# The UCC's Perfect Tender Rule

So far, we have considered the rules concerning performance and breach under the common law. The UCC includes multiple default rules dealing with many aspects of the performance and breach of contracts for the sale of goods. They include provisions regarding the time of performance, the location of performance, certain risks during performance, the buyer's right to inspect the goods, and more. A full study of those terms is beyond the scope of this book. In this section, however, we examine a few core principles, focusing on instances where the UCC deviates from the common law.

**T.W. Oil, Inc. v. Consolidated Edison Company of New York, Inc.**
57 N.Y.2d 574 (Court of Appeals of New York, 1982)

FUCHSBERG, Judge.

In the first case to wend its way through our appellate courts on this question, we are asked, in the main, to decide whether a seller who, acting in good faith and without knowledge of any defect, tenders nonconforming goods to a buyer who properly rejects them, may avail itself of the cure provision of subdivision (2) of section 2–508 of the Uniform Commercial Code. We hold that, if seasonable notice be given, such a seller may offer to cure the defect within a reasonable period beyond the time when the contract was to be performed so long as it has acted in good faith and with a reasonable expectation that the original goods would be acceptable to the buyer.

The factual background against which we decide this appeal is based on either undisputed proof or express findings at Trial Term. In January, 1974, midst the fuel shortage produced by the oil embargo, the plaintiff (then known as Joc Oil USA, Inc.) purchased a cargo of fuel oil whose sulfur content was represented to it as no greater than 1%. While the oil was still at sea en route to the United States in the tanker *M T Khamsin*, plaintiff received a certificate from the foreign refinery at which it had been processed informing it that the sulfur content in fact was .52%. Thereafter, on January 24, the plaintiff entered into a written contract with the defendant (Con Ed) for the sale of this oil. The agreement was for delivery to take place between January 24 and January 30, payment being subject to a named independent testing agency's confirmation of quality and quantity. The contract, following a trade custom to round off specifications of sulfur content at, for instance, 1%, .5% or .3%, described that of the *Khamsin* oil as .5%. In the course of the negotiations, the plaintiff learned that Con Ed was then authorized to buy and burn oil with a sulfur content of up to 1% and would even mix oils containing more and less to maintain that figure.

When the vessel arrived, on January 25, its cargo was discharged into Con Ed storage tanks in Bayonne, New Jersey. In due course, the independent testing people reported a sulfur content of .92%. On this basis, acting within a time frame whose reasonableness is not in question, on February 14 Con Ed rejected the shipment. Prompt negotiations to adjust the price failed; by February 20, plaintiff had offered a price reduction roughly responsive to the difference in sulfur reading, but Con Ed, though it could use the oil, rejected this proposition out of hand. It was insistent on paying no more than the latest prevailing price, which, in the volatile market that then existed, was some 25% below the level which prevailed when it agreed to buy the oil.

The very next day, February 21, plaintiff offered to cure the defect with a substitute shipment of conforming oil scheduled to arrive on the *S.S. Appollonian Victory* on February 28. Nevertheless, on February 22, the very day after the cure was proffered, Con Ed, adamant in its intention to avail itself of the intervening drop in prices, summarily rejected this proposal too. The two cargos were subsequently sold to third parties at the best price obtainable, first that of the *Appollonian* and, sometime later, after extraction from the tanks had been accomplished, that of the *Khamsin*.[3]

There ensued this action for breach of contract,[4] which, after a somewhat unconventional trial course, resulted in a nonjury decision for the plaintiff in the sum of $1,385,512.83, essentially the difference between the original contract price of $3,360,667.14 and the amount received by the plaintiff by way of resale of the *Khamsin* oil at what the court found as a matter of fact was a negotiated price which, under all the circumstances, was reasonably procured in the open market. To arrive at this result, the Trial Judge . . . decided as a matter of law that subdivision (2) of section 2–508 of the Uniform Commercial Code was available to the plaintiff even if it had no prior knowledge of the nonconformity. Finding that in fact plaintiff had no such belief at the time of the delivery, that what turned out to be a .92% sulfur content was "within the range of contemplation of reasonable acceptability" to Con. Ed., and that seasonable notice of an intention to cure was given, the court went on to hold that plaintiff's "reasonable and timely offer to cure" was improperly rejected. The Appellate Division, having unanimously affirmed the judgment entered on this decision, the case is now here by our leave….

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[3] Most of the Khamsin oil was drained from the tanks and sold at $10.75 per barrel. The balance was retained by Con Ed in its mixed form at $10.45 per barrel. The original price in January had been $17.875 per barrel.

[4] The plaintiff originally also sought an affirmative injunction to compel Con Ed to accept the *Khamsin* shipment or, alternatively, the *Appollonian* substitute. However, when a preliminary injunction was denied on the ground that the plaintiff had an adequate remedy at law, it amended its complaint to pursue the latter remedy alone.

We turn then to the central issue on this appeal: Fairly interpreted, did subdivision (2) of section 2–508 of the Uniform Commercial Code require Con Ed to accept the substitute shipment plaintiff tendered? In approaching this question, we, of course, must remember that a seller's right to cure a defective tender, as allowed by both subdivisions of section 2–508, was intended to act as a meaningful limitation on the absolutism of the old perfect tender rule, under which, no leeway being allowed for any imperfections, there was, as one court put it, just "no room . . . for the doctrine of substantial performance" of commercial obligations (Mitsubishi Goshi Kaisha v. Aron & Co., 16 F.2d 185, 186 (1926) [Learned Hand, J]).

In contrast, to meet the realities of the more impersonal business world of our day, the code, to avoid sharp dealing, expressly provides for the liberal construction of its remedial provisions (§ 1–102) so that "good faith" and the "observance of reasonable commercial standards of fair dealing" be the rule rather than the exception in trade (see § 2–103, subd. [1], par. [b]), "good faith" being defined as "honesty in fact in the conduct or transaction concerned" (Uniform Commercial Code, § 1–201, subd. [19]). As to section 2–508 in particular, the code's official comment advises that its mission is to safeguard the seller "against surprise as a result of sudden technicality on the buyer's part" (Uniform Commercial Code, § 2–106, Comment 2).

Section 2–508 may be conveniently divided between provisions for cure offered when "the time for performance has not yet expired" (subd. [1]), a precode concept in this State, and ones which, by newly introducing the possibility of a seller obtaining "a further reasonable time to substitute a conforming tender" (subd. [2]), also permit cure beyond the date set for performance. In its entirety the section reads as follows:

> "(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.
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> "(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."

Since we here confront circumstances in which the conforming tender came after the time of performance, we focus on subdivision (2). On its face, taking its conditions in the order in which they appear, for the statute to apply (1) a buyer must have rejected a nonconforming tender, (2) the seller must have had reasonable grounds to believe this tender would be

acceptable (with or without money allowance), and (3) the seller must have "seasonably" notified the buyer of the intention to substitute a conforming tender within a reasonable time.[7]

In the present case, none of these presented a problem. The first one was easily met for it is unquestioned that, at .92%, the sulfur content of the *Khamsin* oil did not conform to the .5% specified in the contract and that it was rejected by Con Ed. The second, the reasonableness of the seller's belief that the original tender would be acceptable, was supported not only by unimpeached proof that the contract's .5% and the refinery certificate's .52% were trade equivalents, but by testimony that, by the time the contract was made, the plaintiff knew Con Ed burned fuel with a content of up to 1%, so that, with appropriate price adjustment, the *Khamsin* oil would have suited its needs even if, at delivery, it was, to the plaintiff's surprise, to test out at .92%. Further, the matter seems to have been put beyond dispute by the defendant's readiness to take the oil at the reduced market price on February 20. Surely, on such a record, the trial court cannot be faulted for having found as a fact that the second condition too had been established.

As to the third, the conforming state of the *Appollonian* oil is undisputed, the offer to tender it took place on February 21, only a day after Con Ed finally had rejected the *Khamsin* delivery and the *Appollonian* substitute then already was en route to the United States, where it was expected in a week and did arrive on March 4, only four days later than expected. Especially since Con Ed pleaded no prejudice (unless the drop in prices could be so regarded), it is almost impossible, given the flexibility of the Uniform Commercial Code definitions of "seasonable" and "reasonable" (n. 7, supra), to quarrel with the finding that the remaining requirements of the statute also had been met.

Thus lacking the support of the statute's literal language, the defendant nonetheless would have us limit its application to cases in which a seller knowingly makes a nonconforming tender which it has reason to believe the buyer will accept. For this proposition, it relies almost entirely on a critique in Nordstrom, Law of Sales (§ 105), which rationalizes that, since a seller who believes its tender is conforming would have no reason to think in terms of a reduction in the price of the goods, to allow such a seller to cure after the time for performance had passed would make the statutory reference to a money allowance redundant.[8] Nordstrom,

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[7] Essentially a factual matter, "seasonable" is defined in subdivision (3) of section 1–204 of the Uniform Commercial Code as "at or within the time agreed or if no time is agreed at or within a reasonable time". At least equally factual in character, a "reasonable time" is left to depend on the "nature, purpose and circumstances" of any action which is to be taken (Uniform Commercial Code, § 1–204, subd. [2]).

[8] The premise for such an argument, which ignores the policy of the code to prevent buyers from using insubstantial remediable or price adjustable defects to free themselves from unprofitable bargains, is that the words "with or without

interestingly enough, finds it useful to buttress this position by the somewhat dire prediction, though backed by no empirical or other confirmation, that, unless the right to cure is confined to those whose nonconforming tenders are knowing ones, the incentive of sellers to timely deliver will be undermined. To this it also adds the somewhat moralistic note that a seller who is mistaken as to the quality of its goods does not merit additional time. . . .

[Decision from other states] demonstrate that, in dealing with the application of subdivision (2) of section 2–508, courts have been concerned with the reasonableness of the seller's belief that the goods would be acceptable rather than with the seller's pretender knowledge or lack of knowledge of the defect . . .

It also is no surprise then that the afore-mentioned decisional history is a reflection of the mainstream of scholarly commentary on the subject …

White and Summers, for instance, put it well, and bluntly. Stressing that the code intended cure to be "a remedy which should be carefully cultivated and developed by the courts" because it "offers the possibility of conforming the law to reasonable expectations and of thwarting the chiseler who seeks to escape from a bad bargain," the authors conclude, as do we, that a seller should have recourse to the relief afforded by subdivision (2) of section 2–508 of the Uniform Commercial Code as long as it can establish that it had reasonable grounds, tested objectively, for its belief that the goods would be accepted. It goes without saying that the test of reasonableness, in this context, must encompass the concepts of "good faith" and "commercial standards of fair dealing" which permeate the code (Uniform Commercial Code, § 1–201, subd. [19]; §§ 1–203, 2–103, subd. [1], par. [b]).[10]

For all these reasons, the order of the Appellate Division should be affirmed, with costs.

COOKE, C.J., and JASEN, GABRIELLI, JONES, WACHTLER and MEYER, JJ., concur.

Order affirmed.

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money allowance" apply only to sellers who believe their goods will be acceptable with such an allowance and not to sellers who believe their goods will be acceptable without such an allowance. But, since the words are part of a phrase which speaks of an otherwise unqualified belief that the goods will be acceptable, unless one strains for an opposite interpretation, we find insufficient reason to doubt that it intends to include both those who find a need to offer an allowance and those who do not.

[10] Except indirectly, on this appeal we do not deal with the equally important protections the code affords buyers. It is as to buyers as well as sellers that the code, to the extent that it displaces traditional principles of law and equity (§ 1–103), seeks to discourage unfair or hypertechnical business conduct bespeaking a dog-eat-dog rather than a live-and-let-live approach to the marketplace (e.g., §§ 2–314, 2–315, 2–513, 2–601, 2–608). Overall, the aim is to encourage parties to amicably resolve their own problems . . .

**Notes and Questions**

1. The extreme volatility of the oil market in the mid-1970s could have made transactions exceptionally beneficial or disastrous for the parties involved. Under such conditions, the willingness of the parties to renegotiate and work out their differences is limited, and T.W. Oil is one of many noteworthy, litigated contract disputes relating to this industry from this era. In this case, the sharp decline in market prices (see footnote 3) made the buyer eager to get out of a bad deal.

2. The case focuses on the seller's ability to cure a breach. The court mentions that the generous cure provision of the UCC is needed "as a meaningful limitation on the absolutism of the old perfect tender rule." The perfect tender rule is indeed old but is still valid. UCC § 2-601 states:

> § 2-601. Buyer's Rights on Improper Delivery.
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> Subject to the provisions of this Article on breach in installment contracts (Section 2-612) . . . if the goods or the tender of delivery fail *in any respect* to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.

   (emphasis added). The reference to "in any respect" is, as you by now know, a significant deviation from the common law self-help rules, which require a material breach. The perfect tender rule, as the name suggests, allows the buyer to reject tendered goods if they do not conform with the contract specification in any way, whether it concerns the quantity or quality of the goods or even the timing of delivery and whether that deviation is material or not. The buyer, of course, does not need to pay for goods that were appropriately rejected. How would the case be analyzed under the common law? What can justify the difference between the common law's material breach approach and the UCC's perfect tender rule?

3. UCC § 2-508, the code's cure provision, softens the harshness of the perfect tender rule, including by allowing the seller to have "further reasonable time" to cure. Make sure you understand why the plaintiff in *T.W. Oil* complied with § 2-508. In particular, considering that performance was due on January 30 and that the seller was able to perform on March 4, was this cure within "reasonable time"?

4. The buyer's right to reject any non-conforming goods, as stated in UCC § 2-601, is limited to goods that were *tendered* (meaning, for the most parts, delivered, but see UCC § 2-503's definition of the term) but not *accepted*. Goods are considered accepted if the buyer fails to reject them after a reasonable opportunity of inspection (UCC § 2-606). Rejecting the goods past the moment of acceptance, which the code calls "revocation of acceptance" (thus allowing the seller an opportunity to cure or else the contract is rescinded), while possible, is subject to a much higher threshold. Those limitations are listed in UCC § 2-608 and include, among others, showing that the "non-conformity substantially impairs [the goods] value to" the buyer. In addition, the revocation needs to have a reason: either that the buyer reasonably assumed that the non-conformity would be cured or that it was difficult to discover the non-conformity before acceptance. Post-acceptance, the buyer also (i) must pay and (ii) has the burden of proving the breach (UCC § 2-607). However, as is the case outside of the UCC, even if the buyer is unable to revoke the acceptance and rescind the contract, it can still sue the seller for breach by delivering non-conforming goods (UCC §§ 2-607(2), 2-714).

5. On top of the broad cure provision and the limitations on post-acceptance rejection, UCC § 2-612 includes an additional powerful measure softening the impact of the perfect tender rule:

> § 2-612. "Installment contract"; Breach.
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> (1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.
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> (2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.
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> (3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without reasonably notifying

> of cancellation or if he brings an action with respect only to past installments or demands performance as to future installment.

The heart of this provision is the restrictions that are placed on buyers in an installment contract transaction. Subsection (2), for example, limits the buyer's right to reject any single installment to cases when the "non-conformity substantially impairs the value of that installment and cannot be cured" (does that remind you of Restatement (Second) of Contracts § 237, and *K&G*?). A breach of the whole contract requires, per subsection (3), "non-conformity . . . [that] substantially impairs the value of the whole contract."

Installment contracts are not rare. What if T.W. Oil and Con Ed, instead of agreeing to a one-time transaction, would have agreed that the former would provide the latter with four shipments of oil, each paid for separately, and one of those shipments turned out to be non-conforming? The parties' obligations in that case would be quite different from the one discussed in *T.W. Oil*. What justifies these differences?

6. Now that we have examined the perfect tender rule and its exceptions, how meaningful are the differences between the power of the buyer of non-conforming goods in a sale of goods transaction and that of a breached-against party in a non-UCC transaction?