

FREEDOM OF CONTRACT UNDER THE UNIFORM COMMERCIAL CODE

CHARLES BUNN*

A society that relies on private enterprise for most of its food, clothing, shelter, transportation, and amusement, and for the capital plant needed to produce them, must evidently allow its private enterprisers freedom to act and plan, and to make their plans secure by contracting with each other. But if the same society thinks about its underdogs it may endeavor to protect them against unconscionable contracts brought about by their inferior bargaining position. So in any legislation (or in any course of judicial decision or administrative action) about business we are apt to find some things that business men must do, some others they must not do, and a third group that they may do if they wish. The size of the three groups, and the importance of the items that compose them, disclose the state of business freedom under the laws in question.

The Uniform Commercial Code is not a "regulatory" law. Its central purpose is not to restrict free contract by imposing required terms (as e.g., usuary laws, hour and wage laws or public utility laws necessarily do) but to facilitate commercial transactions by making the governing law simpler, clearer, more modern, and more uniform. Nevertheless, like any law at all concerning business, it must consider in some detail what bargains, in what circumstances, have to be permitted, forbidden, or denied effect. The purpose of this paper is to examine what the Code has done about these questions.

Forbidden or denied effect. When we speak of freedom of contract we mean, I should suppose, not simply freedom to sign papers or write letters to each other, but freedom to make agreements which the legal system will enforce. This kind of freedom is restricted not only by those legal rules which say "You must not make that kind of promise" but equally by those which say "Even if you make that kind of promise, it is not enforceable." The abolition of the latter form of rule in several situations is among the Code's more striking affirmative contributions to liberty of contract.

THE PARTIES' POWER TO CHOOSE THE APPLICABLE LAW

In any transaction across state or national lines the question is presented: Which law governs? May that question be determined by the parties' conscious choice?

* Professor of Law, University of Wisconsin Law School; A.B. 1914, Princeton University; LL.B. 1917, Harvard University. Author, *Jurisdiction and Practice of the Courts of the United States* (5th ed. 1949).

Substantial common law authority declares that it may not. The law itself, not the wishes of the parties, decides which law will govern.¹ Of course the parties often have not liked that rule. They have specified which law they have wanted to apply, and quite often their wishes have prevailed—but not always. The place of contracting, the place of performance, and the place of trial all have their claims and one or the other of them may prevail over the parties' choice.

At one time, and for quite a time, drafts of the Code took an authoritative position in this matter. "Pay no attention to the parties' choice," it seemed to say. "This is a real good Code. Apply its rules whenever the Constitution of the United States will let you."²

That made some sense, provided only one was sure that the Code rules were, for always and for everywhere, the best that could be written. But suppose, with one end of a transaction in a Code State, and the other in New York or in Ontario, the parties opted clearly for the non-code law. Should the Court in the Code state respect their choice? Has their choice anything to do with what law governs their transactions? Or is that something for "the law" itself to settle?

The debate that swirls around these issues I shall not attempt to summarize. The final Code decision is a clear victory for parties' choice. With five small and clearly identified exceptions "when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties." And such agreements are effective. It is only "[f]ailing such agreement" that "this Act applies to transactions bearing an appropriate relation to this state."³

This, right or wrong, is a clear and important victory for freedom of contract, in an area of great importance. For, Code or no Code, and international legislation or not, no one expects, in finite time, to see all differences vanish between commercial laws in different places. As long as there are differences the parties may prefer one to the other, and if they do, and can agree about it, and their transaction touches the state or country whose law they want to have apply, the Code says

¹ 2 Beale, *Conflict of Laws* §§ 332.1-332.57 (3rd ed. 1935); *Restatement, Conflict of Laws* §§ 332-47, 358-72 (1934).

² UCC § 1-105 (1948 Printing; Text and Comments Ed., 1950, 1952, 1954). See Max Rheinstein's detailed and effective criticism of these provisions. *Conflict of Laws in the Uniform Commercial Code*, 16 *Law & Contemp. Prob.* 114 (1951).

³ UCC § 1-105 and comments thereto. It is no secret that the American Law Institute seems likely, in its forthcoming revision of the *Restatement of Conflict of Laws*, to accept the same general position as good Conflicts law without a statute. See *Restatement (Second), Conflict of Laws* §§ 332, 332a (Tentative Draft No. 6, April, 1960).

they can make their preference effective. This is an important freedom in all interstate and international transactions.

What are the limits on it?—Clearly the first limit must be that the choice does not defraud third persons who are not parties nor privies to the contract.

For example, the manner of a sale or other transfer may be fraudulent against the seller's creditors, or may require some notice to them. And since the laws both of fraudulent conveyance and of bulk sale differ from state to state, it is necessary that the creditors be able to look to a single state. That state, under the Code as under many existing statutes and decisions, is the state where the goods are,⁴ and the parties cannot by contract set aside that rule.⁵

Similarly, when a seller or lender is asked to extend credit on the security of personal property, or to extend unsecured credit on a financial statement which shows the ownership of property, he needs to know whether the property is already pledged to someone else. And unless he is to rely entirely on the personal statements of his debtor, he should know what public office to consult for information. Accordingly the appropriate Code Article makes valiant efforts to identify the governing law upon secured transactions⁶ and these rules also may not be varied by the parties to the secured transaction.⁷

The other exceptions to the parties' power to choose the applicable law are less important. The liability of a bank in the handling of items is governed by the law of the place where the bank is,⁸ and the validity of a security by that of the place of organization of the issuer.⁹ Both rules are, no doubt, mainly in the interest of certainty, but both may have bearing also on the rights of other people (the drawer or indorsers of the check, the other security holders of the corporation), and, therefore, neither of them may be varied by the parties.¹⁰

FREEDOM TO CONTRACT OUT

So much for the parties' power to choose *among* two or more possibly applicable bodies of law. But consider a different power. Admitting (or agreeing) that the law of X applies, when may the parties contract out of such of X's rules as they don't like? Or, using

⁴ UCC §§ 2-402, 6-102.

⁵ UCC § 1-105(2).

⁶ UCC §§ 9-102(1), 9-103. As to the place to look for filings within the proper state, see § 9-401.

⁷ UCC § 1-105(2).

⁸ UCC § 4-102(2).

⁹ UCC § 8-106.

¹⁰ UCC § 1-105(2).

the Code's language, when may "the effect of provisions of this Act" be "varied by agreement"?¹¹

Lawyers on the continent of Europe have been more clear than we have on this issue. They have known for a long time the general distinction between *jus dispositivum*, the rule that applies unless the parties agree otherwise, and *jus cogens*, the binding rule which the parties cannot set aside by contract. And they have sought, by provisions in their Codes and otherwise, to make clear which *jus* was which.¹²

We of course have had exactly the same problems and have, as usual, dealt with them case by case, in particular compartments of our thinking, without much general theory. The cases are digested under such heads as "negligence," "master and servant," "mortgages," "public utilities," and so on. Sometimes a statute makes the answer clear; more often it does not. Our results may be as good as the civilians'; we do not so often anticipate the problem.

Plainly the draftsmen of the Code could see the problem coming, and set out to indicate solutions. The indications given fall in three main classes: (a) "unless otherwise agreed," (b) "this may not be varied," (c) no express statement in the section either way.

(a) "*Unless otherwise agreed, or its equivalent.* Many sections are expressly in this form.¹³ On examination it will be found that most

¹¹ UCC §§ 1-102(3), 4-103(1), etc.

¹² See Lenhoff, *Optional Terms (Jus Dispositivum) and Required Terms (Jus Cogens) in the Law of Contracts*, 45 Mich. L. Rev. 39 (1946); Schlesinger, *Comparative Law: Cases, Text, Materials*, 281 (2d ed. 1959).

¹³ See, e.g., UCC §§ 1-204(1) (reasonable time), 2-210 (delegation of performance, assignment of rights), 2-306(2) (obligation imposed by contract for exclusive dealing), 2-307 (delivery in lots), 2-308 (place of delivery), 2-310 (time of payment, etc.), 2-311(2) (specifications), 2-312 (warranties of title and against infringement), 2-314, 2-315, 2-316 (warranties of merchantability and fitness), 2-319 (F.O.B. and F.A.S. terms), 2-320 and 2-321 (C.I.F. and C. & F. terms), 2-322 (delivery "ex-ship"), 2-323 (form of bill of lading), 2-324 ("no arrival no sale"), 2-325(3) (letter of credit term), 2-326(1) and 2-327 (sale on approval and sale or return), 2-401 (passage of title), 2-503 (manner of tender of goods), 2-504 (shipment by seller), 2-507 (effect of seller's tender), 2-509 (risk of loss), 2-511 (tender of payment), 2-513 (buyer's right to inspect goods), 2-514 (when documents deliverable), 2-601 (buyer's rights on improper delivery), 2-615 (excuse by failure of presupposed conditions), 2-706(2) (method of resale by aggrieved seller), 2-719 (contractual modification of remedies), 2-725(1) (reducing periods of limitation), 3-414(2) (liability of endorser to each other), 3-506 (time allowed for acceptance or payment), 3-802 (effect of instrument on underlying obligation), 4-103(1), (2) (variation by agreement, bank collections), 4-206 (methods of transfer between banks), 5-106 (time and effect of establishment of credit), 5-109 (Issuer's obligation to its customer), 5-110 (availability of credit in portions), 5-111 (warranties on transfer and presentment), 5-113 (coverage and duration of indemnity), 5-114(2) (Issuer's duty to honor), 7-204 (warehouseman's liability), 7-302 (through bills of lading), 7-309 (carrier's limitation of liability), 7-507 (warranties on transfer of document of title), 8-208(2) (effect of signature of authenticating trustee, etc.), 8-314 (duty to deliver a

of them are statements of the usual commercial understanding of particular terms, or of undertakings normally implied or inferred in particular transactions. Thus, by Section 2-320 we find that "unless otherwise agreed . . . the term C.I.F. destination . . . requires the seller at his own expense and risk to . . ." do five things quite carefully described. By Section 2-314 we find that "unless excluded or modified" a warranty of merchantability is implied in a merchant's sale of goods. The qualifying language calls attention to the fact that short-hand terms do not always carry all their usual meanings, nor particular transactions all their usual inferences, and that when something departing from the standard is intended it can and ought to be set out. Sometimes also, as in the case of the implied warranties of merchantability and fitness, the language calls attention to the means by which the implication can be negated or varied.¹⁴ And sometimes, as in the case of limitation of a carrier's liability, it sets limits to the variance permitted.¹⁵

"Unless otherwise agreed" and similar words then are flags, calling attention in that context to the parties' power to vary and sometimes to specify limitations on it. But the words are not essential to that power. The general rule is that the effect of the Code may be varied by agreement and the absence of the special flag in any section does not by itself exempt it from that rule.¹⁶

(b) *"This may not be varied" or the like.* The sections carrying these legends are not many, but they are important.¹⁷ They are principally for the protection of the party assumed to be the underdog in bargaining position, or of some third person not a party to the contract but who may be affected by it. The most important carry forward principles long known in the law of mortgages and elsewhere.

Thus, as to the underdog, Part 5 of Article 9 deals with default

security), 8-316 (duty to supply proof of authority to transfer), 9-112 (rights where collateral not owned by debtor), 9-204(3), (5) (after acquired property and future advances), 9-206 (agreement not to assert defenses against assignee), 9-207 (duties of secured party in possession of collateral), 9-316 (subordination by agreement), 9-503 (secured party's right to possession on default), 9-504(2) (surplus or deficiency on disposition of collateral).

¹⁴ UCC §§ 2-314, 2-315, 2-316.

¹⁵ UCC § 7-309. Compare §§ 2-718 (liquidated damages and penalties), 2-719 (other modification and limitation of remedies in sales contracts), 9-501 et seq. (secured party's rights and duties after default).

¹⁶ UCC § 1-102(3), (4).

¹⁷ See, e.g., UCC §§ 1-102(3) (general limits on power to vary), 1-105(2) (choice of law), 1-208 (option to accelerate at will), 2-302 (unconscionable contracts or clauses), 2-718 (liquidated damages and penalties), 2-719 (other variation and limitation of remedies in sales), 5-116(2), and 9-318(4) (clauses forbidding assignment of rights), 9-501(3)—9-507 (rights of the secured debtor after default).

under a security agreement, stating the various things that the secured party may do upon default and certain things he must do. As to the latter, we find by Section 9-501(3) that the rules stated in certain carefully identified subsections "may not be waived or varied" except in stated ways. The most ancient and familiar of the debtor's thus protected rights, perhaps, is the right of redemption after default. This, we find by Sections 9-501(3) and 9-506, may not be waived by him in the security agreement, but may be waived "in writing after default." The resemblance to the ancient and the modern law of mortgages is at once perfectly apparent.

A more general provision clearly intended for the protection of the underdog is in the general section of the Code dealing with variation by agreement.¹⁸ We there find that

" . . . the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."

Again, the resemblance is clear enough to the older principles against contracts relieving a party in advance from the effects of his own fraud or negligence. The section does not mean, of course, that everyone under the Code is required to be always diligent, reasonable, or careful (he *is* always required to act in good faith¹⁹), but only that when such requirements are imposed they may not be disclaimed by an agreement in advance. After breach, the resulting cause of action (like any other claim or right arising out of any breach of any contract covered by the Code) can be discharged, even without consideration, by a proper writing.²⁰

A more unusual (in a statute) provision for the underdog, and certainly a controversial one, is the section giving courts express authority to refuse enforcement of unconscionable contracts, or of unconscionable clauses within contracts.²¹

Any lawyer who has tried many commercial cases knows quite well that an indispensable element of victory is a conviction in the

¹⁸ UCC § 1-102(3).

¹⁹ UCC § 1-203.

²⁰ UCC § 1-107.

²¹ UCC § 2-302. Note that this appears in Article 2, Sales, and so is limited in application to that context. Why it is so limited I do not know. Certainly the most striking and important historic application of the principle is the Chancellor's invention of the equity of redemption, many centuries ago.

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judge's mind that his client's conduct in the matter has been fair and decent in a moral sense, or at least not indecent. Our culture wants judges to do justice, and judges want it of themselves, as do juries—justice, of course, *within the law*. But the law has many ingenious devices. So when the conduct or position of one party appears to be unjust, look out! Hard cases often make queer looking law and even strange findings upon the facts.

The section on unconscionable contracts and clauses brings this prejudice against injustice out into the open, and at the same time confines it. If the *court as a matter of law* (that is to say, the judge himself, without the jury) finds the contract or clause *to have been unconscionable at the time it was made* (and not, that is to say, merely harsh to one party by reason of what happened later) he may refuse enforcement, or so limit application as to avoid an unconscionable result. And the determination is to be made in the open, after proof of "its commercial setting, purpose, and effect." In other words: do justice, but find out first where justice really lies.

So much for the underdog. Provisions for the protection of third persons, not parties to the contract but affected by its terms, are rare in the Code because they are, in general, unnecessary. Lawyers and judges do not need to be told that contracts bind only the parties to them and their privies, and that other people are not subject to have the rules of law changed to their detriment by agreements to which they have not given their consent.

At one time the Code contained an express statement of this obvious proposition.²² As it stood in Supplement No. 1 of 1955 this provision read:

"The rights and duties of a third party may not be adversely varied by an agreement to which he is not a party or by which he is not otherwise bound, except as otherwise provided in this Act; . . ."

The staff of the New York Law Revision Commission reported that this provision

"may be self-evident or unnecessary but in itself it is certainly correct under New York law and elsewhere."²³

The Commission itself reported its belief "that this clause accomplishes nothing."²⁴ In 1956 the sponsors' Editorial Board deleted it "as un-

²² UCC § 1-102(3)(b) (1952, 1954 and Supplement No. 1, 1955).

²³ New York Law Revision Commission, Study of Uniform Commercial Code, Article 1, General Provisions, Legislative Document No. 65(B), p. 23 (1955).

²⁴ Report of the New York Law Revision Commission to the Legislature (1956),

necessary."²⁵ So the meaning is perfectly clear: the Code does not intend in this respect to change the ordinary law of contracts.

The principle stated has application everywhere in the commercial law. For example, the buyer of a negotiable instrument, to become a holder in due course, must take it, among other things, without notice of existing defenses.²⁶ Suppose that the buyer and seller of a note agreed, varying the effect of this provision, that the buyer "shall be deemed a holder in due course" although he did have notice. Judges do not need to be told that the maker's available defense is not cut off by any such provision.

Or again, suppose a merchant and his finance company, in an assignment of accounts receivable, agreed that "this assignment is perfected without filing."²⁷ No one would think this clause effective against, say, a lien creditor without notice of the assignment.²⁸

Many such cases can be stated. In most of them the point is obvious, so obvious that in the end both the New York Law Revision Commission and the sponsors' Editorial Board thought express statement of it was unnecessary. One can only hope that the business men who are subject to the Code and the lawyers and judges who advise them and adjudicate their controversies will see the point as clearly.

In a few places particular applications of the principle are still expressly carried in the Code, because, as to them, the point was not quite so obvious. Thus by Section 2-318 we learn that the seller's warranties of quality and fitness, whatever they may be, extend to members of the buyer's household and his guests within limitations stated. And "a seller may not exclude or limit the operation of this section." This is so, no doubt, because, without it, it would at least be arguable that guests and members of the household are privies of the head of the house, and so capable of being bound by his agreements. Whether right or not, that argument is negated by the express provision.

More important, no doubt, because covering more cases, are the limitations on the parties' power to choose the applicable law in interstate and international transactions.²⁹ The main reason for these limitations, as pointed out above, is that third persons, especially

Relating to the Uniform Commercial Code, Legislative Document No. 65, p. 23 (1956).

²⁵ Recommendations of the Editorial Board for the Uniform Commercial Code 1, 3 (1956).

²⁶ NIL § 52(4), UCC § 3-302(1)(c).

²⁷ See, UCC § 9-302(1).

²⁸ See, UCC § 9-301(1)(b), (3).

²⁹ UCC § 1-105(2).

present or future creditors of one or the other of the parties, should not have their rights affected by the parties' choice of law.

In one place, and, so far as I have found, in one place only, the Code makes agreements binding on people who have not assented to them. In the Article on Bank Deposits and Collections we find that

"Federal Reserve Regulations and operating letters, clearing house rules, and the like, have the effect of agreements . . . *whether or not specifically assented to by parties interested in items handled.*"³⁰ [Emphasis supplied.]

This means, for instance, that if a clearing house rule fixed the time within which an item must be returned, "or be considered paid," the rule would bind all parties, although neither the drawer of the check nor the depositor nor the intermediate indorsers knew anything about it. This, plainly, is a rule not of ordinary contract law but of convenience and efficiency in the check collection process. Whether right or not in that connection, it is clearly not the general position.

(c) *No express statement in the Section as to whether that Section can be varied.* This is the commonest of the three cases. Most of the sections of the Code say nothing either way on the parties' power or lack of it to contract out.

To all these many sections the general rule of Article 1 applies:³¹

"The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act, and except that the obligations of good faith, diligence, reasonableness and care (when) prescribed by this Act may not be disclaimed by agreement. . . ."

The limitations on this freedom have been discussed above. The affirmative clear area of freedom is enormous.

NEW FREEDOMS TO MAKE EFFECTIVE CONTRACTS

Whether or not there is honor among thieves without resort to law, the business community requires, from time to time, enforcement of business promises by law. So when freedom of contract is mentioned in a business context, one supposes that the freedom meant is not simply to *make* promises or take them, but to make them legally effective.

This requirement our existing commercial law satisfies, in general, quite well. But there are some spots, in the law on consideration, essential terms, certainty, and the Statute of Frauds, where the

³⁰ UCC § 4-103(2).

³¹ UCC § 1-102(3).

reasonable expectations of the party seeking to enforce the other party's promise are sometimes disappointed.

The Code does not abolish either the general requirement of consideration or certainty or the requirement of a writing when the Statute of Frauds applies. But it does contain revisions in all three areas which will measurably increase business freedom to make effective promises. Moreover, Article 9, on secured transactions, makes several kinds of security effective that were not so before.

(a) *Consideration*.—Offers, as we all know, are generally revocable in our law until they are accepted. If they are to be irrevocable, that is, to become options, something must be paid for the promise to hold them open.

This is, no doubt, all very well in general. But sometimes buyers or sellers, giving or receiving offers upon goods which are part of a larger plan, want to have the offer firm until the larger plan is either tied up or abandoned. So, quite often, offers to buy and sell are made which say that they are firm for a stated limited time, or until some event occurs or doesn't. And, almost as often, when no lawyer is consulted, and the trade is not one in which regular options are customary, no one thinks to pay or to demand separate consideration for the firmness. So *that* promise is not binding.³²

No one, of course, ever needs to make an offer firm unless he wants to. But if he does want to, in a business context, there seems to be no good reason why he should not be able to. In any case, the Code provides that merchants' offers to buy or sell goods, made in signed writings which say that they are firm for limited times, are firm for the time stated, not greater than three months.³³

Another frequent business situation is that of the existing contract which turns out, as time passes, to become so burdensome against one party that the two agree to change it.

Of course no one is under legal obligation to consent to modify an existing binding contract merely because of great deflation or inflation, of threats of war or sudden peace, or other changes in demand or in supply. But often business people, facing default upon the other side in such a situation, are quite willing to agree to change the contract.

When they do so, what is the consideration for the change? If they consult their lawyers they will no doubt learn that the most effective plan is to cancel the existing contract altogether, and start

³² 1 Williston, Contracts § 61 (Rev. ed. 1936); 1 Corbin, Contracts §§ 42, 44, 46 (1950); Restatement, Contracts §§ 35, 46, 47 (1932).

³³ UCC § 2-205.

again from scratch. But unless their lawyers tell them that, they are most unlikely to proceed that way at all. Much more likely they will write each other letters, or both sign a single paper, changing some of the terms only. And if the changes that they make are all one way, one of them is likely to discover later that the changes made are ineffective, since they lack consideration.³⁴

This also the Code changes. Buyers and sellers of goods may change their contracts if they want to. "An agreement modifying a contract within this Article needs no consideration to be binding."³⁵

Other modifications of the requirement of consideration are made elsewhere in the Code, one of them returning to a decision of Lord Mansfield.³⁶ The net effect is a material increase of the freedom of business men to make *binding* contracts if they want to.

(b) *Essential Terms*.—Is a contract of sale binding which does not fix the price? Most lawyers, and most courts, would say at once: of course not, unless some workable standard is provided by which price can be determined. If it is left at large, to be fixed later by agreement of the parties, or by one of them alone, there cannot be a contract. For how can the court fix damages without the essential term?

No doubt in very many cases this lawyer's view agrees entirely with commercial understanding. If I am selling, say, at one extreme 100 shares of General Motors common or, at the other, a unique work of art, I am unlikely to think that I have made a deal until the price is settled. But suppose what I am selling is 18,000 carburetors, more or less, of one design, to be delivered over a year's time, and both the hourly wages that I pay and the cost of brass, etc., that I must buy are subject to be changed within the year in ways that I cannot predict. I may not be willing to offer a firm price for the year, or if I am it may be so high that my buyer will not like it. But if he and I both want to make a deal it is entirely possible that we may make what we both think is a firm contract at, e.g., "seller's prices in effect at the date of each delivery," or some other equally vague words.

Whether we have really made a contract when we do that is most doubtful under present law.³⁷ The Code says that we have *if we*

³⁴ 1 Williston, op. cit. supra note 32, §§ 130, 130A; 1 Corbin, op. cit. supra note 32, § 175; Restatement, Contracts §§ 76, 78 (1932).

³⁵ UCC § 2-209(1).

³⁶ UCC §§ 1-107, 5-105. With the latter, compare Pillans and Rose v. Van Mierop and Hopkins, 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765).

³⁷ 1 Williston, op. cit. supra note 32, §§ 37, 41, 45; 1 Corbin, op. cit. supra note 32, §§ 95, 97, 98; Restatement, Contracts § 32 (1932).

have so intended³⁸ and goes on to provide how the actual price is to be determined in various situations. (In the case put above, the language means the seller's price in effect at the date of each delivery *as fixed by the seller in good faith*.³⁹) Here again the Code increases freedom to make *binding* contracts when the parties want to do so.

(c) *Statute of Frauds*.—It is of course no news that informal memoranda of transactions, although duly signed by the party to be charged, often omit some material term of the agreement and so fail to satisfy the Statute.⁴⁰ In the view taken by the sponsors of the Code this is likely, often, to defeat reasonable expectations even though it is quite clear that a contract was made.

Accordingly, the requirements of the Statute are relaxed. By Section 2-201(1) a signed writing satisfies the Statute if it is "sufficient to indicate that a contract for sale has been made between the parties," and specifies a quantity of goods. Price, quality, warranties, time and place of delivery or payment—any of these may be omitted. (They can be supplied, of course, by oral evidence: the office of the writing is to "afford a basis for believing that the offered oral evidence rests on a real transaction.")⁴¹

Suppose also, what is not uncommon in some trades, that the only writing is a confirmation of an oral contract, mailed by one party to the other and to which no reply is made. The confirmation satisfies the Statute as against the man that sent it, but how about the other? He has signed no writing, and so he is not bound.⁴²

The Code thinks this is wrong. Confirmations are a perfectly good way of recording oral contracts, and it is easy enough to protest if the stated terms are incorrect. Accordingly, between merchants the confirmation satisfies the Statute as against the party who receives it "unless written notice of objection to its contents is given within ten days after it is received."⁴³ That should make possible a just result when the court or jury are convinced that there really was a contract.

(d) *Agreements for Security*.—This is not the time or place to set out the many changes which the Code's Article 9 makes in the law governing secured transactions. But an article on freedom of contract cannot end without reference to some of the provisions which make

³⁸ UCC § 2-305; compare § 2-204(3).

³⁹ UCC § 2-305(2). And note that in this Article 2, Sales, this includes "the observance of reasonable commercial standards of fair dealing in the trade." § 2-103(1)(b).

⁴⁰ 2 Williston, *op. cit. supra* note 32, §§ 569-78; 2 Corbin, *op. cit. supra* note 32, §§ 498-501, 505-06; Restatement, Contracts § 207 (1932).

⁴¹ UCC § 2-201(1) and comment 1.

⁴² 2 Williston, *op. cit. supra* note 32, § 586; 2 Corbin, *op. cit. supra* note 32, §§ 523-24; Restatement, Contracts § 211 (1932).

⁴³ UCC § 2-201(2); for a like rule in the securities business, see § 8-319(c).

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possible effective security agreements where, in many States, they were not possible before.⁴⁴

IN SUMMARY

This is indeed, a miscellaneous list of changes in the law. But a fair general statement of their impact is quite simple: the Code tries hard to make sensible distinctions between the freedoms which it grants and those which it restricts, and in result increases, at many points of material importance, the real freedom of the parties to make binding and effective contracts if they wish.

⁴⁴ E.g., UCC §§ 9-204(3) (after acquired property), 9-204(5) (future advances), 9-205 (use or disposition of collateral without accounting).