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Some Issues on the Law of Direct Damages (US and UK)

Victor P. Goldberg
Columbia Law School, vpg@law.columbia.edu

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When a contract is breached, both U.S. and U.K. law provide that the non-breaching party should be made whole. The Uniform Commercial Code ("UCC") provides that "[t]he remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed."[1] The English version, going back to *Robinson v. Harman*, is "that where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."[2] I propose a general principle that should guide implementation—the contract is an asset and the problem is one of determining the change in value of that asset at the time of the breach.

In the simplest case—i.e., the breach of a contract for the sale of a commodity in a thick market—the change in the value of the asset is simply the contract-market differential; the contract-as-asset notion does not add much. It becomes more useful as we move away from that extreme—e.g., imperfect substitutes, future deliveries, or long-term contracts. Thus, for example, it makes little sense to talk of the contract-market differential if the buyer repudiated a 20-year take-or-pay contract in the third year.

Two caveats. First, I am referring only to direct damages: what are the damages if one of the parties does not go through with the transaction? Consequential damages and breach of warranty raise different questions.[3] Second, the damage rule should be viewed as the price of the option to terminate.

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* Jerome L. Greene Professor of Transactional Law, Emeritus, Columbia Law School. Email: vpg@law.columbia.edu

1. U.C.C. § 1-305 (AM. LAW INST. & UNIF. LAW COMM'N 2001).

2. (1848) 154 Eng. Rep. 363.

3. For my analyses of consequential damages, *see* VICTOR GOLDBERG, RETHINKING CONTRACT LAW AND CONTRACT DESIGN 87–133 (Edward Elgar Publishing Ltd. 2015) *and* VICTOR GOLDBERG, RETHINKING THE LAW OF CONTRACT DAMAGES 165–227 (Edward Elgar Publishing Ltd. 2019). In both countries, courts have blurred the line between direct and consequential damages. *See* GOLDBERG, RETHINKING THE LAW OF CONTRACT DAMAGES, *supra* at 165–98.

Parties might choose to make that price explicit, perhaps with liquidated damages.[4] Or they might choose different prices depending on whether the termination was deliberate (exercising an option) or not intentional. In the absence of an explicit exit price, the make-whole rule becomes the default option price.

I will use the contract-as-asset approach to consider some doctrinal questions in U.S. and U.K. law. Framing the question in this way means that damages should be assessed at the date of breach. Ideally, post-breach facts would be irrelevant. This is not a new notion—the Privy Council so held over a century ago. The buyer had refused to take securities after the price had fallen. Subsequently, the price had risen, and the seller had sold them at the higher price. The issue, said the Privy Council, was this:

> In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach–or is the seller bound to reduce the damages if he can, by subsequent sales at better prices? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordship's' opinion impossible and the former is equally unsound.[5]

However, the principle is not always honored. In both countries, there has been some confusion regarding the role of post-breach information. In the U.S., one issue is the relationship between cover and market damages. If the resale price has risen after a buyer's breach, and the seller subsequently resells the goods after the breach, some courts and commentators argue that granting market damages could result in a windfall for the seller. This is typically framed as a possible conflict between UCC § 2-706 and UCC § 2-708(1). When damages are viewed as the change in the value of the asset, cover should be treated not as an *alternative* measure, but as *evidence*; the apparent conflict disappears. The cover-market relationship will be discussed in Part I.

The English analog to the cover-market question is the notion of an available market in the Sale of Goods Act §§ 50(3) and 51(3). If there is an available market, the damage remedy would be the contract-market differential. But the courts have had some difficulty determining whether there is an available market and, if not, how damages should be assessed. This will be discussed in Part II.

The cover versus market question of Part I raised the question: what weight should be given to a subsequent transaction when assessing damages? A related question concerns measuring damages for the anticipatory repudiation of a

4. For illustrations, *see* GOLDBERG, RETHINKING CONTRACT LAW AND CONTRACT DESIGN, *supra* note 3, at 10–19.

5. Jamal v. Moolla Dawood Sons & Co [1916] 1 AC 175, 179 (PC). For a more recent American case involving damages for non-delivery of securities, *see* Kearl v. Rausser, 293 Fed. App'x 592 (10th Cir. 2008).

contract. There are two variants on this: (a) the repudiation occurs before the time for performance, but the litigation takes place after the date of performance; and (b) the performance was to continue past the date the litigation would be resolved. The U.S. treatment of these problems will be the focus of Part III.

Suppose that a force majeure event occurred after the repudiation but before the decision. Should the court take this new information into account? The contract-as-asset answer is straightforward: no. However, recent decisions in the U.K. have held otherwise. The House of Lords rejected the breach-date measure in *The Golden Victory*.[6] And a decade later, the Supreme Court affirmed that holding in *Bunge v. Nidera*.[7] In *The Golden Victory*, the probability of the excusing event at the time of the repudiation was low, while in *Bunge* it was very high. In both cases, the post-repudiation facts should have been irrelevant. Part IV critiques the two decisions.

I. COVER

In a contract for the sale of goods, when the buyer breaches, the UCC provides two alternative damage remedies and that has led to some confusion. Section 2-706 allows the seller to resell the goods (to cover) and reckons the damages as the difference between the contract price and the price at which the goods were sold. Section 2-708(1) provides for the market-contract differential. If at the time of a buyer-breach the market price had fallen, the buyer's liability would be the market-contract differential. But suppose the market price subsequently rose, and the seller resold the goods at a price greater than the contract price. Some commentators perceive a conflict between § 708(1) and § 706, arguing that allowing recovery of the contract-market differential would give the seller a windfall. The White and Summers' treatise opts for restricting recovery:

> Whether the drafters intended a seller who has resold to recover more in damages under 2-708(1) than he could recover under 2-706 is not clear. We conclude that a seller should not be permitted to recover more under 2-708(1) than under 2-706, but we admit we are swimming upstream against a heavy current of implication which flows from the comments and the Code history.[8]

Some courts and other commentators have joined White and Summers in their concern about a possible windfall.[9]

6. Golden Strait Corp. v. Nippon Yusen Kubishika Kaisha (The Golden Victory) [2007] UKHL 12, [2007] 2 AC 353 (appeal taken from Eng.).

7. [2015] UKSC 43, [2015] 3 All ER 1082 (appeal taken from Eng.).

8. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 8-7 (West Publishing Co., Vol. 1, 6th ed. 2000).

9. *See, e.g.*, Coast Trading Co. v. Cudahy Co., 592 F.2d 1074, 1083 (9th Cir. 1979); Tesoro Petroleum

Consider a simple example: Widgetco promises to sell to Buildco 1,000 tons of widgets for delivery on January 1 for $100,000. On January 1, Buildco breaches and the market value is $70,000. Damages? $30,000. But, Buildco argues, Widgetco did not sell right away; it held the widgets for three more years, ultimately selling them for $120,000. Citing § 2-706, Buildco claims the resale should be taken into account and that Widgetco did not lose $30,000 after all. Compensating that amount would mean Widgetco would net $50,000, plus the $30,000 remedy, plus the $20,000 increase in value, which would be a windfall. So goes the argument.[10]

The widgets three years hence might well be *physically* identical, but they are not *economically* identical. At the moment of breach, Widgetco has lost an asset—the right to the net proceeds of sale on January 1. In this case, it happens to be a positive amount, $30,000. The right to sell widgets on January 1 is not the same as the right to sell physically identical widgets at some subsequent date. Awarding Widgetco $30,000 puts it in as good a position as if the other party had fully performed. In addition to the $30,000, it would still have the widgets, which would be worth $30,000 less than they were when the contract was formed. Had it in fact sold the widgets at the market price at the moment of breach, Widgetco would be in exactly the same position as if the contract had been performed (ignoring the costs of both finding a new buyer and litigation).

After January 1, it would be free to buy, sell, or use the widgets. The subsequent course of prices of widgets (or any other assets) bears no relation to what it had lost at the time of the buyer's breach. If it held the widgets, it bore the risk of subsequent price changes. Suppose that in the three years following January 1, Widgetco had, at various dates, bought and sold physically identical widgets. Buildco argues some of these transactions are cover contracts. The prices of those transactions are as relevant to its damage award as the prices of Widgetco stock or any other assets it might have bought or sold in that subsequent period—namely, no relevance at all. The simple point is this: if the market price information is easily available, the quest for the remedy should be over. If the seller decides to hold, use, eat, or resell the item, that ought to be of no concern to the breaching buyer.

If the market price were not so easily available, then the proceeds of resale might come into play. Rather than treat § 2-706 as an alternative or coequal remedy, it is more useful to view it as a possible source of *evidence* of the market price at the time of the breach. The persuasiveness of the evidence from a

Corp. v. Holborn Oil Co., Ltd., 547 N.Y.S.2d 1012 (N.Y. Sup. Ct. 1989); Eades Commodities, Co. v. Hoeper, 825 S.W.2d 34 (Mo. App. Ct. 1992); *see also* Melvin A. Eisenberg, *Conflicting Formulas for Measuring Expectation Damages*, 45 ARIZ. ST. L.J. 369, 398–99 (2013); Jennifer S. Martin, *Opportunistic Resales and the Uniform Commercial Code*, 2016 ILL. L. REV 487.

10. In *Peace River Seed Co-Operative, Ltd. v. Proseeds Marketing, Inc*., 322 P.3d 531, 532–34, 542, 546 (Or. 2014), the seller sold the product (grass seeds) three years after the breach. The trial court used that price to determine damages. The Oregon Supreme Court reversed, using the price at the time of the breach, much to the consternation of one scholar, Martin, *supra* note 9.

subsequent resale would depend on the temporal proximity of the substitute. If the seller were to resell promptly that would be good evidence of the market price and the burden should be on the buyer to show the sale price was unreasonable. Likewise, if instead the seller had breached, the persuasiveness of the evidence of the buyer's subsequent transaction would depend on both the temporal proximity and the physical similarity of the buyer's subsequent purchase.[11]

Courts struggle over whether a particular transaction should be recognized as the cover transaction. The contract-as-asset framework suggests that this is unnecessary. Any subsequent transactions could be evidence of the market price; the only question ought to be whether a particular transaction would be good evidence for the market price. Here are two representative illustrations of how courts have made a simple question harder by looking for *the* cover contract.

In *Jon-T Farms, Inc. v. Goodpasture, Inc.*,[12] the seller, Jon-T, failed to deliver about 6 million pounds of grain. Goodpasture would buy grain from farmers like Jon-T and store it or sell it on to users. Goodpasture's damage claim was for the market-contract differential at the time of the breach (§ 2-713); but Jon-T insisted that Goodpasture had covered (§ 2-712). The court ultimately decided for Goodpasture (as it should have) but it took a roundabout way of getting there:

> There is no evidence that in Goodpasture's mode of operation it makes a specific purchase contract in order to meet the requirements of a specific sales contract. The company maintains "position" records as to its overall operation which disclose the total amount of grain it has contracted to sell and the total amount it has contracted to buy, and its "position" is maintained in order to fill its sales contracts. The contract entered into between Jon-T and Goodpasture cannot be said to have been entered into to fill any particular outstanding commitment. The grain purchased is commingled with other grain. Although in the overall operation Goodpasture may have bought some grain to compensate for the undelivered Jon-T grain to insure an adequate supply to meet its commitments, there is no testimony that Goodpasture went out and bought specific grain to make up for the specific amount of grain undelivered by Jon-T. Nevertheless, Jon-T insists in its brief that Goodpasture covered in March or April, 1974, for the Jon-T shortage; however, we do not find any evidence of such specific purchases for such alleged cover set out in the record.[13]

11. For a seller's breach, the problem is framed as a conflict between UCC §2-713 (AM. LAW INST. & UNIF. LAW COMM'N 1951) (contract/market differential or market damages) and UCC §1-305 (AM. LAW INST. & UNIF. LAW COMM'N 2001) (the aggrieved party may be put in as good a position as if the other party had fully performed).

12. 554 S.W.2d 743 (Tex. Civ. App. 1977).

13. *Id.* at 750.

Whether Goodpasture matched its orders to buy and sell was irrelevant. The court did not find any evidence of specific purchases for cover; it should not have been looking for that evidence. The only relevant question was whether any subsequent transaction was good evidence of the market price at the time of the breach.

Cargill, Inc. v. Stafford[14] is an extreme example of the confusion regarding cover. The seller repudiated a sale of wheat and the buyer, Cargill, claimed damages based on the date at which Cargill accepted the repudiation. However, in interpreting the § 2-713 language, "when the buyer learned of the breach," the Tenth Circuit Court of Appeals concluded that this meant time of performance (a mistake to be discussed in Part III).

My concern here is the court's assertion that the remedy would depend on whether or not there was a valid reason for the buyer not covering:

> If substitution is readily available and buyer does not cover within a reasonable time, damages should be based on the price at the end of that reasonable time rather than on the price when performance is due. If a *valid reason* exists for failure or refusal to cover, damages may be calculated from the time when performance is due.[15]

The court remanded, holding that:

> If Cargill did not have a valid reason, the court's award based on the September 6 price should be reinstated. If Cargill had a valid reason for not covering, damages should be awarded on the difference between the price on September 30, the last day for performance, and the July 31 contract price.[16]

So, depending on what had happened to the price in the interim, the parties could argue over whether Cargill had covered, if it had, which transaction was the cover transaction, and if not, over the validity of Cargill's reason for not covering.

Did Cargill cover? The court said: "The record contains scant, if any, evidence that Cargill covered the wheat."[17] And again: "The record does not show that Cargill covered or attempted to cover. Nothing in the record shows the continued availability or nonavailability of substitute wheat."[18] And so the case was remanded to determine whether Cargill had a valid reason for failing to

14. 553 F.2d 1222 (10th Cir. 1977).
15. *Id.* at 1227 (emphasis added).
16. *Id.*
17. *Id.* at 1226.
18. *Id.* at 1227.

cover.[19] Cargill, of course, was (and still is) a major player in a thick market. It engages in numerous wheat transactions every day. It makes no sense to identify any particular trade as the cover contract. So, unless the wheat market somehow disappeared on or around September 6, substitute wheat would have been readily available. To even ask whether Cargill covered makes no sense, and it makes even less sense to ask whether the reason for not covering was valid or invalid.

My point in both these instances is simply that the contract-as-asset framework makes identifying a particular transaction as the cover transaction irrelevant. The question ought to be whether *any* of the transactions is helpful in determining the market price at the time of the breach.

Tesoro Petroleum v. Holborn Oil Company[20] is an apparent exception. However, the appearance is an artifact of the seller's misstatement of the facts. The contract was for the sale of a cargo of 10 million gallons of gasoline at $1.30 per gallon. When the market price plummeted, the buyer breached. The seller then sold the cargo for $1.10/gallon. The seller claimed that there was a discrepancy between the cover price ($1.10) and the market price (allegedly 75-80 cents). It argued that compensation should be based on the contract-market differential (§ 2-708) rather than the cover price (§ 2-706). Using the market price (§ 2-708) would have resulted in giving the seller a $3 million "windfall." The court, citing White and Summers with approval, concluded the appropriate price was the cover price, not the market price.[21]

What could explain the divergence between the cover and market price? Nothing. The court conceded that:

> [T]he price for which one actually sells merchandise is evidence as to its market value, and there is no explanation as to why Esso Sapa was willing to pay a premium of about 40% above market to obtain this cargo, the question as to the actual market value is not raised for determination on this motion.[22]

We could envision a situation in which a naïve buyer is unaware of market alternatives, and a clever seller takes advantage of that naiveté by assessing an above-market price. But that is hardly plausible in the world inhabited by sophisticated oil traders. The cover transaction, according to the seller, was heavily negotiated: "After unsuccessfully attempting to convince (defendant) to honor its contract, (plaintiff) scrambled to find a new buyer and, on July 17, after feverish, lengthy and deliberate negotiations, concluded a sale to Esso Sapa."[23]

The July 17 date is the only date mentioned in the opinion. That suggests one

19. *Id.*
20. 547 N.Y.S.2d 1012 (N.Y. Sup. Ct. 1989).
21. *Id.* at 1016–17.
22. *Id.* at 1013.
23. *Id.* at 1016.

possible—albeit unlikely—explanation for the discrepancy. Conceivably, the breach took place weeks earlier and by July 17 the market had bounced back. If that were true, then the seller should have been compensated on the basis of the market price at the time of the breach. In the more plausible situation in which the "cover transaction" took place close to the moment of breach, the cover transaction would have been good evidence of the market price. The outcome would have been correct, but the reasoning would have been wrong.

II. AVAILABLE MARKET

In England, if a buyer were to breach by failing to accept goods, the Sale of Goods Act holds that "where there is an *available market* for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current, price at the time or times when the goods ought to have been accepted."[24] The same applies if the seller were to fail to deliver.[25] That formulation raises three questions: What is meant by available market? What should happen if there were one? And what should happen if the court should conclude that there were none? The courts exert a considerable amount of effort in determining whether an available market exists. This, I suggest, is unhelpful at best.

In effect, the judges are asking whether the non-breacher mitigated or could reasonably have mitigated. If identical goods were available to the buyer at the time of the breach, the buyer could mitigate, if it chose to do so, and the damages would reflect the changed market conditions. This is the idealized available market. As we move away from this idealized form—substitutes are not identical, replacement would not be instantaneous—at some point the courts could conclude there was not an available market. But that focuses on the wrong question. As in the previous section, the relevant question should be: what are the direct damages (the change in the value of the contract)? A subsequent transaction (cover) would be possible evidence of the damages.

After reviewing the case law, I want to make four points. First, there is great confusion about what constitutes an available market. Second, in a number of instances, determination of the existence of an available market is irrelevant. After going through the exercise of determining whether an available market existed, the judge concluded the damages were the same regardless. Third, in other instances the damage remedy did depend on the characterization: the market differential if the judge found an available market and lost profits (or something else) if it did not. Fourth, in some instances, the question was not the measurement of direct damages but rather of consequential damages.

The modern discussion of the available market concept got off to a bad start in the mid-1950's with two decisions regarding a buyer's breach of its contract to

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24. Sale of Goods Act 1979, C. 54, § 50(3) (Eng.).

25. *Id.* at § 51(3).

buy a new automobile. At that time, cars were sold under resale price maintenance (rpm), a factor the courts deemed relevant. In the first, *Thompson (W. L.) Ltd. v. Robinson (Gunmakers) Ltd,*[26] Upjohn J noted:

> It is curious that there is a comparative absence of authority on the meaning of the phrase 'available market,' because one would have thought that there would have been many cases, but the researches of counsel have only disclosed one authority on section 50 (3). It is *Dunkirk Colliery Co. v. Lever*.[27]

In *Dunkirk*, an 1878 decision, the court seemed to assert that an available market would be a physical place where buyers and sellers might meet—like the Corn Exchange or cotton market in Liverpool. Upjohn J conceded there was "nothing in the nature of a market like a Cotton Exchange or Baltic or Stock Exchange, or anything of the sort, for the sale of new motor-cars."[28] He considered that definition to be binding on him in interpreting § 50(3), but concluded that it did not matter since he would have reached the same conclusion whether or not he found that an available market existed. He noted that § 50(3) was only a prima facie rule, so that even if he had found an available market, it would be unjust to measure damages as the difference between the contract and market price (zero because of the rpm). Instead, he held that the damages were the difference between the wholesale and retail price—the lost profits.

In the second case concerning the sale of a new car, *Charter v. Sullivan*,[29] Jenkins J found neither *Dunkirk* nor *Thompson* entirely satisfactory. He concluded that an available market would require a possible difference between the contract and market price:

> The language of section 50 (3) seems to me to postulate that in the cases to which it applies there will, or may, be a difference between the contract price and the market or current price, which cannot be so where the goods can only be sold at a fixed retail price.[30]

Therefore, he concluded, there was no available market. Unlike *Thompson*, the *Charter* court found only nominal damages. I have written elsewhere why the analysis in both decisions is flawed, but I need not go into that here.[31] For present purposes, I note that when the commentators confront the question of the existence of an available market, they often begin with these cases (despite the

26. [1955] 1 Ch 177.
27. *Id.* at 158 (citing Dunkirk Colliery Co. v Lever (1878) 9 Ch. D. 20).
28. *Id.* at 158–59.
29. [1957] 2 QB 117.
30. *Id.* at 128.
31. *See* GOLDBERG, RETHINKING THE LAW OF CONTRACT DAMAGES, *supra* note 3, at 100–41.

fact that they are nonsensical).[32]

A generation later, the issue arose in *The Elena D'Amico.*[33] About halfway through a three-year charter, the ship owner refused to make repairs, thereby repudiating the charter. The charterer could have replaced this charter with another one but chose not to do so. Robert Goff J held there was an available market for replacement charters and there were two implications. First, the direct damages would be the difference between the charter (or contract) price and the market price at the time of the breach. This was true regardless of whether the aggrieved party entered into a substitute transaction. Second, the charterer argued that it had suffered consequential damages—lost profits as a result of the repudiation. If a substitute were not available, then these consequential damages might be recoverable. However, since the judge had found that there was an available market, the charterer could have entered into a substitute charter, and any lost profits from its failure to do so would have been the fault of the charterer, not the owner. The charterer could have rechartered and avoided the loss, but, for whatever reason, chose not to do so.

In *Shearson Lehman Hutton v. Maclaine Watson*,[34] the issue was one of timing. The buyer (Maclaine) failed to perform a contract to take over 7,000 metric tons of tin for about £70 million. Webster J, devoted a considerable amount of his opinion to a review of *Dunkirk Colliery Co v. Lever*, *W L Thompson Ltd v R Robinson (Gunmakers) Ltd*, and *Charter v. Sullivan*, finally concluding there was an available market. He cited an argument in *Charter v. Sullivan* that there was no available market because the resale of the car had taken seven to ten days. Webster J noted that *Benjamin's Sale of Goods*[35] had rejected this argument: "It is submitted that the temporal test should be one of a reasonable time after the breach, given the nature of the goods in question and the business situation of the plaintiff; and that the opinion of Sellers L.J. is wrong on this point."[36] Webster J would not go this far: "I would not, even if it was open to me, conclude that the conclusion of Sellers LJ, that there was no available market because there was no available buyer (at all) until some seven to ten days after the breach, was wrong."[37]

Webster J then proposed his own definition:

> [I]f the seller actually offers the goods for sale there is no available market unless there is one actual buyer on that day at a fair price; that if there is no actual offer for sale, but only a notional or hypothetical sale for the purposes of s 50(3), there is no available market unless on that

32. *See* MCGREGOR ON DAMAGES ¶ 25-118-120 (James Edelman et al. eds., 20th ed. 2019).

33. Koch Marine Inc v. d'Amica Societa di Navigazione arl (The Elena D'Amico) [1980] 1 Ll Rep 75.

34. [1990] 3 All ER 723.

35. BENJAMIN'S SALE OF GOODS ¶ 1294 (The Common Law Library Vol. 11, Sweet & Maxwell) (3rd ed. 1987).

36. I don't believe Sellers said any such thing.

37. *Shearson Lehman Hutton*, 3 All ER, at 730.

> day there are in the market sufficient traders potentially in touch with each other to evidence a market in which the actual or notional seller could if he wished sell the goods.[38]

In implementing this, he asserted this would entail "a hypothetical sale by a hypothetical seller of the amount in question of the goods in question."[39] The seller (Shearson) argued this would require sale of the entire amount on the due date. That would have meant finding the price a buyer would pay for the entire quantity on the date of the breach; given the large quantity, it would most likely not be feasible for the seller to move that entire quantity on that day. Recognizing this, Webster J held the fair market price would take into account the price that might have been negotiated a few days before and after the breach. He assumed

> that the hypothetical seller of the goods in question, knowing that he would have to make the sale on that day, had begun to negotiate it sufficiently far ahead to enable him to make contact with all potential buyers so as to achieve a sale, on that day, at a fair market price for that day. Neither of these assumptions, if they have to be made, seems to me to be inconsistent with the objects of the subsection or with the application.[40]

In effect, this means that by implementing the available market concept in this way, he was rejecting Sellers LJ focus on the sale on the day of the breach and accepting *Benjamin's*. In practice, it meant the market price would be higher than Shearson's proposed standard—sale of the entire quantity on the day of the breach. The market price would not be a fire-sale price but would reflect overall market conditions at the time of the breach.[41] It also meant the available market notion was irrelevant. If he had concluded that there was no available market, he could have looked at market conditions immediately before and after the breach and come to the same conclusion. Determining the market price if the transaction was for a small amount of the goods in a thick market is fairly easy. The less frequent the transactions and the larger the contract amount, the more likely it is that ascertaining the market price would require looking at a longer time period.

The reasonable-period-of-time was stretched further in *Aercap Partners 1 Limited v. Avia Asset Management AB.*[42] Avia entered into a contract to buy two airplanes for delivery in May and November 2009. The buyer repudiated in January 2009 and the seller finally resold the planes in February 2010. The buyer argued that § 50(3) applied and that there was an available market in May and

38. *Id.*

39. *Id.* at 726.

40. *Id.* at 731.

41. Shearson Lehman Hutton v. Maclaine Watson [1990] 3 All ER 723 (Eng.) (citing Garnac Grain Co. v. HMF Faure & Fairclough [1968] AC 1130 (Eng.) to support this proposition).

42. [2010] EWHC 2431, ¶ 6–11 (Comm).

November 2009. In the interim, prices continued falling; the difference between November 2009 and February 2010 prices being over $3 million. Gross LJ held there was sufficient evidence of Aercap's inability to sell the planes at the earlier date and, therefore, there was no available market. In the alternative, he held that had he concluded that there were an available market, under § 50(3) the seller was entitled to a reasonable period of time to go into the market and that the reasonable time period had not expired prior to the February 2010 sale. He did not explain how there could have been known market prices in 2009, but that the seller could not somehow access that market.

Assuming that he was correct in this, then the actual resale price in February 2010 was, Gross LJ believed, the best evidence of the market price at the time of the breach.[43] Two points should be highlighted. First, the result did not depend on whether or not the court found the existence of an available market; the damage measure was the same regardless. Second, if he had concluded that there was an available market, that would be a significant deviation from Webster's definition in *Shearson*: "on that day there are in the market sufficient traders potentially in touch with each other to evidence a market in which the actual or notional seller could if he wished sell the goods."[44] The year between repudiation and the substitute transaction does not meet that standard.

Could there be an available market if the goods were customized? That question arose in *M&J Marine Engineering Services Co Ltd v. Shipshore Limited.*[45] It was further complicated by the fact that the buyer was acting as a middleman. M&J, the breaching seller, entered into a contract with Shipshore (SS) to produce 1032 machine rollers at a price of $175 per unit; the rollers were customized products. SS was acting as a middleman and entered into a separate contract with Arab Shipbuilding and Repair Yard (ASRY). M&J did not deliver; Field J held that there had been a contract and that M&J had breached it. SS found a substitute supplier for about $300 per unit and successfully renegotiated its contract with ASRY at the $300 price. SS argued the substitute goods were acquired in an available market; therefore, the damages were the difference between the contract and substitute price, roughly $125 per unit (about $140,000 total). In the alternative, SS argued it should get its "lost profit" on the ASRY contract, about $23,000.

Field J held "an 'available market' involves a reasonably available supply of the contract goods and a reasonably available source of demand for such goods, and there was no such market for the goods to be supplied by M&J."[46] Because the goods were customized, he concluded there was not an available market, even though SS found someone who could (and did) supply the goods. What would be

43. I would argue that the relevant price should have been the forward price in January 2009 for the deliveries in May and November. I would doubt that the February 2010 price was evidence of this.

44. *Shearson Lehman Hutton*, 3 All ER at 730.

45. [2009] EWHC 2031 (Comm).

46. *Id.* at ¶ 30.

the damages if there were not an available market? Field J held they would be the expected "lost profits"; if both parties had performed, it would have netted the difference between the price it bought from M&J and sold to ASRY. He then made some minor adjustments. So, unlike *Shearson* and *Aercap*, the outcome did depend on whether or not the court had found an available market.

But if SS had not successfully renegotiated the ASRY contract, SS would have been liable to ASRY for the market differential. SS would have suffered a loss on its M&J contract of the same contract-market differential ($140,000) as SS argued it would have received had the court concluded that there was an available market. The difference between the two outcomes did not depend on the available market issue; rather, it was a byproduct of the court linking two independent contracts. If SS had been merely a broker, ASRY could have sued M&J directly for the contract-market differential. But SS was a principal in two separate contracts in which it bore counterparty risk. Its ability to renegotiate one of the contracts should have had no bearing on the damage remedy in the other.[47]

In *Air Studios (Lyndhurst) Limited T/A Air Entertainment Group v. Lombard North Central PLC*,[48] the seller promised to deliver some used equipment used in film and television post-production for £100,000. After concluding the parties had made a contract and the seller had breached, Males J considered the damage question. He posed the question by asking first whether there was an available market:

> The first question to be determined is whether there was an available market for the goods in question. That contains within it two sub-issues. First, it is necessary to ascertain what is meant by 'the goods in question' in the context of this case. Second, the question is whether there was 'an available market' for those goods.[49]

The buyer argued that the "goods in question" referred to new equipment and that the cost of new equipment would be about £500,000. Males J concluded, however, "that the availability of equivalent second-hand goods capable of performing the same functions in much the same way would constitute an available market for 'the goods in question'. A buyer of such equivalent goods would be in the same financial position as if the contract had been performed."[50]

Males J then asked whether there was an available market for the second-hand goods. Was there a ready availability of willing sellers and a reasonable degree of flexibility regarding the timing of delivery?

47. I have examined the question elsewhere; *see* GOLDBERG, RETHINKING THE LAW OF CONTRACT DAMAGES, *supra* note 3, at 100–41.

48. [2012] EWHC 3162 (QB).

49. *Id.* at ¶ 91.

50. *Id.* at ¶ 93.

> It is . . . of the essence of an "available market" that it should in fact be available to the innocent party so that the innocent party, who needs to decide what to do, can be confident that the goods it needs will be available for purchase within a reasonable time. Accordingly when the purchase of equivalent second-hand equipment is possible, but the supply is limited and likely to be possible only after a period of delay, it is a question of degree whether such availability is sufficient to satisfy the requirement for an available market.[51]

In fact, after the breach the buyer no longer had a need for the equipment, but, as Males J acknowledged, that was not relevant. He did conclude:

> [Although a system] would have been sourceable within a matter of about three months with the assistance of specialist dealers or brokers, . . . this falls short of constituting an available market. . . . A delay of several months after which it was probable, but no more than that, that suitable equivalent replacement equipment could be located for purchase does not amount to a reasonably available supply of the goods in question.[52]

Instead of § 51(3), therefore, Males J had to use § 51(2). He could use the value of the goods or the lost profits because the goods were not delivered. The plaintiff, having lost its argument for the price of new goods, argued for the lost profits, but the judge rejected that asserting the plaintiff had not established that its use of the goods would have been profitable. Instead he held: "I consider that the award of damages by reference to the cost of replacement secondhand equipment would compensate Air Studios for the estimated loss directly and naturally resulting, in the ordinary course of events, from Lombard's breach."[53] He then noted:

> I would add that if I am wrong in my conclusion above that there was no available market for the equipment in question, so that in truth there was an available market for equivalent second-hand equipment, the measure of damages pursuant to section 51(3) would be the same as I have found it to be pursuant to section 51(2). It is not surprising that the application of the two sub-sections produces the same result as each sub-section reflects the same principle. On the contrary, it would be surprising if the result was very different according to which sub-section is in play.[54]

In essence, Males J admits that the whole question of the existence of an

51. *Id.* at ¶ 95.
52. *Id.* at ¶ 96.
53. *Id.* at ¶ 103.
54. *Id.* at ¶ 107.

available market was irrelevant. The question that he did answer, even if he did not frame it this way, was the value of the asset—the contract—at the time of the breach. Determining that value is not so easy when the contract concerns second-hand goods, especially when the goods are a group of different items supplied by different firms. But that problem is independent of whether or not the goods are treated as being in an available market.

In *Coastal (Bermuda) Petroleum Ltd v. Vtt Vulcan Petroleum SA ('The Marine Star')*,[55] the available market question again concerned the timing of a substitute transaction. However, it did not concern the contract/market differential; rather, it involved a claim for consequential damages. The decision was complicated by the fact that the buyer (Coastal Bermuda) was selling back-to-back to an affiliated company (Coastal Aruba). Thus, as in *M&J Marine*, the buyer was a middleman, acting as a principal in two separate contracts: Vulcan-Coastal Bermuda (V-CB) and Coastal Bermuda-Coastal Aruba (CB-CA). Vulcan was an oil trader and both Coastal entities were part of a larger group engaged in refining. Both contracts called for the delivery of a specific type of oil (Russian E-4) in a specific time frame—i.e., August 4–10, 1991. Vulcan repudiated on August 2, and CA bought a replacement cargo of a different oil (M-100). The price in the V-CB contract was indexed to the price of West Texas International as quoted on the NY Mercantile Exchange (Nymex) for September oil futures—the average closing price over August 5–9 minus US $6.25 per barrel. The price in the CB-CA contract was the same indexed price minus $6.00. Liability had already been determined so that the only issue was assessing damages.

If the direct damages were to be reckoned only by the contract/market differential, then they would be zero. But it was a thin market and if the buyer had to procure E-4 within the time frame, the buyer would have had to pay a considerable premium, if indeed it could obtain any within that time period. Mance J. found that "a replacement cargo would be unlikely to be found afloat at such short notice,"[56] and it was, therefore, reasonable to consider the imperfect substitute, M-100. The damage claims were under two heads: CB's loss of profit of 25 cents on its contract with CA; and the "loss of yield"—i.e., the difference between the E-4 and M-100 oil.

The available market issue arose with regard to the loss of profit claim. If CB could have acquired E-4 before the delivery period expired, there would be no lost profits—it would have made its 25 cents on the replacement E-4. However, if it could not obtain E-4, Vulcan would, held Mance J, be liable for those lost profits: "The lack of an available market may result not from any particular intervening event, but from a combination of market forces, a tight contractual delivery date and a late repudiation by the defendants leading to a situation in which no replacement goods are available."[57] Mance J then concluded that since

55. [1994] C.L.C. 1019.

56. *Id.* at 1025.

57. *Id.*

the parties, V and CB, contemplated that CB would make a profit on its sale to CA, the 25 cents per barrel would be recoverable. Four points: (1) this would not be direct damages, it would be consequential damages; (2) if CB were merely a broker, CA would have had a direct claim against V, but since CB was a counterparty to two independent contracts it would have had a claim against V and CA would have had a claim against CB; (3) if CB had been merely a broker, CA would have been able to sue V directly; and (4) Coastal structured its business to keep the units independent for business reasons; it seems dubious policy to allow it to treat the units as dependent for this one purpose.

The loss of yield claim had two components, although Mance J failed to recognize this. The first component would be based on the difference between the market price of E-4 and M-100. The market treated the two as roughly equivalent: "E-4 and M-100 traded on the market at about the same price with M-100, if anything, at a higher price."[58] However, E-4 was better suited to the unique features of the Aruba refinery, so the value of E-4 to CA was greater than the value of M-100. Mance J found the difference to be thirty cents per barrel. If this were a direct contract between V and CA, a good argument could be made for allowing recovery of these damages. The buyer could argue the goods were to be fit for a particular purpose. The argument is weaker when, as in this case, CA is not in privity with V if the V-CB contract did not spell out that particular purpose.

In *Fulton Shipping Inc of Panama v. Globalia Business Travel S.A.U. (The New Flamenco)*,[59] the charterer and owner of the New Flamenco, a small cruise ship, were negotiating an extension of the charter period and reached an oral agreement for a two-year extension. The charterer refused to sign and maintained that it could redeliver on the preexisting termination date. The owner disagreed, arguing that an agreement existed, and the charterer had anticipatorily repudiated that agreement. The arbitrator found in favor of the owner on the liability question. The problem arose in assessing damages. The owner claimed that it would have earned €7,558,375 had the charter been performed for the two years. Shortly after the repudiation, the New Flamenco was sold for $23,765,000. Less than a year later, Lehman Brothers imploded, and the market for ships collapsed. The arbitrator found that by November 2009 (the end date for the contract extension), the ship's market value had fallen to $7 million.

The question confronting the arbitrator, and the subsequent justices, was: how, if at all, should the fall in value of the ship be taken into account in determining damages? The charterer argued the breach caused the sale, and the sale mitigated the damages. In effect, it suggested that by breaching it did the owner a favor; by causing him to sell before the market crash, the owner saved

58. *Id.* at 1031.

59. Fulton Shipping Inc. of Panama v. Globalia Bus. Travel S.A.U. (The New Flamenco) [2015] EWCA (Civ) 1299; Fulton Shipping Inc. of Panama v. Globalia Bus. Travel S.A.U. (The New Flamenco) [2017] UKSC 43.

over $16 million. The arbitrator agreed. Because that saving was so much greater than the foregone earnings, he awarded nothing to the owner. In the High Court, Popplewell J rejected the arbitrator's conclusion; he, in turn, was reversed by the Court of Appeal. The Supreme Court reversed again, rejecting the argument that the sale of the vessel mitigated the damages.

All the judges, invoking *The Elena D'Amico,* agreed that if there were an "available market," the damage measure would be the difference between the market rate and the charter rate. If there were an available market and the owner chose not to recharter, liability would still be based on the market rate. A failure to do so would not constitute a failure to mitigate since the losses would be the result of an independent decision not to recharter. In the Court of Appeal, Longmore J said:

> An important question in this area of the law is whether there is an available market. . . . A decision to speculate on the market rather than buying in (or selling) at the date of the breach did not 'arise' from the contract but from the innocent party's decision not to avail himself of the available market.[60]

But what if, as the arbitrator concluded, there were not an "available market"? Rather than recognizing that the decision to sell was independent of the breach, Longmore J argued that the sale of the vessel mitigated damages. He concluded the results for the available market did not hold if no such market were available:

> [T]he prima facie measure of loss in hire contracts is the difference between the contractual hire and the cost of earning that hire (crew wages, cost of fuel etc.). But it will not usually be reasonable for the shipowner to claim that prima facie measure if he is able to mitigate that loss by trading his vessel if opportunities to trade that vessel arise. If he does so trade the vessel, he may make additional losses or additional profits but, in either event, they should be taken into account.[61]

The Supreme Court concluded that the breach did not cause the sale of the vessel, and, therefore, that the sale did not mitigate the damages:

> The repudiation resulted in a prospective loss of income for a period of about two years. Yet, there was nothing about the premature termination of the charterparty which made it necessary to sell the vessel, either at all or at any particular time. Indeed, it could have been sold during the term of the charterparty. If the owners decide to sell the vessel, whether before

60. *The New Flamenco* [2015] EWCA (Civ) 1299, at ¶ 24.
61. *Id.* at ¶ 25.

> or after termination of the charterparty, they are making a commercial decision at their own risk about the disposal of an interest in the vessel which was no part of the subject matter of the charterparty and had nothing to do with the charterers.[62]

The relevant concern, it argued, was the difference between the projected income streams with and without the charter. That was unaffected by the sale of the vessel. The Supreme Court said:

> In the absence of an available market, the measure of the loss is the difference between the contract rate and what was or ought reasonably to have been earned from employment of the vessel under shorter charterparties, as for example on the spot market. The relevant mitigation in that context is the acquisition of an income stream alternative to the income stream under the original charterparty. The sale of the vessel was not itself an act of mitigation because it was incapable of mitigating the loss of the income stream.[63]

In fact, the mitigation took a different form. The owner did not enter into shorter charters on the spot market. Rather, it sold the vessel to a new owner who, apparently, did not charter the vessel to others; instead, it used the vessel for its own purposes. Conceptually, the purchase price could be broken down into two pieces—the first two years (the charter period) and the rest of the vessel's expected life. If the buyer expected to immediately replace the charter at the current market rate (perhaps because the new owner planned to use the vessel immediately itself), then the price would reflect that. That piece would have been valuable to the buyer and that value would have been captured in the sale price. The value of the vessel would have been about the same with or without the charter, and damages would have been close to zero. At the other extreme, if the new owner had anticipated that the ship would remain idle for the full two years, it would have paid nothing for the first piece. The relevant question then becomes: what would have been the expected period of time the vessel would remain idle? Unfortunately, none of the judges considered whether the owner could or did use the vessel in the two-year period.

The arbitrator found that had the vessel remained idle for the entire two years, the damages would have been €7,558,375. Multiplying that number by the fraction of time the vessel was expected to remain idle would provide a good approximation of the owner's damages. If, as is plausible, the expected period of idleness were considerably less than two years, the damages would be reduced accordingly. Whether that approach would give a better picture of the damages than the rates for shorter charter parties on the spot market should have been the

62. *The New Flamenco* [2017] UKSC 43, at ¶ 32.
63. *Id.* at ¶ 34.

relevant question. What happened to the vessel after the owner sold the vessel—whether the shipping market changed, the ship sank, or it was resold—would be irrelevant.

The upshot of this review of the case law is that courts should not waste their time arguing about the existence of an available market. If the plaintiff were to argue that it suffered consequential damages because of the seller's failure to deliver (as in the *Elena D'Amico*), then the question is whether the plaintiff could have entered into an alternative transaction that would have avoided those consequences. For assessing direct damages, the relevant concern is the change in the value of the contract at the time of the breach. For a thick market—like for cotton or grain—that is straightforward. As we move away from that extreme, the measurement problems become more difficult. But labeling the problem as one of whether there existed an available market does nothing to resolve the question.

III. ANTICIPATORY REPUDIATION

Following an anticipatory breach, there is a temporal gap between acceptance of that breach and final disposition of the case. The damage remedy should be reckoned at the point the repudiation was accepted, or should have been accepted. If the court's decision would be made after the date performance was due, this just adds two wrinkles to the analysis of the simple breach problem of Part I. If, however, performance were supposed to continue beyond the decision date, the problem becomes more complicated. The contract-as-asset framework should play a larger role. Section A considers the first problem; Section B considers the second.

A. Performance Due Before Decision

Suppose that a contract calls for delivery of 1,000 widgets on December 1 at a price of $1.00 per widget, but the seller repudiates (and the repudiation is accepted) on June 1. If the court were to decide the case after December 1, the court would have access to all post-repudiation information. Some courts and commentators argue that damage assessment should take into account that post-repudiation evidence, and, therefore, the assessment should be made using the market price at the time of performance (December 1).[64] Recall the discussion of *Cargill, Inc. v. Stafford* in Part I. The question there, like here, was whether the damages should be measured at the time the repudiation was accepted or at the date at which performance was to take place. The court made the answer depend

64. *See, e.g.*, Hess Energy, Inc. v. Lightning Oil Co., 338 F.3d 357, 365 (4th Cir. 2003). The White & Summers treatise enthusiastically endorses that view. WHITE & SUMMERS, U.C.C., *supra* note 8, at § 7-7. Commenting on that decision, the treatise states: "In affirming Hess' jury verdict . . . the Fourth Circuit agrees with our interpretation and arguments . . . for the proposition that 2-713 measures the contract market difference at the time of delivery not at time of repudiation in a repudiation case. Hurray for Judge Niemeyer." (§7.6)

on a nonsensical question—whether Cargill had covered and, if not, whether it had a valid reason for not covering. Since Cargill engages in frequent wheat transactions it made no sense to attempt to identify a particular one as a cover transaction.

The contract-as-asset approach suggests that the change in the value of the asset occurred at the time the repudiation was accepted (June 1). But what price on June 1? Is it the current price of widgets? Economically, a June 1 widget is different from a December 1 widget. Ideally, we would want to find the June 1 price of widgets for delivery on December 1. That is, the appropriate price is not the spot price, but the forward price. Professor Jackson argued decades ago that "contract law presumptively should adopt a general rule that an aggrieved buyer should cover at the forward price as of the date of the repudiation."[65] He used *Oloffson v. Coomer*[66] to illustrate his argument.

I agree with Professor Jackson that this would be the appropriate default rule. However, a closer look at *Oloffson* suggests a bit of caution is in order. A farmer (Coomer) promised in April to sell 40,000 bushels of corn to a grain dealer for delivery in October and December. However, in June, Coomer informed Oloffson he would not be planting any corn because the season had been too wet. The contract price was about $1.12 per bushel, and the price for future delivery at that time was $1.16 per bushel. Oloffson ultimately purchased corn at much higher prices after the delivery dates had passed ($1.35 and $1.49) and argued that its damages should be based on those prices. The court found that, given the nature of the market, a commercially reasonable time to await performance was less than a day. The court affirmed the trial court's use of the forward price at the time of repudiation ($1.16) when calculating damages.

Why my caution? The court noted that Oloffson had argued that he "adhered to a usage of trade that permitted his customers to cancel the contract for a future delivery of grain by making known to him a desire to cancel and paying to him the difference between the contract and market price *on the day of cancellation*."[67] That is, damages would be based on the spot price. But because Coomer had failed to give notice, Oloffson argued that Coomer could not take advantage of the rule and therefore that damages should be measured by the price at the dates of performance ($1.35 and $1.49). The court rejected this argument, not because it was a non sequitur (which it was), but because, it claimed, Coomer did not know of the alleged usage, and good faith required that Oloffson inform him of that usage.[68]

65. Thomas H. Jackson, *"Anticipatory Repudiation" and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance*, 31 STAN. L. REV. 69, 94 (1978).

66. 296 N.E.2d 871 (Ill. App. Ct. 1973).

67. *Id.* at 875 (emphasis added).

68. Remarkably, White & Summers get this completely wrong. WHITE & SUMMERS, U.C.C., *supra* note 8, at § 7-3. Their preference was for time of performance. They reluctantly concede that "[t]he outcome of the case can be defended only on the ground that the contract was implicitly modified by the trade usage that

To call this a trade usage is an understatement. The rule today is, no doubt, the same or similar to what it was when *Oloffson* was decided: "cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day."[69] So, it appears that the standard rule in the grain trade (when courts are willing to recognize it) is to use the *spot* price, not the *forward* price. This does not mean that Professor Jackson and I are wrong to prefer use of the forward price at the time of the repudiation as the default rule. Determination of the spot price in many markets might be a lot easier than determining the forward price. That was most likely true in the next case to be discussed.

In *Cosden Oil & Chemical Co. v. Karl O. Helm Aktiengesellschaft*,[70] Cosden (a producer of polystyrene) promised to deliver the product over a period of time to Helm (a trader). Cosden delivered some, but because of production problems, it cancelled the remaining orders. The jury found that Cosden had anticipatorily repudiated and awarded Helm damages based on the difference between the contract price and the market price at a commercially reasonable time after Cosden repudiated. The court used the spot price—there was no discussion of using the forward price instead. Polystyrene prices had risen between the time of the repudiation and the date of performance. Helm, being a trader, engaged in a number of transactions in the period between the repudiation and the decision. Each party claimed that specific purchases by Helm in that period were cover transactions—Helm choosing those close to the performance date (the higher price) and Cosden those closer to the repudiation date. The jury concluded that none were for cover; the court, treating this as a fact question, upheld the finding. It is not surprising that the parties would identify the cover contracts that were most favorable to them. What is unfortunate is that this would be treated as a fact question. Helms, like Cargill, was a trader entering into numerous transactions; none should be treated as *the* cover transaction. The only question should have been whether any of them provided good evidence of the price at the time of the repudiation.

I do not mean to underestimate the difficulty in determining the damages. Problems existed even in the fairly thick markets I have discussed here and in Part I. And if the market were thin, there would be further difficulties. In *Laredo Hides Co., Inc. v. H & H Meat Products Co., Inc.*,[71] for example, the contract was a nine-month, variable output contract for all the hides H&H produced as a byproduct of its meatpacking business. The court found the seller had repudiated. Laredo claimed that because hides decomposed with age, it had to take the hides

prevailed in the corn market." (§ 7-3) But, as noted, the court *rejected* the trade usage (spot price) and chose instead the forward price. White & Summers' preferred outcome, price at the time of performance, was not even in the running.

69. NAT'L GRAIN & FEED ASS'N, NGFA GRAIN TRADE RULES 28(A)(3) (2017), https://drive.google.com/file/d/1kI5npZOLrKeijuGY76qD9I1hBBkNxJso/view.

70. 736 F.2d 1064 (5th Cir. 1984).

71. 513 S.W.2d 210 (Tex. Civ. App. 1974).

on a month-to-month basis. To determine the damages, the court used the actual hide production of H&H in each month and applied the then-current market price. Although that required looking at post-repudiation data, it might have been a reasonable method for determining the change in the value of the contract. The complexity is ratcheted up when dealing with long-term agreements, the subject of Section B.

B. Long-Term Contract

If a buyer were to repudiate a twenty-year contract in year three, how should damages be reckoned? Often neither the price nor the quantity is fixed. The price might be indexed or subject to renegotiation. The buyer (in a requirements contract) or seller (in an output contract) may determine the quantity to be supplied. The contract might include a take-or-pay or minimum quantity clause, and that might be modified with a makeup clause. The agreement might even include a gross inequity (or hardship) clause that would allow a disgruntled party to appeal to an arbitrator or court to reset the price. The contract might have a mechanism that would allow one of the parties to terminate the agreement under certain circumstances.

"The drafters of the 1950s probably did not contemplate 20 or 30 year contracts," says White and Summers, "but they clearly contemplated contracts where performance would occur after the time for trial. Section 2-723 is designed to deal with at least one issue in such cases. It instructs the court to base damages on the 'market price' at the date that the aggrieved party learns of the repudiation."[72] Section 2-723 provides no coherent answer to the question of how (or even if) future quantities should be determined. It ignores significant features of the contracts such as early termination rights and price redetermination rights. The decisions tend to focus on the price of the *product*—the difference between the contract and market price. There are obvious complications for determining each since both the price and quantity will typically not be fixed for the life of the contract. Even if that problem could somehow be resolved, it still puts the focus on the wrong question. The concern should not be with the change in the price of the product, but with the change in the value of the asset—the contract—at the time of the repudiation. The contract's value encompasses all the nuances that the § 2-723 inquiry fails to reach.

The damages if the buyer were to repudiate should be the change in value of the contract at the moment of repudiation—the present value of the difference in the expected cash flows. If the expected future unit costs of production exceeded the expected prices, then the seller should shut the project down. Its loss would be the expected future revenues less the expected cost of producing that revenue—lost profit. So, for example, when the buyer (NIPSCO) repudiated a

72. WHITE & SUMMERS, U.C.C., *supra* note 8, at § 7-8.

long-term coal purchase contract with Carbon County, Judge Posner found:

> The loss to Carbon County from the breach of contract is simply the difference between (1) the contract price (as escalated over the life of the contract in accordance with the contract's escalator provisions) times quantity, and (2) the cost of mining the coal over the life of the contract.[73]

If, however, the producer expected to continue production through the life of the contract, the damages—the change in the value of the contract—would be the difference between the expected future revenues at the time when the contract was repudiated and the expected future revenues given the new market conditions. Projecting those two streams would clearly be a difficult task. Nonetheless, it can be done. *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*[74] provides an illustration, but also suggests how imperfect the process can be.

In November 2000, American Electric Power Company (AEP) entered into a Power Purchase and Sale Agreement (PPSA) with Tractebel Energy Marketing, Inc. (TEMI). AEP would build a cogeneration plant that would supply steam to Dow Chemical and electric power to TEMI. The PPSA term was for 20 years. Because Dow needed large quantities of steam, and because the steam and electricity were jointly produced, the contract required that TEMI take a substantial amount of electricity. The contract included a "must-take" provision. AEP spent about $500 million building the facility; before the facility was on line, the market for electricity collapsed and TEMI repudiated.

Each side provided expert testimony on AEP's lost profits. AEP's witness concluded that the present value of its losses over the twenty-year period was between $417 and $604 million with the most likely case being $520 million. TEMI's expert claimed that AEP suffered no loss which, given the collapse of the electricity market, was implausible. The trial judge was not impressed by either expert: "I found both experts provided unreliable testimony and worse yet, it appeared to be clouded by their obvious advocacy, to paraphrase a popular show tune, on behalf of the lady they came in with."[75] But even if they had done impeccable work, he would not have accepted it; it would have been too speculative:

> In order to know what AEP's revenues would be over the next twenty years, one would have to be able to presage a vast and varied body of

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73. N. Ind. Pub. Serv. Co. (NIPSCO) v. Carbon Cty. Coal Co., 799 F.2d 265, 279 (7th Cir. 1986). The contract had a price adjustment clause and was for a fixed quantity per year.

74. Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc. (*Tractebel II*), 487 F.3d 89, 109 (2d Cir. 2007).

75. Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc. (*Tractebel I*), No. 03 Civ. 6731(HB), 03 Civ. 6770(HB), 2005 WL 1863853, at *4 (S.D.N.Y. Aug. 8, 2005).

> facts. Any projection of lost profits would necessarily include assumptions regarding the price of electricity and the costs of operating over twenty years. One would also need to surmise what competing forms of energy such as coal and nuclear energy would cost over the same time period. Also factoring into this calculation are the political and regulatory developments over twenty years, population growth in the Entergy region, and technological advances affecting the production of power and related products. With so many unknown variables, these experts might have done as well had they consulted tealeaves or a crystal ball.[76]

So, he concluded, the lost profits damages were too speculative and, hence, were zero. The Court of Appeals disagreed: "The variables identified by the district court exist in every long-term contract. It is not the case that all such contracts may be breached with impunity because of the difficulty of accurately calculating damages."[77] The decision does not indicate how either expert determined the future prices or quantities, nor did it say how they might have dealt with the possibility that either party might exercise a right to terminate the contract. Nonetheless, the decision is consistent with the notion that the damages would be the change in the value of the contract after the collapse of the electricity market.

Take-or-pay contracts present a different problem. In a take-or-pay, the buyer agrees to pay in each period for a minimum quantity, even if it does not take it. A failure to take the minimum in a given period would not be a breach of the contract; the buyer would simply be exercising its option. However, a failure to pay would be a breach, and the damages would be the contract price in that period multiplied by the difference between the amount taken and the minimum quantity. If the buyer repudiated its subsequent obligations, then there would be a breach. Damages would be for the future minimum obligation subject to the possibility that it could sell the goods to a third-party. The remedy would be the same as for *Nipsco* or *Tractebel*. The same remedy would hold if the contract set a minimum amount for, say, a three-year period. So, for example, in the well-known case of *Lake River v. Carborundum*,[78] if the three-year period had elapsed, the damages would be for the price multiplied by the shortfall, although Judge Posner held otherwise. If, however, the buyer anticipatorily repudiated the contract, the damage measure would have to take into account the seller's ability to sell the goods to a third party.

76. *Tractebel I*, 2005 WL 1863853, at *16.

77. *Tractebel II*, 487 F.3d at 112.

78. Lake River Corp. v. Carborundum Co., 769 F.2d 1284 (7th Cir. 1985). For more detail, *see* GOLDBERG, RETHINKING CONTRACT LAW AND CONTRACT DESIGN, *supra* note 3, at 71–86 *and* GOLDBERG, RETHINKING THE LAW OF CONTRACT DAMAGES, *supra* note 3, at 28–29.

IV. *THE GOLDEN VICTORY* AND POST-BREACH FACTS

The House of Lords confronted the question of whether post-breach facts should be taken into account when assessing damages in *The Golden Victory*.[79] Citing a century old non-contract case,[80] it concluded that they should: "Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?"[81] *The Golden Victory* was subsequently ratified by the Supreme Court in *Bunge SA v. Nidera BV*.[82] The post-breach fact in each case was the occurrence of a force majeure event. Unfortunately, both decisions are wrong. Perhaps it is too late to do anything about it, but I hope that "with the light before them" the Court will see fit to reverse course in a future decision.

In July 1998, the owner of the Golden Victory chartered the tanker to a Japanese company for seven years. The charter included a clause that was in use for all time charters for tankers likely to visit the Gulf:

> If war or hostilities break out between any two or more of the following countries: USA, former USSR, PRC, UK, Netherlands, Liberia, Japan, Iran, Kuwait, Saudi Arabia, Qatar, Iraq, both owners and charterers shall have the right to cancel this charter. Either party, however, shall not be entitled to terminate this charter on account of minor and/or local military operation or economic warfare anywhere which will not interfere with the vessel's trade.[83]

The hire rate was initially set at $31,500 per day, increasing by a formula not included in the decision. In addition, the owner would receive a share of the profits over the base rate. In December 2001, following a sharp decline in the market for ship charters, the charterer repudiated; three days later, the owner accepted the repudiation. In a September 2002 interim declaratory award, the arbitrator found there had been a breach, and the earliest contractual date for redelivery would have been in December 2005. The damage measurement issue was not decided until October 2004. That gap turned out to be significant since the second Gulf War began in March 2003. Had the contract still been in effect, the war clause would have been triggered and the charterer would have exercised its right to terminate.

The owner claimed that the termination date for measuring damages should

79. Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory), [2007] UKHL 12, [2007] 2 AC 353 at ¶ 1.

80. Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v. Pontypridd Waterworks Co. [1903] AC 426, 431HL (E).

81. *The Golden Victory*, [2007] UKHL 12, at ¶ 65.

82. [2015] UKSC 43 at ¶ 23.

83. *The Golden Victory*, [2007] UKHL 12, at ¶ 50.

be December 2005. The charterer argued that, since it would have exercised its termination option in March 2003, it should only be liable for damages through March 2003. The arbitrator agreed, as did the judges in the commercial court, the Court of Appeal, and, finally, in the House of Lords (in a 3–2 split). The arbitrator took evidence from experts on whether in December 2001 the war was merely a possibility or was probable or inevitable. The owner argued that the "loss is crystallised at the date of breach and an arbitrator or court should not look at post-breach events in making the assessment. The only exception to this rule was where the subsequent event could be seen at the crystallisation date to be inevitable or 'predestined.'"[84]

In his dissent, Lord Bingham noted that if the damages had been calculated at the time the liability decision had been made, the Gulf War would not yet have occurred, and, presumably, the arbitrator would have had no difficulty awarding damages for the last two-plus years of the charter. Could the charterer then have come back to the arbitrator and asked for a refund for the last two years? Presumably the arbitrator and the majority would have rejected such a claim, perhaps invoking "finality." But why make the remedy depend on the length of the damages phase of the proceedings? War was only one of the many risks that might have impacted the value of the charter. If the market price for charters collapsed, should the charterer's damages be increased to take into account the latest conditions? If not, which post-breach, pre-decision factors should a court take into account when reckoning damages?

The charter was an asset of the owner and the problem was to determine the value of the asset at the time of the breach with or without the breach. The complicated pricing formula—indexing and profit sharing—made that more difficult, but the complications were independent of the timing question. Lord Mance (Court of Appeal) recognized that the contract was an asset, but failed to understand the implications: "But the element of uncertainty, resulting from the war clause, meant that the owners were never entitled to absolute confidence that the charter would run for its full seven-year period. They never had an asset which they could bank or sell on that basis."[85] That's half right; the value of all assets is entirely determined by the future, and the future is, by definition, uncertain. That does not mean that the assets cannot be valued. We do it all the time. The majority wrongly suggested that the war clause made the duration of the charter (and therefore its value) uncertain: "Where there is a suspensive condition such as a war clause, however, the duration of the charter was always uncertain, depending on a contingency of the occurrence of an event which was by definition within the contemplation of the parties."[86] By that reasoning, every contract with a force majeure clause—indeed, every contract—would be at risk.

84. *Id.* at ¶ 58.

85. Golden Strait Corp. v. Nippon Yusen Kubishika Kaisha (The Golden Victory) [2006] 1 WLR 533, 543–44.

86. *Id.* at ¶ 59.

Valuing the asset would, by necessity, take into account the possibility that the war clause would come into play and that one of the parties would exercise its cancellation option. If at the time of the breach war was a low probability event, the discount would have been minor. Conversely, if the breach occurred at the beginning of March 2003, the value of the asset would have been close to zero. A simple analogy might be helpful. Suppose a company is litigating a patent claim. If it were to win, the share value would be $100 and if it were to lose, the share value would be $0. If the chance of winning is 50:50, the value of the stock on the eve of decision is $50. Post-decision it would be $0 or $100. Varying the probabilities would alter the stock price; if winning were "predestined," the stock price would approach $100, and if it were exceedingly unlikely, it would approach $0. The likelihood of a future event at the time of the breach—whether remote, predestined, or something in between—is one of the determinants of the value of the asset.

The Lords' failure to comprehend this point is illustrated in Lord Brown's opinion:

> Shift the facts here and assume that the arbitrator had found, as at December 2001, a probability (or even merely a significant possibility) of (perhaps imminent) war breaking out in the Gulf, but that in fact, by the time damages finally came to be assessed, not only had war not broken out but all risk of it had disappeared—or, indeed, the assessment might not have taken place until the whole nominal term of the charterparty had expired. On the view taken by the minority of your Lordships, the damages award would have had to reflect a risk which never in fact eventuated, a conclusion in the circumstances, greatly to the owner's disadvantage. Yet that inescapably is the logic of the minority's approach.[87]

And that is how it should be. Markets take future risk into account, incorporating the best information at the time of the breach. If the likelihood of the particular event changes over time or, as in this instance, the event comes to pass, the market will reflect those changes. If the news turns out to be better than had been anticipated (Brown's no war scenario), the measured damages at the time of the breach would have been below the measurement at the time of the decision. And if the news turns out to be worse, as in the actual case, the measured damages at the time of breach would exceed those at the time of the decision. Whether the losses were probable or predestined would be determined by the market, not by after-the-fact expert testimony on predestination.

The Supreme Court reaffirmed *The Golden Victory* in *Bunge SA v. Nidera BV*. In 2010, Bunge (the seller) agreed to sell 25,000 metric tons of Russian milling wheat crop (FOB Novorossiysk). The contract was entered into on June

87. *Id.* at ¶ 84.

10, 2010 with delivery to be made between August 23, 2010 and August 30, 2010. The contract price was $160 per metric ton but by August 11, the price of wheat on the world market had risen to between $280 and $285. On August 5, Russia introduced a legislative embargo on exports of wheat from its territory, which was to run from August 15 to December 31, 2010. The contract included a prohibition clause:

> In case of . . . any executive or legislative act done by or on behalf of the government of the country of origin . . . restricting export, . . . any such restriction shall be deemed by both parties to apply to this contract . . . and to that extent this contract or any unfulfilled portion thereof shall be cancelled.[88]

On August 9, the seller jumped the gun, notifying the buyer that because of the embargo the contract was cancelled; the buyer rejected this on August 11, claiming that the seller had repudiated the contract, and it then accepted the repudiation. The seller then offered to reinstate the contract, but the buyer claimed that it was too late. It claimed damages for the difference between the contract price and the market price of wheat on August 11, totaling $3,062,500.

The arbitration panel found that the premature invocation of the prohibition clause amounted to a breach which the buyer had accepted. It was possible that Mr. Putin might have changed his mind before August 30, it held, so it would have been possible that Bunge could have performed. In the subsequent stages of litigation, that finding was upheld, and I will not pursue that issue. The remaining issue concerned damages: had the buyer suffered any damages and, if so, how would they be measured? Should the fact that the embargo remained in place after August 30 be taken into account?

The initial arbitration panel refused to award damages, holding that the buyer had suffered none. The decision took into account post-breach information, namely that the embargo remained in effect on August 23–30, so the contract would have been excused. The arbitration Appeal Board reversed, measuring damages on the date of breach ($3,062,500) and ignoring the subsequent information. On appeal, the Judge was Nicholas Hamblen who had been losing counsel in *The Golden Victory*. He affirmed the decision and distinguished *The Golden Victory* by noting that it involved an installment contract whereas the Bunge-Nidera contract was a one-off.[89] His decision was affirmed by a unanimous Court of Appeal. However, in a unanimous opinion, the Supreme Court reversed, awarding the buyer nominal damages of $5.[90]

None of the decisions say what happened to the wheat. Did Bunge manage to sell it on the world market prior to August 15? Could it? Or did it have to sell in

88. Bunge SA v. Nidera BV [2015] UKSC at ¶ 2.
89. *Id.* at ¶ 54–55.
90. *Id.* at ¶ 36.

Russia at whatever price prevailed in that market after August 30? Russian prices were below the world price at the time of the initial contract and at the time of the breach. As it happened, the Russian price differential remained roughly the same while the embargo was in effect.[91] The post-embargo Russian price, while lower than the world price, was substantially higher than the contract price. So, Bunge made a substantial profit regardless of whether it sold in Russia or in the world market. Doctrinally that might not matter, but there is at least a strong hint in the Supreme Court decision that it was influenced by concern for unfairness to Bunge if it were to have to pay damages. In fact, Bunge had made a significant profit.

The contract was on the Grain and Feed Trade Association's (GAFTA) 49 standard form contract, designed for contracts for the delivery of goods from central and Eastern Europe in bulk or bags. The contract included a "default clause" that set out how damages should be measured in the event of a default. To avoid confusion, I will call this a "damage clause," reserving the term default to mean the rule that would apply in the absence of contract language that would govern the situation. Damages would be the contract-market differential at the time of the breach. This appeared to conflict with the Justices' view that the compensation principle would result in no damages since the embargo remained in force during the delivery period. Lord Sumption resolved this by claiming that the damage clause somehow did not cover this situation: "[I]n my opinion, clause 20 neither addresses nor excludes the consideration of supervening events (other than price movements) which operate to reduce or extinguish the loss."[92]

The damage clause read: "The damages payable shall be based on, but not limited to the difference between the contract price and either the [cover price] or upon the actual or estimated value of the goods on the date of default."[93] The arbitration panel (and presumably the court) interpreted that to mean the price of the goods on the date of the breach, but there is ambiguity as to what that is. It should be the forward price of wheat on August 1l (the day of the breach) for wheat to be delivered between August 23 and August 30. But which wheat? All the judges appear to have assumed that it was the forward price on August 11 of wheat in the *world* market. But that makes no sense. It is inconsistent with the existence of the prohibition clause which only applied to Russian wheat. The relevant price should be the price of *Russian* wheat in the *world* market. That price would reflect the likelihood that the embargo might not be lifted before August 30. The "estimated value of the goods on the date of default" would have to take into account the likelihood on August 11 that the embargo would be lifted, and Russian wheat would have been deliverable outside Russia in the last

91. *See* George Welton, *The Impact of Russia's 2010 Grain Export Ban*, GEOWEL RESEARCH (June 28, 2011), https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/file_attachments/rr-impact-russias-grain-export-ban-280611-en_3.pdf.

92. Bunge SA v. Nidera BV [2015] UKSC at ¶ 32.

93. *Id.* at ¶ 2.

week of August.

The decisions do not say why Bunge jumped the gun. Perhaps it was just careless talk and Bunge had no expectation of benefitting from an early termination. That is at least plausible, given its attempt to retract. If, however, a proper inquiry concluded that as of August 11 it was not feasible to sell the wheat to the world market by August 15, and the probability that Mr. Putin would change his mind before August 30 was very close to zero, then the contract value at the time of the breach would have taken this into account. The price of Russian wheat in the world market for delivery before the end of August would not have been around \$280; it would have been close to zero. Certainly, it would have been well below the contract price of \$160. This measure would be akin to the damages in *The Golden Victory* context had the charterer repudiated in early March 1993. The probability of war would have been high in the one case, as was the continuation of the embargo in the other, and the contract in either case would have been discounted to close to zero. The Supreme Court's result—i.e., nominal damages—was correct. But the path to that result was wrong. The court could have arrived there while still honoring the damage clause and rejecting *The Golden Victory*.

In *Bunge,* Lord Sumption rejected the notion of the contract-as-asset:

> The minority [in *The Golden Victory*] . . . considered that one should value not the chartered service which would actually have been performed, but the charterparty itself, assessed at the time that it was terminated, by reference to the terms of a notional substitute concluded as soon as possible after the termination of the original. That would vary, not according to the actual outcome, but according to the outcomes which were perceived as possible or probable at the time that the notional substitute contract was made. . . . [T]he common law [principles] are concerned with the price of the goods or services which would have been delivered under the contract. They are not concerned with the value of the contract as an article of commerce in itself.[94]

He gave no reason as to why the change in the value of the contract should not be relevant.

In *The Golden Victory* and *Bunge*, the court focused on the virtues of resolving the uncertainty: "With the light before him, why should he shut his eyes and grope in the dark?" The downside of this is that the decisions increase uncertainty in a different dimension. If some subsequent events would result in reckoning damages at the moment of decision, but not others, then each party will have an incentive to argue for the rule favoring it when it is no longer behind the veil of ignorance, and courts will have to determine on an ad hoc basis which cases warrant taking subsequent events into account. As Summers and Kramer

94. *Id.* at ¶ 21.

note:

> The formulae put forward for departing from the breach date rule are hopelessly vague. According to three leading House of Lords decisions, the breach date rule may be departed from "if to follow it would give rise to injustice", "where it is necessary in order adequately to compensate the plaintiff", or where it is "necessary or just to do so in order to give effect to the compensatory principle." And so, on the conventional approach, judges are presented with an apparently unguided discretion which rests on unspecified concepts of justice and compensation.[95]

The problem with *The Golden Victory* and its spawn is, as Summers and Kramer say, the unguided discretion and the ad hoc exceptions it allows.

V. Concluding Remarks

The premise of this article is that the default rule for determining direct damages when the buyer or seller fails to perform should be the change in the value of the contract at the time of the breach. For standardized commodities traded in thick markets this is straightforward—the only question being whether the new contract price is the spot price or the forward price. I have applied the notion to problems in both American and English law.

In the United States, one problem is that there is an apparent difference between two UCC remedies, the contract/market differential and cover. However, once we recognize that cover, or any subsequent contract, should be treated as evidence of the market price and not a separate remedy, the problem goes away. To be clear, there is no reason why there has to be any subsequent transaction. If the buyer were to choose not to replace the transaction, the damages should be determined by finding the market price. Correspondingly, in England, the Sale of Goods Act appears to distinguish between cases in which there is an available market and those where there is not. The courts have proffered a number of unsatisfactory definitions of an available market but have not really come to grips with the notion that the exercise is irrelevant. Again, the problem is to determine the price at the time of the breach, regardless of whether the non-breaching party entered into a subsequent transaction.

The second problem concerned the role of post-breach information. In the United States, the cover question is also implicated. The evidentiary quality of a cover transaction weakens as the gap between breach and the alleged cover transaction grows. American courts have come to different conclusions with regard to an anticipatory repudiation. While some would argue for using the price

95. Andrew Dyson & Adam Kramer, *There is No "Breach Date Rule": Mitigation, Difference in Value and Date of Assessment*, 130 L.Q. REV. 259, 261 (2014) (Dyson changed his last name to Summers after this article was published).

at the time of performance, others would look to the price when the repudiation was accepted. I have argued that the appropriate price would be the forward price when the repudiation was accepted, rather than the spot price. In the more complicated cases of long-term contracts, the value of the contract captures all the relevant features of the contract—variable price and quantity, early termination rights, etcetera.

In England, while the general rule has been to use the time of the breach, the Supreme Court has endorsed an exception. If a force majeure event would have occurred between the time of breach and the performance date, in *The Golden Victory* and *Bunge*, the highest court took into account whether the force majeure event occurred. In both cases, the court failed to appreciate that the likelihood of the occurrence would have been factored in to determine the market price at the time of the breach. In the former case, the probability was very low, and the price was likely not discounted. In the latter case, the likelihood was extremely high. Had the court recognized that the relevant price was for Russian wheat sold outside Russia, the price would have been heavily discounted so that the damages would have been zero.