Problems of Performance of Sales Contracts under Japanese and American Law

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PROBLEMS OF PERFORMANCE OF SALES CONTRACTS UNDER JAPANESE AND AMERICAN LAW

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I. INTRODUCTION

This article will discuss the problem of performance of contracts for the sale of goods (personal property) under American and Japanese law. The discussion of American law will be limited almost entirely to the Uniform Commercial Code.\(^1\) Excluded from this discussion are risk of loss, impossibility and frustration, and products liability; these topics are treated elsewhere in this symposium.

Given such a task, it is unfortunate that it is so difficult to say quite what “performance” means in this context. It clearly does not mean what laymen—the parties to the contract—would think, namely the process of delivering and paying for the goods. Lawyers are rarely concerned with the actual operation of contracts for the sale of goods. Businessmen are unlikely to seek lawyers’ advice—as they might, for example, in the case of tax or anti-trust problems—concerning just what sort of goods they should furnish under a particular sales contract. Rather, the lawyer is called upon only after unsatisfactory performance has been rendered or after satisfactory performance has become unlikely. In other words, the lawyer is usually sought after breach or repudiation (or contemplated breach or repudiation when it is a party who has yet to perform who seeks the lawyer’s advice). If a lawyer is engaged in the transaction, it normally will be only at the time of formation or breach. He does not deal with satisfactory performance at all. He is concerned with unsatisfactory performance only after it has taken place.

To be sure, the commercial codes of both the United States and Japan contain a number of rules which look as though they are designed to deal with performance, such as when goods are to be delivered, how payment is to be made, and whether the buyer may

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\(^1\) All references to the Uniform Commercial Code [hereinafter UCC] are to Uniform Commercial Code 1962 Official Text with Comments. The UCC has been enacted in all the United States except Arizona, Idaho, Louisiana, Mississippi, and South Carolina. U.C.C. Rep. Correlation Tables (Fiske & Fischer ed. 1966).
inspect. But these rules can only be understood if seen in the context of the principle which underlies both American and Japanese sales law: the parties are free to arrange almost everything they wish in their contract. There is almost total freedom of contract. It is usually only when the parties have failed to specify some matter that the code rules apply. Consequently the code rules are best regarded as presumptions of the parties' intention. So, for example, if at the time they made the contract the parties said nothing about where delivery was to take place, a code rule may provide that delivery will be at the seller's place of business. But if there is any evidence of a contrary intention, such intention will govern. This can lead to rather strained interpretations, of course, since often the parties have no thought whatever about a particular matter when they are contracting, and certainly they do not ordinarily think about what the legal rules might be. (They probably think more about price than anything else.) It is necessary, however, to have some sort of standard of performance in order to decide how the parties might have deviated from it—to see whether there is a breach. Both the United States and Japanese sales codes provide such standards in the form of rules for performance which are subject to contrary agreement.

Almost every section in UCC article 2 (Article on Sales) is qualified by "unless otherwise agreed." See Jones, Back to Contract, 1964 Wash. U.L.Q. 143. Similarly, article 91 of the Japanese Civil Code (which also has application in commercial transactions) provides: "If the parties to a juristic act have declared an intention which differs from any provisions of laws or ordinances which are not concerned with public policy, such intention shall prevail." (This translation, and those of the Civil Code provisions which follow, are taken from 2 Eibun horeisha Law Bulletin Series [hereinafter EHS] No. 2100 (1966).) There is, of course, a considerable difference in the attitudes of the courts of the two countries towards the interpretation of contracts, at least in theory. In the United States the courts purport not to "make" (or remake) contracts "for the parties," but only to interpret whatever the parties have agreed to. If the contract is invalid or unenforceable, then the court will not make any effort to change it—indeed it does not have the power to do so. Of course, the power of courts to "interpret" contracts can easily lead to what is, in effect, a reconstruction of the contract. Still the attitude of American courts is much influenced by this doctrine.

The situation in Japan is quite different. The courts are much freer to remake the contract. The principal authority is Japanese Civil Code article 1:

(1) All private rights shall conform to the public welfare.
(2) The exercise of rights and performance of duties shall be done in faith and in accordance with the principles of trust.
(3) No abusing of rights is permissible.

and also article 1-2: "This Code shall be construed from the standpoint of the dignity of individuals and the essential equality of the sexes." To an American ear this sounds too general to be of much practical importance, but like a similar provision, German Civil Code (BGB) article 242, it has served as the basis of very important developments.

In a case where the intention of the parties is not clear, the contract should be interpreted in the light of business practice. (This is, of course, the same as UCC §1-205.) When some parts of the contract are illegal or unjust, this should not cause the invalidity of the entire contract. Rather, the court should, where possible, re-
II. Rules for Delivery and Payment

A. In the United States

The contract provisions for performance, which the Uniform Commercial Code (hereinafter UCC) will presume in the absence of indication of a contrary intent by the parties, are quite orthodox. Thus, the UCC provides that, absent agreement to the contrary, delivery must be in single lots. However, where a contract provides expressly or impliedly for several shipments and not just one, it is presumed in the UCC that separate payments will be made for each shipment. Delivery is to be at the seller's place of business—or if he has none, at his residence—unless the contract is for the sale of identified goods which are somewhere else at the time, in which case delivery will be at that place. If no time is specified, then delivery is to be within a "reasonable time." Payment is due at the time and place the buyer is to receive the goods, and only there. To be entitled to payment, the seller must tender delivery at a reasonable hour. These presumptions apply in cases where there is nothing to indicate that the seller is to ship the goods, and therefore many domestic sales (perhaps most of the large ones) and almost all overseas sales are not covered by the foregoing presumptions.

In any case where the seller is required or authorized to ship the goods—and whether he is or not will be inferred from the contract and attendant circumstances (no set form is required)—the seller has not performed satisfactorily merely by making goods available at his place of business. Once it is determined that the seller is so required or
authorized, the UCC makes a distinction between "shipment" and "destination" contracts. Under the former, which is the more usual situation, the seller is obligated (absent contrary agreement) to perform by putting the goods in the possession of the carrier, making a "reasonable" contract for shipment, and arranging matters so that the buyer can obtain possession of the goods, including prompt notification to the buyer. Thus, in a contract for the sale of 10,000 radios by a Japanese manufacturer to an American dealer under term "F.O.B. Yokohama," delivery to the carrier in Yokohama essentially completes the seller’s performance. If a particular carrier has not been specified, then under the UCC whatever is reasonable under the circumstances—probably delivery to any reputable shipping company—would do.

On the other hand, if the transaction had involved a "destination" contract, delivery to the carrier would not have satisfied the seller’s performance obligations. Thus, in the example above if the term had been "F.O.B. New York," the Japanese seller would be obliged to tender delivery in New York.

It should be pointed out that the UCC has a number of more detailed provisions on certain aspects of delivery. They are included in a number of definitions of commonly used commercial terms, but all are subject to contrary agreement.

B. In Japan

The provisions of the Japanese codes are not greatly different. Thus, in the case of both commercial and non-commercial contracts for the sale of specified goods, delivery is to be made at the place where the goods are located when the contract is made. If the goods are

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11 UCC § 2-504.
12 UCC § 2-504, comment 3. It might be noted that the risk of loss passes to the buyer at this point. UCC § 2-509(1) (a).
13 UCC §§ 2-319(1), 2-503.
14 UCC § 2-509(1) (b).
15 E.g., UCC § 2-319 defines various F.O.B. and F.A.S. terms; §§ 2-320 and 2-321 define C.I.F. and C. & F.; § 2-322 defines delivery "ex-ship"; § 2-323 deals with forms of bills of lading in overseas shipment; § 2-324 deals with "no arrival, no sale"; § 2-325 with letters of credit (as of course does article 5); §§ 2-326 and 2-327 define "Sale on Approval" and "Sale or Return" and "Consignment Sales"; § 2-328 deals with auctions, as to which see also § 2-312(2) and comment 5 (warranty of title).
16 JAPANESE CIVIL CODE art. 484; JAPANESE COMMERCIAL CODE art. 516. The inter-relationship of the Japanese Civil and Commercial Codes should be noted. As to
unspecified, then delivery should be at the seller's residence in a non-commercial transaction, at the seller's place of business in a commercial transaction. The time for delivery is a "reasonable time," or a reasonable hour within the day. Payment is to be made at the seller's house or place of business unless payment and delivery are to be concurrent, in which case payment is to be made at the place of delivery. The time for payment is the time of delivery; in other words cash, not credit, is presumed. The Japanese codes do not deal specifically with questions of shipment. Consequently it is necessary to derive rules governing shipment from custom and usage as well as from case law. Since matters such as the meanings of "C.I.F." and "F.O.B." in the UCC are simply codifications of well-recognized international custom, results under Japanese law ought to be the same.

III. QUALITY OF GOODS

A. In the United States—Warranty

Far more difficult in both systems than problems of delivery and payment are those involving the quality of goods which must be shipped. What does one mean by saying that goods are "defective"? Under American law this question is characterized as one of "breach of warranty." Was there a "warranty" in the transaction? What was it? Was it breached?

The law of warranty is one which historically is quite complex, and these complexities have not all been eliminated by the UCC. This unfortunate state of affairs is really just the result of historical accident—the application of a highly developed and extremely complicated body of real property terminology to a field where it was not appropriate. It could be applied, if at all, only with great inconvenience. Considerable confusion resulted. Consequently, while it is necessary to
use warranty terminology since the UCC uses it, it is even more necessary not to lose sight of the substance of the rules. This is simply that the buyer is entitled to receive, and the seller is required to furnish, whatever goods the contract required to be furnished. The seller has, in other words, some sort of quality obligation. In practice this obligation can be merely to furnish goods which fit the normal meaning of the words used in the contract. This is perhaps the usual case. However, the extent of the seller's obligation may be broadened; he may be made almost an insurer of the quality of the goods. Or, on the other hand, his obligation may be diminished—the buyer may have no right to demand decent goods from the seller. The extent of the obligation is determined by the normal methods of contract interpretation adapted to sales of goods.

As indicated, the usual obligation of quality which is presumed is that the goods fit the general description. This is accomplished in the UCC by section 2-314, which provides that in any sale by a "merchant" it is presumed that goods will be "merchantable" unless the contract indicates the contrary. This "implied warranty of merchantability" is defined in section 2-314 as follows:

(2) Goods to be merchantable must be at least such as
   (a) pass without objection in the trade under the contract description; and
   (b) in the case of fungible goods, are of fair average quality within the description; and
   (c) are fit for the ordinary purposes for which such goods are used; and
   (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
   (e) are adequately contained, packaged, and labeled as the agreement may require; and
   (f) conform to the promises or affirmations of fact made on the container or label if any.

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23 See Jones, supra note 2, at 150-60.

24 There is also an obligation to furnish good title to the goods. This is dealt with in UCC § 2-312. Essentially the obligation is that the title be good and the goods free from encumbrances known to the seller. This is not particularly new and has caused little difficulty for years. There is also a provision in this section warranting that the goods are free of any claim "by way of infringement or the like." This is clearly important but is not dealt with in this paper.

25 "Merchant" is defined by UCC § 2-104 as one "who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." Thus, even a farmer could be a merchant. One is a "merchant" as to a particular transaction; there is no general class of merchants under the UCC.
(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Clearly, then, the basic standard is that of the trade—which is of course what one would expect. If there is a contract between two dealers of wheat, and the seller wires the buyer: "Offer 10 cars No. 2 hard winter wheat, delivery 2 weeks," then the only reasonable way of interpreting the contract is to say that "No. 2 hard winter wheat" means whatever persons in the trade would understand by it. That is not to say that this is always an easy question to answer.

But the obligation of the seller may go beyond the implied warranty of merchantability, provided there are special words or circumstances indicating that this is intended to be the case. If, for instance, the seller says that the rope he sells will hold 10,000 pounds safely, he has made an "express warranty" that the rope will not break under a smaller weight, provided his promise becomes the basis of the bargain. If the rope should break under a load of, say, 6000 pounds, the seller would be liable for damages. This result would follow even though the phrase "rope" or even "1 1/2 manilla" would ordinarily mean rope that would support only 5000 pounds. Or, if the buyer asks for a rope which the seller has reason to know is to be used as a tow rope on a fishing vessel operating under extreme conditions, and the seller sells rope to the buyer who is relying on the seller's skill in choosing the rope, then the seller is impliedly warranting that the rope is fit for this purpose (the "implied warranty of fitness for particular purpose").

It is apparent as one looks at these sections of the UCC that the same phrase can serve to determine the extent of the implied warranty of merchantability, to create an express warranty, and to give rise to an implied warranty of fitness for particular purpose. Consider, for

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2 See UCC § 2-314(2) (a).
29 UCC § 2-313. Note that no special words of warranty or guarantee are required to create an express warranty, nor need the seller have a specific intention of creating an express warranty. Of course, statements by the seller which are mere opinion or "puffing" and which do not become part of the basis of the bargain do not create express warranties. Note also that sales by sample are included under this express warranty section of the UCC.
30 The damages recoverable by the buyer include incidental and consequential damages. UCC § 2-715.
31 UCC § 2-315.
32 For most purposes there is no practical difference in types of warranties. There are certain areas, however, where it can matter which warranty is applied. For instance, there can be no implied warranty of merchantability unless the seller is a merchant. UCC § 2-314(1). On the other hand, there is no such restriction in creating an express warranty under § 2-313. Likewise the implied warranty of fitness
example, an invoice which reads: "G.E. 10,000 B.T.U. room air conditioner 120 V." Under the implied warranty of merchantability, the seller warrants that the item furnished will pass in the trade under the description given, and that the item furnished is fit for the ordinary purposes for which such air conditioners are designed. Where made the basis of the bargain, the terms of the description are express warranties that the item is an air conditioner, that it was manufactured by General Electric, that it has a capacity of 10,000 B.T.U., and that it can be used on ordinary household current (120 volts). Had the item supplied in the invoice been in response to an order for a device which would keep a given-size room at a certain temperature, then the implied warranty of fitness for particular purpose might also arise. It should be added that there may be an additional "warranty," labeled as such, stating the manufacturer will replace parts, etc., for five years, but this frequently has as its intention the elimination or reduction of obligations which would otherwise be present.

On the other hand, if a seller is selling, say, the contents of a flooded warehouse at a very cheap price, he probably does not intend to make himself liable for anything except the quantity of goods that are there (and conceivably not even that). This may be clear from the circumstances, or the seller may have used such words as "as is." In any event, he can "disclaim" any warranty of quality.\footnote{See UCC §2-316(3).}

It should be noted that if one is drafting a sales contract, there is no need to worry about all these phrases. One can make the rights and obligations of both parties perfectly clear without mentioning the word "warranty"; it might be better to do so. It would be unwise (and unusual) to draft a contract in terms of "express" and "implied" warranties, labeled as such. These terms are designed to apply only when the parties have not otherwise expressed themselves. Therefore, they are essentially the framework within which the plaintiff and defendant to a lawsuit make their arguments. Each side will simply manipulate the words actually used into whatever legal form is most expedient. In any event, the real argument will be: What was the contract for? What would reasonable parties have intended if they had made this contract?

for particular purpose may arise without the seller being a merchant. UCC § 2-315, comment 4. More important probably is the problem of disclaimers. For instance, an express warranty will frequently not be affected by a disclaimer clause. UCC § 2-316(1). See generally Akamatsu & Bonneville, Disclaimers of Warranty, Limitation of Liability, and Liquidation of Damages, 42 WASH. L. REV. 509 (1967).
In most situations the precise type of warranty does not matter very much. But there is one situation where the warranty categories do matter, and this is in connection with disclaimer. If one wishes to avoid any quality obligation at all, it is probably well—if not essential—to say expressly "no warranty of merchantability." And it is desirable from the standpoint of the buyer to have the seller say he "expressly warrants," or at any rate to have as much description of the goods and his proposed use of them as possible, in order to broaden the seller's undertaking as much as possible.

B. In Japan

1. Nonperformance and Kash tampo. Japanese law reaches, in most cases, a result similar to that reached in the United States. It does so, however, on the basis of rather different theories. Essentially there are two. The first is the doctrine of Default of Obligation (saimu furikō) and is, simply, an action for nonperformance. The doctrine is applicable when the goods do not meet the specifications agreed upon in the contract; in such a situation the seller has failed to "effect performance in accordance with the tenor and purport of the obligation." This theory would seem to be comparable to breach of an express warranty under UCC section 2-313, but under Japanese law a further ingredient is added: the seller must have been responsible for failing to properly perform. While the burden is on the seller to prove his lack of fault, the requirement is still a serious limitation (from the buyer's point of view) on the application of the default of obligation theory.

The second theory, and that which more closely resembles the American concept of implied warranty (at least in results), is that of Latent

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24 UCC § 2-316(2).
25 JAPANESE CIVIL CODE Art. 415:
If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may demand compensation for damages; the same shall apply in cases where performance becomes impossible for any cause for which the obligor is responsible.
Art. 541:
If one of the parties does not perform his obligation, the other party may fix a reasonable period and demand its performance, and may rescind the contract, if no performance is effected within such period.
26 See ISHIMOTO, KASHITSU NO YŌKEN (Elements of negligence), in 9 MENPO, Sōgō HANREI KENKYŪ SÔSHO (Comprehensive case study series, civil law) 3-4 (1958). The author indicates that the case law and scholarly opinion was formerly that the obligor was liable to the obligee for damages arising from nonperformance, notwithstanding the absence of the obligor's negligence or intentional fault. The author notes, however, that in recent times the Japanese courts have allowed the obligor to assert his lack of negligence or intentional fault as a defense.
Defects (kashi tampo). The theory is based upon Civil Code article 570: "If any latent defects exist in the object of a sale, the provisions of Article 566 shall apply...." The provisions of article 566 alluded to are as follows:

(1) Where the object of a sale is subject to a superficies, emphyteusis, servitude, right of retention or pledge and the buyer was unaware thereof, he may rescind the contract only if the object of the contract cannot be attained thereby; in other cases the buyer may demand only compensation in damages.

(3) ... the rescission of the contract or the demand of compensation for damages shall be made within one year from the time when the buyer became aware of the fact.

Under this theory the buyer who accepts goods, not knowing that the goods are defective (and being without fault in not so knowing), may rescind and/or claim damages on discovering the defect. As the following cases will illustrate, the concept as applied by Japanese courts is broad enough to give relief where American courts would rely upon a theory of breach of warranty.

What is a "latent defect"? One judicial expression of the rule is essentially that when the goods sold have imperfections, and for that reason their value diminishes or they are not fit for their ordinary use or the use specified in the contract, the goods are defective; whether a defect is latent is judged at the time the risk of loss passes to the buyer. The defects are "latent" if the ordinary buyer could not know of them at the time of entering into the contract.

The application of these two theories in practice is illustrated by a number of concrete examples of goods judged to be defective. Thus, it was held that an ice manufacturing machine guaranteed to be capable of making four tons of ice per day was defective when it could make only two tons per day. Also defective were: a public bond, guaranteed to be good, on which payment was subsequently suspended; a horse said to be fit for the plow, when in fact it was not fit for the plow.

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39 Ibid. It should be noted that in this case the time of entering into the contract was the time the risk of loss passed to the buyer. Since the risk of loss does not always pass to the buyer at this point, one should not generalize that the time of judging a defect to be "latent" is the time of entering into the contract. For discussion of when risk of loss passes under Japanese law, see Tanikawa, Risk of Loss in Japanese Sales Transactions, 42 Wash. L. Rev. 463 (1967).

40 Judgment of Oct. 30, 1913, 2 Hyōron-shōhō 366 (Tokyo High Ct.).

41 Hōrijitsu shinbun (No. 1467) 15 (Tokyo Dist. Ct., Feb. 28, 1918). Of course such a case would not be governed by the UCC article 2 (Article on Sales), which
so fit (being afflicted with chronic osteomalacia);\textsuperscript{42} sugar impounded by a court because it was contraband;\textsuperscript{43} a turbine pump operated by a gasoline engine with defects in its ignition;\textsuperscript{44} and fir planks which did not conform to the seller's sample, on which the buyer relied.\textsuperscript{45} It has also been decided that if the goods are said to have some particular quality and the goods lack that quality, the goods are defective even though they are of standard quality.\textsuperscript{46}

In addition to this similarity in the standard of quality required, other requirements of Japanese law are also similar to the American. For example, the type of inspection that must be made follows the UCC test of commercial reasonableness.\textsuperscript{47} Moreover, when the buyer does not know of a defect in the goods which could easily have been found by him if he had inspected the goods at the time of contract,
but he does not inspect the goods, the defect is still "latent" and he
can recover, provided his failure to inspect was not his fault. (Nor-
mally of course it would be.) Thus in one case at the time of contract
the goods were kept in a custom house where the buyer could not go
in to inspect them. Consequently he did not inspect them and did not
know of the defect. In such circumstances, he was not at fault. Buyers
have likewise been held to have been without fault in the following
cases: sale of refined saké, when the buyer sampled it but did not know
the saké did not contain formalin; sale of milk nougats wrapped in
paper bags in a box—the buyer did not know that the nougats were
softened and inferior to the sample in weight and ingredients at the
time of sale.50

In summary, the quality of the goods furnished by the seller must
meet the specifications of the contract; otherwise the seller may be
liable for breach of contract (nonperformance) under Civil Code
article 415. If the contract does not specify the quality of the goods
to be furnished, the goods must be of such quality as will fit their
ordinary use, or the use specified in the contract; otherwise the seller
may be liable under the latent defect theory of Civil Code article 570.
Whether a defect is latent is determined at the time the risk of loss
passes to the buyer; a defect is latent if at that time an ordinary buyer
would not have known of the defect, and if he is not at fault in not
knowing. If the buyer is a merchant, he has a duty to inspect under
Commercial Code article 526, so he would normally be at fault in not
knowing of the defect; but, as the cases illustrate, there are circum-
cstances where even a merchant-buyer is excused from fault in failing
to inspect.

It would seem that the differences between American and Japanese
law of the seller's quality obligation are primarily theoretical. To be
sure, there are some differences of substance, notably in regard to
products liability and disclaimer clauses which are considered else-
where in this symposium. Nevertheless, in the typical case generally
the same result will obtain under both systems.

48 Gōmeigaisha Sakaikanzō-Shōten v. K.K. Okumura Denki Shōkai, 3 Minshū
49 Osawa v. Takenhashi, HORITSU SHIMBUN (No. 4,469) 11 (Tokyo Dist. Ct.,
June 30, 1939).
50 Katsuhara Kōgyō K.K. v. Saitama-ken Gakkō Kyūshoku Shōhi Kumiai, 4
Kakuyū minshū 1111 (Urawa Dist. Ct., Aug. 8, 1953).
51 See Niibori & Cosway, Products Liability in Sales Transactions, 42 WASH.
L. Rev. 483 (1967) ; Akamatsu & Bonneville, supra note 32. See also the discussion of
kashi tempo liability in the latter article, id. at 513-23.
2. Mistake. Another theory which may possibly be used in Japanese law in the cases of quality defect is that of mistake. If the parties were mistaken as to the quality of the goods—where they thought for instance that a motor had greater horsepower than it actually had—so that the object of the contract was frustrated, the sale may be held void under article 95. The basis of this is that if, as is usually the case, the goods are sold as non-defective, when in fact they are defective, there is an inconsistency between the facts as they really are, and the facts which the buyer believed to exist at the time of the contract. This is regarded as being a "mistake" by the buyer. If this inconsistency is significant, then the requirements of Civil Code article 95 (the general mistake provision) are met. In addition, as indicated previously, the requirements of kashi tampo (latent defect) are also met. Consequently, the buyer has the option of bringing an action based on mistake or of bringing one based on latent defect.

Such a result is of course possible in the United States but highly unlikely. It seems probable that something like a situation involving a mistaken third-party opinion would be required; for example, a contract for the sale of a painting made in the mistaken belief that it was supposedly certified by Berenson (say) to be a Caravaggio, when in fact this certification had been of a completely different painting in the same gallery. In view of the highly developed American law of

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22 Japanese Civil Code art. 95: "A declaration of intention shall be null and void, if made under a mistake in regard to any essential elements of the juristic act; however, if there has been gross negligence on the part of the declarant, its nullity cannot be asserted by the declarant himself."

23 Illustrative is Nakano Tekkō Gōshigaisha v. Horie, 27 Minroku 2160 (Gr. Ct. Cass., Dec. 15, 1921). In that case B purchased a 130-horsepower electric motor from S. Sometime after the sale, it was discovered that the motor generated only thirty to seventy horsepower. B sought repayment of the purchase price, contending that the sales contract was null and void under the general mistake provision, article 95 (consequently the ten-year prescription period under article 167 applied). The trial court determined, however, that because there was a latent defect, articles 570 and 566 applied (with a consequent one-year limitation), rather than article 95. On appeal, B's argument was sustained and the Court ruled that article 95 may co-exist with articles 570 and 566. The Court explained that article 95 applies when during the contract negotiations the buyer declares that a particular quality is to be an essential element of the contract. When because of a hidden defect the goods are not of that particular quality, there has been a misunderstanding because the goods were not in fact as the parties believed them to be; hence, the mistake provision applies to render the contract null and void. The mistake provision operates, however, only when the misunderstanding concerns an essential element of the contract. Therefore, if the buyer had made no declaration of intention that a particular quality was to be an essential element of the contract, article 95 would have no application. The buyer's remedy would then have to be under the latent defect provisions of articles 570 and 566. The Court remanded the case to determine whether the buyer had expressly intended that "130-horsepower" should be an essential element of the contract.
warranty, developments along this line appear to be unlikely.\textsuperscript{54}

In sum, then, under both the UCC and the Japanese codes, the parties have almost total freedom to set whatever standards of performance they wish. When they have entered into a valid contract, but have left certain matters unprovided for, the codes will supply certain standard provisions which are quite similar in the two countries. But these provisions are always subject to being superseded by indication of contrary intent.

IV. PERFORMANCE AFTER BREACH

Despite the existence of these rules, actual consideration of the problems under a sales contract by a lawyer will, as indicated above, usually begin after there is a breach or the threat of one. The UCC envisages three stages at which this consideration is likely to take place and sets up somewhat different procedures for each. The three stages are: 1) when there is reasonable doubt that the other party will perform, though as yet there is no failure to perform nor repudiation; 2) anticipatory repudiation by one party before his performance is due; and 3) breach. These seem to reflect the actual situations fairly well and hence serve as a satisfactory framework for discussion of both systems.

A. Reasonable Grounds for Insecurity Prior to Breach or Repudiation

It often happens in the course of performance that one party fears the other will not perform when the time arrives for him to do so. This might result from any number of reasons. For example, the market price may have risen appreciably so that the contract is very disadvantageous to the seller, and perhaps he has already broken other similar contracts with this or other buyers. Or, either the seller or the buyer may be in poor financial condition though not formally insolvent. There are, of course, many other possibilities. In any event, if there is some reasonable ground for insecurity, then the party who regards himself as insecure can, under the UCC, demand assurances that the other party will perform, and if he does not receive such assurances within a reasonable time (not to exceed thirty days), then

\textsuperscript{54} The UCC does not deal with the problem of mistake except for the single instance where, in a contract for an identified object, the goods were destroyed at the time the contract was made, or subsequently, but before the risk of loss passed to the buyer; in such case the contract is avoided. UCC §2-613. Consequently, the usual mistake situation is governed by the common law (or in this case equity) of the state concerned. UCC §1-103.
he can cancel the contract and proceed to his various remedies for breach.\textsuperscript{55}

Unlike the UCC, the Japanese codes do not have a provision which is generally applicable to such threatened misperformances by the other party, except in the event of bankruptcy.\textsuperscript{56} However, some Japanese writers believe that if, after the execution of the contract, the financial situation of either party deteriorates to such an extent that there is reasonable doubt that he can perform, the other party, even though he must perform first according to the agreement, may delay performance until he receives reasonable security or assurances (fuan-no-kōben).\textsuperscript{57}

\textbf{B. Anticipatory Repudiation}

Often, prior to the date of performance, one party will notify the other, formally or otherwise, that he does not intend to go ahead with the contract, or he will fail to respond to inquiries, or will imply that he is not going to perform on time. In such a case what can the other party do? He can, of course, follow the procedure indicated above for one who feels insecure. It is often difficult in fact to establish just when there is a true repudiation, so the above procedure enables one to clarify the situation. At any rate, once the repudiation is established then the UCC sets forth the remedies of the injured party as follows.\textsuperscript{58}

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

It should be noted that this is subject to a requirement of reasonableness. Thus if the contract is made 1 February for delivery to be

\textsuperscript{55} UCC § 2-609.
\textsuperscript{56} See note 103 infra.
\textsuperscript{57} §(1) WAGATSUMA, SAIKEN KAKUBON 84 (1962).
\textsuperscript{58} UCC § 2-610.
1 December, and the seller repudiates on 1 March, the buyer cannot wait until 1 December for him to perform.

Again, there does not appear to be any equivalent provision in Japanese law except, of course, that each party can withhold his performance until the other party performs (absent a credit agreement). In fact, it seems doubtful that when one party to a sales contract repudiates the contract with respect to a performance not yet due, the aggrieved party may resort to any remedy for breach of contract before his own performance is due. Also Civil Code article 541 provides: "If one of the parties does not perform his obligation, the other party may fix a reasonable period and demand its performance, and may rescind the contract, if no performance is effected within such period." The provision is construed to apply only after the defaulting obligor's performance has become due.

C. Breach

1. Under the Uniform Commercial Code. One party performs improperly, what can the other party do? This cannot really be answered until one decides what improper performance is. The UCC would seem to say that any deviation from the contract is a breach. If the contract says delivery by 5:00 p.m., then delivery at 6:00 p.m. is a breach. This is theoretically the traditional rule of Anglo-American contracts, but it is subject to many exceptions in the UCC. In general these exceptions may be summed up in the proposition that precise compliance cannot be insisted on if the circumstances indicate that a more flexible approach was to be expected. However, it is really only feasible to consider the UCC approach to breach from two points of view: that of the injured buyer and that of the injured seller, since

Japanese Civil Code art. 533: "One of the parties to a bilateral contract may refuse performance of his own obligation until the other party tenders performance of his obligation; however, this shall not apply where the obligation of the party is not due."

However, article 543 of the Civil Code provides: "If performance has become impossible in whole or in part by any cause for which the obligor is responsible, the obligee may rescind the contract." It could be argued perhaps that by analogy to article 543, the aggrieved party ought not have to await the obligor's default in performance where the obligor has repudiated the contract. The argument might have appeal out of regard for the disadvantaged position of the aggrieved party while waiting for the repudiating party's time for performance to become due.

UBC §2-601 provides that if the goods or the tender of delivery "fail in any respect to conform to the contract," the buyer may reject the whole. This puts him in a position to use all his remedies for breach under §2-711(1). It is difficult to find a precisely equivalent provision for the seller since the buyer's performance is essentially simple—pay. But UCC §2-703 seems to have the same approach as UCC §2-601 and gives the seller his various remedies whenever the buyer does not perform precisely as required.
the performance of each is so different, and since that is the way the UCC is organized. Ordinarily the buyer has nothing to do except to pay. The seller, on the other hand, usually has a number of performances. Hence the ways in which he can breach are more numerous.

a. *The injured buyer.* The basic aim of the provisions of the UCC which deal with the buyer's remedies is to give him all the help he needs to be put in the position he would have been in if the contract had been performed. Further, the UCC recognizes that a breach of a contract is not necessarily a sin. Contracts are frequently not performed precisely as written and the parties make appropriate adjustments. Often the “breaching” seller would be quite justifiably surprised to learn he could be required to do anything more than make a price adjustment—if that. Consequently, the UCC provides as its basic remedy for the injured buyer the right simply to refuse to perform, or “cancel,” to use the UCC’s language. Though it is not specifically provided that he must do so, he would obviously be well advised to notify the seller of this intention. The buyer retains a right to get damages. If the defect is one in the goods, then his course of action varies according to the circumstances. He has clearly a right to reject the goods. If he has a right to inspect the goods (as he normally does) and the defect is one which a reasonable inspection would reveal (or, of course, if for any reason he in fact knows of the defect), then he must reject the goods and notify the seller that he has done so, and why, or be barred from a remedy. The buyer is liable

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62 UCC § 2-601. The remedies of the buyer are set out in UCC § 2-711:
(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
   (a) “cover” and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
   (b) recover damages for non-delivery as provided in this Article (Section 2-713).
(2) Where the seller fails to deliver or repudiates the buyer may also
   (a) if the goods have been identified recover them as provided in this Article (Section 2-502); or
   (b) in the proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716).
(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 2-706).

63 Under UCC § 2-607, acceptance of the goods with knowledge of the defect precludes any remedy if the seller is not notified promptly of breach. Rejection is ineffective unless the buyer notifies the seller. UCC § 2-602. Moreover, the grounds of rejection must be given. UCC § 2-605.
to pay for the goods once he has "accepted" them, but if he accepts goods without knowing of a breach which he is not bound to know, then he may revoke his acceptance upon discovery, providing this takes place within a reasonable time. He can also revoke if he accepted on the assumption that the defect would be cured. Once he has rejected, he must, if he is a merchant, hold the goods at the disposition of the seller and follow any reasonable instructions. If he is a merchant, and the goods are in danger of suffering great loss as a result of physical injury or market fluctuations (if they are "perishable"), he is under a duty to dispose of them to best advantage even before receiving instructions.

b. The injured seller. As indicated, the seller's position in general is simpler than the buyer's. He merely wishes to get his money. If the buyer refuses to pay where payment is due, the seller can then cancel the contract and bring his various actions for breach of contract. Normally he will get damages.

2. Japanese Law. The provisions of Japanese law are similar but not identical. The most obvious difference is one of organization. The UCC, as indicated, simply mentions various typical fact situations and indicates what the rights and duties of the parties are. The Japanese codes are more abstract. They analyze the parties' obligations in terms of conditions, and then set up relationships among the conditions. Obviously in such an analysis, there is no difference—in theory at least—between the buyer and the seller. Thus in the absence of a credit agreement, delivery and payment are Concurrent Conditions (dōji rikō no kankei). The obligation to deliver the goods is impliedly conditioned on receiving in exchange the agreed payment. The obligation to pay the price is impliedly conditioned on receiving in ex-

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64 UCC § 2-607(1). “Acceptance” is defined in UCC § 2-606 as follows:
(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 (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer had 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.
(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.
65 Ibid.
66 Ibid.
67 Ibid.
68 Ibid.
69 JAPANESE CIVIL CODE art. 533, quoted supra note 59.
change the agreed delivery. The seller can refuse to deliver the goods to the buyer until the buyer tenders the payment, and the buyer can refuse to pay the price until the seller tenders delivery. This is an application to sales contracts of the Right To Demand Simultaneous Performance (dōji rikō no kōbenken) of bilateral contracts. As a result of the principle, one party to a sales contract is not liable for default even though he does not perform his obligation at the agreed time, provided the other party has not tendered his performance. If one party is sued for his failure to perform his obligation, the demand that he must pay the price in exchange for the possession of the goods, or deliver the goods in exchange for the price, will be denied where the plaintiff has failed to perform.

A credit agreement from its nature waives the right to simultaneous performance. So, during the agreed credit term, the party giving credit cannot refuse to perform first. When the agreed credit term expires, there is some dispute as to whether the right to demand simultaneous performance revives or not. Many text-writers and opinions affirm automatic revival when the agreed credit term expires. According to this point of view, once the credit term expires the seller who gave credit to the buyer need not deliver the goods without receiving the promised payment in return. However, where it is obvious from the contract that one party need not perform his obligation until the other party performs — e.g., where the buyer is...

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72 However, the party entitled to simultaneous performance must assert it in court; otherwise it will not be considered by the court. Tomari v. Ayabe, Hōritsu shimbun (No. 3816) 7 (Gr. Ct. Cass., Feb. 19, 1935); 1 WAGATSUMA, op. cit. supra note 57, at 96.

73 P.H. Makee v. Hiraide, Hōritsu shimbun (No. 1417) 18 (Osaka High Ct., April 25, 1918); 1 WAGATSUMA, op. cit. supra note 57, at 91; YUNOKI, op. cit. supra note 70, at 69.

required to pay the price only after he receives the goods and inspects them—the one who has to perform first cannot demand simultaneous performance, even though the other’s time for performance has also arrived. Where the credit does not expire by lapse of time, but rather is extinguished by the buyer’s intervening insolvency, it is not clear whether there is a revival of the first performing party’s right to demand simultaneous performance. Many authors say there is revival, but some influential authors reject this conclusion. There is no reported decision on this point.

One party’s past tender of performance does not deprive the other of his right to demand simultaneous performance, but one party’s performance itself does deprive the other of it. In this respect, Yukii v. Osawa is instructive. In that case the lower court said that where a party has once made a legitimate tender of performance, and this tender placed the other party in delay (chitai), the party in delay, so long as the delay exists, cannot assert the plea of concurrent conditions against the other party’s request to perform. On appeal, the Court reversed the lower court’s judgment on grounds that the lower court had an erroneous understanding of the plea of concurrent conditions. The Court held that only where there is a continuing tender is the party in delay deprived of his right to demand simultaneous performance. The Court admitted that Civil Code articles 413 and 492 would seem to place in default the party who did not accept the tender; but the Court said that these code articles merely affected the obligation of the tenderer and in no way affect the obligation of the other party. The Court reasoned that the plea of concurrent conditions

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7 Tanikawa, Shōshin no baibai (The buying and selling of merchandise) 175 (1964); 1 Wagatsuma, op. cit. supra note 57, at 92.
8 Tanikawa, op. cit. supra note 75, at 175; 1 Wagatsuma, op. cit. supra note 57, at 84.
9 Kondō, Saikēnhō kakkuron (Detailed explanation of the law of obligations) 43 (1938); Yunoki, op. cit. supra note 70, at 75.
11 Yunoki, op. cit. supra note 70, at 76-78.
12 7 Minroku 772 (Gr. Ct. Cass., Dec. 11, 1911).
13 Japanese Civil Code art. 413: “If an obligee refuses to accept performance of an obligation or is unable to accept it, such obligee shall be responsible for delay as from the time when the performance has been tendered.”
14 Japanese Civil Code art. 492: “A tender of performance shall relieve the obligor from all responsibilities for non-performance as from the time of such tender.”
PERFORMANCE OF SALES CONTRACTS

granted under article 533 was a defensive mechanism designed to protect parties to a bilateral contract, a defense which can always be asserted by a party who is asked to perform his obligation. The Court reasoned that if this conclusion were not supportable, then a party who once made tender and subsequently became insolvent would be able to take advantage of the other party, who would be required to perform knowing that he would not be able to receive counterperformance from the insolvent party. Such a result would be unjust.

One who has the definite intention not to perform his obligation in spite of the other’s tender cannot insist on simultaneous performance. In a continuous supply contract, one party can withhold his next performance if the other party has not fulfilled his previous performance. So, for example, a power distribution company can stop the supply of electric power in February if the customer has not paid his January bill. This is somewhat more favorable to the aggrieved party than the American rule in installment contracts.

a. The injured buyer. When the seller does not perform his obligation when performance is due, and such nonperformance is his fault—including that of his assistants (rikō-hojosha)—or when the seller’s performance becomes impossible through his fault, the buyer can recover damages caused by the seller’s breach of obligation and can rescind the contract, provided notice is given within a reasonable period (saikoku), though in the case of impossibility notice is not necessary. Where there has been a delay in performance, but the buyer has not yet rescinded, the seller can still perform his obligation and the buyer cannot refuse the seller’s performance. In such a situation, the seller’s tender of performance must be accompanied with a tender of compensation for damages resulting from the delay.

The Great Court of Cassation was met with this problem in Naijo v. Nishimaru and resolved it with the above rule. The Court reasoned that until rescission is actually executed, the contract continues

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83 Quoted supra note 59.
85 SUEKAWA, op. cit. supra note 74.
86 This would not constitute a “sale of goods” under UCC § 2-105 and would not, in consequence, be governed by the UCC.
87 See UCC 2-612.
in existence so the seller is still entitled to perform his obligation. However, in the interest of fairness the seller must compensate the buyer for any damages caused by the seller's delay in performing.

Impossibility may be a defense to the seller's nonperformance, provided the impossibility does not arise because of the seller's fault. While impossibility is discussed in detail elsewhere in this symposium, it might be noted here that impossibility which is not the fault of the seller will not excuse the seller when the impossibility arises after the seller has already delayed his performance. For example, in *Mizuumi v. Watanabe* S had contracted to sell tobacco leaves to B. After S's performance had become due, but before he had performed, the Tobacco Monopoly Act was enacted, rendering S's future performance impossible. To B's claim for damages resulting from S's nonperformance, S defended on a plea of impossibility. The defense was to no avail. The Court reasoned that S was responsible for the "impossibility" since he was at fault in not performing on time; had S performed on schedule, the subsequent enactment of the Tobacco Monopoly Act would not have rendered S's obligation impossible to perform.

b. The injured seller. If the buyer refuses to pay when payment is due, the seller can rescind the contract and recover damages. As to damages caused by breach of an obligation to pay money, article 419 of the Civil Code provides:

1. The amount of compensation for damages against non-performance of a money obligation shall be determined by the legal rate of interest; however, in case the agreed rate of interest exceeds the legal rate, it shall be determined by the former.

2. With regard to the compensation for damages mentioned in the preceding paragraph, the obligee is neither bound to prove the actual damages nor can the obligor set up vis major as a defence.

In the case of commercial transactions, the legal rate of interest is six per cent per annum under Commercial Code article 541; in the case of non-commercial transactions, the legal interest rate is five per cent under Civil Code article 414.

There is, it may be pointed out, an additional similarity between

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89 An example of seller's fault is where he delivers to a second buyer (without the possibility of getting the goods back) the very goods which he has contracted to sell to the first buyer.


the American and Japanese codes. The merchant-buyer who receives defective goods authorized to store them for the seller's account and he has a security interest in them. There may be an important difference. In the case of perishable goods, the buyer in the UCC must sell the goods, and he need not get anyone's approval. There is no such provision under the Japanese codes. Perhaps argument could be made that the Civil Code's bailment provisions apply—e.g., "A gratuitous bailee shall use the same care in the custody of the thing bailed as he uses in respect of his own property." It is possible that the general principle forbidding abuse of rights could be used to require the Japanese buyer to sell goods that were in danger.

V. SOME SPECIAL PROBLEMS

A. Problems of Proof

To say, as we have, that the rules of law are similar is only to state the obvious. Given freedom of contract and rules of performance which are framed with the intention of producing results similar to what the parties would have provided if they had thought of some matter, it is unlikely that the law of performance of contracts in two countries like the United States and Japan—members of the same international commercial community—would be very different. If the contracts are the same, the law will be the same. But of course the difficult problems in this area are not those of law but of fact. If the parties' manifested intent is to be enforced, then the problem is always a question of what that intent was—a question of fact. Breach always involves questions of fact. What was the condition of the goods when they were injured, if they were? What was the local custom regarding the use of refrigerated cars; was it unreasonable for seller to make a contract not using such cars? What sort of inspection was reasonable? What was discovered? What inspection could have been made? What would have been discovered if it had been? These are all fact questions. And usually the facts will not be neatly arranged. There will be a lot of confusion—perhaps wires and telephone calls back and forth when goods fail to arrive or prove to be unsatisfactory. The court is going to have to take this jumble of evidence and arrive at a judgment in some amount for one party or the other. Presenting the

52 UCC §§ 2-603, 2-604.
53 JAPANESE CIVIL CODE art. 659.
54 JAPANESE CIVIL CODE art. 1 (3): "No abusing of rights is permitted."
material in such a way as to make a favorable result likely can of course be extremely difficult. On the other hand, the dealings between the parties are usually so mixed up, and commercial customs so often vague and ambiguous, that any party can almost always have a respectable case made for him.

Clearly in this area generalizations are useless. Citations of cases are not very helpful since almost every case can be distinguished on its facts. What probably ought to be kept in mind, however, is that while the problem of proof which the parties will face in Japan and the United States is about the same, the methods of proof are quite different. This is no place to go into an analysis of the difference between Japanese and American civil procedure, but the basic difference must be mentioned. Essentially this is that in the United States proof consists of oral testimony supplemented by documents. In Japan the reverse is true. Moreover, the approach of judges is quite different. In the United States, although probably most commercial cases—at least in large cities—are tried without a jury, still a jury is always possible. Furthermore, the atmosphere of all trials in the United States is permeated by the existence of the jury system. Essentially this makes the requirements of proof more exacting. Evidence must be quite explicit. There are limitations as to what inferences will be drawn and what evidence can be considered. Application of the Parol Evidence Rule and Statute of Frauds is clearly influenced by the existence of the jury. On the other hand, the free use of oral testimony means that there will be essentially more flexibility than if only documents are involved. In Japan, in accordance with the continental model, there is no jury. Hence the judges normally have much freedom in what they will consider as evidence and the length to which they will go in their interpretations. But, on the other hand, the general reliance on documentary testimony makes for slightly less freedom.

There is nothing more that can usefully be said about these problems here, but they must be kept in mind.

B. Insolvency and Assignment

Heretofore, we have been dealing only with the rights of the buyer and seller as between themselves, but of course it can easily happen that the rights of third parties become involved. This can happen voluntarily by means of assignment. The UCC is very favorable to assignment. Indeed, it makes it rather difficult to prevent assignment
of the rights of one party to compensation when he has nothing further to perform. The right to damages for breach of contract can be assigned regardless of provisions to the contrary in the contract. The performance itself can be delegated except where otherwise agreed, or where the other party has substantial interest in having his original promisor perform. Japanese law is not significantly different.

However, in addition to this voluntary assignment, there are others of an involuntary nature. One occurs on the death of either party. The UCC does not specifically provide for this. Hence the common law applies (note, it is the differing common law of individual states that applies). Generally, in the United States at the present time, contract rights and duties devolve on whomever the decedent designated if he left a will, otherwise to the estate. The successor to the decedent is both bound to perform and empowered to continue the contract, unless, of course, the performance is so personal that the obligation ceases with death. In the case of corporate merger or consolidation, the resulting corporation will normally take over all the obligations of the predecessor corporations. Again, the situation in Japan is substantially the same. Unless the performance is so personal that the obligation ceases with death—a rare situation in commercial cases—the decedent’s estate or heirs succeed to his interests and the obligee must permit them to perform. The “amalgamated” company assumes the duties of its predecessors.

Perhaps most important of all is the situation on insolvency. There is the same problem as with voluntary assignment, merger, or death, and in the United States the trustee in bankruptcy is given the option of affirming or rejecting all executory contracts within sixty days. This is, of course, governed by federal bankruptcy law and not by the UCC. Insolvency does not, under the UCC, avoid the contract, but it will probably create reasonable grounds for insecurity and give the injured parties the right to demand assurances (which of course the bankrupt could not provide).

62 UCC § 2-210(2).
63 UCC § 2-210.
67 As to assignment of performance, see JAPANESE CIVIL CODE art. 474. As to assignment of debts, see id. art. 466.
68 See 6 CORBIN, CONTRACTS § 1334 (1962).
69 See, e.g., DEL. CODE ANN. tit. 8, § 259 (1953).
70 For succession to the rights and liabilities of the decedent, see JAPANESE CIVIL CODE art. 896. For succession to the rights and duties of predecessor companies, see JAPANESE COMMERCIAL CODE art. 103.
72 UCC § 2-609.
Under Japanese law there is a similar provision in connection with the Right To Demand Simultaneous Performance (*dōji rikō no kōben-ken*). If one party goes bankrupt, or a corporate reorganization procedure is begun before either delivery or payment is completed, the bankrupt's assignee has the right to elect whether to perform contracts or to reject them. When he elects performance of the contract, he may claim the performance from the other in exchange for the performance of the bankrupt's obligation.\(^{103}\)

But there are additional problems to insolvency, quite apart from assignment, notably the ability, in effect, of the buyer or seller to gain the position of a preferred creditor in the event of the other's insolvency. In other words, if the buyer becomes insolvent after having received the goods, but before payment, must the seller simply file a claim with the trustee in bankruptcy or can he get the goods? Contrariwise, if it is the seller who is insolvent, can the buyer get the goods or is he reduced to the position of a general creditor?

The problem of the seller is complicated by the fact that secured credit sales are quite common, and the problem of priority between the seller and a creditor of the buyer is governed generally by the law of chattel security which will not be treated here.\(^{104}\) One can perhaps say that in general under the UCC if the goods are actually physically received by the buyer, then the law of secured transactions will govern, unless the sale was a sale on approval or a sale and return—that is, a sale in which it was specified that the buyer's physical receipt of the goods was only, in effect, to give him the right to examine and accept them if he wished to do so within a certain time.\(^{105}\) Even this transaction may well be called a secured transaction, however, and governed accordingly, if there is any suspicion that it is being used fraudulently. In the normal sale the seller can stop delivery to the buyer up to the moment when the goods are received by him or a negotiable document of title has been issued and negotiated to the buyer (or any holder in due course).\(^{106}\) In addition, if the buyer was insolvent when he received the goods, the seller may reclaim them if he demands them within ten days of receipt. If such delivery was the result of mistrepre-

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\(^{103}\) *Hasanbō* (Bankruptcy law) art. 59(1) (Law No. 71, 1922), in 2 EHS No. 2340; *Kaisha kōshin* (Corporate reorganization law) art. 103(1) (Law No. 172, 1952), in 2 EHS No. 2350.


\(^{105}\) UCC §§ 2-326, 2-327.

\(^{106}\) UCC § 2-705.
sentation of solvency, the ten-day limit does not apply.\textsuperscript{107}

In Japanese law, if the buyer becomes insolvent after having received the goods, and before payment, the seller is given the position of a preferred creditor as to these goods.\textsuperscript{108} He is regarded as having a Statutory Lien (sakidori-totsuken) on such goods. In the event of bankruptcy, the seller is given a preferred position which will be honored.\textsuperscript{109} Japanese law also recognizes the seller's right of stoppage in transit. Thus, if the seller ships goods on credit to the buyer and the buyer becomes bankrupt while the goods are in the possession of the carrier, the seller can stop delivery and retake them.\textsuperscript{110} Of course the seller has the power to stop delivery in any case where delivery has not been made nor a negotiable document of title issued.\textsuperscript{111} But in the absence of insolvency, if this action injures the buyer, the seller will be liable for damages.

In the event of the seller's insolvency, under Japanese law, the buyer who has paid all or part of the purchase price may be able to claim the goods in preference to other creditors. Thus if the buyer has actually received the goods or a negotiable document of title to them, he may keep them. Otherwise he is in the position of a general creditor.

Under the UCC the buyer is also given certain rights to the goods as against creditors of the seller if he has paid all or part of the price, and the seller becomes insolvent within ten days of having received the installment. The buyer must, of course, tender the amount still due in order to obtain the goods.\textsuperscript{112} If he has actually received the goods or received a negotiable document of title to them, then, of course, he may keep them. Otherwise, he is entitled to get the goods only if he qualified as a preferred secured creditor under the UCC provisions governing secured transactions (article 9).

VI. Practical Problems Under the Codes

In sum the results that are likely to be reached under the Japanese and American codes do not appear to be materially different. The procedures that a party may have developed under one system for dealing with breach (the sort of notice given to the other party for

\textsuperscript{107} UCC § 2-702.
\textsuperscript{108} Japanese Civil Code arts. 311(6), 322.
\textsuperscript{109} Hasan hô (Bankruptcy law) art. 92 (Law No. 71, 1922), in 2 EHS No. 2340. It might be noted, however, that this preferred position is of little practical utility. See discussion in Sono & Shattuck, supra note 104, at 618-19, & n.167.
\textsuperscript{110} Hasan hô (Bankruptcy law) art. 89 (Law No. 71, 1922), in 2 EHS No. 2340.
\textsuperscript{111} Japanese Commercial Code art. 582.
\textsuperscript{112} UCC § 2-502.
example), will not have to be changed in all probability in working under the other. Most of the rules can, in any event, be avoided by the use of appropriate provisions in the contract. But all of the matters that have been mentioned here depend in the last analysis on enforcement in a court. Consequently it may be questioned whether any of this meets the real problems of those involved in commercial transactions. The risks of litigation in any system are considerable, and the difficulties of litigating a matter in a foreign country are formidable indeed. It is questionable whether litigation in such circumstances is ever a realistic alternative, unless the stakes are very large, or the defendant has assets in the plaintiff's jurisdiction, or, of course, unless the plaintiff is sufficiently well represented in the defendant's country (with branch offices and the like) to find lawsuits easy to bring. Many merchants would certainly find it quite impractical to sue.

Is there any alternative? The best one is that which is most used by merchants: reliance on the informal pressures of the community. Most people either fulfill their contracts or work out some sort of mutually satisfactory adjustment when there is disagreement, because otherwise they find it difficult to continue doing many types of business. The world of business is small enough—even internationally—that many repetitions of unsatisfactory business dealing become well known, and make it difficult to continue to operate easily. Hence the best assurance that the person one is dealing with will in fact fulfill his obligation, is the general desire to maintain a good reputation. Admittedly, however, there are many occasions when such an approach is not practicable, when for one reason or another one must deal with those one does not know (or knows all too well). If one is willing to go to the trouble and expense of a lawsuit, it is, as indicated, easy enough to work out a contract which will cover most eventualities, and make a favorable judgment likely. But it is also possible to avoid most risks by simply arranging the transaction properly. If one is a buyer, the important thing is to make sure that one gets satisfactory goods before paying. This can be accomplished simply by obtaining a right of inspection prior to payment (although if the transaction is a documentary one, this right will have to be specifically provided for.)\footnote{UCC § 2-513(3).} The seller wishes not to deliver before he is paid. This is of course the whole reason for having documentary transactions. And
there are refinements, such as letters of credit, to make the system more flexible.\textsuperscript{114}

Indeed, this is perhaps the most important thing to keep in mind when discussing performance of sales contracts. The primary effort should be to avoid the application of the codes in litigation or even the prospect of litigation. This can best be accomplished by dealing with gentlemen—or at any rate with those who would like to be known as such. If that is impossible, then one should draft a contract which makes everything very clear (unless, of course, one is oneself toying with the notion of being a little ungentlemanly, in which case ambiguity can be useful). But most important of all, one should arrange things so that he does not give up his own property until he has hold of that of the other party.

\textsuperscript{114} By having a negotiable document of title issued, the seller can easily arrange to retain control of the goods until he receives a credit satisfactory to him. The letter of credit gives him such a credit upon presentation of proper documents. The issuing bank (and hence the buyer) can protect itself even where a personal inspection is impractical by requiring an inspection certificate by some reliable agency in the seller's country.