

Buyer's Right of Rejection and Revocation of Acceptance under the Uniform Commercial Code Compared with English Law*

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I . Introduction

If the buyer realizes that he has not obtained the quality or quantity for which he has bargained in the contract, he may wish to put an end to further performance and as far as possible to put matters back into the position where he was before performance on either side was begun. Most

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legal systems, following this wish, provides him with a right to put an end to the contract. The right has been variously expressed in the use of terminology; for example, "rescission" in Korean law,¹⁾ "avoidance" in CIS G²⁾ and "termination" in PICC³⁾ and PECL.⁴⁾ The right is, however, rather complicated and uncertain in Common Law systems because they do not sharply distinguish between a refusal which amounts merely to a defence in the nature of the *exceptio non adimpleti contractus*, and one which is intended to abrogate the aggrieved party's obligations completely and to seek restitution of what he has already performed.⁵⁾ That is, they do not draw any sharp distinction between the right of rejection (or revocation) and the right to put an end to the contract. This seems to explain why the right to put an end to the contract under Civil Law systems are compared mostly with the right of rejection or revocation under Common Law systems.

The Uniform Commercial Code (here-in-after the UCC) is not an exception in that, although it draws an elaborate set of distinctions between termination, cancellation, rejection and revocation of acceptance,⁶⁾ it does not penetratingly differentiate between them.⁷⁾ The UCC contains two

1) Korean Civil Code Arts. 572(2), 574, 575(1), 580(1), 581(1).

2) CISG Art. 49.

3) PICC Art. 7.3.1.

4) PECL Art. 9:301

5) The reason for the absence of such a doctrinal distinction is explained by the fact that Common Law systems have no formal machinery for termination. G. Treitel, *Remedies for Breach of Contract*, Clarendon Press, (1988), at 319.

6) UCC s. 2-106(3) and (4), s. 2-601, 2-608. Such distinction was for the purpose of removing the vague term 'rescission', but judicial usage of it remains inveterate. Treitel, *op cit.*, at 320.

7) *Id.* "Cancellation occurs when either party puts an end the contract for breach by the other and its effect is the same as that of 'termination' except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance." UCC s, 2-106(4). The effect of "termination" is to discharge "all obligations which are still executory on both sides ..." UCC s. 2-106(3). English law uses the concept of 'electing to treat the contract as at an end', 'justifiable repudiation', 'cancellation', 'termination', and probably most commonly 'rescission', being distinct from that of termination. H. Beale,

alternative remedial schemes for the buyer which are mainly relied upon the concept of "acceptance of the goods".⁸⁾ First, if the buyer receives and continues to "accept" the goods despite the seller's breach, he may be entitled to damages measured by, for instance, the difference in value between conforming goods and non-conforming goods which were actually delivered in addition to incidental and consequential damages.⁹⁾ Second, if the goods do not continue to be accepted,¹⁰⁾ the buyer may resort to the remedies identified in s. 2-711. Thus, the buyer, after recovering any money paid to the seller, may cover¹¹⁾ or obtain damages for non-delivery.¹²⁾ In addition, in certain cases, the buyer may recover goods identified to the contract¹³⁾ or secure specific performance or replevin.¹⁴⁾ The concept of "acceptance" as the sorting and channeling mechanism that dictates which of the alternative remedial schemes described above is closely linked with the remedy of rejection and revocation. This means that the buyer's right to reject the goods and to revoke acceptance is placed as the key remedy to the alternative remedial schemes under the UCC.

Having said that, the purposes underlying this paper are as follows. The first is to describe and analyze in detail the relevant UCC rules to the

Remedies for Breach of Contract, Sweet & Maxwell, (1980), at 13. Prof. Treitel indiscriminately uses 'rescission' which may include to describe 'rescission ab initio'. See Treitel, *op cit.*, at 320. Cf. For the discussion as to its use of terminology in English law, see J. Birds and R. Bradgate (ed.), *Termination of Contracts*, Chancery Law Publishing, (1995), at 9 ff.

- 8) H. Flechtner, "Remedies under the New International Sales Convention: The Perspective from Article 2 of the UCC", (1988) 8 *Journal of Law and Commerce* 53, at 54 ff. Cf. C. Chomsky and C. Kunz, *Sale of Goods: Reading and Applying the Code*, West Group, (2002), at 237.
- 9) The UCC s. 2-714.
- 10) This is the case where the seller has repudiated, or has otherwise wrongfully failed to deliver, or has delivered non-conforming goods which the buyer has properly refused to keep.
- 11) The UCC s. 2-712.
- 12) The UCC s. 2-713.
- 13) The UCC s. 2-502.
- 14) The UCC s. 2-716. A buyer who rightfully rejects or who properly revokes acceptance may also cancel under s. 2-711(1).

buyer's right of rejection and revocation. This may provide legal advice to our sellers residing either in U.S.A. or in Korea who plan to enter into U.S.A markets and take academics' interest in the buyer's right which is deemed to be unique compared to the Civil Law systems. The second is to compare the rules as to the right of rejection and revocation under the UCC with those of English law which are stipulated mainly in the Sale of Goods Act (1979) (here-in-after the SGA) in a statutory form. This may help one better to understand the rules of the UCC which are mostly originated with English law and to find in what way the rules of the UCC depart from those of English law. It should be noted that this study will be restricted to the rules mainly on the requirements for the right of rejection or revocation owing to limited space.

II. Buyer's Right of Rejection

The UCC differentiates between two remedies of the buyer: a right of 'rejection' and a 'right to revoke acceptance'. The remedies do differ and separate bodies of law have now grown up around them.¹⁵⁾ Both remedies entitle the buyer to refuse to pay the price.¹⁶⁾ The substantive requirements for the right of rejection are i) absence of acceptance, ii) goods that do not conform or a tender of delivery that does not conform, iii) absence of an effective and rightful cure by the seller and iv) absence of a contract term prohibiting rejection.¹⁷⁾ In addition there are absence of bad faith requirement¹⁸⁾ and the procedural requirements of an effective rejection.¹⁹⁾

15) Not only is the measure of non-conformity different for revocation and rejection, but the time frame in which notice of each action must be sent may differ significantly.

16) The UCC s. 2-709.

17) The UCC ss. 2-601, 2-602, 2-508, and 2-612,

18) The UCC s. 1-203.

19) The UCC ss. 2-602, 2-603, 2-604, 2-605.

All those requirements will be examined below in turn, focusing on both substantive and procedural requirements.²⁰⁾

1. Substantive requirements

(1) Absence of acceptance

1) The UCC

Under the UCC, the buyer may be disentitled to reject the goods once he is deemed to have accepted the goods delivered. Acceptance of goods under the UCC occurs in one of the following cases.²¹⁾ First, it occurs when the buyer after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity.²²⁾ It seems not easy to identify the circumstances to which this rule applies after an opportunity to inspect. According to Comment 3 to s. 2-606, payment is a "circumstance tending to signify acceptance," but it is ambiguous and not - according to the comment - "conclusive." One should, in addition, remind that a reasonable opportunity to inspect is essential to a finding of acceptance under this rule.

Second, there is deemed to be acceptance when the buyer fails to make an effective rejection.²³⁾ An effective rejection must occur "within a reasonable time after their delivery or tender, and there must be seasonable

20) However, the requirements of absence of a contract term prohibiting rejection and bad faith will be omitted because they seem to be self-evident.

21) The general legal consequences of acceptance under s. 2-607 are i) that the buyer must pay at the contract rate for the goods accepted, ii) that the buyer loses its right to reject, iii) that time starts to run within which buyer must complain of breach or be barred from any remedy, and iv) that the burden shifts to the buyer to establish breach. In addition, under s. 2-201 (3) (c), acceptance takes the contract out of the statute of frauds.

22) The UCC s. 2-606(1)(a).

23) The UCC s. 2-606(1)(b).

notification of rejection by the buyer to the seller.²⁴⁾ In addition, such acceptance does not occur until the buyer has had a reasonable opportunity to inspect the goods.²⁵⁾ An ineffective and wrongful rejection may be regarded as an acceptance under the UCC, whereas an effective yet wrongful rejection (e.g., a rejection of conforming goods) may be not.²⁶⁾

Third, it may be admitted that there is acceptance where the buyer does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.²⁷⁾ An act inconsistent with the seller's ownership may be found, for example, in an attempt by a buyer to resell at the time he is aware of the alleged defect in the goods and the act will be treated as an acceptance.²⁸⁾ Unlike the above two cases, the buyer's reasonable opportunity to examine the goods is unnecessary for a finding of acceptance.

It is stipulated under the UCC that acceptance of part of a commercial unit constitutes acceptance of the entire unit.²⁹⁾ A commercial unit is defined as follows: 'Commercial unit' means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.³⁰⁾

24) The UCC s. 2-602(1).

25) The UCC s. 2-606(1)(b).

26) J. White and R. Summers, *Handbook of the Law under the Uniform Commercial Code*, West Publishing Co., (1995), at 433.

27) The UCC s. 2-606(1)(c).

28) White and Summers, *op cit*, at 433.

29) The UCC s. 2-606(2).

30) The UCC s. 2-105(6).

2) English law compared

In English law, the buyer may lose his right to reject in the following cases of affirmation of contract.³¹⁾ The first case is where he intimates to the seller that he has accepted the goods.³²⁾ This case includes not only cases of express intimation but also those where it may be inferred from the buyer's conduct as long as it is clear.³³⁾ However, the intimation of acceptance cannot amount to acceptance unless the buyer has first had a reasonable opportunity to examine the goods.³⁴⁾ This rule may be analogous to the first case of acceptance under the UCC.

The second case is where his act after the seller's delivery is inconsistent with the seller's ownership.³⁵⁾ It is applied to the cases where the physical return of the goods is impossible as a result of the buyer's conduct; e.g., selling, any other dispositions, consumption or use of the goods more than necessary to check their conformity with the contract.³⁶⁾ However, the buyer is not deemed to have accepted the goods 'merely because he asks for, or agrees to, their repair by or under an arrangement with the seller, or the goods are delivered to another under a sub-sale or other disposition'.³⁷⁾ Like the first case above, an inconsistent act with the seller's ownership cannot necessarily amount to acceptance if a reasonable opportunity to examine the goods by the buyer is absent.³⁸⁾ This rule can be comparable and similar to the third case of acceptance under the UCC. However, unlike the UCC, any inconsistent act with the seller's ownership under English law can not

31) The SGA s. 11(4).

32) The SGA s. 35(1)(a).

33) *Varley v. Whipp* [1900] 1 QB 513; Law Commission WP 85, *Sale and Supply of Goods*, (1983), para. 2.53.

34) The SGA s. 35(2).

35) The SGA s. 35(1)(b).

36) R. Bradgate, *Commercial Law*, Butterworths, (2000), at 317; A. Guest (ed.), *Benjamin's Sale of Goods*, Sweet & Maxwell, (1997), at 580 f.

37) The SGA s. 35(6).

38) The SGA s. 35(2).

constitute acceptance as far as the buyer has not had a reasonable opportunity to examine the goods.³⁹⁾

The third case is where after a reasonable period he retains the goods without indicating that he rejects them.⁴⁰⁾ Reasonableness of a period will be a question of fact depending upon the circumstances of the individual case;⁴¹⁾ the factors to be considered are, for instance, the nature of the goods, the conduct of the parties, the custom of the particular trade, market conditions, and whether the buyer has been given a reasonable time to examine the goods.⁴²⁾ One must note that, unlike the first two cases, the fact that the buyer has not had a reasonable opportunity to examine does not necessarily prevent the buyer being deemed to have accepted the goods because it is taken into account only as a relevant factor. This rule can be compared with the second case under the UCC and find similar to that except the requirements of a seasonable notification which will be examined later in the procedural requirements.

Where the buyer accepts some of the goods forming part of a commercial unit, he is deemed to accept all of the goods comprised in that unit.⁴³⁾ He may therefore not reject goods forming part of a "commercial unit", defined as "a unit division of which would materially impair the value of the goods or the character of the unit",⁴⁴⁾ For example, the buyer would not be allowed to reject one shoe from a pair, one encyclopaedia from a set, or a defective component from a motor car.⁴⁵⁾ This rule is almost same as that of the UCC.

39) The SGA s. 35(2).

40) The SGA s. 35(4).

41) The SGA s. 59.

42) The SGA s. 35(5). Cf. Bradgate, *op cit.*, at 319 f.; Law Commission WP 85, *op cit.*, at para. 2.57; Law Commission 160, *Sale and Supply of Goods*, (1987), at para. 5.19; R. Goode, *Commercial Law*, Penguin, (1995), at 376 f.; Guest (ed.), *op cit.*, at 586 ff.

43) The SGA s. 35(7).

44) The SGA s. 35(7).

45) Law Commission 160, *op cit.*, at para. 6.12.

(2) Perfect tender rule

1) The UCC

The UCC imposes an obligation on the seller to tender the goods in strict conformity to the contract,⁴⁶⁾ which is called "perfect tender rule". The perfect tender rule allows the buyer to reject the goods tendered if the goods or the tender of delivery fail in any respect to conform to the contract. Thus, the buyer may reject or accept the whole of any commercial unit of the tendered goods even if they contain an insubstantial defect.⁴⁷⁾ Despite the perfect tender rule, a buyer's right to a perfect tender is substantially eroded by the following rules. First, the UCC renders the perfect tender rule inapplicable to installment contracts,⁴⁸⁾ and it permits rejection only if 'the non-conformity substantially impairs the value of that installment'.⁴⁹⁾ Second, the seller's right to cure a defective tender by providing a conforming tender is a further restriction upon the buyer's apparent right to reject for insubstantial defects under s. 2-601.⁵⁰⁾ Third, additional restrictions upon the perfect tender rule may be found in the

46) The UCC s. 2-601.

47) The UCC s. 2-601; S. Jenkins, "Evolving Sales Law: Highlights of the Shifting Landscape of Arkansas Purchasing Law", (2005) 57 *Ark. L. Rev.* 835, at 856 f.

48) The UCC s. 2-601. An installment contract is defined by the Arkansas Code as a contract that authorizes the goods to be delivered in separate lots and each lot is to be separately accepted even when the agreement states that each delivery is to be a separate contract. The UCC s. 2-612(1).

49) The UCC s. 2-612.

50) The UCC s. 2-508. The exercise of this right is limited to two contexts. First, when a seller makes a defective tender followed by a rejection before the time for the seller's performance has expired under the terms of the contract, and, second, when the buyer rejects a non-conforming tender and the seller reasonably believed that despite the non-conformity the buyer would accept the goods with or without a money allowance, the seller has a further reasonable time to make a conforming tender. The UCC s. 2-508; Jenkins, *op cit.*, at 858.

cases where an improper shipment contract which causes a late delivery is grounds for restriction only if "material delay or loss ensues"⁵¹⁾ and in the UCC's general invitations to use trade usage, course of dealing, and course of performance in the interpretation of contracts.⁵²⁾ Fourth, the UCC case law in regard to one-shot contracts indicates that a good faith obligation imposed on the buyer⁵³⁾ may sometimes be invoked to prohibit the buyer acting in bad faith from rejection of the goods.⁵⁴⁾

It is suggested by the cases decided to date that the UCC changes and the courts' manipulation have made the perfect tender rule so skeptical that

51) The UCC s. 2-504.

52) The UCC s. 2-208, s. 1-205. For example, if the trade usage states that nineteen or twenty-one items are the equivalent of twenty items, a buyer who receives nineteen on a contract requiring twenty has received a perfect tender and may not allowed to reject. *White and Summers, op cit*, at 440. One example would be a trade usage that provided that a specification of a maximum five percent sulfur content in coal is satisfied by coal containing up to 5.5% sulfur (Cf. *Intermeat, Inc. v. American Poultry, Inc.*, 575 F.2d 1017 (2d Cir. 1978)). On the other hand, sometimes trade usage or its kin will directly limit a buyer's right to reject for a non-conformity; for example, trade custom may permit a certain deviation from the quality or quantity specified in the contract subject only to a price allowance, (see e.g., *Continental Forest Prods., Inc. v. White Lumber Sales, Inc.*, 256 Or. 466, 474 P.2d 1 (1970)) or failure to reject for specific defects under prior contracts or deliveries may be held to create a course of dealing or performance that precludes the buyer from rejecting for similar defects in subsequent contracts or deliveries (See e.g., *Lancaster Glass Corp. v. Philips ECG, Inc.*, 835 F.2d 652 (6th Cir. 1987)). J. Sebert, "Rejection, Revocation, and Cure under Article 2 of the Uniform Commercial Code: Some Modest Proposals", (1990) 84 *Nw. U. L. Rev.* 375, at 386 f. However, these frequently operate not to modify the perfect tender rule but to change the requirements of the contract so that what appears to be a breach is in fact a fully conforming delivery. W. Lawrence, "The Prematurely Reported Demise of the Perfect Tender Rule", (1987) 35 *Kan. L. Rev.* 557 at 560 ff.

53) The UCC s. 1-203.

54) *T.W. Oil, Inc. v Consolidated Edison Co.*, 57 N.Y. 2d 574, 457 N.Y.S. 2d 458, 443 N.E. 2d 932, 35 UCC 12 (1982). In this case the buyer sought to reject in a falling market because of insubstantial non-conformity, and despite an offer of a monetary allowance by the seller. The New York Court of Appeals cited s. 1-203 to find the buyer's rejection improper. The court stressed that the buyer was really trying to take advantage of a market break and was invoking a minor non-conformity to do that.

the law would be little changed if s. 2-601 gave the right to reject only upon "substantial" non-conformity.⁵⁵⁾ Any of the reported Code cases on rejection that we have found does not actually grant rejection on what could fairly be called an insubstantial non-conformity, despite language in some cases allowing such rejection.⁵⁶⁾ However, one must note that there seems to be no cases clearly refusing to give effect to a rejection solely on the ground that the asserted non-conformity was a minor one.⁵⁷⁾

2) English law compared

In English law there seems to be no expressive equivalent perfect tender rule. The general step to examine the buyer's right to reject the goods in English law is to categorize contractual terms into conditions, warranties or innominate terms.⁵⁸⁾ This is because the remedy of rejection is only available to the buyer when the seller's breach of contract goes to the root of the agreement, i.e., either because it is a breach of condition or because of the nature or consequences of a breach of an innominate term, whereas if the term broken by the seller is merely a warranty, the buyer will only have a remedy in damages.⁵⁹⁾ Insofar as the seller's liability for defective

55) White and Summers, *op cit.*, at 441. However, Professor Lawrence bemoans the "prematurely reported" demise of the perfect tender rule. Lawrence, *op cit.*; recited in Sebert, *op cit.*, at 384.

56) *Id.* For the cases that include language allowing rejection even for insubstantial non-conformity under the perfect tender rule, see *Cavity & Mold, Inc. v. Lyn-Flex Indus., Inc.*, 396 A.2d 1024, 25 UCC 1026 (Me.1979); *Ramirez v. Autos-port*, 88 N.J. 277, 440 A.2d 1345, 33 UCC 134 (1982); *Marlowe v. Argentine Naval Comm'n*, 808 F.2d 120, 2 UCC2d 1226(D.C.Cir.1986).

57) Sebert, *op cit.*, at 385.

58) Its understanding that a contractual term must be either a condition or a warranty is based on the wording of statute in the SGA s. 11(3) which distinguishes between conditions and warranties. *Wallis, Son & Wells v. Pratt & Haynes* [1910] 2 KB 1003. For the authority there being an innominate term as the third category notwithstanding the SGA s. 11(3) recognizing condition and warranty as the only classifications of contractual terms, see *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 QB 26; *The Hansa Nord* [1976] QB 44.

59) The SGA ss. 11(3), 61(1).

goods in quality and title is concerned, the implied terms stipulated in the SGA ss. 12-15 are all classified as conditions, and any breach of condition may entitle the buyer to reject the goods and terminate the contract. With regard to the matter of defective goods in quantity, although the SGA does not deal with it under the heading of implied conditions or warranties,⁶⁰⁾ the SGA imposes, in substance, an implied condition as to quantity on the seller in a similar way to the above implied terms as to quality and title so that the seller is liable for a breach of condition in the event of the delivery of either excess or deficient quantity.⁶¹⁾ In English law, any breach of condition specified above may, in principle, confer on the buyer the right of rejection whether or not the consequence of breach is serious. However, one must note that it does not apply in non-consumer sales where the breach is so slight that it would be unreasonable for the buyer to exercise the right.⁶²⁾ Similarly, in relation to the buyer's right to reject all the goods delivered in the event of either deficient or excess quantity delivered, the business buyer may not be allowed to reject the whole if the deficiency or excess is so slight that it would be unreasonable to reject the whole.⁶³⁾ The test of reasonableness is an objective one so that the buyer's motives for rejection are not intended to be regarded as relevant.⁶⁴⁾

Where the contract may give the buyer an express right to reject, the buyer may be entitled to an unfettered right of rejection. This does not seem to require further explanation here because of the principle of parties' autonomy.

60) It is dealt with under the heading of 'Performance of the Contract'.

61) P. Atiyah, J. Adams, and H. MacQueen, *The Sale of Goods*, Longman, (2001), at 135 f.; Beale, *op cit.*, at 36; Treitel, *op cit.*, at 364.

62) The SGA s. 15A(1).

63) The SGA s. 30(2A).

64) Law Commission 160, *op cit.*, at para. 4.19, 4.21, n. 23.

(3) Seller's right to cure

1) The UCC

It is submitted that another requirement for the buyer's right of rejection is the absence of an effective and rightful cure by the seller.⁶⁵⁾ The exercise of the seller's right to cure is limited to two contexts.⁶⁶⁾ First, when the seller makes a defective tender followed by a rejection before the time for the seller's performance has expired under the terms of the contract, and, second, when the buyer rejects a non-conforming tender and the seller reasonably believed that despite the non-conformity the buyer would accept the goods with or without a money allowance, the seller has a further reasonable time to make a conforming tender.⁶⁷⁾ In the absence of a contract term to the contrary, the buyer is not entitled to require the seller's cure, but the seller has an option to exercise the right to cure the non-conformity in its delivery.⁶⁸⁾

The seller's first right to cure is unfettered one in a sense that, even if his tender or delivery is rejected by the buyer because of non-conformity,

65) However, unlike White and Summers's opinion, it does not necessarily seem to be a requirement for the buyer's right to reject the goods in so far as s. 2-508 allows the seller whose first tender has been rightfully rejected to make a second conforming delivery. That is to say, the buyer's very right to reject can not be any precluded by the seller's right to cure, which is generally claimed after the buyer's rejection as s. 2-508(1) provides; 'Where any tender or delivery by the seller is rejected because non-conforming, the seller may make a conforming delivery.' White and Summers might be misunderstanding two separate concept of the right to reject and the right to repudiate the contract as English law distinguishes. This is supported in Comment 1 to s. 2-711.

66) Jenkins, *op cit.*, at 858.

67) The UCC s. 2-508.

68) Jenkins, *op cit.*, at 858. Upon proper exercise by the seller of its right to cure, the buyer losses any remedies under s. 2-711, namely, the right to cancel, cover and have damages in s. 2-712, and to recover damages for non-delivery in s. 2-713, except for any delay involved. See Comment 1 to s. 2-711.

he has an absolute right to cure such non-conformity as long as the time for performance has not yet expired and the seller seasonably notifies the buyer of his intention to cure.⁶⁹⁾ The seller's second right to cure can be, unlike the first one, exercised even beyond the contract time, that is to say, after the time for performance has expired, but only if (1) the seller had reasonable grounds to believe that a nonconforming tender would be acceptable, (2) the seller seasonably notifies the buyer of its intention to cure, and (3) the seller cures within a "further reasonable time".⁷⁰⁾

With respect to the seller's right to cure beyond the contract time, s. 2-508(2) leads us to several questions to examine. The first question is when the seller has "reasonable grounds to believe" that tender would have been acceptable. The meaning of the "reasonable grounds to believe" may be found through prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract.⁷¹⁾ There has been some debate in the academic literature about

69) The UCC s. 2-508(1) which is read as follows: "Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery."

70) The UCC s. 2-508(2) which is read as follows: "Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender."

71) Comment 2 to s. 2-508. It continues as follows "The seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract as, for example, strict conformity of documents in an overseas shipment or the sale of precision parts or chemicals for use in manufacture. Further, if the buyer gives notice either implicitly, as by a prior course of dealing involving rigorous inspections, or expressly, as by the deliberate inclusion of a "no replacement" clause in the contract, the seller is to be held to rigid compliance. If the clause appears in a "form" contract evidence that it is out of line with trade usage or the prior course of dealing and was not called to the seller's attention may be sufficient to show that the seller had reasonable grounds to believe that the tender would be acceptable."

whether a good faith seller who had no reason to know that the tendered goods were defective is denied to claim the right to cure. On the one hand, a few commentators maintain that the seller's mere excusable ignorance of the defect should not entitle her to cure, and that the right to cure should be limited to situations in which prior events, such as trade usage or course of dealing, would reasonably have led the seller to believe that the buyer would accept the goods despite their defects.⁷²⁾ In effect, this view denies the right to cure to a good faith seller who had no reason to know that the tendered goods were defective. On the other hand, others argue that, rejecting this narrow construction of section 2-508, it should permit cure either if the seller knew of the defect but reasonably believed the defective goods would have been acceptable (with a monetary allowance), or if the seller was reasonably ignorant of the defect.⁷³⁾ The second question is what a "further reasonable time to cure" constitutes. A delay of a month or more could be still reasonable.⁷⁴⁾ The case law on "further reasonable time" is neither plentiful or revealing in a sense that it is a question of fact.⁷⁵⁾ In the New Jersey Supreme Court has provided a useful inventory of relevant factors:⁷⁶⁾ "The determination of what constitutes a further reasonable time depends on the surrounding circumstances, which include the change of position by and the amount of inconvenience to the buyer ..., the length of

72) R. Nordstrom, *Handbook of the Law of Sales*, West Pub., (1970), at 320 f.; M. Schmitt and D. Frisch, "The Perfect Tender Rule-An "Acceptable" Interpretation, (1982) 13 *U. Tol. L. Rev.* 1375, at 1378, 1391, 1399.

73) E.g., *Wilson v. Scampoli*, 228 A.2d 848 (D.C. 1967); *T.W. Oil, Inc. v. Consolidated Edison Co.*, 57 N.Y.2d 574, 443 N.E.2d 932, 457 N.Y.S.2d 458 (1982); *White and Summers, op cit.*, at 470 ff; R. Hillman, "Keeping the Deal Together After Material Breach-Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts", (1976) 47 *U. Colo. L. Rev.* 553 at 588; G. Travaglio, "The UCC's Three "R's'DD": Rejection, Revocation and (the Seller's) Right to Cure", (1984) 53 *U. Cin. L. Rev.* 931, at 944 ff.

74) *T.W. Oil, Inc. v. Consolidated Edison Co.* 57 N.Y.2d 574, 457 N.Y.S.2d 458, 443 N.E.2d 932, 35 UCC 12 (1982).

75) *White and Summers, op cit.*, at 472.

76) *Ramirez v Autosport*, 88 N.J. 277, 285-86, 440 A.2d 1345, 1349, 33 UCC 134, 140 (1982).

time needed by the seller to correct the non-conformity and his ability to salvage the goods by resale to others".

The third question is what constitutes "seasonable notification" by the seller of its intent to cure. Any notification should itself be clear and unequivocal.⁷⁷⁾ And if the seller gives that notification at the time the buyer informs the seller of the rejection, it will usually be seasonable. But notification will not be seasonable if the seller does not give it at the time of rejection, the buyer thereafter reasonably arranges for substitute goods, and the seller claims a right to cure.⁷⁸⁾ The decisions on the timeliness of notification of cure have been predictably fact-intensive, generally reasonable, and quite unremarkable.⁷⁹⁾

The final question is what "effective cure" means. Although the UCC tell us that the seller has a further reasonable time to "substitute a conforming tender",⁸⁰⁾ the case law generally allows repair here as well as substitution of an entirely new tender (i.e. replacement).⁸¹⁾ In addition, the buyer who complains of some insubstantial non-conformity which can be recompensed by a reduction in the price should be made to accept a reduction as cure even if there is no usage in the trade to accept such reduction.⁸²⁾ However,

77) White and Summers, *op cit.*, at 472.

78) National Fleet Supply, Inc. v Fairchild, 450 N.E. 2d 1015, 36 UCC 480 (Ind. App. 1983) (notice of cure insufficient where seller initially told buyer to return engine and get a refund and first indicated intent to cure two months after notice of defect).

79) See, e.g., June G. Ashton Interiors v. Stack Carpet Corp., 142 Ill. App. 3d 100, 491 N.E.2d 120 (1986) (waiting until two weeks after promised delivery date to notify buyer of revised delivery date held insufficient notice of cure when seller knew buyer was anxious for prompt delivery).

80) The UCC s. 2-508(2).

81) See Wilson v Scampoli, 228 A. 2d 848, 4 UCC 178 (D.C.App. 1967) (Repairs); T.W. Oil, Inc. v Consolidated Edison Co., 57 N.Y. 2d 574, 457 N.Y.S. 2d 458, 443 N.E. 2d 932, 35 UCC 12 (1982) (Replacement).

82) White and Summers, *op cit.*, at 472. Cf. Comment 4 to s. 2-508 specifies that "trade usages permitting variations without rejection but with price allowance ... are not covered by this section". For a case allowing reduction as a cure, see Oral-X Corp. v. Farnam Cos., Inc., 931 F.2d 667, 16 UCC2d 111 (10th Cir.1991).

it is argued that this position on price reduction does substantial harm to the underlying policy of statutory cure following rejection.⁸³⁾

2) English law compared

In English law, the recognition of the seller's right of cure seems to depend upon, first of all, the question of whether or not the breach of condition confers on the buyer the right to treat the contract as repudiated and terminate it separately from the right to reject. The current position seems not entirely clear from both the SGA and the case law.⁸⁴⁾ It can be divided into two opposing views; first, the right to reject is treated as if it were merely a component of the general right to terminate a contract for breach,⁸⁵⁾ and second, it is separate from the right of termination.⁸⁶⁾ According to the former view, any breach of the implied condition provided may confer on the buyer the immediate right of termination so that there is no room for the seller's right to cure.⁸⁷⁾ The latter view is again divided

83) W. Lawrence, "Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller", (1994) 35 *Wm. & Mary L. Rev.* 1635, at 1680. He says that "Mandatory acceptance of price adjustment significantly interferes with the buyer's right to receive perfect tender through cure by the seller. It changes the buyer's right to insist on perfect tender in the form of a substitute conforming delivery. It also dilutes the requirement that sellers have "reasonable grounds to believe" that their tender will be acceptable to the buyer in order to qualify for the statutory cure right. Allowing cure through price adjustment effectively transforms the perfect tender rule into the substantial impairment standard by leaving the aggrieved buyer with less-than-conforming goods and monetary compensation for the shortfall. Mandatory price adjustment is simply inconsistent with the perfect tender rule." See also Sebert, *op cit.*, at 394.

84) For an explanation of the unclear position in terms of legislation and case law, see Birds and Bradgate (ed.), *op cit.*, at 57 f.

85) See *Kwei Tek Chao v. British Traders & Shippers Ltd.* [1954] 2 QB 459, 480, per Devlin J; *The Hansa Nord* [1976] QB 44, 83-84, per Ormerod LJ.

86) Atiyah, Adams, and MacQueen, *op cit.*, at 501; Beale, *op cit.*, at 20, 80; Bradgate and White, *op cit.*, at 57, 61 f.; M. Bridge, *The Sale of Goods*, Oxford University Press, (1997), at 162 f.; Guest (ed.), *op cit.*, at 567 ff.

87) However, the absolute right of termination is excluded in non-consumer cases where the breach is so slight that rejection would be unreasonable. The SGA

into two different opinions as to the immediate right of termination. On the one hand, it is argued that all cases of non-conforming delivery with a condition would render the seller in a breach of condition and confer a right of termination on the buyer immediately after he lawfully rejects the goods where the contract is non-severable.⁸⁸⁾ According to this view, the seller has no right to cure non-compliance with any condition regardless of whether the time for delivery has expired because it is always tantamount to a repudiation of the contract.⁸⁹⁾ On the other hand, some contend that as long as the time for delivery has not expired, non-conforming delivery of goods would not necessarily place the seller in a breach of condition so that the buyer would not be conferred an immediate right of termination because their understanding is based on the idea that the seller's duty is to deliver in compliance with condition within the contractual due time.⁹⁰⁾ Therefore, the seller is entitled to cure a non-conforming delivery until the expiry of the contractual time for delivery where the buyer lawfully rejects⁹¹⁾ and the buyer will be allowed to terminate the contract in certain circumstances. First, the time for delivery which is of the essence of the contract has elapsed. Second, a reasonable additional time for the seller's conforming delivery set by the buyer has passed after the contractual time

15A(1)(b).

- 88) Bradgate and White, *op cit.*, at 75 f.; Bridge, *op cit.*, at 162 f. and 197 ff.; Atiyah, Adams, and MacQueen, *op cit.*, at 501 f.; Guest (ed.), *op cit.*, at 479 f.
- 89) However, the seller may be entitled to the right to cure where a buyer elects to reject without terminating, and the right may be so available on the basis of the rules of mitigation of damages where a buyer lawfully terminates the contract and then seeks damages (e.g., *Payzu Ltd. v. Saunders* [1919] 2 KB 581). See Bradgate and White, *op cit.*, at 76.
- 90) Goode, *op cit.*, at 362 f.; Beale, *op cit.*, at 90 ff.; Lord Devlin, "Treatment of Breach of Contract", (1966) C.L.J. 192, at 194; A. Apps, "The Right to Cure Defective Performance", (1994) L.M.C.L.Q. 525, at 534 ff.
- 91) For the cases submitted with the seller's right to cure, see e.g., *Tetley v. Shand* [1871] 25 LT 658; *H. Longbottom & Co. Ltd. v. Bass Walker & Co. Ltd.* [1922] WN 245; *McDougall v. Aeromarine of Emsworth Ltd.* [1958] 3 All ER 431; *The Playa Larga* [1983] 2 Lloyd's Rep 171; *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391; *The Niizura* [1996] 2 Lloyd's Rep 66.

for delivery of which is not initially deemed of the essence of the contract.⁹²⁾ Third, a frustrating time has passed after the contractual time for delivery of which is not deemed of the essence of the contract.⁹³⁾ Fourth, the seller's conduct is tantamount to a repudiation; e.g., insisting on his first non-conforming delivery, refusing to cure, attempting to cure in a way that indicates his unwillingness or inability to perform his contract or in a way that destroys the buyer's confidence.⁹⁴⁾

2. Procedural requirements

(1) The UCC

The UCC imposes two procedural requirements for rejections. First, a rejection must be "within a reasonable time" after delivery or tender of the goods, and it is "ineffective unless the buyer seasonably notifies the seller".⁹⁵⁾ Second, the buyer must state a particular defect which is ascertainable by reasonable inspection and its failure may preclude him from relying on the unstated defect to justify rejection or establish breach where the seller could have cured the defect had the buyer stated the defect seasonably.⁹⁶⁾ The policies behind the notice requirement are a) to give the seller an opportunity to cure, b) to allow the seller to assist the buyer in minimizing the buyer's losses, and c) to return the goods to the seller early before they have depreciated, rotted, or worse.⁹⁷⁾ The circumstances in determining whether a reasonable time has passed before the buyer took his action to

92) *Raineri v. Miles* [1981] AC 1050; *Hartley v. Hymans* [1920] 3 KB 475, at 495, per McCardie J.

93) *Universal Cargo Carriers Corp. v. Citati* [1957] 2 QB 401.

94) Goode, *op cit.*, at 365 f.; Beale, *op cit.*, at 91 f.; Lord Devlin, *op cit.*, at 203.

95) The UCC s. 2-602.

96) The UCC s. 2-605(1).

97) White and Summers, *op cit.*, at 445.

reject are as follows; a) the difficulty of discovering the defect,⁹⁸⁾ b) the terms of the contract,⁹⁹⁾ c) the perishability of the goods,¹⁰⁰⁾ and d) the course of performance after the sale and before the formal rejection.¹⁰¹⁾ 102)

Having said that procedure after effective rejection, there is but one hurdle to clear. The UCC instructs the buyer on proper post-rejection procedure.¹⁰³⁾ If the buyer has taken "physical possession" of the goods, the buyer is obliged to hold them under s. 2-602(2)(b) for a time sufficient to permit the seller to remove them. The UCC provides that the buyer has an obligation to do more than merely hold the goods—such as resale—only if each of the following conditions is met: (1) the seller has no agent or place of business at the market of rejection; (2) the buyer is a merchant and (3) the goods are in the buyer's possession or control.¹⁰⁴⁾ If those conditions are met, the buyer must follow reasonable instructions, sell the goods for the seller's account if they are "perishable or threaten to decline in value speedily."¹⁰⁵⁾ In addition, after rejection, the buyer should use care not to take actions "inconsistent with the seller's ownership" for fear of accepting goods that the buyer has attempted to reject or invalidating an otherwise effective rejectio

98) The nature of defect, the complexity of the goods and the sophistication of the buyer and etc. may be relevant.

99) For example, if the contract says that the buyer must inspect and report all complaints within a specified period of time, the court will give effect to such a contract term under s. 1-204(1) unless the time set is "manifestly unreasonable".

100) For example, farm products need a speedier notice than industrial products.

101) For instance, in *Sarnecki v. Al Johns Pontiac*, 1966 WL 8826, 3 UCC 1121 (Pa.C.P.1966).

102) White and Summers, *op cit*, at 447. In this respect, the UCC tells us that "what is a reasonable time for taking any action depends upon the nature, purpose and circumstances of such action." The UCC s. 1-204(2).

103) The UCC ss. 2-602, 2-603, 2-604.

104) The UCC s. 2-603.

105) Cf. *Integrated Circuits Unlimited, Inc. v. E.F. Johnson Co.*, 691 F.Supp. 630, 7 UCC2d 1478 (E.D.N.Y.1988), reversed on other grounds, 875 F.2d 1040, 8 UCC2d 695 (2d Cir.1989). See also *Willmar Cookie Co. v. Pippin Pecan Co.*, 357 N.W.2d 111, 39 UCC 1249 (Minn.App.1984). The buyer has the same obligations under s. 2-608 (3) with respect to goods for which it has revoked acceptance.

n.¹⁰⁶) The UCC stipulates that the merchant buyer is empowered to reimbursement from the seller out of the proceeds for reasonable expenses incurred in caring for and reselling goods.¹⁰⁷) It also gives the buyer "a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (s. 2-706).¹⁰⁸)

(2) English law compared

In English law, although there is no corresponding procedure as to the notice requirement, it seems to require the buyer in effect to give the notice within a reasonable period as to lack of conformity in a way that intimates his rejection in order not to be deemed to have accepted the goods so that he may not lose his right to repudiate the contract.¹⁰⁹) However, English law does not require the buyer to state a particular defect. The reason for that seems to be that, while English law is not certain about the right to cure, the UCC has a strong policy behind notice provisions. That is to say, it is to give the seller opportunity to cure, to permit the seller to assist the buyer in minimizing the buyer's losses, and to return the goods to the seller early before they have depreciated, rotted or worse.

With regard to post-rejection procedure, the buyer as a bailee of the goods owes the seller a duty of care.¹¹⁰) The buyer may be able to claim the reasonable expense of looking after the goods as agent of necessity, or under the rule in *China Pacific SA v. Food Corp of India (The Winson)*.¹¹¹)

106) *White and Summers, op cit*, at 451. Cf. *Borges v. Magic Valley Foods, Inc.* 101 Idaho 494, 616 P.2d 273, 29 UCC 1282 (1980).

107) The UCC 2-603(2).

108) The UCC 2-711(3).

109) The SGA s. 35. For an indirect application of the notice philosophy, see *Panchaud Frères v. Ets General Grain Co.* [1970] 1 Lloyd's Rep 53.

110) *Guest (ed.), op cit.*, at 593.

The buyer can not deal with the goods without the authority of the seller, nor can the buyer exercise a lien over the goods for return of any money already paid to the seller.¹¹²⁾

III. The buyer's right to revoke acceptance

The UCC distinguishes the right of rejection from the right of revocation which was new when the UCC was introduced. While the right of rejection is more readily available in that there are fewer hurdles to go through for the exercise of such right, the buyer must meet several additional conditions to exercise the right of revocation. This is because revocation always occurs after acceptance and may occur long after the seller regarded the transaction as closed.¹¹³⁾ The followings are to examine both substantive and procedural requirements for the buyer to revoke acceptance.¹¹⁴⁾

111) [1982] AC 939.

112) Bradgate, *op cit.*, at 312.

113) White and Summers, *op cit.*, at 455. They say that "In the first place, the longer the buyer has the goods, the higher the probability that the alleged defect was caused by the buyer or aggravated by its failure properly to maintain the goods. Secondly, the longer the buyer holds the goods, the greater the benefit the buyer may have derived from their use. Finally, the longer the delay, the greater the depreciation and the greater the loss to society." *Id.* See also Lawrence, "Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller", *op cit.*, at 1657.

114) The effect of revocation by the buyer is that the buyer has the same rights and duties with regard to accepted goods as if the buyer had rejected them. The UCC S. 2-608 (3).

1. The UCC

(1) Substantive requirements

1) Substantial non-conformity

The buyer who wishes to revoke its acceptance must show that non-conformity in the goods accepted "substantially impairs" the value of the goods "to him".¹¹⁵⁾ This requirement can be divided into two components; first, there must be a non-conformity, i.e., a respect or respects in which the goods do not conform to the contract, second, this non-conformity must substantially impair the value of the goods 'to the buyer'.

The question of whether there exists a non-conformity may be decided by reference to the terms of the contract, including the law of warranty.¹¹⁶⁾ The buyer's right of revocation is allowed where the non-conformity "substantially" impairs the value of the goods to the buyer. Although there is uncertainty to apply the substantial impairment standard, it is submitted that a fruitful source of factors on substantiality is the general contract law on material breach¹¹⁷⁾ and a reasonable consensus is developing as regards how to interpret and apply the standard in a large number of revocation cases.¹¹⁸⁾ Many of these cases involve efforts by the seller to repair. Where the seller can and does readily repair, there is deemed to be no substantial impairment.¹¹⁹⁾ However, the buyer's revocation can not be prevented where such repair constitutes substituting a major new integral part in whole such

115) The UCC 2-608(1); Comment 2 to s. 2-608.

116) *Westinghouse Electric Corp. v Carolina Power & Light Co.*, 1990 WL 107428, 12 UCC2d 127 (W.D.Pa. 1990).

117) *White and Summers*, *op cit.*, at 457.

118) *Sebert*, *op cit.*, at 399.

119) *Patt v Winnebago Indus., Inc.*, 463 F.Supp. 709, 26 UCC 68 (W.D.Pa. 1979).

as an engine in a new car,¹²⁰⁾ where a whole series of defects arises *seriatim*,¹²¹⁾ and where the buyer loses confidence in the goods, or, as it is sometimes put, the buyer's faith is shaken.¹²²⁾

One must note that the substantial impairment standard is based on the buyer's particular circumstances. In relevant part, s. 2-608(1) provides that the buyer may revoke acceptance of goods "whose non-conformity substantially impairs their value to him".¹²³⁾ The use of "to him" suggests that the court is to measure the impairment by reference to the buyer's particular needs. Although there are many criticisms on the adoption of this subjective standard,¹²⁴⁾ such adoption is nevertheless consistent with the drafters' intent to facilitate aggrieved buyers in determining the appropriate response to non-conforming tenders by sellers.¹²⁵⁾

2) Reasonable acceptance

If the buyer accepted the goods while aware of the non-conformity, revocation is possible only if the buyer accepted on the reasonable assumption that the non-conformity would be cured, and it is not

120) *E.g.*, *Zabriskie chevrolet, Inc. v. Smith*, 99 N.J.Super. 441, 240 A.2d 195, 5 UCC 30 (1968).

121) *E.g.*, *Rester v. Morrow*, 491 So.2d 204, 1 UCC2d 751, 759 (Miss.1986).

122) *E.g.*, *Hemmert Agric. Aviation, Inc. v. Mid-Continent Aircraft Corp.*, 663 F.Supp. 1546, 4 UCC2d 726 (D.Kan.1987).

123) It is further stressed by Comment 2 to s. 2-608: "The question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances."

124) One writer contends that the Official Comment should be ignored [and the buyer allowed to revoke] only if the non-conformity is one that would substantially impair the value of the goods to the ordinary purchaser, unless seller has reason to know of buyer's high standards or special needs, in which case the impairment of the buyer's own particular situation will be the relevant inquiry. D. Whaley, "Tender, Acceptance, Rejection and Revocation - The UCC's "TARR"-Baby", (1974) 24 *Drake L. Rev.* 52, at 76; see also White and Summers, *op cit.*, at 458.

125) Lawrence, *op cit.*, at 1657.

seasonably cured.¹²⁶⁾ As to the matter of when it is reasonable for the buyer to believe that the non-conformity would be cured, the most obvious case is where the seller states that it will cure.¹²⁷⁾ A past course of dealing or usage of trade may also make it reasonable to conclude that the seller will cure.¹²⁸⁾ In addition, other factors such as the nature of the goods (as, for example, goods requiring some post-delivery adjustment or adaption) may make that assumption reasonable.¹²⁹⁾

In the absence of awareness of the non-conformity, the buyer can revoke only if its failure to discover the non-conformity was "reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances".¹³⁰⁾ Thus, if the buyer failed to make a reasonable inspection and that would have revealed the non-conformity, he is prevented from exercising the right of revocation.¹³¹⁾ In addition, if the buyer's acceptance was induced by the seller's assurance, for example, the seller saying things that throw the buyer off guard or otherwise reasonably induce the buyer not to discover the non-conformity, the buyer is not entitled to the right of revocation.¹³²⁾

3) Substantial change not caused by own defect

The buyer's right to revoke acceptance may be automatically expired if the goods undergo a substantial change in condition which is not caused by their own defects.¹³³⁾ Thus, the buyer may not be allowed to revoke its

126) The UCC s. 2-608(1)(a).

127) E.g., *Polycon Indus., Inc. v. Hercules Inc.*, 471 F.Supp. 1316, 26 UCC 917 (E.D.Wis.1979).

128) *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J.Super. 383, 268 A.2d 345, 7 UCC 1257 (1970).

129) *Ybarra v. Modern Trailer Sales, Inc.*, 94 N.W. 249, 609 P.2d 331, 28 UCC 1329 (1980).

130) The UCC s. 2-608(1)(b).

131) E.g., *Buenviaje v. Jorge*, 1993 WL 625738, 22 UCC2d 719 (N.Y.Civ.Ct.1993).

132) E.g. *Alberti v Manufactured Homes, Inc.*, 94 N.C.App. 754, 381 S.E.2d 478, 10 UCC2d 1253 (1989).

acceptance of goods that have "materially deteriorated" in the buyer's hands except insofar as this is attributable to original defects in the goods.¹³⁴⁾ Examples of such "deterioration" not attributable to original defects are as follows: the buyer's use of the goods after modifying them and improperly maintaining them,¹³⁵⁾ the buyer's resale of the goods without recalling the m,¹³⁶⁾ the buyer's knitting defective yarn¹³⁷⁾ and etc. However, reasonable changes due to good faith efforts by the buyer to make the goods useable generally do not prevent revocation.¹³⁸⁾ The same applies to changes (e.g. accident damage to a car) which the buyer has fully repaired¹³⁹⁾ and changes in the form of liens for repairs.¹⁴⁰⁾

If the buyer wishes to preserve the special advantages of revocation, he is expected to take extra care in inspecting the goods prior to processing them and, if necessary, to process a small sample initially in order to detect any defects that are not discoverable until processing.¹⁴¹⁾ However, this result is not made uniformly in all the cases and occasionally the courts permit a buyer to revoke even after the condition of the goods had been substantially changed through processing, particularly if the defects were of a type discoverable only during or after processing.¹⁴²⁾

133) The UCC s. 2-608(2).

134) Comment 6 to s. 2-608.

135) Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 37 UCC 429 (11th Cir.1983).

136) Eaton Corp. v. Magnavox Co., 581 F.Supp. 1514, 39 UCC 152 (E.D.Mich.1984).

137) Calvert Knit Corp. v. Glendale Textiles, Inc., 1987 WL 257439, 3 UCC2d 585 (N.Y.Sup.1987).

138) J.F. Daley Int'l, Ltd. v. Midwest Container & Indus. Supply Co., 849 S.W.2d 260, 20 UCC2d 1259 (Mo.App.1993).

139) Preston Motor Co. v. Palomares, 133 Ariz. 245, 650 P.2d 1227, 34 UCC 1184 (App.1982).

140) Summer v. Fel-Air, Inc., 680 P.2d 1109, 38 UCC 91 (Alaska 1984).

141) Sebert, *op cit.*, at 413.

142) E.g., Lackawanna Leather Co. v. Martin & Stewart, Ltd., 730 F.2d 1197 (8th Cir. 1984). In Lackawanna, the buyer was permitted to revoke acceptance of cattle hides after removing the salt and hair from all of the hides and splitting many of them before discovering the defects. The court emphasized

4) Seller's right to cure

Once the buyer has satisfied with all the requirements for a valid revocation, the question remains whether the seller may be entitled to the right to cure under s. 2-508. Until recent years, most cases were held against the applicability of the right to cure in revocation cases; these cases were relied mostly on a strict reading of the text of the UCC.¹⁴³⁾ As stipulated by the text of s. 2-508, a right of cure is allowed only when the buyer "rejects" and the word of "revocation" does not appear in either the text of s. 2-508 or in its official comments. In addition, there is no explicit mention of cure in s. 2-608, which governs revocation of acceptance. This has led a majority of courts, and some writers, to conclude that the seller has no right to cure when the buyer attempts to revoke.¹⁴⁴⁾ However, many recent cases (and probably a majority of writers) concluded that the seller has an implied right to cure upon revocation that he would have after rejection.¹⁴⁵⁾

evidence that the processing was essential to make the hides useful to the buyer, but this does not seem particularly relevant for revocation purposes. *Id.* at 1202. Of greater importance was evidence that the processing undertaken increased the value of the hides. *Id.* If the processing actually increased (or did not diminish) the value of the hides despite their defects, the result is unusual but not unreasonable.

143) *Colonial Dodge, Inc. v Miller*, 420 Mich. 452, 362 N.W.2d 704, 40 UCC 1 (1984); *Gappelberg v Landrum*, 666 S.W.2d 88 (Tex. 1984) etc.

144) See e.g., *Grappleberg v. Landrum*, 666 S.W.2d 88 (Tex. 1984); *American Honda Motor Co. v. Boyd*, 475 So. 2d 835 (Ala. 1985); *Fleet Maintenance, Inc. v. Burke Energy Midwest Corp.*, 11 Kan. App. 2d 523, 728 P.2d 408 (1986). See also W. Lawrence, "The Prematurely Reported Demise of the Perfect Tender Rule", *op cit.*, at 581-85.

145) See e.g., *Tucker v. Aqua Yacht Harbor Corp.*, 749 F.Supp. 142, 13 UCC2d 382 (N.D.Miss. 1990); *U.S. Roofing, Inc. v. Credit Alliance Corp.*, 228 Cal.App.3d. 1431, 279 Cal.Rptr. 533, 14 UCC2d 746 (1991). See also Hillman, *op cit.*, at 586 f.; *Travalio, op cit.*, at 976 ff.; *Whaley, op cit.*, at 75 f.

(2) Procedural requirements

The buyer who wishes to revoke his previous acceptance is required to give the seller notice of revocation within a reasonable time after the buyer discovers or should have discovered the defects.¹⁴⁶⁾ The primary purpose of the requirement of reasonable notice of revocation is to encourage early decisions concerning revocation so as to increase the likelihood that the seller will be able to obtain a reasonable return when he attempts to resell the goods. The time period begins to run when the buyer discovers or should have discovered the ground for revocation. However, as Comment 4 to s. 2-608 states, "it should extend in most cases beyond the time in which notification of breach must be given, beyond the time for discovery of non-conformity after acceptance and beyond the time for rejection after tender".

As regards the timeliness of revocation, it is submitted that any substantial delay in revocation is not timely unless there are substantial justifications for the delay or the buyer shows that the delay in notice of revocation has not substantially prejudiced the seller.¹⁴⁷⁾ Such justification can be found most frequently where the seller is being given an opportunity to cure the defects.¹⁴⁸⁾ Another possible justification may be found where the buyer and seller are negotiating a possible price reduction or other concession that the buyer would accept in lieu of asserting her right to revoke.¹⁴⁹⁾ In addition, factors such as the perishability of the goods, the seasonal nature of the goods, or rapid market fluctuations may be considered for the justification of delay in revocation.¹⁵⁰⁾

146) The UCC s. 2-608(2).

147) Sebert, *op cit.*, at 411.

148) See e.g., *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117 (8th Cir. 1982).

149) See *Kee v. Campbell*, 8 Kan. App. 2d 561, 661 P.2d 831 (1983).

150) See e.g., *B.P. Dev. & Management Corp. v. P. Lafer Enter., Inc.*, 538 So. 2d 1379 (Fla. Ct. App. 1989); *Chernick v. Casares*, 759 S.W.2d 832 (Ky. Ct. App. 1988).

One must note that, as Comment 5 to s. 2-608 states, mere notification of breach under s. 2-607(3) is not enough for the notice requirement under s. 2-608(2). One line of cases between merchants holds that the essential content of the notice must set forth "the non-conformity in the goods materially impairing their value to the buyer".¹⁵¹⁾ The content must also inform the seller that the buyer does not wish to keep the goods.¹⁵²⁾

2. English law compared

The UCC allows revocation of acceptance in certain circumstances as examined above. This clearly goes further than English law in that once the buyer is deemed to have accepted the goods, there is no right in English law for the buyer to revoke his previous acceptance. However, it is submitted that similar results can often be achieved (especially in consumer cases) by saying that permitting trials, attempts at repair, etc., do not constitute acceptance.¹⁵³⁾

IV. Conclusion

In accordance with the purposes of this article, it has been attempted, first, to describe and analyze the relevant UCC rules to the buyer's right of rejection and revocation, second, to compare the rules as to the right of rejection and revocation under the UCC with those of English law. It could be summarized as follows, focusing on any differences found in the comparison.

Most of all, unlike English law, the UCC differentiates the right of

151) See e.g., *Solar Kinetics Corp. v. Joseph T. Ryerson & Son, Inc.*, 488 F.Supp. 1237, 29 UCC 85 (D.Conn.1980).

152) See e.g., *Agrarian Grain Co. Inc. v. Meeker*, 526 N.E.2d 1189, 7 UCC2d 786 (Ind.App.1988).

153) Guest (ed.), *op cit.*, at 574.

rejection from the right of revocation, although it could be argued that similar results can be made, for instance, by the rules that attempts at repair in consumer cases do not constitute acceptance. However, one must clearly note that English law does not provide the buyer with the right to revoke his acceptance which is decided by all those factors including the seller's attempts at repair. Thus, once he is deemed to have accepted the goods, there is no chance for the buyer to throw the goods back to the seller.

The other differences between the UCC and English law are mostly found in the rules as to the rejection of goods. First, while any inconsistent act with the seller's ownership under English law can not constitute acceptance as far as the buyer has not had a reasonable opportunity to examine the goods, such an act under the UCC can do regardless of the opportunity. Second, although English law does not have the same perfect tender rule as does the UCC, the seller's most tenders of goods which are defective in quality, quantity or title are tantamount to a breach of condition which may entitle the buyer to reject the goods regardless of any minor defect. However, one must note that it does not apply in non-consumer sales where the breach is so slight that it would be unreasonable for the buyer to exercise the right. Third, the UCC expressly stipulates the seller's right to cure, whereas the position in English law seems uncertain. Even if such right is recognized in English law, it seems different from the UCC in that, unlike the UCC, the seller's right to cure beyond the contract time may never be allowed. Fourth, unlike English law, the UCC requires a reasonable notification of rejection by the buyer to the seller for the absence of acceptance of the goods. Nevertheless, similar results can be achieved by saying that English law requires the buyer in effect to give the notification within a reasonable period as to lack of conformity in a way that intimates his rejection in order not to be deemed to have accepted the goods. However, English law is different from the UCC in that it does not impose on the buyer a duty to state a particular defect.

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ABSTRACT

Buyer's Right of Rejection and Revocation of Acceptance under the Uniform Commercial Code Compared with English Law

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Most legal systems provides the aggrieved buyer with a right to put an end to the contract. Unlike Civil Law systems, the right is rather complicated and uncertain in Common Law systems because they do not sharply distinguish between a refusal which amounts merely to a defence in the nature of the *exceptio non adimpleti contractus*, and one which is intended to abrogate the aggrieved party's obligations completely and to seek restitution of what he has already performed. That is, they do not draw any sharp distinction between the right of rejection or revocation and the right to put an end to the contract. This explains why the right to put an end to the contract under Civil Law systems are often compared with the right of rejection or revocation under Common Law systems in most academic papers.

Having said that, this article describes and analyzes in detail the relevant UCC rules to the buyer's right of rejection and revocation, particularly the rules on the requirements for the right of rejection or revocation. This is for the purpose of providing legal advice to our sellers residing either in U.S.A. or in Korea who plan to enter into U.S.A markets and take academics' interest in the buyer's right which is deemed to be unique compared to the Civil Law systems. In addition, the study attempts to compare the rules as to the right of rejection and revocation under the UCC with those of English law which are stipulated mainly in the Sale of Goods Act (1979) in

a statutory form. This may help one better to understand the rules of the UCC which are mostly originated with English law and to find in what way the rules of the UCC depart from those of English law.

Key Words : Right of Rejection; Right of Revocation; UCC; Sale of Goods Act; Right to Cure; Acceptance