

# REQUIREMENT AND OUTPUT CONTRACTS

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A contract for the future delivery of a definite quantity of goods at a definite price is subject to the risk of unfavorable market trends. The parties accept the risk as a normal hazard of business. The less definite requirement and output contracts have made possible a redistribution of business risk in accordance with the ability or willingness of the parties to bear such risks. Thus, the enormous business hazards created by severe competition, expanding markets, and mass production have been partially neutralized so that enterprise might be encouraged.

During the past quarter of a century the economic system of the United States survived the severe test of depression and wartime inflation. The multitude of economic pressures and man-made controls which accompanied these two extremes of economic maladjustment should have focused attention upon the weakness of any contractual obligation involving a performance in the future. Our purpose is to determine how well requirement and output contracts have survived the test.<sup>1</sup>

## I. Requirement Contracts

By the terms of the normal requirement contract the buyer engages to purchase only the materials required in the conduct of his business. The buyer, thus, seeks to avoid the risks of unbalanced supply—insufficient or overabundant—while obviating the hazardous prediction of sales in new or uncertain markets. The seller may be willing to assume these extraordinary risks because of his de-

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<sup>1</sup> The purpose of this article is to trace the judicial treatment of requirement and output contracts. Harold C. Havighurst and Sidney M. Berman, a professor and student respectively, of the Northwestern University School of Law published an exhaustive study of the economic factors influencing such treatment in an article entitled, *Requirement and Output Contracts*, 27 ILL. L. REV. 1 (1932). This writer has relied heavily upon that study for a history of the developments prior to the last two decades.

sire to make volume sales in a highly competitive field or because of his prior experience in the particular market.

These contracts offer opportunities to an unscrupulous buyer to control the effect of business fluctuations at the expense of the innocent seller. Thus, where a buyer has engaged his requirements at a specified price, he may, during a period of falling prices, reduce the margin of his loss at the expense of the seller by reducing his requirements through the use of substitutes, technical improvements, or a decrease or cessation of business operations. Likewise, during a period of rising prices, the unscrupulous buyer might unreasonably expand his requirements for purpose of taking advantage of a favorable contract.

Because of the unfavorable position of the seller and the excessive opportunities for abuse by the buyer, some courts hesitated to enforce the requirement contract.<sup>2</sup> Generally, the needs of business persuaded most courts to uphold such contracts.<sup>3</sup> Some courts managed to read into the contract the implied promise of the buyer to take his normal requirements,<sup>4</sup> or to continue in business.<sup>5</sup> Others found sufficient consideration in the form of an implied promise not to buy from anyone else.<sup>6</sup> The doctrine of mutuality gave some trouble where the courts interpreted it as requiring some equivalency of obligation.<sup>7</sup> But the majority of courts interpreted that doctrine as requiring only an enforceable

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<sup>2</sup> *Bailey v. Austrian*, 19 Minn. 535 (1873); *contra*, *Scott v. T. W. Stevenson Co.*, 130 Minn. 151, 153 N.W. 316 (1915).

<sup>3</sup> *Walker Mfg. Co. v. Swift & Co.*, 200 Fed. 529 (5th Cir. 1912).

<sup>4</sup> *Loudenbeck Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. 298 (6th Cir. 1903); *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427 (1884); *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N.E. 774 (1895).

<sup>5</sup> *Pittsburgh Plate Glass Co. v. H. Neuer Glass Co.*, 253 Fed. 161 (6th Cir. 1918); *Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co.*, 162 Fed. 848 (1st Cir. 1908). Also: *Wells v. Alexandre*, 130 N.Y. 642, 29 N.E. 142 (1891); *Hickey v. O'Brien*, 123 Mich. 611, 82 N.W. 241 (1900); *Diamond Alkali Co. v. P. C. Tomson & Co.*, 35 F.2d 117 (3rd Cir. 1929).

<sup>6</sup> *Traiuor v. Buchanan Coal Co.*, 154 Minn. 204, 191 N.W. 431 (1923); *Texas Co. v. Pensacola Maritime Corp.*, 279 Fed. 19 (5th Cir. 1922).

<sup>7</sup> *Crane v. Crane & Co.*, 105 Fed. 869 (7th Cir. 1901); *Jenkins & Co. v. Anaheim Sugar Co.*, 247 Fed. 958 (9th Cir. 1918).

counter-promise in the form of one of the implied promises just mentioned.<sup>8</sup>

In spite of general enforcement of these contracts, the courts strained to prevent a buyer from taking an unconscionable advantage of a favorable contract or avoiding an unfavorable one. Two methods of treating the abused or unjust contract were devised: The first was to nullify the contract completely under the doctrine of mutuality and certainty; the second method involved the construction of the obligations so that only the activity of the buyer was restricted while the contract remained enforceable.

Under the first method the contract might be held void for uncertainty or lack of mutuality where the article for sale was not "incident to the established business of the buyer."<sup>9</sup> In accordance with this rule some courts were led to hold all jobber's contracts void for lack of mutuality or certainty.<sup>10</sup> Because of its inflexibility many courts rejected this view.<sup>11</sup> Likewise, the contract might be held void for lack of mutuality or certainty where the buyer contracted for the requirements of a business not yet established,<sup>12</sup> but this rule was also too inflexible to be strictly followed.<sup>13</sup>

<sup>8</sup> *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, 133 N.E. 711 (1921); *Texas Co. v. Pensacola Maritime Corp.*, *supra* note 6; *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, *supra* note 4; *Trainor v. Buchanan Coal Co.*, *supra* note 6; *Ziehm v. Frank Steil Brewing Co.*, 131 Md. 582, 102 Atl. 1005 (1917).

<sup>9</sup> *Crane v. Crane & Co.*, *supra* note 7.

<sup>10</sup> *Crane v. Crane & Co.*, *supra* note 7; *Jenkins & Co. v. Anaheim Sugar Co.*, 237 Fed. 278 (S.D.Cal. 1916), *reversed*: 247 Fed. 958 (9th Cir. 1918); *Cohen v. Clayton Coal Co.*, 86 Colo. 270, 281 Pac. 111 (1929).

<sup>11</sup> *Jenkins & Co. v. Anaheim Sugar Co.*, *supra* note 7; *Texas Co. v. Pensacola Maritime Corp.*, *supra* note 6; *Baker v. Murray Tool & Supply Co.*, 137 Okla. 288, 279 Pac. 340 (1929); *Trainor v. Buchanan Coal Co.*, *supra* note 6; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, *supra* note 4; *Pittsburgh Plate Glass Co. v. H. Neuer Glass Co.*, *supra* note 5.

<sup>12</sup> *American Trading Co. v. National Fibre & Insulation Co.*, 31 Del. 66, 111 Atl. 290 (1920). *Dicta*: *Klipstein & Co. v. Allen*, 123 Fed. 992 (C.C.N.D.Ga. 1903); *Ziehm v. Frank Steil Brewing Co.*, *supra* note 8; *Grimwood v. Munson S.S. Line*, 273 Fed. 166 (2d Cir. 1921); *Lima Locomotive & Machine Co. v. National Steel Castings Co.*, 155 Fed. 77 (6th Cir. 1907).

<sup>13</sup> *Texas Co. v. Pensacola Maritime Corp.*, *supra* note 6; *Baker v. Murray Tool & Supply Co.*, *supra* note 11.

In a proper case the court might interpret the contract to be for the sale of such materials as the buyer might "wish" or "want." The quantity of the sale being uncertain because determined at the caprice and convenience of the buyer, the contract might be held void and unenforceable.<sup>14</sup> The court might declare an abused contract void for lack of consideration by finding no promise, express or implied, not to buy elsewhere.<sup>15</sup> Yet, where there was no evidence of abuse on the part of the buyer, the court, by interpretation, might find ample consideration in the form of an implied promise not to buy from another.<sup>16</sup>

The second method emphasized construction of the contract provisions. The contract might be declared enforceable, but limited in operation by implied promises read into it. Thus, where the buyer was a non-established business, the court declared the seller's obligation to be conditional upon the business becoming established before deliveries were to begin.<sup>17</sup> Where the buyer sought to "stock up" on the materials ordered under his requirement contract, the court read into the contract an implied obligation to supply only actual requirements.<sup>18</sup> Where the requirements of the buyer had expanded under the pressure of business, the courts implied an obligation to supply only

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<sup>14</sup> *Texarkana Casket Co. v. Binswanger & Co.*, 3 F.2d 611 (E.D. Tex. 1924); *Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77 (8th Cir. 1902); *Hoffman v. Maffioli*, 104 Wis. 630, 80 N.W. 1032 (1899); *Northern Iowa Gas & Electric Co. v. Incorporated Town of Luverne*, 257 Fed. 818 (N.D.Iowa 1919); *McCaw Mfg. Co. v. Felder*, 115 Ga. 408, 41 S.E. 664 (1902).

<sup>15</sup> *Schlegel Manufacturing Co. v. Cooper's Glue Factory*, 231 N.Y. 459, 132 N.E. 148 (1921).

<sup>16</sup> *Bartlett Springs Co. v. Standard Box Co.*, 16 Cal.App. 671, 117 Pac. 934 (1911); *Lima Locomotive & Machine Co. v. National Steel Castings Co.*, *supra* note 12; *A. Santaella & Co. v. Otto F. Lange Co.*, 155 Fed. 719 (8th Cir. 1907).

<sup>17</sup> *Nassau Supply Co., Inc. v. Ice Service Co., Inc.*, 252 N.Y. 277, 169 N.E. 383 (1929).

<sup>18</sup> *Dowd v. Hercules Powder Co.*, 66 Colo. 302, 181 Pac. 767 (1919); *Asahel Wheeler Co. v. Mendleson*, 180 App. Div. 9, 167 N.Y.Supp. 435 (1917); *Armstrong Paint & Varnish Works v. Continental Can Co.*, *supra* note 8; *Laclede Construction Co. v. Moss Tie Co.*, 185 Mo. 25, 84 S.W. 76 (1904); *Cullinan v. Standard Light & Power Co.*, 65 S.W. 689 (Tex.Civ.App. 1901); *Moore v. American Molasses Co.*, 179 App. Div. 505, 166 N.Y.Supp. 4 (1917).

“normal” requirements.<sup>19</sup> But where the expansion was deemed to have been within the contemplation of the parties, a sympathetic court could read into the contract an obligation to furnish all good faith requirements.<sup>20</sup>

Similarly, in a falling market the contract provisions have been interpreted to favor the unfortunate seller. Thus, the buyer might be held to have obliged himself to remain in business.<sup>21</sup> Or he might be declared to have obliged himself to take his normal requirements.<sup>22</sup> Or the court might read into the contract an obligation on the buyer to take all that he in good faith required.<sup>23</sup>

An examination of the more recent cases has failed to reveal any decision holding a requirement contract unenforceable simply because the buyer was a jobber or a “non-producing” business. In many cases the requirement contracts of jobbers and “non-producing” businesses have been declared valid and enforceable, and consequently, not void for uncertainty or lack of mutuality.<sup>24</sup> Where a coal dealer, who consumed no coal to his own use, contracted to buy his requirements of coal from a mine operator, the court upheld the contract as valid although the dealer’s business was for sale at the time the contract was made.<sup>25</sup>

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<sup>19</sup> *Andrews Coal Co. v. Board of Directors*, 151 La. 695, 92 So. 303 (1922); *Smith v. Donk Brothers Coal & Coke Co.*, 260 S.W. 545 (Mo. App. 1924); *Minnesota Lumber Co. v. Whitebreast Coal Co.*, *supra* note 4; *E. G. Dailey Co. v. Clark Can Co.*, 128 Mich. 591, 87 N.W. 761 (1901); *Anaheim Sugar Co. v. Jenkins & Co.*, 274 Fed. 504 (9th Cir. 1921).

<sup>20</sup> *New York Central Ironworks Co. v. United States Radiator Co.*, 174 N.Y. 331, 66 N.E. 967 (1903).

<sup>21</sup> *Diamond Alkali Co. v. P. C. Tomson & Co.*, *supra* note 5; *Hickey v. O'Brien*, *supra* note 5.

<sup>22</sup> *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, *supra* note 4; *Chalmers & Williams v. Bledsoe & Co.*, 218 Ill.App. 363 (1920).

<sup>23</sup> *Cragin Products Co. v. Fitch*, 6 F.2d 557 (8th Cir. 1925); *McKeever, Cook & Co. v. Canansburg Iron Co.*, 138 Pa. 184, 20 Atl. 938 (1890).

<sup>24</sup> *Hladik v. Noe*, 214 Iowa 854, 243 N.W. 180 (1932); *Great Eastern Oil Co. v. DeMert & Dougherty, Inc.*, 350 Mo. 535, 166 S.W.2d 490 (1942); *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F.Supp. 723 (M.D.Ga. 1942); *Joest v. John A. Denie's Sons Co.*, 174 Tenn. 410, 126 S.W.2d 312 (1939).

<sup>25</sup> *William C. Atwater & Co. v. Terminal Coal Corp.*, 115 F.2d 887 (1st Cir. 1940).

Likewise, the courts' initial distaste for the favored position of the non-established business which contracts for its requirements has been overcome with rare exception. In one case where a non-established match company contracted to buy its requirements of matches from a seller and the seller contracted not to sell matches in competition with the buyer, the court, in upholding the contract, said:

"We cannot see why any valid distinction should be made where a contract is entered into between two persons concerning the purchase of goods because of the fact that one of the parties had not been in business before. This . . . is what is known . . . as a 'requirement' contract and calls for the manufacture and delivery by the [seller] to the [buyer] of the amount of goods that it would require and sell to its trade."<sup>26</sup>

And, where a non-established jobber contracted to buy all the sand which he could sell, the contract was declared enforceable and not void for lack of mutuality.<sup>27</sup> A contract for the requirements of a non-established business has been enforced where that point was not in issue.<sup>28</sup> On the other hand, in the case of *Pessin v. Fox Head Wankesha Corp.*,<sup>29</sup> where a non-established beer distributor agreed to purchase his requirements from the seller and the seller agreed not to sell to any other distributor in the territory, the contract was held to be void for lack of mutuality because the requirements of a non-established business were too indefinite to be enforceable, notwithstanding the fact that the contract had been amended to require a minimum of 100 barrels per week. But this case has been severely criticised on the grounds that the distributor's promise to sell no other product was consideration for the seller's promise to furnish requirements and that the price and quantity terms prevented abuse by the buyer.<sup>30</sup>

<sup>26</sup> *Match Corporation of America v. Acme Match Corp.*, 285 Ill.App. 197, 202, 1 N.E.2d 867, 869 (1936).

<sup>27</sup> *McMichael v. Price*, 177 Okla. 186, 58 P.2d 549 (1936).

<sup>28</sup> *Knowles Foundry & Machine Co. v. National Plate Glass Co.*, 301 Ill.App. 128, 21 N.E.2d 913 (1939).

<sup>29</sup> 230 Wis. 277, 282 N.W. 582 (1938).

<sup>30</sup> *Recent Cases*, 52 HARV.L.REV. 836 (1939).

The courts apparently retain the prerogative to interpret an unconscionable contract as one for the buyer's "wishes" or "wants" and therefore void for uncertainty and lack of mutuality.<sup>31</sup> But this is not entirely satisfactory for the result is to nullify the contract as of its inception while the real difficulty is in determining the nature of the performance required by its terms. In order to preserve the validity of the requirement contract, yet restrict the freedom of the buyer, the courts have continued to emphasize the construction of the provisions. Where a buyer purchased a going business and agreed ". . . to purchase and pay for within one year . . . all of . . . said stock of parts which can reasonably be used" by the buyer, the court declared the provision to create a definite and certain obligation and that it was not restricted to the parts which the buyer could actually use.<sup>32</sup>

It appears to be settled that courts which hold requirement contracts valid, no longer find an implied obligation on the part of the buyer to stay in business so as to continue to have requirements. In the case of *In re United Cigar Stores Co. of America*,<sup>33</sup> the buyer contracted to buy from the seller ". . . all the ice cream . . . required for its stores." When the buyer ended its business in voluntary bankruptcy, the court ruled that the buyer's conduct did not constitute a breach of the contract for there was no implied obligation to have requirements. The court reasoned that the buyer should be free to deal with its own business as it sees fit so long as its conduct is *bona fide*. Again, in *William C. Atwater & Co. v. Terminal Coal Corp.*,<sup>34</sup> a coal dealer contracted to buy his requirements of coal not to exceed a certain maximum. When the dealer sold his business and thus ended his requirements before the end of the term, the court found no implied obligation upon the dealer

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<sup>31</sup> *G. Loewus & Co. v. Vischia*, 2 N.J. 54, 65 A.2d 604 (1949); *Master Contracting Corp. v. M. F. Hickey Co.*, 275 App.Div. 860, 89 N.Y.S.2d 265 (1949), *reversing* 87 N.Y.S.2d 870 (1949).

<sup>32</sup> *Whiting Stoker Co. v. Chicago Stoker Corp.*, 171 F.2d 248, 249 (7th Cir. 1948).

<sup>33</sup> 72 F.2d 673 (2d Cir. 1934).

<sup>34</sup> *Supra* note 25.

to stay in business under the circumstances. The business had been up for sale at the time the contract was made. The buyer in *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.*<sup>35</sup> contracted to buy seventy-five per cent of its requirements from the seller. The contract was to continue until written notice of annulment was given in which case certain diminished orders would result over a year's time after which the contract would terminate. During prosperous years the seller advanced large sums of money to enlarge the buyer's building wherein the seller produced goods to satisfy the contract and the seller also invested large sums in new machinery to be utilized in satisfying the contract. When the buyer ceased to operate its business the court found no duty upon the buyer to have requirements so long as the buyer acted in good faith. Likewise, in *Southwest Natural Gas Co. v. Oklahoma Portland Cement Co.*,<sup>36</sup> where the buyer reduced his requirements of natural gas for fuel by replacing worn-out equipment with new and more efficient equipment, the court failed to find an implied promise to maintain normal requirements. The only implied obligation which the court read into the contract was for good faith conduct of the business. The courts have generally abandoned the use of all implied obligations in construing such contracts, except the obligation of the buyer to purchase all of his good faith, actual requirements.<sup>37</sup>

## II. Output Contracts

By the terms of the normal output contract, the seller agrees to sell its entire production for the specified period. The seller seeks an advantage through reduced cost of marketing and a better division of labor, while the buyer desires the higher rate of profit derived from lower unit cost of materials.

<sup>35</sup> 130 F.2d 471 (3rd Cir. 1942).

<sup>36</sup> 102 F.2d 630 (10th Cir. 1939).

<sup>37</sup> *In re United States Cigar Stores Co. of America*, *supra* note 33; *Southwest Natural Gas Co. v. Oklahoma Portland Cement Co.*, *supra* note 36; *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.*, *supra* note 35; *Royal Paper Box Co. v. Apt Shoe Co.*, 290 Mass. 207, 195 N.E. 96 (1935).

Because of an unfavorable bargaining position, the output seller has been allowed more freedom than the requirement buyer. The courts in the earlier cases never denied recovery to the seller on the grounds that the contract lacked consideration, mutuality or certainty, although those defenses were frequently urged.<sup>38</sup> Likewise, contracts involving the sale of the output of jobbers and non-established businesses were upheld on every occasion.<sup>39</sup> In some instances where it was evident that an output seller was decreasing or ceasing production to avoid an unfavorable contract the court was not inclined to declare such conduct a breach.<sup>40</sup> A different result was reached, however, where the buyer had gone to large expense in reliance on the contract,<sup>41</sup> or where the seller stopped his production only for the duration of the contract.<sup>42</sup> If the reduced output was a result of *bona fide* business considerations and not an effort to avoid the contract, that conduct was held not to be a breach.<sup>43</sup> There appear to be no cases which required the seller to maintain normal production in a rising market.

Where the seller expands production in a falling market courts have on occasion limited the seller's freedom. In one case the court declared a buyer not bound to purchase the increased output resulting from the use of new equipment

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<sup>38</sup> *Imperial Refining Co. v. Kanotex Refining Co.*, 29 F.2d 193 (8th Cir. 1928); *Ramey Lumber Co. v. Schroeder Lumber Co.*, 237 Fed. 39 (7th Cir. 1916); *Fayette-Kanawha Coal Co. v. Lake & Export Coal Corp.*, 91 W.Va. 132, 112 S.E. 222 (1922); *City of Marshall v. Kalman*, 153 Minn. 320, 190 N.W. 597 (1922); *Green v. Lovejoy*, 155 Minn. 241, 193 N.W. 173 (1923); *Hollandsworth v. William Meade Tie Co.*, 26 F.2d 33 (6th Cir. 1928); *McIntyre Lumber & Export Co. v. Jackson Lumher Co.*, 165 Ala. 268, 51 So. 767 (1910).

<sup>39</sup> *Ramey Lumber Co. v. Schroeder Lumber Co.*, *supra* note 38; *City of Marshall v. Kalman*, *supra* note 38; *Kanaskat Lumber & Shingle Co. v. Cascade Timber Co.*, 80 Wash. 561, 142 Pac. 15 (1914).

<sup>40</sup> *Pfann v. Turner Cypress Lumber Co.*, 194 Fed. 69 (5th Cir. 1912); *Wemple v. Stewart*, 22 Barb. Ch. 154 (N.Y.Sup.Ct. 1856).

<sup>41</sup> *Wigand v. Bachmann-Bechtel Brewing Co.*, 222 N.Y. 272, 118 N.E. 618 (1918).

<sup>42</sup> *Dawson Cotton Oil Co. v. Kenan, McKay & Speir*, 21 Ga.App. 676, 94 S.E. 1037 (1918).

<sup>43</sup> *Kenan, McKay & Speir v. Yorkville Cotton Oil Co.*, 260 Fed. 28 (4th Cir. 1919); *Dawson Cotton Oil Co. v. Kenan, McKay & Speir*, *supra* note 42; *Wigand v. Bachmann-Bechtel Brewing Co.*, *supra* note 41; *Burt v. Garden City Sand Co.*, 237 Ill. 473, 86 N.E. 1055 (1908).

because the contract was to purchase the output of a mine as it then was.<sup>44</sup> But where the expansion was *bona fide* and reasonably foreseeable the buyer was in one case held bound to purchase the output of the seller which had increased one and three-fourths times the original estimate.<sup>45</sup>

In keeping with the early favorable treatment of the output seller, the courts of the last twenty years have refused to invalidate a contract for a seller's entire output on the grounds of a lack of mutuality, certainty or consideration. Where the output seller sold a portion of its output to a third party not included in the output contract and the seller contended, in defense of a suit brought by the buyer, that the contract was void for lack of "mutuality of obligation," the court summarily dismissed that contention by saying that the output contract was sufficient to bind the seller.<sup>46</sup> Likewise, where a non-established business contracted to sell its entire output up to a maximum figure, the seller was declared to be obligated for the entire output even though it was less than the maximum.<sup>47</sup> And no case appears in which a contract for the output of a jobber or non-established business has been declared invalid because of the uncertainty of the business.

It is interesting that no cases of the last few years have directly presented the problem of an output seller who has decreased or ended his output primarily to avoid an unfavorable contract in a rising market although the rising market has been in existence. On several occasions where output has ceased, the court has failed to find any obligation upon the seller to stay in business. In one case, where a city owned ice houses and agreed to ". . . sell unto the [buyer] such quantity of ice as the city owns or shall harvest . . ." for a definite period, the court held that it was

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<sup>44</sup> *Fayette-Kanawha Coal Co. v. Lake & Export Coal Corp.*, *supra* note 38.

<sup>45</sup> *Eustis Mining Co. v. Beer, Sondheimer & Co.*, 239 Fed. 976 (S.D. N.Y. 1917).

<sup>46</sup> *A. M. Webb & Co. v. Robert P. Miller Co.*, 157 F.2d 865 (3rd Cir. 1946); also see: *Wood v. Saylor Tie & Timber Co.*, 67 S.W.2d 826 (Mo.App. 1934).

<sup>47</sup> *Mantell v. International Plastic Harmonica Corp.*, 138 N.J.Eq. 562, 49 A.2d 290 (1946).

not a breach of contract for the city to refuse to harvest ice or to refuse to rebuild the ice houses that had burned down during the contract term. The city was declared obliged to sell only such ice as was actually harvested.<sup>48</sup> A contract for "sale of all casinghead gasoline, from 25 to 35 cars per month, which may be produced or manufactured" during a particular year was declared not to obligate the seller to continue to have output.<sup>49</sup> And, where the seller agreed to sell its output for a period of five years and it liquidated its business during the term, the court found no obligation upon the seller to remain in business. But the court there implied that such an obligation might have been found had the seller not acted upon *bona fide* business judgment, when it said: "The essence of any cause of action based on going out of business and ceasing to have requirements or output is bad faith."<sup>50</sup>

### III. Special Clauses

Aside from the implied obligations, other special provisions regarding the quantity of goods were often written into requirement and output contracts by the parties themselves. These appeared to be self-imposed limitations, but the courts which recognized the utility of requirement and output contracts favored the flexibility of the requirement and output provision as more definite and certain than the qualifying estimate.<sup>51</sup> On one occasion the court construed a contract to be for requirements where only an approximate figure had been mentioned.<sup>52</sup> Yet, approximate figures have been adopted as limits upon buyers who were seeking to abuse favorable contracts.<sup>53</sup> Courts which were careful to avoid embarrassment in future cases, how-

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<sup>48</sup> *Ives v. City of Willimatic*, 121 Conn. 408, 410, 185 Atl. 427, 427 (1936).

<sup>49</sup> *Henry H. Cross Co. v. Arkansas Natural Gas Corp.*, 284 Ill.App. 644, 2 N.E.2d 587, 587 (1936).

<sup>50</sup> *Duboff v. Matam Corp.*, 272 App. Div. 502, 503, 71 N.Y.S.2d 134, 136 (1947).

<sup>51</sup> *Brawley v. United States*, 96 U.S. 163 (1877).

<sup>52</sup> *Ruth-Hastings Glass Tube Co. v. Slattery*, 266 Pa. 288, 109 Atl. 695 (1920).

<sup>53</sup> *Waddell v. Phillips*, 133 Md. 497, 105 Atl. 771 (1919).

ever, used these figures only in support of other circumstances when forming a limitation.<sup>54</sup>

Except in a few cases the courts have favored the flexible requirements and output terms over the more explicitly restrictive maximum-minimum provisions. On one occasion the court interpreted the provision to set the absolute limits of the obligation but declared that the buyer's requirements were the measure within those limits.<sup>55</sup> In another, the buyer was declared to be obligated to purchase at least the minimum amount regardless of his requirements.<sup>56</sup> Usually, the terms were declared contradictory so that only one was enforced. Thus, a buyer was held to be entitled to his requirements even though in excess of the stated maximum.<sup>57</sup> Similarly, a seller who delivered his entire output was held not to have broken his contract even though the amount delivered fell far short of the stated minimum.<sup>58</sup> And where the clauses were in conflict the court allowed the practical construction of the parties to determine which should govern.<sup>59</sup> Other courts in similar cases have held the maximum-minimum provisions controlling while allowing the buyer to order at his discretion within the limits set.<sup>60</sup>

No recent case has been found in which a contract provision for an estimated or approximated quantity has been held to predominate over the requirement provision. Many cases have ruled the requirement provision to be the dominant measure of the contract.<sup>61</sup> Similar cases regarding

<sup>54</sup> *Andrews Coal Co. v. Board of Directors of Public Schools*, 151 La. 695, 92 So. 303 (1922); *Dawson Cotton Oil Co. v. Kenan, McKay & Speir*, *supra* note 42.

<sup>55</sup> *Louisville Soap Co. v. Taylor*, 279 Fed. 470 (6th Cir. 1922).

<sup>56</sup> *Heisel v. Volkman*, 55 App.Div. 607, 67 N.Y.Supp. 271 (1900).

<sup>57</sup> *Walker Manufacturing Co. v. Swift & Co.*, 200 Fed. 529 (5th Cir. 1912).

<sup>58</sup> *Herren v. Gaines*, 63 N.C. 72 (1868).

<sup>59</sup> *Bell-Wayland Co. v. Russell Jobbers' Mills*, 92 Okla. 201, 218 Pac. 827 (1923).

<sup>60</sup> *Corsicana Compress Co. v. Magnolia Petroleum Co.*, 253 S.W. 559 (Tex.Civ.App. 1923); *Diamond Alkali Co. v. Aetna Explosives Co.*, 264 Pa. 304, 107 Atl. 711 (1919).

<sup>61</sup> *Webber v. Johnston*, 214 Cal. 378, 5 P.2d 886 (1931); *Royal Paper Box Co. v. Apt Shoe Co.*, *supra* note 37; *Knowles Foundry & Machine Co. v. National Plate Glass Co.*, *supra* note 28; *M. W. Kellogg Co. v. Standard Steel Fabricating Co.*, 189 F.2d 629 (10th Cir. 1951).

output contracts have seemed to reach the same result. Where the contract was for the “. . . sale of all . . . gasoline, from 25 to 35 cars per month, which may be produced . . .” and the seller voluntarily closed its plant, the court found an obligation on the seller to sell only that which it actually produced.<sup>62</sup> Yet, where the seller contracted to sell “. . . all white oak cross-ties produced by [seller] . . . estimated at 10,000 in number,” and the buyer refused further deliveries after receiving approximately 3,000 ties, the court ruled that the estimate was the dominant measure of the contract. The court said, “The phrase is not indefinite or conjectural in meaning,” and suggested that the estimate was included for the purpose of approximating the amount bought.<sup>63</sup>

At least one modern case involving a maximum-minimum provision in a requirement contract was interpreted to favor the flexibility of the requirement provision. The buyer agreed to purchase “. . . all Jetty Stone required to complete the two jetties at Cape May.” The contract included the provision: “The approximate daily delivery will be between 500 and 700 tons.” The court ruled that the contract was one for requirements after the seller refused to deliver on demand.<sup>64</sup>

Recent cases in which maximum estimates accompanied the requirement provision were decided in favor of the requirement provision. Where the buyer ordered a “maximum of 35,000 gallons” of anti-freeze and the seller replied, “. . . Please do not be misled into signing any other contract as we have covered your requirements,” the court declared that a contract for requirements had been made.<sup>65</sup> And where a coal dealer agreed to purchase his requirements of coal not to exceed 150,000 tons, the buyer was declared obligated to purchase only his good faith require-

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<sup>62</sup> Henry H. Cross Co. v. Arkansas Natural Gas Corp., *supra* note 49.

<sup>63</sup> Wood v. Saylor Tie & Timber Co., *supra*, note 46 at 829.

<sup>64</sup> Kingston Trap Rock Co. v. Eastern Engineering Co., 132 N.J.L. 254, 258, 39 A.2d 422, 424 (1944).

<sup>65</sup> Great Eastern Oil Co. v. DeMert & Dougherty, Inc., 350 Mo. 535, 166 S.W.2d 490 (1942).

ments even though they ended short of the 150,000 tons when the buyer sold its business.<sup>66</sup>

**Conclusion**

There is no longer any doubt that requirement and output contracts may be *enforced*. The necessarily implied promise of the output seller not to sell to anyone else, or of the requirement buyer not to buy from anyone else, furnishes all the consideration necessary for the counter-promise of the buyer or seller as the case may be.<sup>67</sup> If the only question involved were one of consideration, the promisor might be left free to expand to the fullest in order to take advantage of a favorable contract or to cease operations entirely in order to avoid an unfavorable one. The recent cases, however, avoid these results, not by striking down the contracts entirely, but by reading into it a requirement of good faith.

The proposed *Uniform Commercial Code*<sup>68</sup> also treats the problem as one of interpretation. It provides:

“A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of any stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.”

By and large this appears to be an effort to codify the prevailing case law.<sup>69</sup> It would require even good faith perform-

<sup>66</sup> *Supra* note 25.

<sup>67</sup> 1 CORBIN, CONTRACTS, §§ 156, 158 (1950).

<sup>68</sup> § 2-306 (1) as revised Sept. 1950.

<sup>69</sup> UNIFORM COMMERCIAL CODE § 2-306 (1), Comment 1 (Spring 1950).

“... [This section] applies to . . . contracts of nonproducing establishments such as dealers or distributors as well as to manufacturing concerns.”

§ 2-306 (e), Comment 2 (Spring 1950).

“... Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance. A shutdown to curtail losses, however, is not permissible . . . but a shutdown for lack of orders might be permissible . . .”

ance to be restricted to the reasonable contemplation of the parties as of the making of the contract.<sup>70</sup> A departure from the general trend of case law is more evident in the treatment of approximations in the contract. While the courts have tended to favor the flexibility of the requirement or output provision, the Code would allow estimates and approximations to control.<sup>71</sup> What constitutes an unreasonably disproportionate quantity appears to be a question of fact to be determined in the light of existing circumstances.

It is submitted that the good faith rule as proposed by the *Uniform Commercial Code* offers a sound practical approach to the problem. Such a rule allows reasonable expansion and contraction according to business demands, while protecting a party in an unfavorable bargaining position from the caprice of the other.

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<sup>70</sup> *Ibid.* § 2-306 (1), Comment 2 (Spring 1950).

"... [T]he party who will determine quantity is required to ... conduct his business in good faith ... so that his output or requirements will approximate a reasonably foreseeable figure."

<sup>71</sup> *Ibid.* § 2-306 (1), Comment 3 (Spring 1950).

"... Any minimum or maximum set by the agreement shows a clear limit on the intended elasticity. In similar fashion, the agreed estimate is to be regarded as a center around which the parties intend the variation to occur."