CONTRACT

REQUIREMENT CONTRACTS AND THE DOCTRINE OF MUTUALITY—PROPOSED APPROACH OF THE UNIFORM COMMERCIAL CODE

G. Loewus & Co., a New Jersey wine distributor, sold its bottling plant in 1942 and restricted its business to the wholesaling of bottled wines. At the same time they agreed to buy all their requirements of certain brands of wine from the Vischia Bottling Co., the price to be dependent upon the cost of bulk wine to the latter. Vischia refused to supply when wartime price-fixing caused a scarcity of bulk wine, and Loewus sued for damages. The New Jersey Supreme Court affirmed a trial court judgment for Vischia, holding that the contract lacked *mutuality* because Loewus was entering a new business in 1942, the requirements of which were not ascertainable with sufficient certainty. *G. Loewus & Co. v. Vischia,* 65 A. 2d 604 (N. J. 1949).

Under the "mutuality" doctrine[1] courts have often declared that contracts to furnish the requirements of an established producing concern, such as a manufacturing, utility, or transportation company, are valid;[2] while contracts to furnish the requirements of a non-producing business, such as a wholesaler, retailer, distributor, jobber, or any *new* concern, are void.[3] The usual explana-

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1. As stated in Ash v. Noble Oil & Gas Co., 96 Okla. 211, 217, 23 Pac. 175, 179 (1923), "'mutuality' as applied to a contract means consideration." And, as pointed out in Royal Brewing Co. v. Uncle Sam Oil Co., 205 Mo. App. 616, 617, 226 S. W. 656, 657 (1920), "The rule in respect to 'mutuality of contract' is that the contract must obligate each party to do something in consideration of what the other does, or is to do, and a contract which purports to bind one party to do something and leaves the other free to do, or not to do, as he may please, is void for lack of mutuality." See Patterson, *"Illusory" Promises and Promisor's Options,* 6 IOWA L. BULL. 209 (1921), reprinted in *Selected Readings on the Law of Contracts* 415, *et seq.*)1931); 1 WILLISTON, CONTRACTS § 37 (rev. ed. 1937); ANSON, CONTRACTS § 319 (Turk ed. 1929). See also Jordan v. Indianapolis Water Co., 159 Ind. 337, 64 N. E. 680 (1902).

2. Brightwater Paper Co. v. Manadock Paper Mills, 151 F.2d 869 (1st Cir. 1947); Walker Mfg. Co. v. Swift, 200 Fed. 529 (5th Cir. 1912); Lima Locomotive & Machine Co. v. National Steel Castings Co., 155 Fed. 77 (6th Cir. 1907); Manhattan Oil Co. v. Richardson Lubricating Co., 113 Fed. 923 (2d Cir. 1902); Long Beach Drug Co. v. U. S. Drug Co., 13 Cal.2d 168, 88 P.2d 698 (1939); Lincoln Mining Co. v. Board of Education, 212 Ill. App. 596 (1918); Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774 (1895); National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427 (1884); Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 76 N. E. 294 (1905); Semon, Bache & Co. v. Coppes, 35 Ind. App. 351, 74 N. E. 41 (1905); Smith v. Morse, 20 La. Ann. 200 (1868); Holmes Co. v. Detroit, 158 Mich. 137, 122 N. W. 506 (1909); E. G. Dailey Co. v. Clark Can Co., 128 Mich. 591, 87 N. W. 761 (1901); Koehler & Henrichs Mercantile Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703 (1919); Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316 (1915); Reeves v. Fulton Market Refrigerating Co., 105 Misc. 130, 173 N. Y. S. 568 (1918); Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142 (1891); Cox v. Humble, 16 S. W.2d 285 (Tex. Com. App. 1929); Excelsior Wrapping Co. v. Messinger, 116 Wis. 549, 93 N. E. 459 (1903).

3. Curtis Candy Co. v. Silberman, 45 F.2d 451 (6th Cir. 1919); Crane v. Crane, 105 Fed. 869 (7th Cir. 1901); Leach v. Ky. Block Channel Coal Co., 256 Fed. 686 (S.D. N.Y. 1919); Cohen v. Clayton Coal Co., 86 Colo. 270, 281 Pac. 111 (1929); Chappell v. Andrea, 41 Ga. App. 413, 153 S. E. 218 (1930); Joliet Bottling Co. v. Joliet Citizens Brewing Co.,

tion for this distinction is that sellers need protection from buyers whose requirements are uncertain, due to the nature of their business, and therefore susceptible to an unfair increase in times of rising prices.[4] It is thought that the requirements of the manufacturer, for example, will be severely restricted by the capacity of his production machinery;[5] whereas those of the retailer or wholesaler will be limited largely only by the commodity market. Even so, it can hardly be contended that the requirements of the established manufacturer are always *completely* ascertainable; for if that were the case no need would exist for this type of agreement. Thus, the test must be based on the existence of *requirements susceptible of reasonable ascertainment.*[6] The question then becomes, is a non-producing business *inherently* lacking in this respect? Even cursory consideration of the problem results in the conclusion that this is not so; for quite obviously an instance could arise where the personal knowledge and experience of the seller in dealing with the buyer is such as to enable him

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254 Ill. 215, 98 N. E. 263 (1912); Fred Allen Auto Supply Co. v. Johns-Manville Co., 211 Ill. App. 217 (1918); Rehm-Zeiher Co. v. Walker Co., 156 Ky. 6, 160 S. W. 777 (1913); Saginaw Medicine Co. v. Dykes, 210 Mo. App. 399, 238 S. W. 556 (1922); Schlegel v. Cooper, 231 N. Y. 459, 132 N. E. 145 (1921); Pessin v. Fox Head Waukesha Corp., 230 Wis. 277, 282 N. W. 582 (1938).

4. "Plaintiffs in error were . . . in no manufacture. . . . They were . . . merchants pure and simple—middlemen. . . . Should the contract under discussion be upheld, the plaintiffs in error would be held to occupy this advantageous situation: If the prices . . . rose, they would, by that much, increase their ratio of profits, and probably, coming into a situation to outbid competitors, increase also, the quantum of orders." Grosscup, J., in Crane v. Crane, 105 Fed. 869, 872 (1901). *See also* Cohen v. Clayton Coal Co., 86 Colo. 270, 275, 281 Pac. 111, 114 (1929); Schlegel v. Cooper, 231 N. Y. 459, 463, 132 N. E. 148, 150 (1927).

There are many cases in which a buyer has attempted to make an unjust use of his advantage, but the real reason for the decision is obscured by verbalization in terms of "lack of mutuality." The following cases should be tested on this basis: Jenkins & Co. v. Anaheim Sugar Co., 274 Fed. 504 (9th Cir. 1921); Lodenbach Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298 (6th Cir. 1903); Leach v. Ky. Block Channel Coal Co., 256 Fed. 298 (S.D. N.Y. 1919); Wickham & Burton Coal Co. v. Farmers' Lumber o., 189 Iowa 1183, 179 N. W. 417 (1920); Andrews Coal Co. v. Directors of Public Schools, 151 La. 695, 92 So. 303 (1922); Nelson v. Barber, 143 La. 783, 79 So. 403 (1918); Waddell v. Phillips, 133 Md. 497, 105 Atl. 771 (1919); Aschlex & Wheeler Co. v. Mandelson, 180 App. Div. 9, 167 N. Y. S. 435 (1917); Moore v. American Molasses Co., 106 Misc. 263, 174 N. Y. S. 440 (1919). See Patterson, *"Illusory" Promises and Promisor's Options,* 6 IOWA L. BULL. 209, 211-224 (1921), reprinted in *Selected Readings on the Law of Contracts* 417-428 (1931); Note, 28 COL. L. REV. 225 (1928).

5. "The capacity of the furnace, the needs of the railroad, or the requirements of the hotel are, within certain limits, ascertainable by the vendor." Grosscup, J., in Crane v. Crane, 105 Fed. 869, 872 (1901).

A new manufacturer would probably have to enlarge factory space, obtain more machinery, and otherwise reorganize as much as an established manufacturer, in order to take advantage of price increases. See, in general, Havighurst and Berman, *Requirement and Output Contracts,* 27 ILL. L. REV. 1 (1932).

6. See Bailey v. Austrian, 19 Minn. 535 (1873), where the court voided a contract because it was not possible for the seller to *completely* ascertain the buyer's requirements. The case was overruled in Scott v. T. W. Stevenson Co., 130 Minn. 151, 153 N. W. 316 (1915), on the ground that reasonable ascertainment is the standard. The cases cited in note 2 *supra* reveal that this is the proper test. See Levery, *The Doctrine of Bailey v. Austrian,* 10 MINN. L. REV. 584 (1926).

to reasonably ascertain the latter's requirements regardless of the nature of the business involved.[7]

Also, conceding that exploitation of seller by buyer is an evil, it is doubtful that it supports such a doctrinaire distinction between different types of businesses. Requirements agreements are a direct consequence of the actual inability of many businesses, both producing and selling, to determine their future need for commodities,[8] and are not, as assumed by some courts, instruments designed for the perpetration of fraud.[9] It would be a different matter if the fruits of a requirements contract ran to the buyer alone—if sellers were coerced into making such agreements. When fluctuating market conditions favor the buyer, the seller may assume some burdens he would not otherwise undertake.[10] Yet, even when a buyer's market prevails, it is apparent that the seller as well as the buyer benefits from a requirements agreement.[11] Certainty

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7. For cases in which contracts to supply the requirements of a distributor, jobber, wholesaler, or new business have been held valid on the ground that the requirements were reasonably ascertainable, see Brightwater Paper Co. v. Monadock Paper Mills, 161 F.2d 869 (1st Cir. 1947); Mills-Morris Co. v. Champion Spark Plug Co., 7 F.2d 38 (6th Cir. 1925); Texas Co. v. Pensacola Maritime Corp., 279 Fed. 19 (5th Cir. 1922); National Publishing Co. v. International Paper Co., 269 Fed. 903 (2d Cir. 1920); Pittsburgh Plate Glass Co. v. Neuer, 253 Fed. 161 (6th Cir. 1918); T. W. Jenkins Co. v. Anaheim Sugar Co., 247 Fed. 958 (9th Cir. 1918); Pittsburgh Plate Glass Co. v. Jarrett, 42 F. Supp. 723 (N.D. Ga. 1942); Atwater & Co. v. Terminal Coal Corp., 32 F. Supp. 178 (Mass. 1940); Match Corp. of America v. Acme Match Corp., 285 Ill. App. 197, 1 N. E.2d 867 (1936); N. Y. Cent. Iron Works v. United States Radiator Co., 174 N. Y. 331, 66 N. E. 967 (1903); McMichael v. Price, 177 Okl. 186, 58 P.2d 549 (1936); Baker v. Murray Supply Co., 138 Okl. 288, 279 Pac. 340 (1929).

No particular element is controlling in the determination of the seller's ability to ascertain the buyer's requirements. See Note, 28 COL. L. REV. 223, 230 (1928). Actual knowledge, of course, is possible. T. W. Jenkins Co. v. Anaheim Sugar Co., 247 Fed. 958 (9th Cir. 1918); American Trading Co. v. National Fibre & Insulation Co., 1 Harr. 258, 114 Atl. 67 (Del. 1921). But experience of the buyer in his business may provide a basis whereby the seller can predict the buyer's requirements, even though the latter had never before purchased from the seller. Brightwater Paper Co. v. Monadock Paper Mills, 161 F.2d 869 (1st Cir. 1947); McMichael v. Price, 177 Okl. 186, 58 P.2d 549 (1936).

8. See Havighurst and Berman, *Requirement and Output Contracts,* 27 ILL. L. REV. 1-3 (1932). In Walker Mfg. Co. v. Swift, 200 Fed. 529, 531 (5th Cir. 1912), the court said with reference to a requirement contract: "Business necessities require contracts of this class, though more or less indefinite, to be upheld." See also Levery, *The Doctrine of Bailey v. Austrian,* 10 MINN. L. REV. 584 (1926).

9. See notes 3 and 4 *supra.*

10. See, *e. g.,* Koehler & Henrichs Mercantile Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703 (1919).

11. Of course a price risk is inherent in any contract to buy and sell for a fixed price; and the requirements buyer does have a measure of control over the quantity he will require. The only disadvantage to the requirements buyer will result when prices decline. The seller, however, bears a risk of price increase and also the burden of ascertaining what the buyer's future requirements will be, so as to be in a position to carry out his obligation. Unless the seller has considerable raw material on hand, bought during a period of higher costs, he is not as likely to press the buyer to have normal requirements, since the seller is only deprived of contract profits. But if prices increase, the seller is more likely to want to hold the buyer down to normal requirements, unless he has con-

of supply is the primary inducement for the buyer. In addition a price advantage may result from quantity buying and warehousing economies. The seller receives the benefits of an assured demand and is enabled to effect savings on selling, credit, advertising, storage, and transportation costs.[12] Thus, the arbitrary position taken by some courts in completely denying the advantages of this important transaction to large numbers of ethical businessmen is untenable.

It is doubtful that the fictional concept of "mutuality," as applied in the requirements area, could sustain any other result; for "mutuality" is concerned only with the facts at "time of making," rendering a contract either altogether valid or entirely void at its inception.[13] It should also be apparent that "mutuality" does not preclude the possibility of exploitation.[14] Due to the technical nature of the law of consideration the enforcement of a contract depends upon the manner in which it is drafted.[15] If a seller receives a consideration (a tom-tit) other than the buyer's promise to buy, in exchange for his promise to sell, the doctrine of mutuality is satisfied.[16] Other concepts must be called upon if subsequent injustice is to be prevented.[17]

Actually, where a buyer promises to buy *all* of his requirements from a seller, the seller's promise should be enforced for any quantity the buyer desires, insofar as the only objection to enforcement is based upon lack of

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siderable raw materials obtained during a low cost period. For a discussion of the economic elements involved, see Havighurst & Berman, *Requirement and Output Contracts,* 27 ILL. L. REV 1 (1932).

12. See McLaren, *Related Problems of "Requirements" Contracts and Acquisitions in Vertical Integration Under the Antitrust Laws,* 45 ILL. L. REV. 141 (1950).

13. "The difficulty [with the mutuality doctrine] is that the court must purport to make its decision on the basis of facts existing at the time the contract is entered into, whereas probably the most significant elements center around what happens in the course of dealing under the contract. What has happened cannot well be subordinated to speculation as to what might have happened. There is, perhaps, some flexibility in the use of the broad terms 'mutuality' and 'certainty.' . . . But the tendency to crystallize rules for recurring situations makes the flexibility only apparent." Havighurst & Berman, *Requirement and Output Contracts,* 27 ILL. L. REV. 1, 10 (1932)..

14. See Patterson, *"Illusory" Promises and Promisor's Options,* 6 IOWA L. BULL. 209, 223 (1921), reprinted in *Selected Readings on the Law of Contracts* 427 (1931).

15. See Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?,* 49 HARV. L. REV. 1225 (1936). See also Sylvan Crest Sand & Gravel Co. v. United States, 150 F.2d 642 (2d Cir. 1945); Wood v. Lucy, 222 N. Y. 88, 118 N. E. 214 (1917).

16. Fuchs v. Motor Stage Co., 135 Ohio St. 509, 21 N. E.2d 669 (1939). As to the confusion that has existed on this point, see Note, 24 A.L.R. 1352 (1923) and *In re* United Cigar Stores Co., 8 F. Supp. 243 (S.D. N.Y. 1934). Where a distributor has promised to buy its requirements and has also promised to push its sales and make reasonable and good faith efforts to obtain customers, some courts have indicated that the latter promises provide mutuality of obligation. Mills-Morris Co. v. Champion Spark Plug Co., F.2d 38 (6th Cir. 1925); Fred Allen Auto Supply Co. v. Johns-Manville Co., 211 Ill. App. 217 (1918); Schlegel v. Cooper, 231 N. Y. 459, 132 N. E. 148 (1921). But the decision is often otherwise. Miami Coco-Cola Bottling Co. v. Orange Crush Co., 296 Fed. 693 (5th Cir. 1924).

17. See note 13 *supra.*

mutuality. Such a contract imposes a definite obligation on the buyer.[18] Certainly the obligation is as mutual here as it is in an option contract where the buyer need buy nothing if he so chooses.[19]

The Loewus case not only emphasizes the inflexibility of the mutuality doctrine, but also exemplifies the inadequacy of adopting an arbitrary approach to the intricate problems confronting today's businessman. Loewus was obligated to buy certain of its wine requirements exclusively from Vischia. Yet, the New Jersey Supreme Court, rather than concern itself with Vischia's ability to determine future obligations, or with Loewus' opportunity to take advantage of price increase,[20] unhesitatingly accepted the artificial distinction between types of businesses and mechanically applied the mutuality doctrine.[21] By deciding that Loewus was entering a "new" business the question was settled[22]—all that followed was automatic. The exclusion of evidence that the contracting parties had previously discussed the buyers estimated future requirements was, therefore, considered as immaterial.[23]

A much more practical legal tool with which to check exploitation of seller by buyer where a requirements agreement has been entered into is the implied condition. Significantly, the proposed Uniform Commercial Code has adopted this approach in dealing with these contracts:

> A term which measures . . . the requirements of the buyer means such actual . . . requirements as may occur in *good faith*, except that no quantity unreasonably disproportionate to any stated estimate

18. Texas Co. v. Pensacola Maritime Corp., 279 Fed. 10 (5th Cir. 1922); *In re* United Cigar Stores Co., 8 F. Supp. 243 (S.D. N.Y. 1934); Jenkins v. City Ice & Fuel Co., 118 Fla. 795, 160 So. 215 (1935); Bartlett Springs Co. v. Standard Box Co., 16 Cal. App. 671, 117 Pac. 937 (1911). See 1 WILLISTON, CONTRACTS § 104a (rev. ed. 1937). 2 WILLISTON, SALES § 464a (3d ed. 1948); Patterson, *"Illusory" Promises and Promisor's Options*, 6 IOWA L. BULL. 209, 228 (1921), reprinted in *Selected Readings in the Law of Contracts* 431 (1931).

19. See, *e. g.*, Sylvan Crest Sand & Gravel Co. v. United States, 150 F.2d 642 (2d Cir 1937); Gurfein v. Werbelovsky, 97 Conn. 703, 118 Atl. 32 (1922).

20. There were discussions between Loewus and Vischia, at the time of entering the contract, as to Loewus's probable future requirements; and Loewus's orders, before Vischia declared the contract terminated, were reasonably steady. See Joint Appendix, Brief for Appellant and Respondent, p. 99a, G. Loewus & Co. v. Vischia, 65 A.2d 604 (N. J. 1949). But more interesting is the fact that Loewus had been in the wholesale business long before the contract in question was made..

21. "[Requirement contracts are], by weight of authority, held *mutual* and binding on the parties where, from the *nature* of the purchaser's business the quantity of the goods needed is subject to a reasonably accurate estimate." G. Loewus & Co. v. Vischia, 65 A.2d 604, 606 (N. J. 1949). If the sale of Loewus's bottling plant had been partly "in exchange" for Vischia's promise to sell bottled wines, a different result could have been reached. The contract of sale and requirements were entered "separately," however. This is enough to suggest that the law of consideration concerns itself greatly with formalism.

22. Although Loewus had been wholesaling bottled wines since 1895, (Joint Appendix, Brief for Appellant and Respondent, p. 22a, G. Loewus & Co. v. Vischia, 65 A.2d 604 (N. J. 1949), the court states: "A new business was created" since Loewus changed in 1942 to strictly wholesaling. G. Loewus & Co. v. Vischia, 65 A.2d 604, 609 (N. J. 1949)

23. See note 20 *supra*.

> or to any normal or otherwise comparable prior . . . requirements may be demanded. [This section] applies to contracts of non-producing establishments such as *dealers* or *distributors* as well as to manufacturing concerns. (emphasis added)[24]

The trend of modern cases is also in this direction.[25]

Although all requirements agreements should be regarded as valid when made,[26] there may be certain facts or conduct on the part of the buyer, occuring during the time set for performance, which would prevent the buyer from strictly enforcing the seller's promise.[27] Two types of implied conditions may be utilized in this connection: the first would compel the buyer to operate his business according to accepted commercial standards, so as to have reasonably foreseeable requirements. A manufacturer, for example, will normally operate without extreme fluctuations, whereas a retailer can usually be expected to push sales whenever possible.[28] An unreasonable deviation on the part of either would be prima facie evidence that the requirements agreement was to be used as an instrument for unfair price speculation.[29] This, of course, as in the case of any other type of bad faith dealing, would terminate the contract, discharge the seller, and render the buyer liable for damages.[30]

The second type of condition would only partially relieve the seller from his obligation. The presumption of bad faith arising from an extensive in-

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24. § 2-306(1) (Spring 1950) and comment 2 (May 1949).

"By drawing into issue the 'normal requirements' and 'good faith' of the buyer, courts have made the elements in the subsequent course of dealing material matters for consideration. That is the advantage of this treatment. The degree of expansion of the business, the cause of expansion, the knowledge of the seller as to the condition of the business, the foreseeability of circumstances making the seller's performance onerous—all these become matters of legitimate inquiry. At the same time it is possible to control the buyer without denying all relief." Havighurst & Berman, *Requirement and Output Contracts*, 27 ILL. L. REV. 1, 13 (1932).

25. Brightwater Paper Co. v. Monadock Paper Mills, 161 F.2d 869 (1st Cir. 1947); Mills-Morris Co. v. Champion Spark Plug Co., 7 F.2d 38 (6th Cir. 1925); Pittsburgh Plate Glass Co. v. Jarrett, 42 F. Supp. 723 (N.D. Ga. 1942); *In re* United Cigar Stores Co., 8 F. Supp. 243 (S.D. N.Y. 1934); Match Corp. of America v. American Match Corp., 285 Ill. App. 197, 1 N. E.2d 867 (1936); Jenkins v. City Ice & Fuel Co., 118 Fla. 795, 160 So. 215 (1935). Also compare annotation in 14 A.L.R. 1300 (1921) with annotations in 24 A.L.R. 1352 (1923) and 74 A.L.R. 476 (1931).

26. 1 WILLISTON, CONTRACTS § 44 (rev. ed. 1937). See also Patterson, *"Illusory" Promises and Promisor's Options*, 6 IOWA L. BULL. 209 (1921), reprinted in *Selected Readings on the Law of Contracts* 415 *et seq.* (1931). "The damage may be uncertain, especially if the buyer is a wholesaler or distributor or engaged in a new business, so that an award of substantial damages may not be feasible, but the existence of a valid contract is clear." Jenkins v. City Ice & Fuel Co., 118 Fla. 795, 797, 160 So. 215, 216 (1935).

27. See note 24 *supra*.

28. The proposed Uniform Commercial Code § 2-306, comment 2 (May, 1949) states: ". . . the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards so that his . . . requirements will approximate a reasonably foreseeable figure."

29. See Mills-Morris Co. v. Champion Spark Plug Co., 7 F.2d 38 (6th Cir. 1925).

30. See N. Y. Cent. Iron Works Co. v. United States Radiator Co., 174 N. Y. 331, 66 N. E. 967 (1903).

crease in requirements should be rebutted if the buyer can show that he had no intention of taking an unfair advantage of price increases. In such a case the seller should not be discharged from his obligation entirely, but only from that part which to him was unforseeable.[31] Relevant to this determination are previous or normal requirements prior to the formation of the contract.[32] A prior estimate would be of particular importance in cases involving a new business having no previous requirements.

The intricacies of modern business make requirements agreements a near necessity. They are beneficial not only to the immediate parties, but to the consuming public as well;[33] and since harm results only through subsequent fraudulent manipulations, any device which places these agreements in their true perspective should be employed.[34] To be effective, a court's application of commercial law governing the everyday affairs of businessmen must be tempered by a thorough understanding of good business practice and commercial standards.[35]

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31. William C. Atwater & Co. v. Terminal Coal Corp., 32 F. Supp. 178 (Mass. 1940); *In re* United Cigar Stores Co., 8 F. Supp. 243 (S.D. N.Y. 1934); Southwest Natural Gas Co. v. Oklahoma Portland Cement Co., 102 F.2d 630 (10th Cir. 1939), cited with approval in proposed Commercial Code § 2-306, comment 2 (May, 1949). See also 2 WILLISTON, SALES § 264 (3d ed. 1948).

32. Chalmers & Williams v. Walter Bledsoe & Co., 218 Ill. App. 363 (1920); Scott v. Stevenson Co., 130 Minn. 151, 153 N. W. 316 (1915).

33. See note 8 *supra*.

34. See note 13 *supra*.

35. The proposed Commercial Code § 2-306, comment 1 (May, 1949), states that the general approach of the Code "requires the reading of commercial background and intent into the language of any agreement and demands good faith in the performance of that agreement." See Comment, 62 HARV. L. REV. 1376 (1949), for an enlightening discussion of private lawmaking by trade associations.