the seller's right of stopping goods in transit upon learning of the buyer's insolvency. If the seller learns that the buyer is insolvent or if the buyer repudiates or fails to make a payment when due, the seller may refuse delivery except for cash and has the right to order a bailee to stop delivery until the goods are received by the buyer, or attorned to the buyer by the bailee, or a negotiable document of title is negotiated to him.³² The Code makes the proof of insolvency somewhat easier³³ and gives the right only in the case of larger shipments such as a carload because of the burden to the carrier.³⁴ As a practical matter this rule is only applicable to a credit sale on open account when shipment is by non-negotiable bill of lading naming the buyer as consignee, because otherwise the seller either has control over the goods anyway and can simply withhold them from the buyer, or else he has lost this right by negotiating the bill of lading to someone. The seller also has the right to get the goods back from the buyer if the latter was insolvent when he received them, if he (the seller) acts within ten days, unless the buyer made misrepresentations in writing to the seller as to insolvency within three months before receipt in which case the ten day limit does not apply.³⁵

V. THE REMEDIES SET BY THE PARTIES

All of the remedies that have been mentioned so far are those provided by the Code (or at any rate by the law) when the parties have not agreed on something else. But the Code is consistent in its contractual approach, and provides that the parties can arrange an entirely different scheme of remedies for themselves subject only to the requirements of good faith and unconscionability. The basic provision is section 400.2-719, which provides that the parties can agree to any remedy they wish in addition to, or in substitution of, the Code remedies, and it gives as an example of the sort of thing that might be agreed upon, the right

32. § 400.2-705, RSMo 1963 Supp.

33. Section 400.1-201(23), RSMo 1963 Supp. adds to the equity and bankruptcy definitions the failure in fact to pay debts as they become due whether or not the debtor is able to do so.

34. § 400.2-705(1), RSMo 1963 Supp.

35. § 400.2-702, RSMo 1963 Supp.

of the buyer to return being substituted for the right to damages.³⁶ It also provides that consequential damages can be eliminated in the contract unless such elimination is unconscionable, but elimination of damages for personal injury is prima facie unconscionable.³⁷ Apart from clauses for the elimination of consequential damages, liquidated damages clauses are probably the most common provisions of this sort. These last are dealt with specially in section 400.2-718, whose provisions are not appreciably different from those of the *Restatement of Contracts*.³⁸ Thus the amount of damages must bear some relation to the anticipated loss, damages must be difficult to compute, etc. If there is no liquidated damages clause, there is a limitation on the amount of money which the seller can retain if he justifiably refuses to deliver to the buyer and the buyer has paid something in advance.³⁹

But although these are the most common provisions of this sort, they are certainly not the only ones possible, and this section (400.2-719) offers, in fact, an unlimited opportunity for development of new methods of dealing with breach of contract. One obvious possibility is the use of this section to supply the lack of a statute or rule of law providing for the arbitration of future disputes in states such as Missouri where this lack exists.⁴⁰ But especially in the case of complicated contracts, such as those involving the development of a new product, where not only are damages difficult to prove, but even the existence of breach is difficult to determine (did defendant use his best efforts though he failed), it would seem possible and wise to work out in advance a system of courses of action including, but not limited to, schedules of compensation to adjust any possible disputes. These could include liquidated damages and arbitration clauses of various sorts. So far as the Code is concerned, there are no limits save the ingenuity of the parties and the general limits of unconscionability. How far the courts will go along with such ideas, especially where they would require specific performance,⁴¹ is, of course, difficult to say. The more they look like liquidated damage clauses the more likely enforcement will be in all probability.

36. § 400.2-719(1)(a), RSMo 1963 Supp.

37. § 400.2-719(3), RSMo 1963 Supp.

38. RESTATEMENT, CONTRACTS § 339 (1932).

39. § 400.2-718(2), RSMo 1963 Supp.

40. Section 435.010 RSMo 1959 provides that an agreement to arbitrate a dispute does not constitute a bar to suit nor a condition precedent to suit.

41. Any special remedy that involves any sort of action by the other party will almost inevitably require specific performance to be effective.

VI. FUNCTION OF REMEDIES IN THE CODE

This section on the ability of the parties to set their own remedies leads quite naturally to the place of remedies in the general scheme of the Code. Remedies are not viewed in the Code as penalties for wrongdoing but simply as one common aspect of a contractual relationship. The earlier sales law dealt primarily with a simple sale—a single delivery of a fairly simple item. In such transactions—which remain, of course, very common—it is relatively easy to determine the moment of breach. A party has performed—delivered or paid—or he has not. And in the vast majority of cases he does perform without incident. Compensation for the injured party is fairly obvious also. But in more complex transactions the situation changes. Breach becomes the rule, not the exception. So, in a three year contract for monthly delivery of coal (of a defined quality) up to 100 carloads per month to be shipped according to buyer's orders, it is almost certain that at some point during the three years the orders will not be given on time, or will be given incorrectly, or the shipment will be late, or defective in quality. All of these things are breaches, and in a really complex contract, like one for the building of a product to a new design, there will be many more. An infinitesimal number will result in law suits, because in most cases the parties have decided to do business with each other and wish to continue to do so if at all possible. But even if a lawsuit results, it is clear that in situations of this sort a breach of contract is not necessarily a sin. It is often just another way of performing the contract which gives rise to a different compensation (a delivery of a wrong quality or quantity results in a price allowance). Hence the Code encourages the adjustment of disputes in the performance sections, as in permitting the injured party to await performance by one who has breached anticipatorily,⁴² and in permitting the seller to cure in many cases.⁴³ And, if there is a breach, the parties still have to act reasonably: the buyer must ask what to do with the defective goods, and, if necessary, sell them.⁴⁴ The Code also encourages such action in the remedies sections. In the case of an instalment contract, the injured party can treat a breach as justification for cancellation only if it substantially impairs the value of the whole contract.⁴⁵ And of course

42. § 400.2-610(a), RSMo 1963 Supp.

43. §§ 400.2-508, 2-612, RSMo 1963 Supp.

44. § 400.2-603, RSMo 1963 Supp.

45. § 400.2-612, RSMo 1963 Supp.

there is the possibility of agreed-upon remedies.⁴⁶ Moreover by virtue of section 400.2-209 the old rule of *Foakes v. Beer*⁴⁷ is overruled and parties can agree to modifications of the contract once entered into without new consideration, and this would include, of course, modifications made after breach (settlement).

Nevertheless, there are situations where relations are broken off completely, where the parties made no advance arrangements for breach, and have arrived at no settlement. Here the Code encourages self-help since most parties wish to avoid suit, and thus continues with its general approach to breach. It also offers a full battery of judicial remedies to give the injured party all he needs to be made whole in fact, but no more. Thus it lets the seller continue to manufacture if necessary to recoup his loss⁴⁸ but it makes it difficult for him to recover the full price when the difference between contract price and resale price will do, that is, when the reasonable seller would have sold.⁴⁹

This surely is what the courts wish to do as well in these cases—to let the parties arrange their own affairs if possible. If they cannot do so, the courts do whatever is necessary to readjust matters without putting an undue burden on the one who has broken the contract. The Code provisions, it is to be hoped, will make this easier by indicating the reasonable course of action in the light of commercial understanding.

46. § 400.2-719, RSMo 1963 Supp.

47. 9 App. Cas. 605 (1884).

48. § 400.2-704, RSMo 1963 Supp.

49. § 400.2-709, RSMo 1963 Supp.