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Evolving Sales Law: Highlights of the Shifting Landscape of Arkansas Purchasing Law

Sarah Howard Jenkins
University of Arkansas at Little Rock William H. Bowen School of Law, shjenkins@ualr.edu

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For more than a decade, Article 2 of the Uniform Commercial Code ("U.C.C." or "the Code") has been the subject of microscopic inspection by various interest groups, scholars, and drafting committees seeking to update, modernize, and clarify its provisions.[1] Despite numerous attempts at revision, Article 2 received only modest adjustments to its provisions in 2002.[2] At this writing, none of the promulgated amendments have been codified by a state legislature.

This article addresses the impact of significant changes in the text of Article 1 as well as the potential impact of some of the proposed amendments to Article 2 on existing Arkansas

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* The author is a Visiting Professor of Law, University of Houston Law Center; B.A., 1969, Hanover College; M.A., 1970, J.D. 1982, University of Kentucky. The author wishes to thank research assistants Melanie Alsworth, University of Arkansas at Little Rock, J.D. 2002, Debora Inman, Joseph I. Easter, J.D.s expected 2005, Vera M. Chenault, J.D. expected 2006, University of Arkansas at Little Rock, and David M. Paz, University of Houston Law Center, J.D. expected 2006, for their assistance.

1. For a sampling of the scholarly commentary on the revision process and the revised article, see Peter A. Alces & David Frisch, *On the UCC Revision Process: A Reply to Dean Scott*, 37 WM. & MARY L. REV. 1217 (1996); Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541 (2000); Raymond T. Nimmer et al., *License Contracts Under Article 2 of the Uniform Commercial Code: A Proposal*, 19 RUTGERS COMPUTER & TECH. L.J. 281 (1993); Daniel T. Ostas & Frank P. Darr, *Redrafting U.C.C. Section 2-207: An Economic Prescription for the Battle of the Forms*, 73 DENV. U. L. REV. 403 (1996); Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683 (1999); Robert E. Scott, *Is Article 2 the Best We Can Do?*, 52 HASTINGS L.J. 677 (2001); Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607 (2001); Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT'L L. & BUS. 165 (1995); Giuseppe Tucci, *The Adequacy and Efficiency of American Commercial Law*, 29 LOY. L.A. L. REV. 1137 (1996); Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43 (1991).

2. *See* The National Conference of Commissioners on Uniform State Laws, Drafts of Uniform and Model Acts, *available at* http://www.law.upenn.edu/bll/ulc/ulc.htm (last visited Nov. 5, 2004).

sales law. This article also compares the Vienna Convention on Contracts for the International Sale of Goods ("the Convention") and other relevant international contract law with Article 2 provisions. Eleven nations, including the United States, ratified the Convention by December 11, 1986, with the Convention becoming effective on January 1, 1988.[3] Consequently, the Convention may be the applicable law for a sales transaction before Arkansas courts and, pursuant to the Supremacy Clause, must be applied by the Arkansas courts rather than the domestic sales law, Article 2. The parties may, however, expressly opt out of the Convention or modify its effect.[4] At this writing, sixty-three nations are contracting states to the Convention and contracts for the sale of goods between parties whose places of business are in these different states are subject to the Convention.[5] The Convention is also applicable to transactions between parties if only one party has its place of business in a contracting state and the application of private international law rules, conflict of law rules, point to the law of the contracting state, unless that state made a reservation to be subject to the Convention only when both parties had places of business in contracting states.[6]

The purpose of this article is to assist lawyers, judges, purchasing managers, and students in understanding the current and evolving state of sales law in Arkansas; to review the current state of Arkansas purchasing law; to provide insight into the subtle nuances between the Convention and Article 2 despite the similarity of language in the two bodies of laws; and to assist the legislature in its determination of whether it should codify the recent revisions of Article 1 and amend Article 2. Part I of this article discusses two major revisions of Article 1 and the resulting impact on existing sales law if codified by the

3. *See generally* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 3 (3d ed. 1999).

4. *See* Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Apr. 10, 1980, S. Treaty Doc. 9, 98th Cong., 1st Sess. (1983), *reprinted in* 19 I.L.M. 668, 689 (1980) [hereinafter C.I.S.G.].

5. C.I.S.G., *supra* note 4, at art. 1(1)(a). To determine whether a nation is a contracting state, visit www.UN.ORG/Depts/Treaty or http://untreaty.un.org.

6. C.I.S.G., *supra* note 4, at art. 1(1)(b). The United States, China, Czech Republic, Singapore, Slovakia, St. Vincent, and the Grenadines made such a reservation under Article 95 of the Convention.

Arkansas Legislature. Part II reviews and evaluates the current state of buyer's goods-oriented remedies of rejection and revocation of acceptance, a seller's right to cure, and a buyer's obligation upon exercising either the right to reject or to revoke acceptance. These remedies may be coupled with a buyer's exercise of the right to cover by acquiring substitute goods. This right to cover and the limitations imposed on that right are likewise highlighted. Finally, Part III evaluates the current state of the exemptions for non-performance as set forth in sections 2-613 and 2-615 of the U.C.C. and questions the lack of parity between the statutory privilege granted to the seller but not the buyer with a recommendation for eliminating the lacuna.

I. REVISED ARTICLE 1 AND ITS IMPACT ON ARKANSAS SALES LAW

Revised Article 1[7] contains several changes, which, if enacted by the Arkansas Legislature, will significantly impact sales law as it exists in the state. The proposed changes discussed below focus on two important provisions of the revised article: 1) section 1-103,[8] the coordination of supplemental principles of common law and equity and the Code, and 2) section 1-301,[9] the choice of law provision.

A. Supplementation of the Code with Principles of Common Law and Equity

Current section 4-1-103 of the Arkansas Code is a rule of construction of paramount significance in understanding the rights and obligations of commercial parties but is often overlooked when the rights and obligations of the parties are addressed.[10] Section 4-1-103 permits supplementation of the Code with principles of both common law and equity unless these principles are displaced by provisions of the Code.[11]

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7. *See id.*
8. *See* U.C.C. § 1-103 (2001).
9. *See* U.C.C. § 1-301 (2001).
10. *See* ARK. CODE ANN. § 4-1-103 (Repl. 2001).
11. "Unless displaced by the particular provisions of this [a]ct, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, [b]ankruptcy, or other validating or invalidating cause shall supplement its provisions."

Although official comment one to section 1-103 of the Code acknowledges "the continued applicability of *all* supplemental bodies of law except insofar as they are explicitly displaced by [the] Act," courts have taken diverging positions in construing the purpose and function of section 1-103 and the resulting applicability of principles of common law and equity to a commercial transaction within the ambit of the Code.[12] Revised Article 1, therefore, seeks to provide guidance on when displacement occurs as a means of clarifying and simplifying commercial law and promoting uniformity in construction of the relationship between the Code and the principles of common law and equity.

1. *Patterns of Displacement*

Four basic trends in the construction of section 1-103 have emerged from courts across the country. The first approach is a broad displacement of common law and equitable principles by the existence of a particular provision or provisions within the Code.[13] If a Code provision applies to the facts or grants

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ARK. CODE ANN. § 4-1-103; *see also* U.C.C. § 1-103.

12. U.C.C. § 1-103 cmt. 1 (emphasis added).

13. Stefano v. First Union Nat'l Bank of Va., 981 F. Supp. 417 (E.D. Va. 1997). In *Stefano*, a co-payee brought an action against a bank for conversion of checks under revised section 3-420 and common law conversion. *Id.* at 420. The court in this case emphasized that "[t]he common law cause of action for conversion [was] displaced by the Code only in circumstances where [the Code] applies." *Id.* Thus, if a Code provision specifically applies to the facts of the case, the common law is displaced, and if not, the cause of action survives. *Id.* The court construed the broad statement of the general applicability of common law conversion in section 3-420 as limited to those claims of conversion of a negotiable instrument not specifically covered by section 3-420. *Id.* at 421 (stating that where the Code provides the elements necessary to state a claim, the common law is displaced where it differs from the noted requirements); *see* Great Lakes Higher Educ. Corp. v. Austin Bank of Chicago, 837 F. Supp. 892 (N.D. Ill. 1993). In *Great Lakes*, the drawer and drawee sued the depositary bank for negligence, breach of presentment warranties, and conversion for receiving checks for collection without an indorsement. *Id.* at 893-94. Here the court found that the Code provisions need not "expressly" bar a common law claim. The presence of other remedies under the U.C.C. rendered the common law negligence claim unnecessary. *Id.* at 896; *see* Carlisle Corp. v. Uresco Constr. Materials, Inc., 823 F. Supp. 271 (M.D. Pa. 1993). In *Carlisle Corp.*, a manufacturer brought an action for payment of outstanding purchase orders, and a distributor counterclaimed for breach of agreement and sought to set-off its damages against the amount it owed. *Carlisle Corp.*, 823 F. Supp. at 272. The court held common law set-off unavailable. *Id.* at 275 (citing Microsize, Inc. v. Arkansas Microfilm, Inc., 29 Ark. App. 49, 55, 780 S.W.2d 574, 578 (1989)). The "Code sections 'occupy the legal field' except insofar as they do not 'particularly' displace pre-existing legal principles." *Id.*

remedial relief, the common law is deemed displaced even in the absence of express language resulting in displacement. For example, a negligence claim seeking consequential and punitive damages, when sought in addition to a claim for conversion under former section 3-419 was held displaced by the remedial relief provided within former Article 3.[14] Section 3-419, a particular provision, was held to have supplanted the payee's negligence action and foreclosed the recovery of consequential damages.[15] Because recovery under the section was limited to the face amount of the instrument, consequential damages were not recoverable.[16] However, no particular provision displaced

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Because the Code specifically addressed set-off under section 2-717, the common law rule of set-off was found to be displaced by the particular provision. *Id.* Although section 2-717 was not applicable in this case, the court considered the fact that the Code provided for set-off in this situation evidence that Code drafters intended to displace set-off except where explicitly allowed. *Carlisle Corp.*, 823 F. Supp. at 275; *see* Roy Supply, Inc. v. Wells Fargo Bank, N.A., 46 Cal. Rptr. 2d 309, 318 (Cal. Ct. App. 1995). In *Roy Supply*, a corporate customer sued a bank alleging negligent payment of forged checks. *Roy Supply*, 46 Cal. Rptr. 2d at 311. Here, a customer's negligence claim was displaced by the particular provisions of section 4-406 that "expressly cover the allegations of plaintiffs' complaint." *Id.* at 318; *see* Flavor-Inn, Inc. v. NCNB Nat'l Bank of S.C., 424 S.E.2d 534 (S.C. Ct. App. 1992). In *Flavor-Inn*, a payee sued a depositary bank to recover for payment on forged indorsements asserting a negligence claim and seeking consequential and punitive damages, as well as a conversion claim under former section 3-419. *Flavor Inn*, 424 S.E.2d at 535. The court held that section 3-419 supplanted the payee's negligence action and foreclosed recovery of consequential damages because recovery under section 3-419 was limited to the face amount of the instrument. *Id.* at 536-37. However, no particular provision displaced the common law rule permitting recovery of punitive damages if the standards were met. *Id.* at 537; May v. Westfield Vill., L.P., 51 U.C.C. Rep. Serv. 2d 752 (Ohio Ct. App. 2003). The appellee in *May* was the transferee of a note that contained a cognovit judgment, confession of judgment clause. The maker of the note sought relief from the judgment previously entered on the grounds that cognovit provisions were, at common law, personal to the payee of the note and could not be transferred. The court relying on U.C.C. revised section 3-203 held the common law authority was displaced. The specific provision of Article 3's shelter doctrine vested the transferee the same rights as the transferor to enforce the cognovit judgment provision. *Id.*; *see* Miller-Rogaska, Inc. v. Bank One, Tex., N.A., 931 S.W.2d 655 (Tex. Ct. App. 1996). In *Miller-Rogaska*, the payee of a misdelivered check sued the depository bank for conversion of the misdelivered instrument. *Miller-Rogaska*, 931 S.W.2d at 659. Texas common law permitted one entitled to possession of property to prevail on a claim for conversion. *Id.* at 662. Because this right of recovery conflicted with possession requirements of former section 3-419, the Code provision displaced common law conversion under these facts because "common-law claims may only exist to the extent they do not conflict with code provisions." *Id.*

14. *See, e.g.*, *Flavor-Inn*, 424 S.E.2d 534.
15. *Id.* at 536-37.
16. *Id.* at 537.

the common law rule permitting recovery of punitive damages.[17]

The second trend of cases regarding displacement recognize implied displacement from the structure, purposes, and policies of the Code.[18] These cases demonstrate that the legislature's intent to displace the common law rests not only upon the existence of a particular provision but also upon the entire code scheme—its purposes and policy goals as reflected in current section 1-102, the relevant article, the drafting history of the pertinent provisions, and the structure of remedial relief

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17. *Id.*

18. *See* Berthot v. Security Pac. Bank of Ariz., 823 P.2d 1326, 1330-31 (Ariz. Ct. App. 1991). In *Berthot*, the payee of two checks brought an action alleging negligence and breach of contract against the payor bank for wrongfully paying proceeds of checks to the payee's father based upon forged indorsements. *Id.* at 1327. The overlapping nature of the common law and Code theories of negligence and the overlapping nature of the claims and conflicting burdens of proving elements of "due care" and common law negligence "demonstrated an intended displacement of the negligence cause of action." *Id.* at 1330. The court defined "reasonable commercial standard" as the equivalent of "due care." *Id.* at 1329; *see* Trinidad Bean & Elevator Co. v. Frosh, 494 N.W.2d 347 (Neb. Ct. App. 1992). In *Frosh*, a buyer who had pursued an action against a seller for breach of contract appealed the court's instruction to the jury on mitigation of damages under section 2-713. *Frosh*, 494 N.W.2d at 348-49. After construing "learned of the breach," in the context of an anticipatory repudiation to mean the time at which the buyer "learned of the repudiation," the court found that the policies of section 2-713 were inconsistent with the defense of mitigation of damages. *Id.* at 353-55. Thus, although the buyer's damages were to be measured on the date of repudiation, if covering on that date was commercially unreasonable the buyer had, under Code policy, a reasonable time thereafter to cover. *Id.* at 355; *see* First Interstate Bank of Or., N.A. v. Wilkerson, 876 P.2d 326 (Or. Ct. App. 1994). In *First Interstate Bank*, a customer appealed the court's application of the subjective standard of good faith to the bank's payment of an overdraft check drawn by a joint account holder instead of using the common law objective standard of good faith. *First Interstate Bank*, 876 P.2d at 327. Since the U.C.C. does not expressly state that the duty of good faith set forth therein replaces the common law duty, the court determined that the purposes of the U.C.C. were promoted by supplanting the common law duty with a statutory definition. *Id.* at 329. Following *United States National Bank of Oregon v. Boge*, 814 P.2d 1082 (Or. 1991), the court held the common law duty of good faith was displaced by section 1-201(19). *Id.*; *see also Boge*, 814 P.2d 1082. In *Boge*, a bank sued to recover on promissory notes. *Boge*, 914 P.2d at 1083. The borrower counterclaimed that the bank breached its duty to act in good faith. *Id.* The jury awarded damages to both parties. *Id.* On appeal the bank argued that the common law duty of good faith, as the trial court instructed the jury, did not apply to transactions governed by Article 9. *Id.* The court identified four indicators of the legislature's intent to displace the common law under section 1-103: 1) the subject matter and completeness of the relevant Code terms, 2) the structure of the Code, 3) the purposes of the Code delineated in section 1-102, and 4) the drafting history of the pertinent provisions of the Code. *Id.* at 1087-89. The goal of this analysis was to determine whether the terms of the Code provisions left a logical gap that needed to be filled by some other source of law. *Boge*, 814 P.2d at 1087-89.

available.[19] The court in *United States National Bank of Oregon v. Boge*,[20] identified four factors as indicators of legislative intent to displace the common law: 1) the subject matter and completeness of the terms of the relevant Code provisions, 2) the structure of the Code, 3) whether the policy goals of the Code delineated in section 1-102 are furthered by displacing the asserted common law or equitable principle, and 4) the drafting history of the pertinent Code provisions.[21] Unless this assessment establishes the existence of a logical gap in the Code, the asserted supplemental law is deemed displaced.[22] In other words, if the analysis reveals a logical gap in the Code, then supplementation is warranted and the relevant common law or equitable principle has not been displaced.[23] The commentary to revised Article 1 adopts this approach to displacement, concluding that revised section 1-103, the Code's rule of construction and statement of its underlying policy goals, is the particular provision that displaces the relevant common law or equitable principle.[24] Conversely, a third approach recognizes supplementation if circumstances, competing policies, or the nature of the relief sought, justify supplementation.[25]

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19. *See, e.g.*, *Boge*, 814 P.2d at 1087.

20. 814 P.2d 1082.

21. *Id.* at 1087-89.

22. *Id.* at 1087.

23. *See In re* Advance Insulation & Supply, Inc., 176 B.R. 390 (Bankr. D. Md. 1994). In *Advanced Insulation*, the secured creditor sued the Chapter 7 trustee for turnover of funds held by the trustee and sought a declaratory judgment stating that the creditor held a perfected, first priority security interest in funds generated from pre-petition bulk sales. *Id.* at 393. The court stated that "[t]he enactment of Article 9 of Uniform Commercial Code has not displaced the common law doctrine of subrogation." *Id.* at 399 (citing Finance Co. of Am. v. United States Fid. & Guar. Co., 353 A.2d 249, 254 (Md. 1975)). The *Finance Co.* court stated "[n]othing in the provisions of Title 9 regarding secured transactions expressly or implicitly refutes the application of subrogation; in fact, [section] 9-102 implicitly recognizes the continued vitality of the doctrine." *Finance Co. of Am.*, 353 A.2d at 253.

24. *Boge*, 814 P.2d at 1089; U.C.C. § 1-102 cmt. 2.

25. *See* Ed Peters Jewelry Co. v. C & J Jewelry Co., 124 F.3d 252 (1st Cir. 1997). In *Ed Peters Jewelry*, a sales agent appealed the dismissal of a successor liability claim after a foreclosure sale of the debtor's assets. *Id.* at 258. Distinguishing the discharge of the lien from the discharge of the underlying obligation, the court of appeals determined that the nature of the "foreclosure process [could not] preempt the successor liability inquiry." *Id.* at 267. Further, section 9-504 of Rhode Island's Article 9 neither explicitly nor impliedly preempted the successor liability doctrine. *Id.* at 268; *see* First Valley Leasing, Inc. v. Goushy, 795 F. Supp. 693 (D.N.J. 1992). In *Goushy*, an equipment buyer filed suit against

At the other end of the spectrum, reflecting a fourth approach, several courts require an explicit provision in the Code displacing the common law rule or equitable principle[26]

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the seller alleging common law fraud, breach of contract, and breach of a New Jersey consumer fraud statute. *Goushy*, 795 F. Supp. at 695. The buyer was not prevented from recovering fraud damages for purely economic loss where the seller and the buyer's lessee allegedly conspired to defraud the buyer by having the seller submit an invoice for goods that it did not own. *Id.* at 701. Determining that the dispute involved a primary claim of fraud and was not "essentially contractual in nature," the district court opined that the New Jersey Supreme Court would permit the buyer to pursue its claim for tort damages. *Id.* at 700. The court did not address section 2-721 in its analysis. *See id.* Similarly, in *D'Angelo v. Miller Yacht Sales*, 619 A.2d 689 (N.J. Super. Ct. App. Div. 1993), the court held that the buyer's recovery for economic loss was limited to Code remedies, but section 1-103 saved the buyer's common law fraud and Consumer Fraud Act claims arising from the same transaction. *Id.* at 690; *see* G.P. Publ'ns, Inc. v. Quebecor Printing-St. Paul, Inc., 481 S.E.2d 674 (N.C. Ct. App. 1997). In this case, an unsecured creditor contested the sale of a debtor's assets to the purchaser at a foreclosure sale, asserting successor liability. *G.P. Publ'ns*, 481 S.E.2d at 677. Although recognizing the strong public policy favoring discharge of subordinate claims after a U.C.C. foreclosure sale, the court held that "nothing in [section] 9-504" absolutely precluded successor liability based on a new corporation being a continuation of the prior debtor corporation. *Id.* at 679, 682. Given the strong public policy favoring discharge of subordinate claims, the court limited the standard to be applied in determining successor liability on the theory of "mere continuation" to the traditional test. *Id.* at 682.

26. Occidental Chem. Corp. v. Environmental Liners, Inc., 859 F. Supp. 791 (E.D. Pa. 1994). In *Occidental Chemical*, the debtor tendered a check in full satisfaction of a disputed claim; the creditor negotiated the check and sued for the difference asserting that section 1-207 displaced the common law principles of accord and satisfaction. *Id.* at 792, 795-96. First, the court concluded that the scope of the terms of section 1-207 were inapplicable to accord and satisfaction and that the purpose of section 1-207 would not be furthered by its application. *Id.* at 796. Second, the court predicted that the Pennsylvania Supreme Court would conclude that under section 1-103 the common law doctrine was retained "where not expressly superseded" with specific language in the statute or its comments. *Id.* at 797; *see* Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1092 (Del. 1995) (holding that section 1-207 and its comments did not displace the Delaware common law doctrine of accord and satisfaction); *see also* Felde v. Chrysler Credit Corp., 580 N.E.2d 191 (Ill. App. Ct. 1991). In *Felde*, a buyer sued the seller's assignee to rescind a retail installment sales contract for the purchase of a defective car. *Felde*, 580 N.E.2d at 193. The court held that rescission was a proper remedy for breach of warranty and that section 2-714 did not contain language precluding buyers from seeking the remedy of rescission. *Id.* at 198; Fleet Nat'l Bank v. Liberty, 845 A.2d 1183 (Me. 2003). In *Fleet*, Liberty issued three promissory notes to Fleet in 1992 that were signed before attesting witnesses. Thereafter, Liberty defaulted on all three notes. Fleet commenced its action in 2002. A state statute authorized a twenty-year statute of limitations for promissory notes signed before an attesting witness. U.C.C. revised section 3-118(a) provided a six-year limitations period. Although holding on the narrow basis of the inapplicability of the revised article to instruments issued before the effective date of the revised statute, the court addressed the relationship between the two statutes. Noting the absence of a provision explicitly displacing the twenty-year statute, the court held the twenty-year limitations period applicable to attested promissory notes and said that the Code provision,

before prohibiting supplementation. Sections 2-205, 2-207, and 2-209 are examples of provisions containing terms explicitly displacing the common law. Some courts within this fourth approach adopt a narrow view of displacement by an explicit provision. For example, in *First Interstate Bank of Oregon, N.A. v. Wilkerson*,[27] the court stated that unless the express terms of the relevant Code provision occupied the field, all relevant common law and equitable principles supplement the Code.[28] In an action under Article 3 for conversion of an instrument, the court in *Hecker v. Ravenna Bank*[29] held that the elements of tortious conversion of a negotiable instrument were not covered by section 3-419 and, consequently, this provision did not displace the common law principle.[30] The court reached this conclusion after examining section 3-419, which expressly addressed the remedial right sought by the litigant and after reviewing the variety of methods by which an instrument might be converted.[31] Thus, the court concluded that section 3-419 did not occupy the field and that supplementation was warranted.

Revised Article 3 no longer limits the remedial relief for conversion to the conduct expressed in former section 3-419, such as the payment of an instrument bearing a forged or unauthorized indorsement or paying an instrument omitting

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a statute of general applicability, governed the limitations period for unattested negotiable instruments. *See also* Bank One, Dearborn, N.A. v. Maisel, 52 U.C.C. Rep. Serv. 2d 963 (N.D. Cal. 2004) (requiring explicit language displacing California's common law rule of restitution for mistaken payment despite a substantially similar provision authorizing restitution for mistaken payment, revised section 3-418); Wisner Elevator Co., Inc. v. Richland State Bank, 862 So. 2d 1112 (La. Ct. App. 2003) (citing the commentary to U.C.C. section 1-103 and holding that the common law principle of waiver supplemented the applicable Code section on restrictive indorsements; the court also noted that commentary on restrictive indorsements explicitly authorized supplementation by the common law principles of waiver).

27. 876 P.2d 326; *see also* Johnson v. Creager, 76 P.3d 799 (Wyo. 2003). In *Johnson*, a mobile home vendor brought a replevin action because of the purchaser's failure to make timely payment. In response to the purchaser's argument that the U.C.C. displaced the remedial device of replevin, the Court held that the U.C.C. was not intended to supplant remedies such as replevin, but rather to supplement them.

28. *Wilkerson*, 876 P.2d. at 329 n.6.

29. 468 N.W.2d 88 (Neb. 1991).

30. *Id.* at 92, 95 (discussing a customer suing bank asserting conversion of a cashier's check when, after issuing the check, bank stopped payment on the check and applied the proceeds to an outstanding loan).

31. *Id.* at 94-95.

terms regarding the indorsement of a joint payee.[32] Indeed, the revised article expressly authorizes the application of the general law of the conversion of personal property to instruments.[33] Therefore, recovery for acts constituting conversion of an instrument at common law or equity are now cognizable under the revised article.

2. *Displacement in Arkansas Cases*

Existing Arkansas case authority employs conflicting approaches for determining the displacement of the common law. *Walker v. Grant County Savings and Loan Association*[34] provides an example of the broad displacement reflected in the first trend of cases. Here, the Arkansas Supreme Court rejected the savings and loan's assertion that the debtor's post default conduct, including a purported oral agreement to a private sale of the repossessed collateral, constituted a waiver of the required written notice of the private sale of the collateral or gave rise to equitable estoppel barring the assertion of the absence of adequate notice.[35] After considering the enumerated rights of the debtor upon default, the court, in requiring that notices and modifications relating to the sale be in writing, deemed any other interpretation inconsistent with the "clear policy reason underlying the Article 9 default provisions."[36] Therefore, not only did the court consider the express terms of the relevant sections, it also considered the policies and purposes of the Article 9 default provisions which include protecting a post-

32. ARK. CODE ANN. § 4-3-420(a) (Repl. 2001).

33. ARK. CODE ANN. § 4-3-420(a).

34. 304 Ark. 571, 803 S.W.2d 913 (1991); *see also* Adams v. Wacaster Oil Co., 81 Ark. App. 150, 98 S.W.3d 832 (2003). In *Adams*, the buyer purchased aviation fuel from the seller for use in its crop-dusting service. After the purchase, the buyer's plane crashed. The Federal Aviation Administration investigation showed that the plane was not using the proper fuel. The buyer sued the seller asserting claims for breach of Article 2 express and implied warranties, including the implied warranty of fitness for a particular purpose, and breach of contract. The seller argued that the buyer failed to provide reasonable notice of the breach as required by Arkansas Code Annotated section 2-607(3)(a). Affirming the trial court's granting of summary judgment to the seller, the Arkansas Court of Appeals concluded the buyer's claim for breach of contract was displaced by provisions of Article 2 and the notice requirement for Article 2 was a condition precedent to recovery under Article 2.

35. *Walker*, 304 Ark. at 576-77, 803 S.W.2d at 916.

36. *Id.*

default debtor from overbearing tactics and intimidation by a secured party in a position of dominance and control.[37] Thus, the principle of equitable estoppel did not supplement the requirement of a post-default written agreement; the principle was displaced by the post-default provisions and the underlying policies and purposes of those provisions.

A second opinion of the Arkansas Supreme Court, *Gordon v. Planters & Merchants Bancshares, Inc.*[38] obscures the perception that the court would adhere to the broad view of the displacement of common law and equity Code provisions, as reflected in *Walker*.[39] In *Gordon*, the court was faced with the issue of whether punitive damages were recoverable under section 4-215(d).[40] In making its determination, the court analyzed the section 1-106 directive to liberally administer remedies and also examined the section's prohibition on the recovery of consequential, special, or penal damages.[41] In its construction of section 1-106,[42] the *Gordon* court identified three prevailing approaches used in awarding consequential, special, or penal damages. Courts employing the first approach hold that consequential, special, or punitive damages may be awarded unless a particular provision of the Code directly prohibits such an award and, supplementation occurs unless recovery is explicitly displaced.[43] A second approach used by the courts allows consequential, special, or punitive damages to be awarded only if expressly authorized by the provisions of the Code or if available by an analogical extension of the Code. The effect of this position is that the remedial provisions of the Code impliedly displace the recovery of special damages unless

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37. *Id.*
38. 326 Ark. 1046, 935 S.W.2d 544 (1996).
39. *Id.* at 1052-53, 935 S.W.2d at 547-48.
40. *Id.*
41. *Id.*; *see also* ARK. CODE ANN. § 4-1-106 (Repl. 2001).
42. ARK. CODE ANN. § 4-1-106. This section states:

> (1) The remedies provided by this subtitle shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this subtitle or by other rule of law.
> (2) Any right or obligation declared by this subtitle is enforceable by action unless the provision declaring it specifies a different and limited effect.

ARK. CODE ANN. § 4-1-106.
43. *Gordon*, 326 Ark. at 1052-53, 935 S.W.2d at 547.

expressly provided or available by extension of the Code.[44] The third approach takes an intermediary position that allows the imposition of damages if authorized by principles of common law and equity that supplement the provisions of the Code through section 1-103.[45] After describing the various approaches to section 4-1-106, the court rejected the second approach in its construction of the Code which mandates the filling of gaps in the Code through the use of analogy and extrapolation rather than resorting to common law.[46] The rejected construction is consistent with the broad displacement approach to section 1-103 reflected in *Walker*, requiring an assessment of whether such damages are consistent with Code policy as reflected by current section 1-102 and Article 4 of the U.C.C.[47]

The effect of the court's ruling in *Gordon* is a construction that section 4-1-103 does not displace the availability of punitive damages when punitive damages are not authorized by the provisions of the Code. In dicta, the court adopts a construction of section 4-1-106 that permits the award of punitive damages unless provisions of the Code expressly prohibit such an award.[48] "[T]his court . . . indicated that punitive damages can be awarded for Article 4 violations where the statute does not specifically prohibit them without the necessity that an alternative, common law tort be pled."[49] The substance of this position is that express language is required in a provision before displacement of a common law right to punitive damages can occur. This approach falls within the narrow view to explicit displacement. Under the narrow approach to displacement, all principles of common law and equity co-exist with the Code in the absence of express language to the contrary. Such a construction of the Code defeats the stated

44. *Id.* (stating that "courts should not go beyond the Code for answers to problems that are not specifically addressed therein").

45. *Id.* at 1053, 935 S.W.2d at 547.

46. *Id.* at 1055, 935 S.W.2d at 549.

47. *Walker*, 304 Ark. at 576, 803 S.W.2d at 916.

48. *Gordon*, 326 Ark. at 1053, 935 S.W.2d at 548.

49. *Id.* at 1055, 935 S.W.2d at 549. *But see* Bank of Am. v. C.D. Smith Motor Co., 353 Ark. 228, 106 S.W.3d 425 (2003) (affirming the trial court's holding that Arkansas Code Annotated section 16-64-130 prohibits the recovery of punitive damages in a civil action against a financial institution for a breach of contract arising from the loan of money or the extension of credit).

policy goals of section 4-1-102 that the Code should be liberally construed to clarify, simplify, and make commercial law uniform among the jurisdictions.[50]

Section 4-4-103 treats any violation by a bank of its prescribed duties or responsibilities under Article 4 as a failure to exercise ordinary care.[51] One such duty is the granting of a final settlement on an item by a collecting bank to a customer upon final payment by the payor bank.[52] The appellee in *Gordon* received such a settlement. Section 4-4-103, in relevant part, provides that recovery for a failure to exercise ordinary care is limited to the amount of the item unless the actions occurred in bad faith.[53] If occurring in bad faith, the customer is entitled to damages suffered as a proximate consequence.[54] Punitive damages however, are not damages proximately caused by conduct but are imposed to penalize wrongful conduct.[55] The question then, is whether the Arkansas Legislature intended to displace the recovery of punitive damages. Section 4-4-103(e) clearly authorizes recovery of compensatory damages proximately caused by the bad faith conduct of the bank.[56] The

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50. ARK. CODE ANN. § 4-1-102 (Repl. 2001).

> (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
>
> (2) Underlying purposes and policies of this subtitle are:
>
> (a) to simplify, clarify and modernize the law governing commercial transactions;
>
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
>
> (c) to make uniform the law among the various jurisdictions.

ARK. CODE ANN. § 4-1-102; *see also* Revised U.C.C. § 1-103(a) (2004).

51. *Gordon*, 326 Ark. at 1053-54, 935 S.W.2d at 548-49.

52. ARK. CODE ANN. §§ 4-1-103, 4-4-215 (Repl. 1999).

53. *Gordon*, 326 Ark. at 1053-54, 935 S.W.2d at 548.

54. *Id.* at 1054, 935 S.W.2d at 548.

55. *See* HCA Health Servs. of Midwest, Inc. v. National Bank of Commerce, 294 Ark. 525, 533, 745 S.W.2d 120, 125 (1988) (distinguishing the standard for punitive damages, whether the appellant knew or ought to have known, in the light of the surrounding circumstances, that its conduct would naturally or probably result in injury and that it continued such conduct in reckless disregard of the circumstances from which malice may be inferred, and compensatory damages proximately caused by the defendant's mere negligence).

56. *See* AmSouth Bank, N.A. v. Spigener, 505 So. 2d 1030, 1037 (Ala. 1986) (holding that punitive damages are not recoverable under U.C.C. section 4-103; a separate tort must be established); Drier v. Chase Manhattan Bank, N.A., 1983 WL 160561 (N.Y. Civ. Ct. Dec. 13, 1983) (distinguishing compensable damages recoverable under U.C.C. section 4-103 and punitive damages recoverable for violating a public wrong); *see also* Citizens Bank of Pa. v. Chevy Chase Bank, No. Civ.A 03-CV-5208, 2004 WL 875499 at

Gordon court concluded that the Arkansas Legislature did not intend to displace the recovery of punitive damages based on the absence of an express prohibition against the recovery of punitive damages.[57]

This stated need for an express prohibition limiting the recovery of punitive damages suggests that displacement does not occur in the absence of language that expressly addresses the issue in question. This resolution results in a construction of the Code that falls within that line of cases employing the narrow view, that a particular provision of the Code displaces common law and equitable principles only to the extent the Code occupies the field. Such a construction is inconsistent with that demonstrated by the court earlier in *Walker*, positioning Arkansas in the minority of jurisdictions that recognize the continued viability of all common law and equitable rights and remedies absent express displacement.[58] Revised section 1-103 is consistent with *Walker*.[59] Codifying the revision to Article 1 resolves a conflict in Arkansas authority.

B. Choice of Law

With one restriction, current Arkansas Code Annotated section 4-1-105 empowers parties in most instances, with the right to designate the law to govern their transaction.[60] In its current form the provision requires that the transaction bear a reasonable relation to the state whose law is selected; this means that the parties are empowered to designate the law of any jurisdiction that has a reasonable relation to the contract.[61] Most recently, the Arkansas Supreme Court, in *Evans v. Harry Robinson Pontiac-Buick, Inc.*,[62] construed the "reasonable relation" limitation of section 4-1-105 as requiring substantial

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*3 (E.D. Pa. Mar. 22, 2004) (holding punitive damages not recoverable for breach of contract). *But see* Smallman v. Home Fed. Sav. Bank of Tenn., 786 S.W.2d 954 (Tenn. Ct. App. 1989) (holding that the trial court should have dismissed a claim for punitive damages because of a lack of evidence to support an award—suggesting that punitive damages are recoverable under U.C.C. section 4-103).

57. *Gordon*, 326 Ark. at 1054, 935 S.W.2d at 548.
58. *Id.* at 1055, 935 S.W.2d at 549.
59. *See* U.C.C. § 1-103.
60. ARK. CODE ANN. § 4-1-105(1) (Repl. 2001).
61. ARK. CODE ANN. § 4-1-105(1).
62. 336 Ark. 155, 983 S.W.2d 946 (1999).

contacts between the jurisdiction whose law is designated and the contract.[63] In *Evans*, an Arkansas buyer sought to purchase an automobile from an Arkansas dealer.[64] In order to finance the purchase, the buyer completed and signed the lender's credit application at the dealership.[65] The lender was a Nevada corporation with an office in Texas and evaluated the buyer's credit application and information at its Texas location.[66] Thereafter, the lender notified the dealer that Evans was conditionally approved for credit.[67] Evans signed a retail installment contract with the dealer for the purchase of a 1994 Buick Skylark and completed a verification of employment; the dealer signed an assignment provision on the face of the agreement.[68] The lender made its final decision regarding the funding at its Texas office.[69] After Evans received the car he began mailing his monthly payments to the lender in Texas, but later defaulted on the contract.[70] Thereafter, Evans sued asserting the 18% interest per annum imposed by the agreement was in violation of the Arkansas Constitution.[71] Eight days later the vehicle was repossessed.[72] The Arkansas Supreme Court upheld the parties' designation of Texas law as the applicable law, holding that the transaction bore a reasonable relation to Texas because acceptance and approval of the contract occurred in Texas, the lender's presence in the transaction was essential for the buyer's acquisition of the car, and the payments were mailed outside of Arkansas to Texas.[73]

The choice of law provision of revised Article 1 broadens party autonomy in *commercial* transactions by eliminating the "reasonable relation" limitation on the selection of the law of

63. *Id.* at 162-64, 983 S.W.2d at 950-51; *see also* Arkansas Appliance Distrib. Co. v. Tandy Elecs., Inc., 292 Ark. 482, 730 S.W.2d 899 (1987); Standard Leasing Corp. v. Schmidt Aviation, Inc., 264 Ark. 851, 576 S.W.2d 181 (1979) (citing ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW § 147 (1968)).

64. *Evans*, 336 Ark. at 157, 983 S.W.2d at 947.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 157-58, 983 S.W.2d at 947.

69. *Evans*, 336 Ark. at 158, 983 S.W.2d at 947.

70. *Id.* at 158, 983 S.W.2d at 947-48.

71. *Id.* at 158, 983 S.W.2d at 948.

72. *Id.*

73. *Id.* at 163-64, 983 S.W.2d at 950.

any domestic jurisdiction.[74] Thus, if revised Article 1 were adopted, commercial parties would no longer be limited in their choice-of-law selection to states that have "substantial contacts" with the transaction. However, in a consumer transaction[75] like that in *Evans*, the choice in the modified version of revised section 1-301 remains restricted by the "reasonable relation" test. Regardless of whether the designated jurisdiction satisfies the "reasonable relation" test, the designation of that jurisdiction's law may not operate to deprive a consumer of a mandatory, non-variable rule of law that is protective of

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74. U.C.C. § 1-301 (2001). Section 1-301 discusses the parties' power to choose the applicable law.

> (c) Except as otherwise provided in this section:
>
> (1) an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State is effective, whether or not the transaction bears a relation to the State designated; and
>
> (2) an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated.
>
> (d) In the absence of an agreement effective under subsection (c), and except as provided in subsections (e) and (g), the rights and obligations of the parties are determined by the law that would be selected by application of this State's conflict of laws principles.
>
> (e) If one of the parties to a transaction is a consumer, the following rules apply:
>
> (1) An agreement referred to in subsection (c) is not effective unless the transaction bears a reasonable relation to the State or country designated.
>
> (2) Application of the law of the State or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement:
>
> (A) of the State or country in which the consumer principally resides, unless subparagraph (B) applies; or
>
> (B) if the transaction is a sale of goods, of the State or country in which the consumer both makes the contract and takes delivery of those goods, if such State or country is not the State or country in which the consumer principally resides.
>
> (f) An agreement otherwise effective under subsection (c) is not effective to the extent that application of the law of the State or country designated would be contrary to a fundamental policy of the State or country whose law would govern in the absence of agreement under subsection (d).
>
> (g) To the extent that [the Uniform Commercial Code] governs a transaction, if one of the following provisions of [the Code] specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified . . . .

U.C.C. § 1-301.

75. U.C.C. § 1-201(b)(11) (2001) ("'Consumer' means an individual who enters into a transaction primarily for personal, family, or household purposes.").

consumers that applies in the consumer's place of residence or, for transactions in goods, rules of law of the state *or* country where the consumer *both* makes the contract and takes possession of the goods, if that place is not the consumer's principal place of residence.[76] The original promulgation of section 1-301 imposed greater restrictions on the power to alter applicable law by agreement.[77] Indeed, the prior draft, defined those jurisdictions with a "reasonable relation" to the transaction to include only the consumer's place of residence at the time the transaction became enforceable or within thirty days thereafter or the state where the goods or services were received or used.[78] The current promulgation provides greater freedom of contracting to the parties but maintains the benefits inherent in the original promulgation of insuring that the protections afforded by the consumer's home state or the place of contracting and taking delivery remain available.[79]

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76. Revised U.C.C. § 1-301 (2001) provides:

> (e) If one of the parties to a transaction is a consumer, the following rules apply:
>
> (1) An agreement referred to in subsection (c) is not effective unless the transaction bears a reasonable relation to the State or country designated.
>
> (2) Application of the law of the State or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing matter within the scope of this section, which both is protective of consumers and may not be varied by agreement:
>
> (A) of the State or country in which the consumer principally resides, unless subparagraph (B) applies; or
>
> (B) if the transaction is a sale of goods, of the State of country in which the consumer both makes the contract and takes delivery of those goods, if such State or country is not the State or country in which the consumer principally resides.

Revised U.C.C. § 1-301.

77. U.C.C. § 1-301 (2000). Territorial Applicability; Parties' Power to Choose Applicable Law.

> (b) If one of the parties to an agreement referred to in subsection (a) is a consumer, the agreement is not effective unless the State or country designated is either:
>
> (1) the State or country in which the consumer habitually resides at the time the transaction becomes enforceable or within [thirty] days thereafter; or
>
> (2) the State or country in which the goods, services, or other consideration flowing to the consumer are to be received or are used by the consumer or a person designated by the consumer.

U.C.C. § 1-301 (2000).

78. *See supra* note 77.

79.

> [S]ubsection (e)(2) provides that application of the law of the State or country determined by the rules of this section (whether or not that State or country was designated by the parties) cannot deprive the consumer of the protection of rules

The effect of both the original and current promulgations of the consumer provisions might have benefited the buyer in *Evans*. Under the original provision, the car, the only consideration flowing to the consumer, was received in Arkansas.[80] Therefore, the designation of Texas law would be unenforceable unless the court found that Texas was or became the buyer's place of residence within thirty days of the agreement becoming enforceable, or the court found that the buyer used the car in Texas. Under the current draft, the designation of Texas law satisfies the "reasonable relation" test, but Arkansas's constitutional prohibition on usurious interest rates remains applicable to the transaction. The constitutional prohibition is protective of consumers and may not be varied by agreement.[81] Consequently, a term imposing 18% interest per annum is unenforceable. Thus, codification of revised section 1-301 would result in a change in Arkansas's choice of law rule as currently developed for commercial parties but would only impact consumer transactions if the designated law robs the consumer of mandatory protections that may not be varied by agreement.[82]

With the abrogation of the "reasonable relation" requirement in commercial transactions, substantial contacts are no longer required when commercial parties designate the

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> of law which govern matters within the scope of [s]ection 1-301, are protective of consumers, and are not variable by agreement. The phrase "rule of law" is intended to refer to case law as well as statutes and administrative regulations. The requirement that the rule of law be one "governing a matter within the scope of this section" means that, consistent with the scope of [s]ection 1-301, which governs choice of law only with regard to the aspects of a transaction governed by the Uniform Commercial Code, the relevant consumer rules are those that govern those aspects of the transaction. Such rules may be found in the Uniform Commercial Code itself, as are the consumer-protective rules in Part 6 of Article 9, or in other law if that other law governs the UCC aspects of the transaction. See, for example, the rule in [s]ection 2.403 of the Uniform Consumer Credit Code which prohibits certain sellers and lessors from taking negotiable instruments other than checks and provides that a holder is not in good faith if the holder takes a negotiable instrument with notice that it is issued in violation of that section.

U.C.C. § 1-301, cmt. 3 (emphasis added); *see also* U.C.C. § 2A-106 (2003); Convention on the Law Applicable to Contractual Obligations, 19 I.L.M. 1492 (1980).

80. *Evans*, 336 Ark. at 157-58, 983 S.W.2d at 947.

81. ARK. CONST. art. 19, § 13.

82. U.C.C. § 1-301.

jurisdiction whose law will be applicable to the transaction.[83] Rather than facilitating the state's public policy interest in protecting and regulating its citizen's contractual relations or contracts with significant contacts within its borders, party autonomy and freedom of contracting become the overriding policy goals.[84] The change will negate a commercial party's ability to avoid the application of another jurisdiction's laws to the transaction by showing that the transaction was wholly an Arkansas contract with the designation of another jurisdiction's laws without substantial contacts to avoid the state's usury law. This argument, used in *Cooper v. Cherokee Village Development Co.*,[85] will become ineffective.[86]

A borrower might, however, assert that the choice of law provision violates a fundamental policy of the state, namely, its usury laws. Revised section 1-301 permits a forum court to disregard the parties' designated law if the application of the designated law would violate a fundamental policy of the state whose law would otherwise be applicable because of its relationship to the transaction. A borrower should not prevail on such an argument under Arkansas law. Although the usury laws reflect a strong public policy in Arkansas, the courts have not avoided the application of another state's law as a matter of fundamental policy if the other state bears a reasonable relationship to the transaction.[87] If deemed a matter of fundamental policy, existing case authority should indicate that the reasonable relation of another state to the transaction is immaterial.[88] It does not. Revising the choice of law provision

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83. U.C.C. § 1-301.

84. The test for "reasonable relation" is not whether there were significant contacts but whether the state's relationship with the transaction is reasonable enough to justify and "uphold the parties' express stipulation." *See In re* United States Mach. Tools, Inc., 59 B.R. 470, 474 (Bankr. D. Conn. 1985); *see also* U.C.C. § 1-105 cmt. 1 (2000).

85. 236 Ark. 37, 364 S.W.2d 158 (1963).

86. *See id.* at 41-45, 364 S.W.2d at 161-63.

87. *See, e.g.*, Lyles v. Union Planters Nat'l Bank of Memphis, 239 Ark. 738, 393 S.W.2d 867 (1965); Hutchingson v. Republic Finance Co., 236 Ark. 832, 370 S.W.2d 185 (1963); *see also* William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 713, 721 (2001) (questioning the impact of the fundamental policy exception on franchising agreements and usury laws).

88. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (Supp. 1988). This section states:

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties

to negate the need for a reasonable relationship test would suggest that the legislature determined that party autonomy prevails despite the otherwise strong public policy against usury. Several jurisdictions codifying revised Article 1 have chosen to maintain, as the applicable choice of law provision, the requirement of a reasonable relation between the transaction and the law designated by the parties for both commercial and consumer transactions.[89]

1. Commercial Transactions Without a Choice of Law Term

Without an agreement on choice of law, recent Arkansas authority addressing the applicable law in a transaction subject to the Code employs the most significant contacts test or the center of gravity test.[90] This remains unchanged by the revised article and determination of the applicable law is made by applying the forum court's conflict of law principles unless a specific provision of the Code designates the applicable law.[91]

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could not have resolved by an explicit provision in their agreement directed to that issue, *unless either*

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or

(b) application of the law of the chosen state would be *contrary to a fundamental policy of a state which has a materially greater interest* than the chosen state in the determination of the particular issue and which, under the rule of [section] 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Id. at § 187 (emphasis added).

89. ALA. CODE § 7-1-103 (2004); IDAHO CODE § 28-1-301 (Michie Supp. 2004); MINN. STAT. ANN. § 336.1-301 (West Supp. 2004); TEX. BUS. & COM. CODE ANN. § 1.301 (Vernon Supp. 2004); VA. CODE ANN. § 8.1A-301 (Michie Supp. 2004). Revised Article 1 is currently pending before the legislatures of Arizona (SB 1234), Connecticut (HB5975), Nebraska (LB 570), and North Dakota (SB 2143). Both the Nebraska and North Dakota bills reject the promulgated version of section 1-301. *See* Keith Rowley, *U.C.C. Legislative Update on Revised Article 1*, U.C.C. Law Listserv, Feb. 2, 2005.

90. *See Evans*, 336 Ark. at 162-63, 983 S.W.2d at 950 (applying the substantial contacts test); ARK. OP. ATT'Y GEN. NO. 2002-071 (Mar. 26, 2002); *see also* Heating & Air Specialists, Inc. v. Jones, 180 F.3d 923, 928-29 (8th Cir. 1999) (reviewing Arkansas authority on choice of law in contract cases).

91. U.C.C. § 1-301(g) (2001). Territorial Applicability; Parties' Power to Choose Applicable Law.

(g) To the extent that [the Uniform Commercial Code] governs a transaction, if one of the following provisions of [the Uniform Commercial Code] specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law [including the conflict of law rules] so specified:

2. Ineffective Choice of Law by the Parties

Despite the freedom to choose the applicable law, a forum may find the agreed upon choice of law provision ineffective to the extent that the law of the state or country designated is contrary to a fundamental policy of the state or country whose law would otherwise govern.[92] This fundamental policy exception to party autonomy is not triggered by the existence of a law that is different from that of the designated jurisdiction. Instead, the law of the designated jurisdiction must offend a basic, primary societal value or "fundamental principle of justice [or] some prevalent conception of good morals, some deep-rooted tradition of the common weal."[93]

II. BUYER'S REMEDIES

A. Buyer's Right of Rejection Under Section 4-2-602 of the Arkansas Code

Unlike the substantial performance standard for service contracts, the Arkansas Code, in theory, imposes an obligation on a seller to tender goods in strict conformity to the contract for sale.[94] The perfect tender rule of section 4-2-601 empowers a buyer with the right to reject the goods tendered if the goods or the tender of delivery fail in any respect to conform to the contract.[95] Thus, a buyer may reject or accept the whole of any

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(1) Section 2-402;
(2) Sections 2A-105 and 2A-106;
(3) Section 4-102;
(4) Section 4A-507;
(5) Section 5-116;
(6) Section 6-103;
(7) Section 8-110;
(8) Sections 9-301 through 9-307.

U.C.C. § 1-301(g).

92. U.C.C. § 1-301(f) (2001).

93. U.C.C. § 1-301 cmt. g (2001) (quoting Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 202 (N.Y. 1918)).

94. ARK. CODE ANN. § 4-2-601 (Repl. 2001).

95. ARK. CODE ANN. § 4-2-601. The statute describes a buyer's rights on improper delivery.

> Subject to the provisions of this chapter on breach in installment contracts ([section] 4-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy ([sections] 4-2-718 and 4-2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer

commercial unit of the tendered goods because of an insubstantial defect. Rejection of the goods must occur within a reasonable time after their delivery or tender.[96] Unless the buyer seasonably notifies the seller of its intent to reject, the rejection is ineffective and constitutes an acceptance.[97] Despite the perfect tender rule, a buyer's right to a perfect tender is substantially eroded by the seller's right to cure, particularly in Arkansas.[98]

A seller's obligation to satisfy the perfect tender rule is not the applicable standard in a multiple delivery or installment contract. 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.[99] In this context, the buyer may only reject if the non-conformity substantially impairs the value of the installment and the non-conformity cannot be cured.[100] If the seller gives the buyer "adequate assurance" that the defective installment can be cured, the buyer must accept the installment unless the non-conformity substantially impairs the value of the whole

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may:

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest.

ARK. CODE ANN. § 4-2-601.

96. ARK. CODE ANN. § 4-2-602 (Repl. 2001). Manner and effect of rightful rejection.

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two (2) following sections on rejected goods ([sections] 4-2-603, 4-2-604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this chapter ([section] 4-2-711(3)), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has not further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this chapter on seller's remedies in general ([section] 4-2-703).

ARK. CODE ANN. § 4-2-602.

97. ARK. CODE ANN. § 4-2-602.

98. ARK. CODE ANN. §§ 4-2-508, 4-2-612 (Repl. 2001).

99. ARK. CODE ANN. § 4-2-612(1).

100. ARK. CODE ANN. § 4-2-612.

contract.[101] If the non-conformity of the goods provided by the seller in one or more installments substantially impairs the value of the whole contract, a breach of the entire contract results and the buyer may cancel the entire contract and resort to a remedy.[102] Thus, care must be taken by the buyer to avoid reinstating the contract and negating its right to cancel. If the buyer accepts a subsequent installment without notifying the seller that the contract is cancelled or if the buyer brings an action against the seller based on a past installment or demands conformity of future installments, the entire contract has been reinstated.[103] *Cargill, Inc. v. Storms Agri Enterprises, Inc.*,[104] provides some guidance on determining whether the value of the installment contract as a whole is substantially impaired, resulting in breach of the entire contract. Storms Agri entered into an oral installment contract with Cargill for the purchase of cottonseed.[105] Pursuant to the contract, Storms Agri had roughly one year to purchase seventeen truckloads of cottonseed.[106] Four months into the contract and after purchasing only three truckloads of cottonseed, Storms Agri did not place any additional orders for cottonseed.[107] Cargill, believing that Storms Agri had repudiated the installment contract, filed suit seeking damages.[108] The trial court found that Cargill presented evidence of repudiation but had not shown that the repudiation substantially impaired the contract as a whole.[109] The Arkansas Court of Appeals disagreed, stating that "it cannot be seriously argued that [the seller's] repudiation of fourteen of seventeen loads . . . did not substantially affect the value of the whole contract."[110] Substantial impairment is determined by considering the entire contract, not simply the individual installment repudiated.[111] Further, the issue of whether the

101. ARK. CODE ANN. § 4-2-612(2).
102. ARK. CODE ANN. § 4-2-613(3) (Repl. 2001).
103. ARK. CODE ANN. § 4-2-613(3).
104. 46 Ark. App. 237, 878 S.W.2d 786 (1994).
105. *Id.* at 238-39, 878 S.W.2d at 788.
106. *Id.*
107. *Id.* at 239, 878 S.W.2d at 788.
108. *Id.* at 238-40, 878 S.W.2d at 787-88.
109. *Storms Agri*, 46 Ark. App. at 242, 878 S.W.2d at 789-90.
110. *Id.* at 242, 878 S.W.2d at 790.
111. *Id.* at 242, 878 S.W.2d at 789.

impairment is substantial is to be decided by the trier of fact.[112] The court of appeals found that Cargill had presented sufficient evidence to withstand a motion for directed verdict because Storms Agri had failed to purchase fourteen of seventeen truckloads of cotton, resulting in a substantial loss to Cargill.[113]

B. Seller's Right to Cure

A second limitation on the perfect tender rule is a seller's right to cure a defective tender by providing a conforming tender of substitute goods.[114] 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,[115] 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.[116] Unless the parties agree otherwise, the seller is only entitled to cure if one of these two factual situations exists. Absent a contract term to the contrary, a buyer has no right to demand a cure but a seller may exercise the right to cure the non-conformity in its delivery under section 4-2-508.[117] Unlike the statutory provision suggests, in Arkansas the right to cure, as interpreted by the courts, appears to be absolute

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112. *Id.*

113. *Id.* at 242, 878 S.W.2d at 790.

114. ARK. CODE ANN. § 4-2-508.

> (1) 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.
>
> (2) 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.

ARK. CODE ANN. § 4-2-508.

115. ARK. CODE ANN. § 4-2-508(1).

116. ARK. CODE ANN. § 4-2-508(2).

117. *Compare* ARK. CODE ANN. § 4-2-508, *with* C.I.S.G., *supra* note 4, at art. 46(2-3) (empowering buyer with the right to demand tender of substitute goods if the non-conformity is a fundamental breach or require the seller to remedy the lack of conformity by repair).

and without condition.[118] Despite the statutory limitations on the right to cure, Arkansas courts impose an opportunity to cure as a condition precedent to the buyer's right to revoke acceptance whether or not the seller has the "right" to cure because it meets the statutory conditions.[119] This approach to cure substantially restricts the remedial scheme designed to protect a buyer's legitimate interests and encourages bad faith performance by sellers. Furthermore, this required opportunity to cure creates conceptual difficulty in cases when the statutory requirements imposed on sellers in section 4-2-508 are not met. Time spent by buyers negotiating with sellers or seeking to extract performance from a seller who has not sought in the first instance to provide conforming goods goes uncompensated and prolongs the buyer's exercise of its legitimate right to revoke acceptance.

In some Arkansas cases, the seller has been permitted to cure despite a failure to give reasonable notice and without establishing that it could either tender conforming goods before its time to perform expired or establish that it had reasonable grounds to believe the non-conforming goods would be acceptable with or without a money allowance.[120] This deficiency in Arkansas authority should be corrected as courts implement the Code policy of giving the seller a right to correct insubstantial defects, after reasonable notice, if the seller had reasonable grounds to believe the goods would be acceptable. Yet, this right must not prejudice the rights of the buyer to reject goods that fail to conform to the terms of the agreement if the seller fails to satisfy the conditions precedent to the exercise of the right to cure.

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118. *See, e.g.*, Marine Mart, Inc. v. Pearce, 252 Ark. 601, 480 S.W.2d 133 (1972).

119. Pedco, Inc. v. Ergo-Tech, Inc., 40 U.C.C. Rep. Serv. 2d 472, 475 (Ark. Ct. App. 1999) (stating that seller has a right to cure before an effective revocation of acceptance may occur) (citing Rhode v. Kremer, 280 Ark. 136, 655 S.W.2d 410 (1983)).

120. *See generally Rhode*, 280 Ark. 136, 655 S.W.2d 410; *see also* Marine Mart, Inc. v. Pearce, 252 Ark. 601, 480 S.W.2d 133 (1972) (stating the buyer's allegation that the fiberglass boat had holes in its side). Although the buyer prevailed in *Marine Mart*, the opinion does not indicate that the seller was initially entitled to cure. The facts do not suggest that the dealer could have a reasonable belief that its tender would be acceptable with or without a money allowance.

1. The Right to Cure—The Convention Contrasted

Unlike a buyer whose contract is subject to domestic sales law, the buyer in an international transaction governed by the Convention may require the seller to cure by delivering substitute goods or by repairing the non-conformity.[121] If the seller's breach is a fundamental breach and the request is made with the notice of non-conformity or within a reasonable time after the buyer discovers or should have discovered the breach, the buyer may request the delivery of substitute goods.[122] The buyer's right to request that the goods be repaired must be reasonable in light of the circumstances but a fundamental breach is not required.[123] The request for repair must be made in conjunction with the buyer's notice of a lack of conformity or a reasonable time thereafter.[124] The buyer's right to request cure is in addition to the seller's right to cure. Unlike the seller's right to cure under the Code, the seller's right to cure under the Convention may be limited by, and subject to, the buyer's consent.

In a documentary transaction, if the buyer consents, the seller may deliver either the documents or the goods *before* the agreed upon time for delivery.[125] Thereafter, the seller may cure any lack of conformity *before* the contract delivery date, unless doing so causes the buyer unreasonable inconvenience or unreasonable expense.[126] Neither a fundamental breach nor a right to avoid the contract is required before a buyer may refuse to permit an early delivery by the seller.[127] The buyer may merely exercise its right under the contract to take delivery as agreed.[128] From a practical perspective, the buyer may need time to prepare its facilities for taking possession of the goods. If the early delivery is permitted, the seller may cure a defect in the delivery of goods by delivering any missing part, or providing additional goods for any deficiency in quantity, or

121. C.I.S.G., *supra* note 4, at art. 46.
122. *Id.* at arts. 39, 46.
123. *Id.* at art. 46.
124. *Id.*
125. *Id.* at art. 52.
126. C.I.S.G., *supra* note 4, at arts. 34, 37.
127. *Id.* at art. 60(b); *see also* HONNOLD, supra note 3, at § 319.
128. C.I.S.G., *supra* note 4, at art. 52(1).

remedying any lack of conformity.[129] This provision of the Convention is analogous to current section 2-508(1) of the Code.[130] Similarly, a defect or lack of conformity in documents relating to the goods, handed over *before* the designated contract time, may be cured before the agreed time for delivery of the documents. The right to cure a permitted early delivery is subject only to a determination of whether unreasonable inconvenience or unreasonable expense will be incurred by the buyer.[131]

However, a seller's right to cure a delivery *after* the delivery date, whether the initial delivery was a permitted early delivery or occurred during the contract delivery period, is subject to the buyer's consent if the buyer has the right to avoid the contract.[132] The right of avoidance exists if the non-

129. *Id.* at art. 37.

130. U.C.C. § 2-508 (1)(2001).

131. C.I.S.G., *supra* note 4, at arts. 34, 37.

132. *Id.* at art. 48. The following case abstracts are instructive on determining whether the breach is a fundamental breach:

1. The buyer, a German trading company, refused to pay the price for shoes purchased from an Italian manufacturer when the shoes were not delivered within the time specified by the contract and did not conform to the contract specifications. The court held that the buyer failed to establish a fundamental breach or the setting of an additional time for performance followed by the seller's failure to deliver and was not entitled to declare the contract avoided. Therefore, the buyer was liable for the price and interest. The buyer had not specified whether the shoes were below standard, justifying a reduction in price, or totally unfit. *See* Case Abstract 79: Germany, Oberlandesgericht Frankfurt a.M.; 5 U 15/93 (Jan. 18, 1994) Published in German: Recht der Internationalen Wirtschaft (RIW) 1994, 240 Commented on by Diedrich, RIW 1995, 11, *available at* http://www.uncitral.org/en-index.htm (last visited Feb. 11, 2005).

2. The plaintiff was a Swedish seller of Coke which was delivered to a company in the former Yugoslavia under instructions of the defendant, a German buyer. The plaintiff sued the defendant demanding payment of the purchase price. The defendant asserted that the Coke was of inferior quality. The court held that the supply of goods of inferior quality did not constitute a fundamental breach of contract that justified the avoidance of the contract and the refusal to pay. *See* Case Abstract 83: Germany, Oberlandesgericht Munchen; 7 U 4419/93 (Mar. 2, 1994) Published in: Recht der Internationalen Wirtschaft (RIW) 1994, 595, *available at* http://www.uncitral.org/en-index.htm (last visited Feb. 11, 2005).

3. The plaintiff, a Swiss buyer, placed an order with the defendant, an Italian seller, requesting that the goods be delivered within ten to fifteen days. Almost two months later and after the buyer confirmed its order, the seller assured the buyer that the goods would be dispatched within a week. Contrary to the seller's assurance, the buyer had not yet received the goods two months later. The buyer sent the seller a notice canceling the order and demanding a refund of the price. The seller admitted that it had handed over only a

conformity was a fundamental breach or the seller's non-delivery extended beyond an additional time set by the buyer.[133] The buyer's setting of an additional time for delivery gives the buyer the opportunity to establish a fundamental breach based upon the seller's delay.[134] The right to cure in this context is prohibited if doing so causes the buyer unreasonable inconvenience or unreasonable expense.[135]

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partial order of the goods to the carrier after receiving the notice of cancellation from the buyer. The buyer refused to accept the late, partial delivery; the seller did not refund the purchase price. The buyer commenced legal action asserting avoidance of the contract for breach by the seller, seeking a refund of the purchase price with interest and damages. The court found that the seller was bound to dispatch all the requested goods within the following week. The court held the two month delay and the delivery of only one third of the goods sold constituted a fundamental breach of the contract. Consequently, the buyer was entitled to avoid the contract and to recover the full purchase price already paid to the seller. *See* Case Abstract 90: Italy: Pretura circondariale di Parma, sez.di Fidenza; 77/89 (Nov. 24, 1989); Foliopack Ag v. Daniplast S.p.A.; Reported on in English: [1995] UNILEX, *available at* http://www.uncitral.org/en-index.htm (last visited Feb. 11, 2005).

4. A company with its place of business in France sold to an individual resident in Portugal a used warehouse for the price of 500,000 French francs, including the cost of dismantling and delivery. The price of the warehouse was 381,200 francs and the dismantling and delivery costs totaled 118,800 francs. The buyer's refused to pay the final installment of the price asserting that the dismantled metal elements were defective. The Court of Appeal of Grenoble found that the disputed contract covered the sale of a used warehouse together with the service of dismantling the structure. The court further found that the invoices established that the supply of services did not constitute the preponderant part of the contractual obligations. The court concluded that the contract was within the scope of the Convention, art. 3(2). Although finding a that the goods were not fit for the particular purpose of reassembly, the court held that the agreement was not fundamentally breach, the defect related to only part of the warehouse and could be repaired. The court therefore found that this breach did not justify avoidance of the contract pursuant to Article 49. *See* Case Abstract 152: France—Court of Appeal of Grenoble (Commercial Division) (Apr. 26, 1995), Marques Roque Joaquim v. S.A.R.L. Holding Manin Rivire, *available at* http://www.uncitral.org/en-index.htm (last visited Feb. 11, 2005).

Abstracts of judicial opinions and arbitral awards applying the Convention or the UNIDROIT Principles of International Contracts may also be found at www.unilex.info or www.C.I.S.G..law.pace.edu.

133. C.I.S.G., *supra* note 4, at arts. 47-48.

134. Larry A. DiMatteo, *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of C.I.S.G. Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 403 n.636 (2004)
(stating Article 47 permits a buyer to convert delay into a fundamental breach and limit the seller's ability to cure).

135. C.I.S.G., *supra* note 4, at art. 48.

C. Acceptance of the Goods

Acceptance of the goods is a legally significant point in the transaction between the parties. For example, after acceptance, the buyer is obligated to pay the price for the goods[136] and the buyer has the burden of establishing the seller's breach. Further, the buyer loses the right to reject the goods[137] and may only thrust the goods back on the seller if a non-conformity results in a substantial impairment of the value of the goods to the buyer.[138] Section 4-2-606 defines three categories of actions that result in the acceptance of the goods tendered.[139] Each of the three categories of actions relates to conduct at stages after tender and each stage reflects an increase in the passage of time and an increase in the buyer's awareness of the defective condition of the tendered goods. However, unless the parties otherwise agree, acceptance can only occur after inspection, a right guaranteed by section 4-2-513 that must occur before the legally operative event of acceptance.[140]

The buyer has a right to inspect the goods at tender of delivery.[141] The time of inspection is the first timeframe within which an acceptance can occur.[142] With an opportunity to inspect, acceptance occurs if the buyer signifies or engages in conduct that indicates that the goods are conforming or that they will be taken or retained despite any non-conformity.[143] For instance, payment is an act that may signify that the goods are

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136. ARK. CODE ANN. § 4-2-607(1) (Repl. 2001).

137. ARK. CODE ANN. § 4-2-607(2).

138. ARK. CODE ANN. § 4-2-608(1) (Repl. 2001).

139. ARK. CODE ANN. § 4-2-606 (Repl. 2001).

> (1) Acceptance of goods occurs when the buyer:
>
> (a) 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; or
>
> (b) fails to make an effective rejection ([section] 4-2-602(1)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
>
> (c) 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.

ARK. CODE ANN. § 4-2-606.

140. *See* ARK. CODE ANN. § 4-2-513 (Repl. 2001).

141. ARK. CODE ANN. § 4-2-513.

142. ARK. CODE ANN. § 4-2-513.

143. ARK. CODE ANN. § 4-2-606 cmt. 3; *see, e.g.*, Plateq Corp. of North Haven v. Machlett Labs., Inc., 456 A.2d 786 (Conn. 1983) (finding that despite obvious non-conformities in custom tanks, the buyer had promised to send a truck to pick up the tanks).

conforming but, according to the comments, this is not conclusive.[144] A buyer who pays after inspection and who has notice of non-conformities, should indicate that the payment is under protest with reservation of all rights including rejection of the goods, to avoid an acceptance.[145] Whether the buyer *should* pay depends on the terms of the agreement and whether the remedial device of demanding adequate assurance of performance is available to justify suspending its obligation to pay.[146]

Delay after inspection is the second time frame that can give rise to acceptance.[147] If the buyer has knowledge of a defect after inspection and delays in giving notice of its rejection of the goods, acceptance can occur.[148] After the lapse of a reasonable time after inspection, a buyer accepts by failing to give notice of its desire to reject in a timely manner or failing to particularize the defects that become the basis of its rejection.[149] Here, there is an ineffective rejection which results in acceptance.

Finally, after inspection and notice of rejection of the goods, the buyer accepts by engaging in acts that are inconsistent with its intent to reject unless otherwise authorized by the Code.[150] Upon rejection, title to the goods vests in the seller by operation of law.[151] With knowledge of a defect and without the seller's direction or authorization by the Code, conduct by the buyer that is inconsistent with an intent to reject are actions that are inconsistent with the seller's ownership interest.[152] Thus, if the buyer fails to give notice to the seller and re-sells the defective goods, the buyer may be deemed to have accepted.[153] This principle is subject to the right of the buyer to protect its security interest in the goods and its obligation to sell perishable goods or goods that may rapidly

144. ARK. CODE ANN. § 4-2-606 cmt. 3.
145. ARK. CODE ANN. § 4-1-207; Revised U.C.C. § 1-308 (2004).
146. *See* ARK. CODE ANN. § 4-2-609 (Repl. 2001).
147. ARK. CODE ANN. § 4-2-606.
148. *See* ARK. CODE ANN. § 4-2-607.
149. ARK. CODE ANN. § 4-2-607.
150. ARK. CODE ANN. § 4-2-606(1)(c).
151. ARK. CODE ANN. § 4-2-401(4) (Repl. 2001).
152. ARK. CODE ANN. § 4-2-606(1)(c).
153. *See, e.g.*, Borges v. Magic Valley Foods, Inc., 616 P.2d 273 (Idaho 1980) (holding that buyer's actions after notice of rejection constituted acceptance).

decline in value for the seller's benefit.[154] Consequently, a buyer who retains defective goods after a rightful rejection must follow reasonable instructions given by the seller with respect to the goods. If the buyer is a merchant, the buyer must make reasonable efforts to sell perishable goods or goods that threaten to decline speedily in value for the seller's account.[155] This obligation to sell the defective goods for the seller's account is subject to the buyer's right to protect its security interest that arises from any payment of contract price or expenses incurred from inspecting, receiving, transporting, or holding the defective goods.[156] Despite the right to sell the defective goods pursuant to its security interest or for the seller's account, a buyer taking such action is required to give appropriate notice to the seller and to conduct a reasonable resale of the defective goods.[157]

Thus, *Jacob Hartz Seed Company v. Coleman*[158] was rightly decided although the facts relied upon by the court skewed or distorted the goal of section 4-2-606(b) and (c). In *Jacob Hartz Seed*, the buyer purchased soybeans and immediately resold them to a wholesale seed dealer in Georgia.[159] The dealer took delivery from the seller at the seller's warehouse.[160] Thereafter, the dealer had the soybeans tested by the Georgia Department of Agriculture.[161] The soybeans were tagged with the seller's name and the seller was notified by the Georgia Department of Agriculture when the soybeans failed certification testing.[162] The buyer then gave the seller notice of rejection.[163] The Arkansas Supreme Court held that the resale without notice of a defect was not an acceptance and that the buyer rejected after having a reasonable time to inspect.[164] The court's holding was correct; however, the court relied on two facts that were immaterial to the determination of whether an acceptance occurred: 1) the soybeans were tagged

154. ARK. CODE ANN. §§ 4-2-603 to -604 (Repl. 2001).
155. ARK. CODE ANN. § 4-2-603.
156. ARK. CODE ANN. § 4-2-711(3).
157. ARK. CODE ANN. §§ 4-2-706, 4-2-711(3).
158. 271 Ark. 756, 612 S.W.2d 91 (1981).
159. *Id.* at 757, 612 S.W.2d at 91.
160. *Id.* at 758, 612 S.W.2d at 91.
161. *Id.*
162. *Id.* at 759, 612 S.W.2d at 92.
163. *Jacob Hartz Seed*, 271 Ark. at 758, 612 S.W.2d at 92.
164. *Id.* at 758-60, 612 S.W.2d at 92-93.

with the seller's name, and 2) the seller was given notice that the soybeans failed the germination test.[165] Location of title to the goods is determined independently of whether acceptance has occurred.[166] Absent a contract term to the contrary, title to the soybeans vests in the buyer when the seller completes its obligation of performance, upon delivery to the Georgia dealer.[167] However, acceptance does not occur before a reasonable opportunity for inspection.[168] In *Jacob Hartz Seed*, the inspection by the Georgia Department of Agriculture was a reasonable manner of inspection. Upon notice of the failed testing, the buyer promptly rejected the goods.[169] At this point, title revested in the seller.

The seller argued that the sale to the dealer constituted acceptance, as it was an act inconsistent with the seller's ownership interest.[170] However, the buyer's transaction with the Georgia dealer was not an act inconsistent with the seller's ownership as argued by the defendant in *Jacob Hartz Seed*, rather the buyer's forward contract was a contract to sell future goods—goods that existed but were not yet identified.[171] The Code provides that goods must be both existing and identified for an interest in the goods to pass[172] and that a "sale" constitutes the passage of title.[173] Although the goods that the buyer sold to the dealer existed, the specific soybeans that were to be used to satisfy the buyer's obligation of performance were not designated to the forward contract until the seller delivered the goods to the dealer.[174] At the point of the seller's delivery to the Georgia dealer, title passed from the seller through the buyer to the Georgia dealer. The obligation of performance was

165. *Id.* at 759, 612 S.W.2d at 92.

166. *See* ARK. CODE ANN. § 4-2-401(2).

167. ARK. CODE ANN. § 4-2-401(2).

168. *See* ARK. CODE ANN. § 4-2-513.

169. *Jacob Hartz Seed*, 271 Ark. at 760, 612 S.W.2d at 93.

170. *Id.* at 758, 612 S.W.2d at 92.

171. ARK. CODE ANN. § 4-2-105(2) (Repl. 2001) ("Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are 'future' goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.").

172. ARK. CODE ANN. § 4-2-105(2).

173. "A 'sale' consists in the passing of title from the seller to the buyer for a price .... A 'present sale' means a sale which is accomplished by the making of the contract." ARK. CODE ANN. § 4-2-106 (Repl. 2001).

174. *See* ARK. CODE ANN. § 4-2-501.

satisfied for both contracts. Before that point in time, the agreement between the buyer and the dealer was a contract to sell, not a present sale of the soybeans. As a contract to sell, the buyer's actions cannot and do not affect the seller's interest in the goods.

However, the same should be true if the transaction between the buyer and the dealer were for the sale of a specific good, for example a Picasso etching numbered 1348. Here, the good exists and is identified, but until delivery by the seller to the dealer, the buyer only has an insurable interest in the goods.[175] Hence, title cannot be transferred. No present sale occurs. This too is a contract to sell and is not an act inconsistent with the seller's ownership interest in the goods. Consequently, the buyer's conduct is not an acceptance. To hold otherwise may adversely affect market transactions, limiting a buyer's ability to enter into forward contracts until title vested—when the seller completes its obligation of performance—to avoid the loss of its right of rejection and, concomitantly, the acceptance of goods that might be non-conforming.[176]

On the facts of *Jacob Hartz Seed*, although the soybeans were tagged with the seller's name and address at the time of the testing and the seller was notified of the failed testing, the seller did not have an ownership interest in the goods between the time of its delivery to the dealer and the buyer's rejection.[177] The title passed through the buyer to the dealer when the seller delivered the goods to the dealer. When the dealer rejected the goods, title revested in the buyer until its rejection of the goods. Upon the buyer's rejection, title revested in the seller. Therefore until the buyer's rejection, the buyer's actions cannot be considered inconsistent with the seller's ownership interest.

D. Buyer's Revocation of Acceptance

Revocation of acceptance is a buyer's final opportunity to thrust the goods back on the seller.[178] Having accepted the

175. *See* ARK. CODE ANN. § 4-2-501.

176. Commentary on *Jacob Hartz Seed* analysis, Professor Irma Russell, University of Memphis, Cecil C. Humphreys School of Law, Oct. 16, 2004.

177. *Jacob Hartz Seed*, 271 Ark. at 759, 612 S.W.2d at 92-93.

178. ARK. CODE ANN. § 4-2-608.

goods, the buyer is liable for the price of the goods unless it has the right to justifiably revoke that acceptance.[179] Revocation is available if: 1) a defect in the goods results in a substantial impairment of the value of the goods to the buyer and 2) acceptance is made with knowledge of the defect and on the assumption that the defect could be cured and the seller has not seasonably cured the defect or 3) if acceptance occurred without discovery of the defect because of the difficulty of discovery before acceptance or because of the seller's assurances.[180] After justifiably revoking its acceptance, the buyer may resort to a remedy and is no longer liable for the price.[181] Here again, the Arkansas courts have reached a correct result but the analysis lacks clarity.[182] A buyer who justifiably revokes its acceptance has the same rights and duties as a buyer who rejects the goods.[183]

After rejecting or revoking acceptance of the goods, the buyer may engage in conduct that constitutes acceptance or re-acceptance of the goods.[184] However, the Code authorizes conduct by a buyer including the sale of non-conforming goods after revocation of acceptance or rejection of the goods.[185] Section 4-2-603 imposes a duty upon merchant buyers to sell rejected goods or goods for which acceptance has been revoked that are perishable or that threaten to decline in value

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(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it:

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

ARK. CODE ANN. § 4-2-608.

179. *See* ARK. CODE ANN. § 4-2-608.

180. *See* ARK. CODE ANN. § 4-2-608.

181. *See* ARK. CODE ANN. § 4-2-608.

182. *See, e.g.*, Grand State Mktg. v. Eastern Poultry Distribs. Inc., 63 Ark. App. 123, 975 S.W.2d 439 (1998).

183. ARK. CODE ANN. § 4-2-608(3).

184. *See, e.g.*, *Borges*, 616 P.2d at 276.

185. ARK. CODE ANN. § 4-2-603.

speedily.[186] If the goods are not perishable and the seller fails to give reasonable instructions after a reasonable time, the merchant buyer may store, sell, or reship the goods.[187] More importantly, a buyer who has made part or full payment of the price or who incurs incidental damages in handling goods after revocation of acceptance or rejection has a security interest in the goods to the extent of its payments or expenses and may sell the goods as "an aggrieved seller" to protect its security interest.[188] In either of these three situations, the sale must conform to the standards of section 4-2-706 and, if so, the buyer's conduct will not constitute a reacceptance of the goods. The proceeds that exceed the buyer's security interest are held for the seller's account.

The holding in *Grand State Marketing v. Eastern Poultry Distributors Inc.*,[189] suggests that the court considered the buyer's conduct in selling conforming goods as a reacceptance of the goods. In *Grand State Marketing*, the buyer purchased 34,320 pounds of frozen chicken in 858 forty-pound cartons.[190] The seller assured the buyer that the chicken was split fryer breasts, no more than six-to-eight-months-old.[191] The seller offered the buyer an opportunity to inspect the 858 forty-pound

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186. ARK. CODE ANN. § 4-2-603. Merchant buyer's duties as to rightfully rejected goods.

> (1) Subject to any security interest in the buyer ([section] 4-2-711(3)), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

ARK. CODE ANN. § 4-2-603.

187. ARK. CODE ANN. § 4-2-603(1).

188. ARK. CODE ANN. § 4-2-711 (Repl. 2001). Buyer's remedies in general—buyer's security interest in rejected goods.

> (3) On rightful rejection or justifiable revocation of acceptance a buyer has 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 ([section] 4-2-706).

ARK. CODE ANN. § 4-2-711.

189. 63 Ark. App. 123, 975 S.W.2d 439.

190. *Id.* at 126, 975 S.W.2d at 441.

191. *Id.*

cartons.[192] The buyer declined and informed the seller it would rely on the seller's assurances.[193] The buyer immediately tendered the chicken to the purchaser.[194] Thereafter, the purchaser rejected 521 cartons of the chicken as non-conforming.[195] The buyer gave the seller notice, revoking acceptance.[196] After the seller refused to permit the return of the 521 cartons, the buyer sold the chicken parts at a loss of $0.22 per pound.[197] The seller sued the buyer for the contract price.[198] The trial court found that the chicken was non-conforming and permitted the buyer to deduct from the contract price its lost profits, incidental damages incurred for storage charges, freight charges, and attorney's fees.[199] On appeal, the Arkansas Court of Appeals upheld the buyer's rightful and effective revocation of acceptance and affirmed the award of damages.[200] The court recognized the Code's authorization of revocation of acceptance when acceptance is induced by the seller's assurances.[201] Here, the assurances constituted express warranties.[202]

Generally, the proper damage recovery after revocation of acceptance is not a deduction of lost profits from the balance due on the contract. Upon revocation of acceptance, a buyer is entitled to a return of any part of the purchase price plus any incidental and consequential damages.[203] Only upon acceptance is a buyer liable for the contract price.[204] In *Grand State Marketing*, the buyer only accepted a commercial unit, or 337

192. *Id.* at 127-28, 975 S.W.2d at 441.
193. *Id.* at 128, 975 S.W.2d at 442.
194. *Grand State Mktg.*, 63 Ark. App. at 125, 975 S.W.2d at 441.
195. *Id.* at 126, 975 S.W.2d at 441.
196. *Id.* Given the quantity of goods purchased and the buyer's immediate need for the goods to satisfy its obligation of performance, the author does not believe the buyer had a reasonable opportunity to inspect. Because the goods were tendered to the purchaser who had the facilities for inspecting and did inspect within a two-week period and the goods remained in substantially the same conditions as tendered to the buyer coupled with the seller's assurances, the buyer's time for rejection had not lapsed. Had the buyer alleged an effective rejection, the facts in this case would support an effective rejection by the buyer.
197. *Id.*
198. *Id.*
199. *Grand State Mktg.*, 63 Ark. App. at 126, 975 S.W.2d at 441.
200. *Id.* at 128, 130, 975 S.W.2d at 442-43.
201. *Id.* at 128, 975 S.W.2d at 442.
202. *See* ARK. CODE ANN. § 4-2-313 (Repl. 2001).
203. ARK. CODE ANN. § 4-2-714 (Repl. 2001).
204. ARK. CODE ANN. § 4-2-607.

forty-pound cartons.[205] The seller was entitled to the contract price for these accepted goods.[206] As to the revoked goods, the merchant buyer must sell goods that are either perishable or threaten to decline in value speedily.[207] After the seller refused to permit the return of the goods, the sale by the buyer was required because the chicken was dated and the value would continue to decrease with the passage of time. A sale was also permissible as an action to protect the buyer's security interest for any incidental damages for transporting and storing the non-conforming 521 cartons.[208] The effect of the trial court's construction of damage award and the Arkansas Court of Appeals affirmation resulted in the buyer's liability for the contract price with an offset for various expenses.[209] Was the court treating the sale as a reacceptance under section 4-2-606(c)? Reselling the chicken should not, under these circumstances, constitute a reacceptance of the goods. However, if the buyer failed to give the seller a reasonable time to give instruction after giving notice of rejection, or if the buyer failed to comply with section 4-2-706 by either failing to give notice of a private or public sale or by making a commercially unreasonable resale, then the buyer's actions should constitute an acceptance.[210] The buyer's obligation on the contract should have been limited to the price of the 337 accepted cartons with a right to recover the difference between the cover price of any substitute goods tendered to its purchaser and the contract price or its lost profits on the 521 cartons, plus incidental damages incurred for insuring, transporting, or storing the non-conforming 521 cartons, and the cost of resale.

Arkansas cases addressing rejection and revocation of acceptance lack clarity. Often the outcome is correct but the rationale is either unclear or undeveloped and fails to provide the clarity and predictability the Code was designed to provide.[211] This lack of clarity results from the court's failure to

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205. *Grand State Mktg.*, 63 Ark. App. at 127, 975 S.W.2d at 441.

206. *See* ARK. CODE ANN. § 4-2-607.

207. *See* ARK. CODE ANN. § 4-2-603.

208. ARK. CODE ANN. § 4-2-714.

209. *Grand State Mktg.*, 63 Ark. App. at 126, 130, 975 S.W.2d at 441, 443.

210. *See* ARK. CODE ANN. §§ 4-9-610 to -611 (Repl. 2001).

211. *See* ARK. CODE ANN. § 4-1-102(2)(a) (Repl. 2001) ("Underlying purposes and policies of [the Code] are . . . to simplify, clarify and modernize the law governing

resolve in its opinions four major issues: 1) the failure to distinguish whether a purported rejection was timely and effective or untimely resulting in an acceptance; 2) the failure to delineate when an act is inconsistent with the seller's ownership and thereby constitutes an acceptance; 3) although consistently holding that delivery of the goods does not constitute acceptance, the failure to draw a line between conduct after delivery that constitutes acceptance and that which does not constitute acceptance; and 4) the failure to recognize the statutory conditions precedent to a seller's right to cure. The failure to identify the conditions precedent to a seller's right to cure becomes a major sticking point because Arkansas courts have consistently held that granting the seller an opportunity to cure is a condition precedent to the buyer's right to revoke acceptance pursuant to section 4-2-608. A buyer's granting of a right to cure as a condition precedent should only be applicable if the seller had a right to cure under section 4-2-508 and gave seasonable notice of its intent to cure.[212]

E. Buyer's Cover or Procurement of Substitute Goods

After a seller breaches, whether by failure to deliver the goods, repudiation of its contractual obligation, or the tender of non-conforming goods, the buyer may cover or procure substitute goods.[213] Cover is a goods-oriented remedy available to facilitate fulfillment of the buyer's essential need—acquisition of goods.[214] The buyer's use of the cover remedy also avoids the difficult evidentiary task of proving market price at the time the buyer learned of the breach. If the seller fails to deliver or

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commercial transactions . . . .").

212. ARK. CODE ANN. § 4-2-508.

213. ARK. CODE ANN. § 4-2-712. "Cover"—Buyer's procurement of substitute goods.

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined ([section] 4-2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

ARK. CODE ANN. § 4-2-712.

214. U.C.C. § 2-712 cmt. 1.

repudiates the contract, the evidence must establish the market price *at the place of tender*, at the relevant time.[215] If the buyer rejects the goods or revokes acceptance, the buyer must establish the market price *at the place of arrival*, at the relevant time.[216] The cover remedy is an alternative to section 4-2-713, which provides the market measure for damages resulting from non-delivery or repudiation by a seller.[217]

In exercising the remedial right of cover, the buyer need not purchase identical goods and may agree to terms that differ from those of the breached contract.[218] However, the buyer's actions must be taken seasonably and in good faith. Although not identical, the goods must be "commercially usable as reasonable substitutes under the circumstances of the . . . case."[219] Whether a purchase was a reasonable cover is a question for the fact finder.[220]

An injured buyer's purchase must be that of goods usable as reasonable substitutes but need not be identical.[221] Clearly, the purchase of goods of a different kind or type because of a change in judgment by the buyer regarding the appropriateness of the purchased goods for its business, unrelated to the defect in the goods, is not the purchase of a reasonable substitute.[222] Additionally, the buyer may not use cover to put itself in a better position than would result from contract performance.[223] Such deliberate conduct violates the duty of good faith in enforcement of its remedial right under the agreement.[224] An injured buyer is not limited to resorting to the market to acquire the replacement

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215. ARK. CODE ANN. § 4-2-713 (Repl. 2001).

216. ARK. CODE ANN. § 4-2-713.

217. *See* U.C.C. § 2-712 cmt. 3.

218. *See* U.C.C. § 2-712 cmt. 2.

219. *See* U.C.C. § 2-712 cmt. 2.

220. *See* Dickson v. Delhi Seed Co., 26 Ark. App. 83, 94, 760 S.W.2d 382, 389 (1988).

221. *See* U.C.C. § 2-712 cmt. 2.

222. *See, e.g.*, Valley Die Cast Corp. v. A.C.W. Inc., 181 N.W.2d 303, 311 (Mich. Ct. App. 1970) (upholding the trial court's ruling that purchase of a brush car wash system was not "cover" for the original contract for a power car wash system).

223. *See, e.g.*, Martella v. Woods, 715 F.2d 410, 413-14 (8th Cir. 1983) (applying Missouri law, the contract required the seller to resell 144 heifers previously purchased from the buyer under "feeder agreement" and at the time of breach the heifers weighed 900 pounds and one-third were pregnant and the buyer purchased as substitutes fifty pregnant heifers weighing 1100 to 1200 pounds).

224. *See* U.C.C. § 1-304 (2004).

goods by purchase. The buyer may also obtain goods by barter or exchange,[225] from its existing inventory, or by manufacturing the replacements.[226]

III. EXEMPTION—EXCUSE FOR NON-PERFORMANCE

A party to a domestic contract governed by Article 2 of the U.C.C. must answer in damages for its failure to perform in the absence of an exemption for its non-performance under Arkansas Code Annotated section 4-2-613,[227] seller's excuse by casualty to the goods, or 4-2-615,[228] excuse by a failure of presupposed conditions, or some supplemental doctrine or rule from the common law such as frustration of purpose.[229]

A. Seller's Excuse—Casualty to the Goods

Substantially similar to the traditional concept of impossibility, section 4-2-613 permits discharge of the seller when specific goods in existence at the time of contracting,

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225. Doner v. Snapp, 649 N.E.2d 42, 43, 45 (Ohio Ct. App. 1994) (bartering or exchanging ostriches is permissible).

226. *See generally* Dura-Wood Treating Co. v. Century Forest Indus., 675 F.2d 745 (5th Cir. 1982); Cives Corp. v. Callier Steel Pipe & Tube, Inc., 482 A.2d 852 (Me. 1984).

227. ARK. CODE ANN. § 4-2-613 (Repl. 2001).

> Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term ([section] 4-2-324) then
>
> (a) if the loss is total the contract is avoided; and
>
> (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

ARK. CODE ANN. § 4-2-613.

228. ARK. CODE ANN. § 4-2-615 (Repl. 2001).

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

ARK. CODE ANN. § 4-2-615.

229. *See* ARK. CODE ANN. § 4-1-103 (Repl. 2001).

whose continued existence is required for performance of the contract, suffer casualty without the fault of either party.[230] If the casualty occurs before the risk of loss shifts to the buyer, the seller is discharged without liability for non-performance if the loss is total; the agreement is avoided.[231] If the loss is partial, the buyer may either avoid the contract, discharge its obligation of performance, or perform the contract.[232] To the extent the goods are accepted, the buyer is entitled to an allowance against the price for the deficiency in the promised goods without further relief against the seller.[233]

No mention is made in section 4-2-613 regarding the availability of restitution to the buyer for any portion of the price previously paid as a deposit or installment upon total casualty to the goods.[234] On its face, in the context of a total loss of the goods by a casualty, section 4-2-613 appears to leave the loss where it falls.[235] The seller does not receive restitution for any preparation of the goods for its performance and no provision is made for restitution of any prepayments or deposits by the buyer.[236] However, section 4-1-103 permits supplementation of Article 2 unless the applicable common law rule is displaced.[237]

The Restatement (Second) of Contracts in sections 272 and 377 grants the court broad discretion to provide relief to a party whose duty does not arise or whose duty has been discharged because of impracticability or frustration of purpose.[238] Thus, the buyer who has made prepayments or deposits in advance of the seller's performance that is discharged for impracticability, should be entitled to restitution of the payments made.[239] Going

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230. *See* ARK. CODE ANN. § 4-2-613.
231. *See* ARK. CODE ANN. § 4-2-613(a).
232. ARK. CODE ANN. § 4-2-613(b).
233. ARK. CODE ANN. § 4-2-613(b).
234. *See* ARK. CODE ANN. § 4-2-613.
235. *See* ARK. CODE ANN. § 4-2-613.
236. *See* ARK. CODE ANN. § 4-2-613.
237. *See supra* notes 10-58 and accompanying text (discussing displacement under the Code).
238. RESTATEMENT (SECOND) OF CONTRACTS § 272 cmt. b (1981).
239. *See, e.g.*, Dole Fresh Fruit Co. v. Delaware Cold Storage, Inc., 961 F. Supp. 676, 685 (D. Del. 1997) (permitting the amendment of the plaintiff's complaint to permit a request for restitution of money paid under the contract should the defendant prevail on its defense of impossibility); *see also* Cazares v. Saenz, 256 Cal. Rptr. 209 (Cal. Ct. App. 1989) (stating that an inexperienced attorney associated with a partnership in order to engage the services of one attorney who, after two and one-half years of service, was

beyond restitution, the Restatement authorizes recovery of reliance expenses, even though the other party has not benefited from the other's change of position, if such a recovery is necessary to prevent injustice.[240] The court has the power to supply terms "as justice requires,"[241] to fill the gap in the contract that resulted from the parties' failure to address, *ex ante*, the circumstances existing after a casualty to or deterioration of the goods. The flexible Restatement rule permits a balancing of equities between the parties. After the occurrence of a casualty, the seller is discharged from its obligation to perform without liability for damages.[242] Restoring the buyer to its pre-contractual status ameliorates the harsh results of discharging the seller and prevents the buyer from bearing not only the loss of the seller's performance but also the costs the buyer expended in preparing and performing in reliance on the seller's promise.

B. Impracticability

Upon the occurrence of an unforeseeable frustrating event, "a contingency the non-occurrence of which was a basic assumption on which the contract was made," section 4-2-615 expressly provides for the seller's exemption from liability for delay or non-performance.[243] Section 4-2-615 operates as a general default gap-filling rule if the parties have not by

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appointed to the bench rendering his continued performance impossible. Thereafter, the matter settled and the partnership brought a claim for its services; the court of appeals ruled the partnership was entitled to recover in *quantum meruit* for the reasonable value of its services).

240. RESTATEMENT (SECOND) OF CONTRACTS § 272(2) & cmt. b.

241. *Id.*; *see, e.g.*, Unihealth v. U.S. Healthcare, Inc., 14 F. Supp. 2d 623 (D.N.J. 1998) (modifying the agreement between the parties to provide an equitable remedy after the agreement was frustrated).

242. RESTATEMENT (SECOND) OF CONTRACTS § 262 cmt. a.

243. ARK. CODE ANN. § 4-2-615. *But see* MISS. CODE ANN. § 75-2-615 (2002).

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> > (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c), *or failure to take delivery as provided for under the contract on the part of a buyer who complies with paragraph (d)*, is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made . . . .

MISS. CODE ANN. § 75-2-615 (emphasis added).

agreement determined the scope of the seller's obligation. Remedial relief available to the seller includes an exemption from liability for damages suffered by the other party[244] and adaptation or modification of the contract to limit the seller's obligation of performance to a prorated amount of the seller's production.[245]

Official comment nine to this section suggests that relief granted by the section is available to buyers.[246] In *Jacob Hartz Seed Company v. Coleman*,[247] the buyer asserted an exemption under section 4-2-615 as an alternative to its claim that it effectively rejected the tendered soybeans when the soybeans purchased from the seller failed certification as required by the terms of the contract.[248] Holding that the buyer rejected the goods within a reasonable time after discovery of the non-conformity, the court declined to address the buyer's use of section 4-2-615.[249] Thus, the question remains open in Arkansas. A buyer's intended use of the goods to be purchased, its delay in performing its obligation to take delivery and to pay for the goods may be the by-product of compliance with a

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244. U.C.C. § 2-615 cmt. 11 (2001).

245. ARK. CODE ANN. § 4-2-615(b).

246. U.C.C. § 2-615 cmt. 9.

> [W]here the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement subcontract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption.

U.C.C. § 2-615 cmt. 9; *see also* Northern Ill. Gas Co. v. Energy Coop., Inc., 461 N.E.2d 1049, 1060 (Ill. App. Ct. 1984) (agreeing with the trial court that the utility as buyer was entitled to assert the applicability of U.C.C. section 2-615); Nora Springs Coop. Co. v. Brandau, 247 N.W.2d 744, 748 (Iowa 1976) (holding U.C.C. section 2-615 equally applicable to buyers, but finding the evidence insufficient to support a conclusion of impracticability to excuse the buyer's failure to accept grain); Golsen v. ONG W., Inc., 756 P.2d 1209, 1213 (Okla. 1988) (determining that the buyer's claim for exemption for non-performance of a gas take or pay contract for market failure was impermissible under both the terms of the *force majeure* clause of the contract and U.C.C. section 2-615 without questioning the applicability of the section to buyers). *But see* Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 277 (7th Cir. 1986) (*cited in* Peter A. Alces & David Frisch, *Commenting on "Purpose" in the Uniform Commercial Code*, 58 OHIO ST. L.J. 419, 448 n.105 (1997) (observing that Judge Posner held section 2-615 inapplicable to buyers because the official comments had not been adopted by Indiana Legislature)).

247. 271 Ark. 756, 612 S.W.2d 91 (1981).

248. *Id.* at 757, 612 S.W.2d at 92-93.

249. *Id.* at 758, 612 S.W.2d at 93.

government rule or regulation. Both the Convention on Contracts for the International Sale of Goods[250] and the UNIDROIT Principles of Commercial Contracts[251] grant a buyer an express right to seek an exemption. However, the Article 2 drafting committee did not seize the opportunity provided by the 2002 amendment process to modify this omission. There is no legal justification for denying a buyer the opportunity to employ section 2-615. Indeed, the Article 2 study group appointed by the Permanent Editorial Board recommended that the buyer's right to employ section 2-615 be incorporated into a revision of Article 2.[252] Despite the recommendation, the first revised Article 2 drafting committee in its July 1997 draft declined to modify the section and establish a uniform approach to exemption for buyers and chose to relegate the buyer to using the common law doctrine of frustration of purpose.[253] The commentary to the draft suggests that the drafting committee was unable to appreciate the possibility that circumstances other than a shift in the market, an impressible event for exemption pursuant to section 2-615,[254] would necessitate delay or non-performance by a buyer.[255] Such a perspective is, indeed, shortsighted.

If section 4-2-615 is construed to be unavailable to buyers, an Arkansas buyer must consider the availability of relief under the common law doctrines of frustration of purpose and impracticability that supplement the Code under section 4-1-103. Because section 2-615 does not expressly address exemption for buyers, neither a particular provision nor the policies of Article 2 suggest that displacement of common law frustration of purpose or impracticability occurred.[256]

1. Restatement (Second) of the Law of Contracts

Subject to a contrary agreement or circumstances, a

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250. *See infra* notes 265-71 and accompanying text.

251. *See infra* notes 272-84 and accompanying text.

252. National Conference of Comm'rs on Uniform State Laws, Annual Meeting Draft, revised § 2-716, n.2 (July-Aug. 1997).

253. *Id.*

254. U.C.C. § 2-615 cmt. 4 (2001).

255. Annual Meeting Draft, Revised § 2-716 n.2.

256. *See supra* notes 34-58 and accompanying text (discussing displacement under Arkansas law).

discharge by supervening impracticability is available for a party whose performance is made impracticable by the occurrence of an event, if the non-occurrence was a basic assumption of both parties.[257] The occurrence of the event must be without the intentional, negligent, or other fault of the party seeking a discharge,[258] and the party seeking exemption must use reasonable efforts to "surmount obstacles to performance."[259] The substance of the Restatement's rule of exemption replicates that of the Code.[260]

On the other hand, frustration of purpose under the Restatement permits discharge only when a party's principal purpose is substantially frustrated.[261] The principal purpose "must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense."[262] The mere fact that the transaction has become less profitable is insufficient to establish frustration of purpose.[263] The performance must become commercially valueless, which requires near total frustration, such as a government regulation that prohibits the purchase or distribution of the product.[264] Thus, exemption under the frustration of purpose standard becomes more difficult to obtain than an exemption under the impracticability standard of either Arkansas Code Annotated section 4-2-615 or Restatement section 261.

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257. RESTATEMENT (SECOND) OF CONTRACTS § 261.

258. *See id.* at § 261 cmt. d; *see, e.g.*, Sink v. Meadow Wood Country Estates, Inc., 559 A.2d 725, 728 (Conn. App. Ct. 1989) (holding that the developer's lack of diligence in failing to complete the subdivision was "fault" within the section).

259. RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d.

260. *See, e.g.*, B.F. Goodrich Co. v. Vinyltech Corp., 711 F. Supp. 1513, 1519 (D. Ariz. 1989) (using section 261 as a basis for interpreting the *force majeure* clause of the contract that was analogous to that of the section to hold that the buyer was not exempt from its obligation to purchase resin because of the availability of a lower price in the market).

261. RESTATEMENT (SECOND) OF CONTRACTS § 265.

262. *Id.* at § 265 cmt. a.

263. *Id.*

264. *Id.* at § 265 cmt. a, illus. 5, 6; *see also* Felt v. McCarthy, 922 P.2d 90, 93-94 (Wash. 1996) (finding that the developer's intended purpose for use of land was adversely affected by wetlands regulations but some use remained available, so commercial frustration was inapplicable); Washington State Hop Producers, Inc., Liquidation Trust v. Goschie Farms, Inc., 773 P.2d 70, 73-75 (Wash. 1989) (finding that hop allotment contracts became worthless—frustrated—by deregulation of the hop production).

2. Contracts for the International Sale of Goods

Unlike the Code, the Convention extends the rule of exemption for liability beyond damages that might accrue because of delay and nondelivery to exempt any aspect of *either* party's performance that is prevented where: 1) the failure to perform was due to an impediment beyond the party's control; 2) the party could not have been expected to have considered the impediment at the time of contracting; or 3) the party could not reasonably be expected to have avoided or overcome the impediment or its consequences.[265] The legal effect of these requirements is to impose a duty of performance unless the performance becomes "impossible."[266] If the burden of performance becomes more onerous or impracticable, performance must occur. Thus, the Convention is more restrictive than the Code on the effect of the circumstances giving rise to an exemption. The Convention reflects the traditional view that the loss incurred from a frustrating event rests where it falls, *pacta sunt servanda*.[267] In the absence of contractual provisions between parties that authorize exemption upon frustration or impracticability, such theories should not be appropriated from domestic law. Supplementation of the Convention with these domestic law theories contravenes the express goals of construing the Convention to promote uniformity in application and to maintain its international character.[268]

Remedial relief available under the Convention is not limited to avoidance or allocation. Article 79, subsection 5 expressly reserves the right of both parties to pursue all rights under the Convention, excluding the recovery of damages.[269] Consequently, restitution for any portion of the price paid or goods delivered can be demanded, as well as any benefit accruing to the party who received the part performance.[270]

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265. C.I.S.G., *supra* note 4, at art. 79.

266. *Id.*

267. *See* Sarah Howard Jenkins, *Exemption for Nonperformance: UCC, C.I.S.G., UNIDROIT Principles—A Comparative Assessment*, 72 TUL. L. REV. 2015, 2020 (1998) (discussing the theoretical basis for the doctrine of impossibility).

268. *See* C.I.S.G., *supra* note 4, at art. 7.

269. *Id.*

270. *Id.* at art. 81.

However, reliance expenses incurred by the seller for any part performance may not be recovered in the absence of some benefit accruing to the buyer.[271]

3. The UNIDROIT Principles

The UNIDROIT principles ("Principles") recognize two contexts in which a party's duty of performance might be excused: hardship and *force majeure*.[272] *Force majeure* under the Principles is a restatement of exemption under the rule of impossibility of the Convention.[273] Despite expressing the fundamental principle that a validly entered contract is binding, suggesting adherence to the traditional view of exemption, *pacta sunt servanda*, the Principles expand the concept of exemption beyond that reflected in section 2-615 of the Code to include hardship, which encompasses frustration and impracticability.[274] Hardship requires a change in circumstances so severe and fundamental that a party cannot be held to its promise although a possibility of performance exists.[275] If an unforeseeable event, not within the control of the disadvantaged party, the occurrence of which was not a risk assumed by the disadvantaged party, occurs or becomes known after contracting, and the equilibrium of the contract is fundamentally altered for either party, a hardship results.[276] A contract is fundamentally altered if events unknown at the time of contracting or occurring after the parties

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271. *Id.* at art. 77.

272. International Institute for Unification and Private Law (UNIDROIT) *Principles of International Commercial Contracts*, arts. 6.2.1-6.2.3, 7.1.1 (1994) [hereinafter UNIDROIT Principles]; Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Test and a Review*, 63 FORDHAM L. REV. 281, 298 (1994).

273. UNIDROIT Principles, *supra* note 272, at art. 6.2.1, 7.1.7.

274. *Id.* at art. 6.2.2 cmt. 2; Perillo, *supra* note 272, at 300.

275. UNIDROIT Principles, *supra* note 272, at art. 6.2.2.

276. *See id.*

> There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

Id.

form their agreement cause an increase in the cost for performance or a decrease in the value of the performance to be received.[277] One author suggests that a 50% decrease in the value of the performance to be received or a 50% increase in the cost of performance is sufficient to satisfy the "fundamental change" requirement of Article 6.2.2.[278] This 50% change is substantially less than that required for frustration of purpose by the Restatement.[279]

Unlike the U.C.C. and the Convention, the Principles mandate good faith, constructive renegotiation between the parties to adapt the contract in adjusting for the unforeseen circumstances.[280] The parties, in the first instance, are allocated responsibility for resolving the disequilibrium or to fill the gap in their agreement. If, after a reasonable period of time, the parties are unsuccessful in their attempt to adjust the contract, either party may request the intervention of a court or arbitral tribunal.[281] Thereafter, a court is authorized to grant four possible options of relief if it finds a hardship exists: 1) terminate the contract at a specified date and on terms to be fixed; 2) adapt the contract with a view to restoring its equilibrium;[282] 3) direct the parties to resume negotiations to reach an agreement adapting the contract; or 4) confirm the terms of the contract as originally agreed.[283] During the pendency of renegotiation or court resolution, the disadvantaged party may not withhold its performance.[284]

Existing legal regimes authorize parity between the parties for exemption for unforeseen contingencies when the circumstances satisfy the rigid requirements imposed. As Arkansas courts construe section 4-2-615 and the legislature contemplates the amendment of the Sales Article, authorizing the application of section 4-2-615 to buyers should be a top priority. Although resort to suppletory common law principles

277. *Id.* at cmt. 2.
278. *See* Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. COMP. L. 657, 662 (1992).
279. RESTATEMENT (SECOND) OF CONTRACTS § 265.
280. UNIDROIT Principles, *supra* note 272, at art. 6.2.3 cmt. 5.
281. *Id.* at art. 6.2.3(3).
282. *Id.* at art. 6.2.3(4).
283. *Id.* at art. 6.2.3 cmt. 7.
284. *Id.* at art. 6.2.3 (2).

of impracticability and frustration of purpose is an option, the policy goals of uniformity of construction with sister jurisdictions and simplifying commercial law are not implemented when resort is made to particularized local law.

IV. CONCLUSION

During the 2005 legislative session, the Arkansas Legislature has the opportunity to revise Article 1 of Arkansas's version of the Uniform Commercial Code to clarify the supplementary role of common law and equity under the Code, and to broaden the ability of commercial parties to designate the law to govern their transactions. These changes will significantly impact existing Arkansas case authority. Of the six jurisdictions that have codified revised Article 1, five, Alabama, Idaho, Minnesota, Texas, and Virginia, maintain the reasonable relationship test of current section 1-105 for both commercial and consumer transactions. Codification of the revised choice of law rule provides an opportunity to increase party autonomy and, correspondingly, to limit the state's interest and regulatory authority over its citizenry and their contractual relationships.

Beyond the impact of revised Article 1 on Arkansas law, the concern for proper construction of existing rights, remedies, and obligations, particularly a seller's right to cure is a significant one that Arkansas litigants and courts must address. Current Arkansas case authority imposes an obligation on the buyer to permit cure despite the seller's failure to meet the statutory requirements for the exercise of that right. Such a position grants the seller an unearned benefit and may, especially if the seller is an unscrupulous one, substantially compromise the buyer's remedial rights, especially, the right of revocation of acceptance. This discrepancy between the statutory requirement and the case authority should be eliminated.