CONTRACTS

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The Uniform Commercial Code, in the article pertaining to Sales, contains several provisions on the contract to sell, its formation, its construction, its discharge, and the Statute of Frauds. Since more than half the cases litigated in the field of contracts involve sales agreements, this area of the law would be considerably affected by the Code.¹

This article proposes to point out and discuss a few of the more salient changes which will be effected in the New York law of contracts if the Code is adopted in this state.

IRREVOCABILITY OF OFFERS

At common law, a promise to keep an offer open, even if in writing and signed by the offeror, was not binding in the absence of a special consideration received therefor.² By statute in New York, however, a promise to keep an offer open is binding, even without consideration, if it is in writing, and signed by the offeror.³ If the promise specifies a time, the offer shall remain open for that period of time; if no time is mentioned the offer will remain open for a reasonable time.⁴

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³ See Hallwood Cash Register Co. v. Finnegan, 84 N. Y. Supp. 154 (Sup. Ct. 1903), where a representative of the plaintiff obtained from the defendant an order for a cash register written on one of plaintiff’s order blanks on which, above defendant’s signature, were printed the words: “This order shall not be countermanded.” Before plaintiff accepted this offer (order) by shipping the machine, it received a letter from defendant revoking his order. Plaintiff nevertheless shipped the register and suing for the price, received judgment. Defendant appealed, contending no liability because no contract. In reversing the judgment, Mr. Justice MacLean wrote: “He [defendant] is right, for his statement that he would not countermand, being without consideration, was not binding, and acceptance or acts tending thereto by the plaintiff, subsequent to the revocation of the order, were unavailing and ineffectual.” Id. at 155.
⁴ N. Y. PERS. PROP. LAW § 33(5).
* Ibid.
The Uniform Commercial Code provides:

An offer by a merchant to buy or sell goods in a signed writing which gives assurance that it will be held open needs no consideration to be irrevocable for a reasonable time or during a stated time but in no event for a time exceeding three months; but such term on a form supplied by the offeree must be separately signed by the offeror.

It should be observed that the Code provision speaks only of offers made by merchants. According to the section comment, however, a non-merchant's offer may become irrevocable under this section "... when it is shown that the offeror had full understanding of the nature and effect of the offer made." It is to be noted, also, that under this section, an offeror is protected from inadvertently signing an agreement containing an irrevocability clause by the requirement that such clause be separately authenticated by the offeror if the form is prepared by the offeree. Authentication may consist in initialing the clause involved.

Thus, the Code, if adopted, would effect two important changes in the present New York law relating to the revocation of offers:

1. The present statutory rule that a promise to keep an offer open is binding without consideration if expressed in

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5 The Code draws a distinction between a "merchant" and a "non-merchant" in applying some of the rules, the reason given, being that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer. Uniform Commercial Code § 2-104, Comment 1 (Spring 1950). The term, "merchant," is defined as "... a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." Uniform Commercial Code § 2-104(1) (Spring 1951).

6 Uniform Commercial Code § 2-205 (Spring 1951).

7 Each section of the Code is followed by a comment explaining the purpose and coverage of the section. These comments "... may be consulted in the construction and application of this Act but where text and comment conflict, text controls; ..." Uniform Commercial Code § 1-102(3) (f) (Spring 1951). The comments referred to and quoted from in this article are those appearing in the Spring 1950 draft, since, at press time, the comments for the 1951 draft has not yet been published.

8 Uniform Commercial Code § 2-205, Comment 2 (Spring 1950).

9 Id., Comment 5.

10 Id., Comment 3.
a signed writing\(^{11}\) would be limited by the Code so that it would apply only to offers by merchants\(^{12}\) unless it could be shown that the non-merchant offeror had a "... full understanding of the nature and effect of the offer made."\(^{13}\)

2. Whereas at present no maximum period for irrevocability is fixed by statute, the Code would impose an outside limit of three months on the period of irrevocability whether a time is fixed by the parties or not.\(^{14}\) It should be noted, however, that this limitation would apply only to current "firm" offers, and not to long-term options.\(^{15}\)

**Counter-offers**

Under the existing law of contracts, it is generally held that a reply by an offeree containing additional terms, not expressly or impliedly included in the offer, is regarded as a counter-offer;\(^{16}\) and when received by the offeror, amounts to a rejection and termination of the original offer.\(^{17}\)

The Uniform Commercial Code provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon.

(2) The additional or different terms are to be construed as proposals for addition to the contract and between merchants become part of the contract unless they materially alter it or notification of objection to them is given within a reasonable time.\(^{18}\)

This section imposes upon the offeror, who has received a communication from the offeree purporting to be an accep-

\(^{11}\) N. Y. Prop. Prop. Law § 33(5).

\(^{12}\) Uniform Commercial Code § 2-205, Comment 2 (Spring 1950).

\(^{13}\) Ibid.

\(^{14}\) Uniform Commercial Code § 2-205 (Spring 1951).

\(^{15}\) Uniform Commercial Code § 2-205, Comment 4 (Spring 1950).

\(^{16}\) Porter v. Gossell, 112 Ark. 380, 166 S. W. 533 (1914); Poel v. Brunswick-Balke-Collender Co., 216 N. Y. 310, 110 N. E. 619 (1915); Griswode on Contracts § 49 (1947); 1 Williston on Contracts §§ 72, 73, 77 (Rev. ed. 1936), and cases there cited.

\(^{17}\) Minneapolis and St. Louis Railway v. Columbus Rolling Mill, 119 U. S. 149 (1886).

\(^{18}\) Uniform Commercial Code § 2-207 (June 1951).
tance, but stating additional terms, the duty of rejecting the same at the risk of being bound thereto, unless the additional terms "materially alter" the agreement already reached by the parties. The test as to whether additional terms "materially alter" the bargain is whether they would normally occasion surprise to a merchant in that line of business. If so, they will not be included in the contract unless expressly agreed to by the other party. On the other hand, if the additional terms are such as frequently appear in contracts in that trade or line of business, they will not be regarded as materially altering the contract, and will be incorporated automatically unless notification of objection is "given" within a reasonable time.

This provision of the Code is intended to apply even when the parties have reached an agreement by correspondence and one of them in a formal acknowledgment thereof adds terms which have not been discussed. Likewise, it is

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10 Uniform Commercial Code § 2-207, Comment 4 (Spring 1950). "Examples of typical clauses which would normally 'materially alter' the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable."

20 What constitutes "giving" notice is not clear; whether notice of objection is "given" on mailing or not until it is received, has not been specified. It would seem that the term "given" should require receipt of the objection.

21 Uniform Commercial Code § 2-207, Comment 5 (Spring 1950). "Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening causes beyond his control . . . ; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for resale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance 'with adjustment' or otherwise limiting remedy in a reasonable manner . . . ."

22 Uniform Commercial Code § 2-207, Comment 1 (Spring 1950). In a leading New York case, Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 75 (1894), after an agreement had been reached through correspondence for the sale and shipment of apples, the buyer returned to the seller the formal contract declaring that he would not sign it unless certain additional terms were inserted which had not been referred to in the correspondence.
operative when the wire or letter which is expressed and intended as the confirmation or closing of an agreement adds such minor suggestions or proposals as, "ship draft against bill of lading inspection allowed" or "ship by Tuesday." 23

Acceptance of an Offer

(a) Medium of Communication

At present, the acceptance of an offer must be made or dispatched in a manner and through a means of communication either expressly or impliedly authorized by the offeror before a contract can arise upon the starting forward of the acceptance. 24 Thus where an offer was sent by mail, it was held that it could not be accepted by telegraph so as to close a contract upon dispatch of the telegram of acceptance. 25

The New York Court of Appeals held that the buyer had no right to insist on the proposed modifications but was bound without them on the agreement already reached through the correspondence. Cf. Poel v. Brunswick-Balke-Collender Co., 216 N. Y. 310, 110 N. E. 619 (1915).

23 Uniform Commercial Code § 2-207, Comment 1 (Spring 1950). In the leading case of Neer v. Lang, 252 Fed. 575 (2d Cir. 1918), to an offer from the defendant to sell 20 shares of Saxon Motor common stock at 400 the plaintiff wired: "We accept twenty Saxon at four hundred ship with draft attached and wire when you have done this." In affirming the judgment of the court below that the correspondence disclosed no contract, Mr. Justice Rogers of the appellate court said: "The telegram 'accepts twenty Saxon at four hundred.' If nothing more had been added, a valid contract would have resulted. . . . But the telegram contained something more, and that was 'Ship with draft attached and wire when you have done this.' This imported a new item into the acceptance and prevented a contract from being made." Id. at 576.

In Cameron v. Wright, 21 App. Div. 395, 47 N. Y. Supp. 571 (1st Dep't 1897), an offer was made to sell stock at 33 cents on the dollar. The alleged acceptance was in a telegram reading: "I accept offer; 33 for all your stock; draw three days sight draft with stock attached." This was held to be a variance from the offer, and the interposition of a term not embraced in the offer and therefore not binding.

24 "The series of English decisions which establish the doctrine that the acceptance of an offer is complete so soon as a letter of acceptance has been posted begins with Adams v. Lindsell (1 B. and Ald. 681), which was decided in 1818, and concludes with Henthorn v. Fraser, (1892) 2 Ch. 27, in which judgment was given in 1892. In every one of these cases, except the last one, it was clear as a matter of fact that the offeror authorized the acceptor to make use of the post as a means of signifying his acceptance." Innes, C.J., in Bal v. Van Staden, Transvaal Law Reports, 128 (1902).

The Uniform Commercial Code provides:

Unless the contrary is unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances . . . .

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The Code comment to this section declares that "Former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc., are hereby rejected and a criterion that the acceptance be 'in any manner and by any medium reasonable under the circumstances,' is substituted." 27

(b) Manner of Acceptance

The policy of the Commercial Code to adopt a liberal view as to what may constitute such acceptance as to close a contract is further illustrated by Section 2-204 which provides:

(1) A contract for sale of goods may be made in any manner sufficient to show agreement.

(2) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale even though the moment of its making cannot be determined.28

This provision is directed primarily to the situation in which the actions of the parties indicate that a binding obligation has been undertaken, but the interchanged correspondence does not disclose the exact point at which the deal was closed.29

It is believed that this section of the Code states a principle broader than most courts have enunciated. It is easy to conceive of a situation when the moment of the making of a contract would be material, e.g., when the specific goods, which are the subject matter of the contract, are destroyed.

26 Uniform Commercial Code § 2-206(1)(a) (Spring 1951).
27 Uniform Commercial Code § 2-206, Comment 1 (Spring 1950).
28 Uniform Commercial Code § 2-204 (Spring 1951).
29 Uniform Commercial Code § 2-204, Comment (Spring 1950).
during the period of negotiation. Unless it could be determined at what time the contract arose it would be difficult, if not impossible, to determine whether or not title and risk of loss have passed.

(c) Acceptance of Order for Shipment

At present, an offer can be accepted either by an act or a promise, depending upon which the wording of the offer and/or the surrounding circumstances, indicate the offeror intends to be the acceptance of his offer. A reward offer, for example, clearly calls for an act as the acceptance. In the case of an offer for the purchase or sale of merchandise, however, it is often difficult to determine whether the offeror wants a return promise or the offeree's act of shipping the goods or of making payment to serve as the acceptance.

The Uniform Commercial Code provides:

... an order or other offer to buy goods for prompt or current shipment can be accepted either by such shipment or by a prompt promise thereof.

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30 Phillips v. Moor, 71 Me. 78 (1880); 6 Williston on Contracts § 1946 (Rev. ed. 1938).
31 1 Williston on Contracts § 31A (Rev. ed. 1936).
32 Thus in Dickey v. Hurd, 33 F. 2d 415 (1st Cir. 1929), a written offer to sell land stated: "... I will sell the same to you for $15 per acre cash and give you till July 18, 1926, including that day to accept this offer." The offeree replied by wire on July 17th that he would accept. Circuit Judge Bingham said: "A more difficult question is whether the offer calls for payment of the purchase price, an act of acceptance on or before July 18; or whether it simply calls for a notice of acceptance." Id. at 418. Referring to the language of the offer, he said: "Standing alone and apart from the surrounding circumstances, the words 'to accept this offer' are equivocal. They may mean that he would give through July 18 to accept the offer by paying the price fixed; or would give him through that date to accept the offer by giving him notice to that effect." Ibid. The learned justice pointed out that on two occasions prior to July 18 the offeror had received letters from the offeree clearly indicating that the latter construed the offer as calling merely for notice of acceptance before July 18, and that since the offeror had not corrected that impression by notifying the offeree that payment on or before July 18 was intended acceptance, he was bound by the offeree's reasonable construction of the offer as calling only for notice of acceptance before that date. Ibid.

In Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 75 (1894), an offer to sell apples read: "this proposition to be accepted not later than the 31st inst., and you to pay us $500 upon acceptance of the proposition..." It was held that the contract was closed upon the giving of a notice of acceptance without the contemporaneous payment of $500.
33 Uniform Commercial Code § 2-206(1)(b) (Spring 1951).
The section rejects the theory that only one mode of acceptance is normally envisaged by an offer, and, in accordance with ordinary commercial understanding, interprets an order looking to current shipment as allowing acceptance either by actual shipment or by a prompt promise to ship.34

(d) Shipment of Wrong Goods as an Acceptance

At common law, no act could be an acceptance of an offer so as to form a contract unless it was the very act called for by the terms of the offer.35

The Uniform Commercial Code provides:

Unless the seller states the contrary a shipment sent in response to an order to which it does not conform is an acceptance and at the same time a breach.36

According to its comment, this provision applies to the situation where a shipment made following an order is plainly referable to that order but has a defect. Such a non-conforming shipment is treated as simultaneously closing the bargain and breaching it.37 However, where, as an attempted accommodation to the buyer, the seller ships admittedly non-conforming goods in substitution for those ordered, the shipment would not be such an acceptance as would give rise to a contract.38

(e) Commencing Performance as Acceptance

Under present law, if an offer calls for an act as the acceptance, the mere commencing to perform it is not an acceptance.39 Also, where the offer is to pay for certain work, and states that the offeree may begin the work upon an agree-
ment to complete it within a fixed period, the commencing to do the work without agreeing to complete it within the time specified is not an acceptance of the offer.\footnote{40}{White v. Corlies, 46 N. Y. 467 (1871).}

The Uniform Commercial Code provides:
The beginning of a requested performance can be a reasonable mode of acceptance but in such a case an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.\footnote{41}{UNIFORM COMMERCIAL CODE § 2-206(3) (Spring 1951).}

The Comment to this section advises that the beginning of performance by an offeree can be effective as an acceptance only if followed by notice to the offeror within a reasonable time. Such beginning of performance must unambiguously demonstrate the offeree's intention to engage himself.\footnote{42}{UNIFORM COMMERCIAL CODE § 2-206, Comment 3 (Spring 1950).}

It is the rule in some jurisdictions (although not in New York)\footnote{43}{Quincy and Co. Arbitrage Corp. v. Cities Service Co., 156 Misc. 83, 282 N. Y. Supp. 294 (Sup. Ct. 1935), aff'd without opinion, 1 N. Y. S. 2d 654 (1st Dep't 1937). Where, however, an entire and indivisible offer is made, calling for a series of performances as soon as the first performance is completed, the offeror may not revoke the offer. Post v. Albert Frank & Co., 75 Misc. 130, 132 N. Y. Supp. 807 (Sup. Ct. 1912). \footnote{44}{Los Angeles Traction Co. v. Wilshire, 135 Calif. 654, 67 Pac. 1086 (1902); Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 N. W. 769 (1912). \footnote{45}{RESTATEMENT, CONTRACTS § 45 (1932): "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree . . . the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time." This rule has been rejected in New York. See note 43 supra. \footnote{46}{UNIFORM COMMERCIAL CODE § 2-206, Comment 3 (Spring 1950).}}} that the beginning of performance by an offeree has the intermediate effect of barring revocation of an outstanding offer.\footnote{44}{Los Angeles Traction Co. v. Wilshire, 135 Calif. 654, 67 Pac. 1086 (1902); Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 N. W. 769 (1912). \footnote{45}{RESTATEMENT, CONTRACTS § 45 (1932): "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree . . . the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time." This rule has been rejected in New York. See note 43 supra. \footnote{46}{UNIFORM COMMERCIAL CODE § 2-206, Comment 3 (Spring 1950).}} Similarly, the Restatement declares that performance begun within a reasonable time after the making of an offer is an acceptance and will give rise to a contract, subject to the condition subsequent that if the work so begun is not prosecuted with due diligence, the contract is null and void.\footnote{46}{UNIFORM COMMERCIAL CODE § 2-206, Comment 3 (Spring 1950).} It is interesting to note that the Code requirement that notice to the offeror be given within a reasonable time after the beginning of performance, in no way defeats the operation of such rules.\footnote{46}{UNIFORM COMMERCIAL CODE § 2-206, Comment 3 (Spring 1950).}
ST. JOHN'S LAW REVIEW

INDEFINENESS

(a) Terms Left Open for Future Adjustment

One needs no authority to say that at common law the terms of an agreement were required to be definite and complete. If they were not, and a legal controversy arose, there would be no way for the court to determine what the respective obligations were, or whether they had been performed. Consequently, it has generally been held that where an executory agreement is indefinite or incomplete as to one or more material terms, no recovery can be had for its breach.\(^4\) Likewise, "agreements to agree" on terms are unenforceable.\(^5\)

The Uniform Commercial Code provides:

Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.\(^6\)

Under this section, any agreement will be recognized as valid in law, if it can be shown: (1) that the parties intended to enter into a contract; and (2) that there is a reasonably certain basis for granting a remedy. Thus, certainty as to the duties of the respective parties or the amount of damages owing to the plaintiff would not be the test of validity. Instead, the binding character of a contract would be measured by the application of commercial standards on the point of indefiniteness. In determining the intention of the parties, the number of terms left open in the contract are to be considered, but the actions of the parties may frequently be conclusive on the matter despite the number of omissions.\(^7\)


\(^{49}\) UNIFORM COMMERCIAL CODE § 2-204(3) (Spring 1951).

\(^{50}\) UNIFORM COMMERCIAL CODE § 2-204, Comment (Spring 1950). See also Richter, The Uniform Commercial Code—A Preview, 24 CALIF. STATE BAR J. 414, 420 (1949). "The concept of a 'meeting of the minds' on all the essential terms of a contract has long been embedded in the law. Yet, section 2-204 of the Article on Sales provides that a contract for sale does not fail for indefiniteness even though one or more terms are left open if the parties have intended a contract and there is a reasonably certain basis for giving an appropriate remedy."
(b) **Performance Term to be Supplied**

It has been held in New York that a written contract for the sale and shipment of goods is not incomplete or invalid merely because it makes no provision for incidental and immaterial matters of performance, such as destination, routing and name of consignee. However, the courts have emphasized the incidental and immaterial character of the omissions. The Code makes no such emphasis. Instead, it simply provides that sales contracts, which are otherwise sufficiently definite, are not made invalid by the fact that particulars of performance are left to be specified by one of the parties. The "agreement" which enables one party to specify missing terms in such contract may be express or implicit from the course of dealing, usage of trade, or the surrounding circumstances.

In exercising the power to so specify, the party to whom it is given must of course act reasonably and in accordance with commercial practice. Indeed, the range of permissible variation is expressly limited to what is "commercially reasonable."

(c) **As to Price Terms**

It has been held that the price term of a contract of sale must be definite, and that an "agreement to agree" on the price term is unenforceable.

The Uniform Commercial Code provides:

The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if (a) nothing is said as to price;

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52 Uniform Commercial Code § 2-311(1) (Spring 1951).
53 Uniform Commercial Code § 2-311, Comment 1 (Spring 1950).
54 Ibid.
55 United Press v. N. Y. Press, 164 N. Y. 406, 58 N. E. 527 (1900), where the price term was "a sum not exceeding three hundred dollars during each and every week." The Court of Appeals held that this was too indefinite as it merely stated the limit which the price to be paid each week must not exceed; it would have to be the subject of future agreement and hence the contract was not binding since neither party could be compelled to agree with the other.
or (b) the price is left to be agreed by the parties and they fail to agree; or (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.\textsuperscript{56}

Under this section, "[a] price to be fixed by the seller or by the buyer means a price for him to fix in good faith."\textsuperscript{57} There is a further provision to the effect that a wrongful interference by one party with the agreed machinery for price-fixing in the contract may be treated by the wronged party as a repudiation justifying cancellation. Or, at his option, the aggrieved party may himself fix a reasonable price.\textsuperscript{58} In still another subsection the Code provides:

Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.\textsuperscript{59}

Thus the Code recognizes that there may be cases in which a particular person's judgment is not chosen merely as the index or barometer of a fair price, but is an essential condition to the parties' intention to make any contract at all. For example, the case where an art expert is to appraise a particular oil painting may differ markedly from the situation where a named "expert" is to determine the market quality of a quantity of tobacco. The difference in circumstances might well support a finding that in the former instance, the parties did not intend to make a binding agreement if the particular expert was unavailable; whereas in the latter supposition, it might justifiably be concluded that a contract was intended even though the "expert" proved to be unavailable.\textsuperscript{60}

\textsuperscript{56} \textit{Uniform Commercial Code} § 2-305(1) (Spring 1951).
\textsuperscript{57} \textit{Id.} § 2-305(2).
\textsuperscript{58} \textit{Uniform Commercial Code} § 2-305, Comment 5 (Spring 1950).
\textsuperscript{59} \textit{Uniform Commercial Code} § 2-305(4) (Spring 1951).
\textsuperscript{60} \textit{Uniform Commercial Code} § 2-305, Comment 4 (Spring 1950).
(d) As to Duration of Performance

At common law, a contract calling for continuing performance but containing no provision for its duration, was construed to be terminable at the will of either party.\textsuperscript{61} Although the rule has had its most frequent application to contracts of agency and employment, it has been expressed as applicable to other types of agreement, including those for the purchase and sale of commodities.\textsuperscript{62}

The Uniform Commercial Code provides:

Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.\textsuperscript{63}

In determining what is a "reasonable time" under this section, it is necessary to consider the surrounding circumstances of the case. For example, where an arrangement has been carried on by the parties for a number of years, the "reasonable time" may continue indefinitely, and the contract would not terminate until notice.\textsuperscript{64}

Still another subsection provides:

Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.\textsuperscript{65}

This latter subsection is explained as a recognition that sound commercial practice and principles of good faith normally call for such notification of the termination of a going contract relationship as will give the other party a reasonable time in which to seek a substitute arrangement.\textsuperscript{66}

Taken together, the above provisions would seem to effect a change in the present New York rule which is that no notice is required to be given by the party electing to terminate a

\textsuperscript{63} \textsc{Uniform Commercial Code} § 2-309(2) (Spring 1951).
\textsuperscript{64} \textsc{Uniform Commercial Code} § 2-309, Comment 7 (Spring 1950).
\textsuperscript{65} \textsc{Uniform Commercial Code} § 2-309(3) (Spring 1951).
\textsuperscript{66} \textsc{Uniform Commercial Code} § 2-309, Comment 8 (Spring 1950).
contract indefinite as to duration, unless the party against whom cancellation is sought, has, to the knowledge of the cancelling party, made heavy outlays of money or equipment or made other commitments necessary to carry out his part of the agreement.

Auction Sales

The Uniform Sales Act, now in force and effect in thirty-seven states including New York, provides:

"A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve." It should be observed that in the second sentence of the above quotation, the words, "any bidder may retract his bid" are shut off by a semicolon from the last clause, "unless the auction has been announced to be without reserve." Consequently, this latter clause applies only to the right of the auctioneer to withdraw the goods from sale, and does not limit the right of the bidder to retract his bid. That right is unlimited under the first part of the sentence preceding the semicolon. In other words, under existing law, any bidder may retract his bid before the hammer falls even if the sale has been announced to be without reserve.

But under the proposed Code, he may not. The applicable section provides:

In an auction without reserve the goods cannot be withdrawn nor a bid retracted.


69 Uniform Sales Act § 21(2); N. Y. Pers. Prop. Law § 102(2).

70 Uniform Commercial Code § 2-328(3) (Spring 1951).
Still another change is effected in the law governing auction sales by the Code provision which specifies that goods may be withdrawn at any time before they are actually "put up" regardless of whether the auction is advertised as one without reserve.\textsuperscript{71} Under existing law, an auctioneer may withdraw goods from sale only if the sale had not been announced to be "without reserve." No definition is given in the Code for the expression "put up for sale"; presumably the question of whether goods had actually been put up for sale would be left for the jury in each particular case.

**Requirement Contract—Effect of Estimate**

In requirement contracts, the parties sometimes insert an estimate of the quantity that will be required. Such estimate would seem to be intended to limit the seller's obligation, and at the same time to afford a basis for computing the buyer's probable needs, in other words, to have legal effect either as a maximum to the seller's liability or a minimum to the buyer's liability. In the majority of states, however, the estimate is treated by the courts as having no legal effect whatsoever, except when made by the buyer in bad faith. In such case, it operates as a maximum to the seller's liability.\textsuperscript{72}

The Uniform Commercial Code provides:

A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.\textsuperscript{73}

Thus if an estimate of output or requirements is included in the agreement, no quantity unreasonably disproportionate to it may be tendered or demanded. Any minimum or maximum set by the agreement shows a clear limit on the intended elasticity. In similar fashion, the agreed estimate is to be

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\textsuperscript{71} Uniform Commercial Code § 2-328, Comment 2 (Spring 1950).

\textsuperscript{72} See 28 Col. L. Rev. 223 (1928).

\textsuperscript{73} Uniform Commercial Code § 2-306(1) (Spring 1951).
regarded as the center around which the parties intend the variation to revolve.  

**Modification of Existing Contract**

Generally, a promise to modify an existing contract is unenforceable unless supported by some new additional consideration. By statute in New York, however, if the new promise, modifying an existing contract, is in writing and signed by the promisor, it is not denied effectiveness merely because of the absence of consideration to support it.  

The Uniform Commercial Code provides:

An agreement modifying a contract within this Article needs no consideration to be binding.

According to its comment, this section seeks to protect and make effective all necessary and desirable modifications of sales contracts, without regard to the technicalities which at present hamper such adjustments. Reasonable modifications due to unforeseen circumstances or affecting matters which do not go to the essence of the agreement are intended to be effective without consideration. Although the Code provides that an agreement modifying a contract needs no consideration to be binding, the comment advises that proposed modifications must meet the test of good faith, and satisfy the requirements of the Statute of Frauds, so as to limit possible oral modification. The test of "good faith" requires in the first instance, "... an objectively demonstrable commercial reason for seeking the readjustment." There need not be an unforeseen difficulty severe enough to make out a legal excuse for non-performance; such matters as a market shift which, in the event of performance, would

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74 **Uniform Commercial Code** § 2-306, Comment 3 (Spring 1950).
76 **N. Y. Pers. Prop. Law** § 33(2).
77 **Uniform Commercial Code** § 2-209(1) (Spring 1951).
78 **Uniform Commercial Code** § 2-209, Comment 1 (Spring 1950).
79 Id., Comment 2.
80 Id., Comment 3.
81 *Ibid*.
82 Id., Comment 2.
result in a loss, will meet the test of good faith in seeking a readjustment.\textsuperscript{83}

\textbf{Assignment of Contracts}

Under present law, if the assignment of a contract contains an express promise by the assignee to assume the assignor's duties, the other original party to the contract may sue the assignee on such promise as beneficiary even though no consideration moved from him to the assignee for such promise.\textsuperscript{84} In the absence of such express promise, however, no promise on the part of the assignee to assume the assignor's duties will be implied from the mere acceptance by him of the assignment.\textsuperscript{85} The Restatement declares: "Where a party to a bilateral contract which is at the time wholly or partially executory on both sides, purports to assign the whole contract, his action is interpreted, in the absence of circumstances showing a contrary intention, as an assignment of the assignor's rights under the contract and a delegation of the performance of the assignor's duties. Acceptance by the assignee of such an assignment is interpreted, in the absence of circumstances showing a contrary intention, as both an assent to become an assignee of the assignor's rights and as a promise to the assignor to assume the performance of the assignor's duties." \textsuperscript{86} The courts of New York have expressly declined to follow this rule of the Restatement.\textsuperscript{87}

The Uniform Commercial Code provides:

An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the circumstances indicate the contrary (as in an assignment for security) it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes

\textsuperscript{83} Ibid.
\textsuperscript{84} See Langel v. Betz, 250 N. Y. 159, 162, 164 N. E. 890, 891 (1928).
\textsuperscript{85} Langel v. Betz, 250 N. Y. 159, 164 N. E. 890 (1928).
\textsuperscript{86} RESTATEMENT, CONTRACTS § 164 (1932).
a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.\textsuperscript{88}

The Code provision is self-explanatory.

\textbf{STATUTE OF FRAUDS}

(a) \textit{Amount of Price to Come Within the Statute}

Statutes in force and effect throughout the United States and England have generally provided that contracts for the sale of personal property of a value in excess of a fixed amount are unenforceable unless in writing and signed by the party to be charged. The original Uniform Sales Act set the amount at five hundred dollars,\textsuperscript{89} but the various state legislatures have altered the figures to conform with their peculiar commercial clime.\textsuperscript{90} In New York, the price has been fixed at fifty dollars.\textsuperscript{91} The Uniform Commercial Code sets the amount at five hundred dollars.\textsuperscript{92}

(b) \textit{Party Signing Memorandum}

The existing Statute of Frauds in New York requires the contract of sale or memorandum thereof to be signed by the party to be charged or by his agent.\textsuperscript{93} The plaintiff cannot manufacture the evidence required by means of a writing signed only by himself.\textsuperscript{94}

The Uniform Commercial Code provides:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements . . . [of the Statute of Frauds] against such party

\textsuperscript{88} \textit{Uniform Commercial Code} § 2-210(4) (Spring 1951).

\textsuperscript{89} \textit{Uniform Sales Act} § 4.

\textsuperscript{90} \textit{E.g.}, Connecticut and Michigan set the amount at one hundred dollars, while Minnesota and Wisconsin have adopted a fifty-dollar minimum. In New Jersey and Pennsylvania, the price is fixed at five hundred dollars.

\textsuperscript{91} \textit{N. Y. Pers. Prop. Law} § 85(1).

\textsuperscript{92} \textit{Uniform Commercial Code} § 2-201 (Spring 1951).

\textsuperscript{93} \textit{N. Y. Pers. Prop. Law} § 85.

\textsuperscript{94} \textit{Accord}, 300 West End Ave. Corp. v. Warner, 250 N. Y. 221, 165 N. E. 271 (1929); \textit{cf.} Lord v. Cronin, 154 N. Y. 172, 47 N. E. 1088 (1897).
Thus, as between merchants, the failure of the recipient of a letter of confirmation to acknowledge or reject it would be tantamount to a writing, and would preclude either party from asserting the Statute of Frauds as a defense. Such failure to object, however, is not conclusive on the existence of a contract. The party who has failed to answer may still prove that no contract was ever in fact made.

(c) Completeness of the Memorandum

It has been held in New York that a memorandum, to be sufficient, must contain all the essential terms of the bargain, leaving no material term for future agreement, that it must correctly reflect the oral understanding, and that it must clearly indicate which party is the seller, and which is the buyer.

The Uniform Commercial Code provides:

A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable . . . beyond the quantity of goods shown in such writing.

According to the section comment the required writing need not indicate which party is the buyer and which is the seller, need not contain all the material terms of the contract, and need not state precisely such material terms as are included. Indeed, the only term which must appear is the quantity term, and even that is not required to be stated accurately. Where such term is inaccurately stated, however, recovery is limited to the amount set forth in the memorandum. "All that is required is that the writing afford a

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95 Uniform Commercial Code § 2-201(2) (Spring 1951).
96 Uniform Commercial Code § 2-201, Comment 3 (Spring 1950).
100 Uniform Commercial Code § 2-201(1) (Spring 1951).
basis for believing that the offered oral evidence rests on a real transaction."  

(d) **Part Acceptance—Part Payment**

The existing New York Statute of Frauds provides that in lieu of a memorandum signed by the party to be charged, the oral contract is enforceable if there has been a receipt and acceptance of the goods or part of them, or payment, or part payment. The very language of the statute warrants the conclusion that the receipt and acceptance of part of the goods or part payment makes the contract as a whole enforceable and not merely enforceable as to such part acceptance or part payment.

The Statute of Frauds section of the proposed Commercial Code declares that a contract which does not satisfy the requirement of a writing, but which is valid in other respects, is enforceable "... with respect to goods for which payment has been made and accepted or which have been received and accepted." The comment to this section points out that the "delivery and acceptance" test is limited to the goods which have been accepted, and that "partial performance" as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted.

**Delivery Under Entire Contract**

Under existing statute in New York, and under the Uniform Sales Act, if a seller tenders delivery of a quantity less than the contract calls for, the buyer has the right to reject the tender, even though the seller expects to deliver the balance, and such rejection will not be a breach of contract. Likewise, if an entire contract does not fix the time for pay-

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101 Uniform Commercial Code § 2-201, Comment 1 (Spring 1950).
103 Ibid.
104 Uniform Commercial Code § 2-201(3) (c) (Spring 1951).
105 Uniform Commercial Code § 2-209, Comment 3 (Spring 1950).
106 Uniform Commercial Code § 2-201, Comment 2 (Spring 1950).
ment, no payment is due and enforceable until full performance has been tendered. The seller has no right to demand a proportionate payment after delivery of some of the goods.\textsuperscript{108}

If adopted, the Uniform Code will effect some modification in each of the above mentioned rules. The pertinent Code section provides:

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender, \textit{but where the circumstances give either party the rights to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot}. (Italics supplied.)\textsuperscript{109}

Thus, in cases where it is not commercially feasible to deliver or to receive all of the goods contracted for in a single lot (\textit{e.g.}, where a contract is for the purchase of all of the bricks needed for an apartment house), a partial delivery may not be arbitrarily rejected, and the seller may even demand a proportionate payment of the purchase price.\textsuperscript{110} Of course, the partial delivery must be made under circumstances which ". . . do not indicate a repudiation or default by the seller as to the expected balance. . . ." \textsuperscript{111} And, the undelivered balance must be forthcoming within a reasonable time and in a reasonable manner.\textsuperscript{112}

\textbf{STATUTE OF LIMITATIONS}

In New York, the Civil Practice Act requires that an action upon a contract obligation must be commenced within six years after the cause of action has accrued.\textsuperscript{113} Under the proposed Code, an action for breach of any contract \textit{for sale} would have to be commenced within four years after the cause arose.\textsuperscript{114}

\textsuperscript{109} \textit{Uniform Commercial Code} \textsection{2-307} (Spring 1951).
\textsuperscript{110} \textit{Uniform Commercial Code} \textsection{2-307}, Comment 3 (Spring 1950).
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid.
\textsuperscript{113} N. Y. \textit{Civ. Prac. Act} \textsection{48}(1).
\textsuperscript{114} \textit{Uniform Commercial Code} \textsection{2-725(1)} (Spring 1951).
This provision is intended to take sales contracts out of the general laws which limit the time for the commencement of contract actions. A four-year period has been selected as the most appropriate to modern business practice, since it is within the normal "keeping period." The Code permits the parties by agreement to reduce the period of limitation to one year, but not to extend it. The Code section would not alter the law on tolling of the statute of limitations.

Policing Contracts by the Courts

It has been repeatedly declared by courts in so-called "hard cases" (i.e., cases where, although the parties were dealing at arm's length, and with eyes open, one of them has made a "bad bargain," or failed to insert a condition for his protection) that the court will not make a better contract for him than he himself made. Even where actual coercion has been practiced, the farthest the courts have gone is to declare the contract void or voidable. They have never reformed contracts on their own initiative and have done so at the request of the parties only when it appears that there has been a mutual mistake.

The Uniform Commercial Code provides:

If the court finds the contract or any clause of the contract to be unconscionable it may refuse to enforce the contract or may strike any unconscionable clauses and enforce the contract as if the stricken clause had never existed.

The practice thus authorized by this section has been referred to by some commentators as one of "policing" contracts by the courts. Indeed, the pertinent Code comment expressly declares: "This section is intended to make it

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115 Uniform Commercial Code § 2-727, Comment (Spring 1950).
116 Uniform Commercial Code § 2-725(1) (Spring 1951).
117 Id. § 2-725(4).
118 Mullen v. Hawkins, 141 Ind. 363, 40 N. E. 797 (1895); Raner v. Goldberg, 244 N. Y. 438, 155 N. E. 733 (1927); Chandler v. Webster, [1904] 1 K. B. 493.
120 Uniform Commercial Code § 2-302 (Spring 1951).
possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. . . . This section is intended to allow the court to pass on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability."

If the determination as to unconscionability of any clause or contract should involve passing on a question of fact, such fact question, like questions of law, would be for the court to determine.

Conclusion

A summary and appraisal cannot readily or even properly be predicated upon the type of examination which has been employed in the above survey of proposed Code change of present contract law. Indeed, none is intended. Suffice it to say, that the changes proposed by the Code are significant and tradition-uprooting. If effected, they will—for a time—precipitate lawyerly confusion and increased uncertainty.

But they are not to be condemned merely because they are changes. There is nothing sacred about inadequate contract principles. Indeed, the whole history of contract law has been one of remodelling and revamping to meet the changing needs of changing times.

122 Uniform Commercial Code § 2-302, Comment 1 (Spring 1950).
123 Uniform Commercial Code § 2-302, Comment 3 (Spring 1950).