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U.C.C. Section 1-–302: Dodging a Supply Chain Crisis One Waiver at a Time

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U.C.C. Section 1-–302: Dodging a Supply Chain Crisis One Waiver at a Time

Cover Page Footnote

I would like to thank my family, especially my parents, for all their support in helping me achieve my goals. I also want to thank Casey Jones, Tom Hankinson and Professor Jeff Schmitt for their mentorship in assisting me with this Comment and helping me become a better law student and professional.

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U.C.C. SECTION 1-302: DODGING A SUPPLY CHAIN CRISIS ONE WAIVER AT A TIME

*Nick Taylor**

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I. INTRODUCTION

A global supply chain crisis has affected both corporations and consumers, and a minor change in how corporations draft commercial requirements contracts can benefit the world of commercial contracting forever.[1] This Comment proposes a method of contracting that converts a requirements contract into a "buyer's option contract."[2] The emergence of buyer's option contracts under the Uniform Commercial Code ("U.C.C.") has left courts struggling to apply foundational principles of contract formation.[3] However, establishing a lawful and efficient way to form non-exclusive, open quantity contracts can provide buyers with substantial advantages in contracting, while also reducing the effects of the supply chain crisis. This Comment explains that by contracting for the right to purchase non-

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[1] Martin Farrer, *Global Supply Chain Crisis Could Last Another Two Years, Warn Experts*, The Guardian (Dec. 18, 2021), https://www.theguardian.com/business/2021/dec/18/global-supply-chain-crisis-could-last-another-two-years-warn-experts.

[2] *See, e.g.*, Crown Battery Mfg. Co. v. Club Car, Inc., No. 3:12CV2158, 2014 U.S. Dist. LEXIS 18907, at *10 (N.D. Ohio Feb. 14, 2014) (interpreting New York law); Brooklyn Bagel Boys, Inc., v. Earthgrains Refrigerated Dough Prods., Inc., 212 F.3d 373, 378 (7th Cir. 2000); Miller v. McLean Cnty. Unit Dist. No. 5 (In re Mod. Dairy, Inc.), 171 F.3d 1106, 1109–10 (7th Cir. 1999).

[3] *See, e.g.*, *Brooklyn Bagel Boys, Inc.*, 212 F.3d at 378–80; BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co., 804 F.3d 1229, 1231–33 (7th Cir. 2015); *Miller*, 171 F.3d at 1108; *Crown Battery Mfg. Co.*, 2014 U.S. Dist. LEXIS 18907, at *10–12; City of Cuba v. City of Canton, No. 3-11-0066, 2011 Ill. App. Unpub. LEXIS 2541, at *11 (Ill. App. Ct. Oct. 18, 2011).

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exclusively from a range of suppliers, buyers can limit problems with delivery delays, substantial increases and decreases in requirements, and variations in quality.[4] Moreover, this could be a viable strategy in limiting slowdowns in production because, if a good is not readily available from one supplier, a buyer can switch temporarily to a different supplier to continue production without interruption and ensure compliance with the buyer's collateral contracts.[5]

The primary roadblock to this solution is the statute of frauds.[6] Under U.C.C. Section 2-201, a contract for the sale of goods over $500 is unenforceable beyond the quantity of goods shown in the contract.[7] In other words, a contract must have a quantity in writing and is not enforceable for goods ordered in excess of that written quantity.[8] The typical exception to the U.C.C. quantity requirement is promising exclusivity and good faith through a requirements contract.[9]

Just over 20 years ago, the United States Court of Appeals for the Seventh Circuit classified non-exclusive, open quantity agreements as buyer's option contracts in Brooklyn Bagel Boys and Modern Dairy.[10] Since then, other circuits have grappled with non-exclusive, open quantity contracts as well.[11] The theory behind a buyer's option contract is a buyer can contract for the right to purchase non-exclusively, while not committing to purchase any, let alone all, requirements from a given supplier.[12] Since these contracts do not state a quantity, corporations run the risk of buyer's option contracts being interpreted as either requirements contracts or Master Purchase Agreements ("MPAs") that merely set the terms of the parties' future dealings

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[4] "When parties try to increase or decrease requirements, this usually results in disputes that go to court." *Requirements Contracts: Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/requirements-contract (last updated Nov. 2, 2020). *See also* Ed Blazina, *Supply-Chain Problems Delaying Completion of Some PennDOT Projects*, PITT. POST-GAZETTE (Dec. 15, 2021), https://www.post-gazette.com/news/transportation/2021/12/15/Supply-chain-problems-delaying-completion-of-some-PennDOT-projects/stories/202112150159.

[5] Many goods are in short supply and arriving late. *See, e.g.*, Blazina, *supra* note 4. In a requirements contract, if a seller is not in compliance with a contract, the buyer must either terminate or sue for breach, which will result in lost business from the original supplier and could leave a buyer scavenging for a new supplier. Tania L. Williams, *Thinking of Terminating Your Outsourcing Agreement?*, SOURCING SPEAK (Jan. 13, 2012), https://www.sourcingspeak.com/thinking-of-terminating/. In this scenario, goods may be delayed even more, which explains why many sellers may opt to stay with the original seller despite nonconformities. If the buyer and seller are in a buyer's option contract, the buyer can retain rights to the contract with the original seller while searching for a new seller in instances of nonconformance, which eliminates the likelihood of further consequences resulting from termination. *See, e.g.*, *Brooklyn Bagel Boys, Inc.*, 212 F.3d at 378.

[6] Merritt-Campbell, Inc. v. RxP Prods., Inc., 164 F.3d 957, 964 (5th Cir. 1999).

[7] U.C.C. § 2-201(1).

[8] *Id.*

[9] *Id.* § 2-306(1)–(2).

[10] *See, e.g.*, *Brooklyn Bagel Boys, Inc.*, 212 F.3d 373, 378–79 (7th Cir. 2000); Miller v. McLean Cnty. Unit Dist. No. 5 (In re Mod. Dairy, Inc.), 171 F.3d 1106, 1108–09 (7th Cir. 1999).

[11] *See, e.g.*, City of Cuba v. City of Canton, No. 3-11-0066, 2011 Ill. App. Unpub. LEXIS 2541, at * 10–11 (Ill. App. Ct. Oct. 18, 2011); Crown Battery Mfg. Co. v. Club Car, Inc., No. 3:12CV2158, 2014 U.S. Dist. LEXIS 18907, at *10–12 (N.D. Ohio Feb. 14, 2014); *Merritt-Campbell, Inc.*, 164 F.3d at 964.

[12] *See, e.g.*, *Brooklyn Bagel Boys, Inc.*, 212 F.3d at 378; *see also Miller*, 171 F.3d at 1109–10.

without obligating the seller to accept purchase orders.[13] Dicta in Modern Dairy alluded to the idea that buyer's option contracts may bind the seller to accept all purchase orders, but this claim is unsupported by law.[14] A U.C.C. option contract without a quantity still violates the statute of frauds.[15] Accordingly, the seller is not obligated to accept purchase orders because the long-term contract is unenforceable. This Comment contends that a way to avoid this issue is by waiving the statute of frauds in writing.[16]

Sophisticated corporations may vary U.C.C. contracts by agreement, except for the obligation of good faith.[17] Courts have never ruled on an agreement to vary the statute of frauds quantity requirement in written contracts. While the U.C.C. commentary prohibits waiver of the statute of frauds in oral agreements, the commentary is silent on the validity of waiving the statute of frauds in written contracts.[18] This Comment argues sophisticated parties who assent to the material terms of an agreement in writing should be permitted to waive the statute of frauds quantity requirement. Additionally, parties drafting a non-exclusive, written contract without a quantity can both be bound to meet purchase orders by incorporating fundamentals of buyer's option contracts, paying consideration for the option to buy at the buyer's discretion for a set duration, and varying U.C.C. Section 2-201's quantity requirement.

While requirements contracts have their benefits and should not be disregarded, they tend to reduce competition and prevent smaller competitors from succeeding in the market.[19] A non-exclusive buyer-seller relationship gives the buyer freedom to switch suppliers or purchase from multiple suppliers if requirements increase, while still retaining the right to use the original supplier.[20] Not only can non-exclusive contracting allow for smaller suppliers to compete in the market, it can reduce supply chain shortages.[21] As a result, competition increases supply to meet demand, which decreases the

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[13] *See City of Cuba*, 2011 Ill. App. Unpub. LEXIS 2541, at *11 (holding that a contract was a requirements contract despite not expressly stating that appellant must purchase exclusively from appellee); *see also* Shelley Smith, *A New Approach to the Identification and Enforcement of Open Quantity Contracts: Reforming the Law of Exclusivity and Good Faith*, 43 VAL. U.L. REV. 871, 942–43 (2009).

[14] *Miller*, 171 F.3d at 1109–10; *see also* Smith, *supra* note 13, at 945–46.

[15] *See Merritt-Campbell, Inc.*, 164 F.3d at 964 ("[O]ption contracts are subject to the statute of frauds.").

[16] *See* U.C.C. § 1-302 cmt. 1–2; *see also Freedom of Contract*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/freedom_of_contract (last visited Sept. 24, 2022).

[17] U.C.C. § 1-302(a)–(b).

[18] *See id.* § 1-302 cmt. 1.

[19] *Exclusive Dealing or Requirements Contracts*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/exclusive-dealing-or (last visited Sept. 24, 2022).

[20] *See, e.g.*, Brooklyn Bagel Boys, Inc., v. Earthgrains Refrigerated Dough Prods., Inc., 212 F.3d 373, 378–79 (7th Cir. 2000); Crown Battery Mfg. Co. v. Club Car, Inc., No. 3:12CV2158, 2014 U.S. Dist. LEXIS 18907, at *11–12 (N. Dist. Ohio Feb. 14, 2014).

[21] *See Exclusive Dealing or Requirements Contracts*, *supra* note 19.

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price of goods for consumers.[22] The market is in dire need of an end to the supply chain crisis and buyer's option contracts, when drafted correctly, can significantly benefit the economy, corporations, and everyday citizens.

This Comment analyzes strategies to promote a new way of contracting that can enhance a buyer's contracting position, reduce economic waste, and limit supply chain shortages. Section II focuses on the statute of frauds, requirements contracts, and other forms of contracting that have been held enforceable. Section III explains why the Seventh Circuit's decisions relative to buyer's option contracts are incorrect under the U.C.C. Section IV discusses solutions to the drawbacks of buyer's option contracts and formulates a way to successfully and lawfully draft non-exclusive, open quantity contracts. Section V explains the benefits and incentives that enforceable buyer's option contracts can provide for contracting parties, competition in the open market, and supply chain deficiencies. Finally, this Comment concludes by discussing the advantages corporations and consumers can derive from contracting non-exclusively.

II. ENFORCEABLE COMMERCIAL CONTRACTS UNDER THE U.C.C.

A. *The U.C.C. Statute of Frauds and Requirements Contracts*

"The 'Statute of Frauds' requires that certain types of contracts be written and signed by all parties in order to be considered binding and enforceable."[23] The purpose of the statute of frauds is to limit conflicts that arise when parties dispute what was said and promised during contract negotiations.[24] Under the U.C.C., a contract for the sale of goods over $500 must be in writing, indicating a sale has been made between the parties, and must be signed by the party the contract is being enforced against.[25] These contracts typically must have a stated quantity.[26] Under U.C.C. Section 2-201, "[a] contract is not enforceable . . . beyond the quantity of goods shown in such writing."[27] Put more simply, a contract for the sale of goods over $500 must be signed by the party raising the statute of frauds defense and include a stated quantity term to be enforceable.[28] A contract is not enforceable for

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[22] *See How Demand and Supply Determine Market Price*, ALBERTA, https://www.alberta.ca/how-demand-and-supply-determine-market-price.aspx (last visited Sept. 24, 2022); *see also* Peter S. Goodman, *How the Supply Chain Broke, and Why It Won't Be Fixed Anytime Soon*, N.Y. TIMES (Oct. 22, 2021), https://www.nytimes.com/2021/10/22/business/shortages-supply-chain.html (discussing that short supply has caused prices to increase).

[23] *Statute of Frauds in California Contracts*, LAW OFF. OF STIMMEL, STIMMEL & ROESER, https://www.stimmel-law.com/en/articles/statute-frauds-california-contracts (last visited Sept. 24, 2022).

[24] *Id.*

[25] U.C.C. § 2-201(1).

[26] *Id.* § 2-201 cmt. 1.

[27] *Id.* § 2-201(1).

[28] *Id.*

any quantity beyond what is memorialized in the written contract.[29]

Under the U.C.C., quantity is more important than price.[30] In *FFP Marketing Co.*, FFP, the buyer, formed a pricing agreement on discount cigarettes with Medallion, the seller, for a five-year period.[31] When Medallion refused purchase orders, FFP brought claims for breach of contract and fraud.[32] Medallion moved for summary judgment, contending the contract failed to state a quantity.[33] In response, FFP argued the contract implied exclusivity and was a requirements contract.[34] However, the court found the contract to be a long-term agreement to purchase at a listed price, which was held unenforceable for failure to state a quantity.[35] Despite evidence of a writing and negotiations, the absence of a specified quantity term or waiver renders a contract unenforceable beyond goods already accepted and paid for.[36] This shows the importance courts place on the statute of frauds quantity requirement.[37]

The quantity requirement is viewed with higher scrutiny compared to other missing terms, which courts typically fill in.[38] Ambiguous or missing terms can be implied through the course of dealing, custom, and usage of trade.[39] Courts tend not to extend the same courtesy to contracts failing to include a stated quantity.[40] In *Doral Hosiery Corp.*, the parties exchanged six letters clearly indicating ongoing dealings and conduct among the buyer and seller.[41] However, since the letters only stated a price rather than a quantity or estimate, the court held conduct was insufficient to enforce a contract without a quantity.[42]

Despite the stringency of U.C.C. Section 2-201's quantity requirement, U.C.C. Section 2-306 carves out an exception permitting exclusivity and good faith to substitute for consideration and quantity in certain contracts.[43] This exception is called a requirements contract.[44] A requirements contract is an agreement where a buyer agrees to purchase all

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[29] *Id.*
[30] *Id.* § 2-201 cmt. 1
[31] FFP Mktg. Co. v. Medallion Co., No. 01-10385, 2001 U.S. App. LEXIS 30631, at *2 (5th Cir. Dec. 19, 2001).
[32] *Id.* at *3.
[33] *Id.*
[34] *Id.* at *5.
[35] *Id.* at *7.
[36] *See id.*; *see also* Doral Hosiery Corp. v. Sav–A–Stop, Inc., 377 F. Supp. 387, 389–90 (E.D. Pa. 1974).
[37] *See generally FFP Mktg. Co.*, 2001 U.S. App. LEXIS 30631.
[38] *See generally Doral Hosiery Corp.*, 377 F. Supp. at 389.
[39] *Id.*
[40] *Id.*
[41] *Id.* at 389.
[42] *Id.* at 389–90.
[43] *See* U.C.C. § 2-306.
[44] *Id.* § 2-306(1).

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its needs for a specific good exclusively from a single seller.[45] For example, if Company A manufactures pencils and is in a requirements contract with Company B to buy erasers, Company A must buy all of its erasers from Company B, and Company B must supply all orders made in good faith by Company A. A requirements contract satisfies the statute of frauds because, "the subject matter of the requirements is known and [a] commitment . . . to purchase all of such items from [a] seller [exists]."[46] Further, acceptance of exclusivity, in place of a quantity, forms a binding contract because the law implies an obligation for the parties to act in good faith.[47]

"[A]ccuracy of the quantity term is immaterial" in determining whether an enforceable requirements contract has been formed.[48] For example, in *Riegel Fiber Corp.*, the court held that a buyer agreeing to buy "all the acceptable cotton produced during the crop year" was not too indefinite for the formation of a requirements contract.[49] Rather, the court asserted "[t]he essential test is whether the party is acting in good faith" as opposed to whether a sufficiently definite quantity term is available.[50] The duty of good faith in requirements contracts is codified by U.C.C. Section 2-306(1) as follows:

> A term which measures the quantity by the . . . requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.[51]

Essentially, the duty of good faith prohibits ordering a quantity that is unreasonably disproportionate to any stated estimate.[52] If an estimate is not provided, the good faith test is whether orders are normal or comparable to prior requirements ordered.[53] A buyer must conduct business "according to commercial standards of fair dealing."[54] Courts have used the obligation of good faith and reasonable foreseeability interchangeably.[55] Thus, courts view a violation of good faith as unreasonably disproportionate when "quantities

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[45] Roger Edwards, LLC v. Fiddes & Son, Ltd., 245 F. Supp. 2d 251, 260 (D. Me. 2003).
[46] Int'l Com. Res., Ltd. v. Jamaica Pub. Serv. Co., 612 F. Supp. 1153, 1155 (S.D.N.Y. 1985).
[47] Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214–15 (N.Y. 1917); *see also* U.C.C. § 2-306(1).
[48] Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 789 (5th Cir. 1975).
[49] *Id.* at 790–91, 793 n.7.
[50] *Id.* at 790–91; Canusa Corp. v. A & R Lobosco, 986 F. Supp. 723, 728 (E.D.N.Y. 1997) (quoting N.Y. U.C.C. § 2-306 cmt. 2).
[51] U.C.C. § 2-306(1).
[52] *Id.*
[53] *Id.*
[54] *Id.* § 2-306 cmt. 2.
[55] *See, e.g.*, Waste Stream Env't, Inc. v. Lynn Water & Sewer Comm'n, 2003 Mass. Super. LEXIS 43, at *29 (Mass. Dist. Ct. Jan. 3, 2003). "'Reasonable foreseeability' and the obligation of 'good faith' are 'somewhat redundant,' in that one defines the other." *Id.* (quoting Atlantic Track & Turnout Co. v. Perini Corp., 989 F.2d 541, 544 (1st Cir. 1993)).

vary greatly from those [that are] reasonably foreseeable."[56]

Is the reasonably foreseeable standard different depending on whether requirements (the quantity ordered) are increasing or decreasing? To start, for both increases and decreases, it is understood that changes in requirements cannot be based on "second thoughts about the terms of the contract."[57] Thus, requirements increases and decreases lack good faith when the reason behind the change is dissatisfaction with the terms of the contract.[58]

For example, in *Empire Gas*, Judge Posner's majority opinion indicated the "essential ingredient of good faith" when a buyer reduces estimated requirements is whether the buyer has a legitimate business reason for reducing requirements.[59] This action commenced when American Bakeries reduced its requirements from 3,000 units to zero.[60] American Bakeries argued it did not violate the agreement because units were not subsequently purchased from another supplier.[61] However, the court held exclusivity alone was insufficient.[62] American Bakeries was financially capable of continuing performance under the agreement and failed to meet the burden of articulating a legitimate business reason for reducing its requirements to zero, which was a substantial departure from the agreed-upon requirements.[63] Therefore, changes in requirements merely because of dissatisfaction with the terms of an agreement, absent a legitimate business reason for the changes, is a breach of the duty of good faith.[64]

When there is a legitimate business reason for changes in requirements, the U.C.C. permits "reasonable elasticity" but the test for "unreasonably disproportionate" changes depending on whether requirements are increasing or decreasing.[65] Reducing requirements because of a lack of orders may be permissible, but reducing requirements merely to avoid loss is not.[66]

Courts and the U.C.C. are stricter about exploitation of suppliers in an increased requirements situation because of the potential for bad faith increases after the market price has risen when the contract contains a fixed

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[56] *Atlantic Track*, 989 F.2d at 544; *see also Waste Stream Env't, Inc.*, 2003 Mass. Super. LEXIS 43, at *29.

[57] *Waste Stream Env't Inc.*, 2003 Mass. Super. LEXIS 43, at *32 (quoting Empire Gas Corp. v. Am. Bakeries Co., 840 F.2d 1333, 1340 (7th Cir. 1988)).

[58] *See Empire Gas Corp.*, 840 F.2d at 1341.

[59] *Id.* at 1340–41.

[60] *Id.* at 1341.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 1340–41.

[65] *See* U.C.C. § 2-306(1); § 2-306 cmt. 2 ("A shut-down by a requirements buyer for lack of orders might be permissible when a shut-down merely to curtail losses would not. The essential test is whether the party is acting in good faith.").

[66] *Id.* 2-306 cmt. 2.

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price.[67] Sudden increases in requirements amount to a lack of good faith because sudden increases are outside the scope of the contract.[68] The U.C.C. only permits increases in requirements when they are normal, foreseeable, and within the scope of the contract.[69] Thus, increases in requirements are heavily fact dependent and the inability to increase requirements is potentially burdensome to buyers and the supply chain if demand rises.

The elements of the statute of frauds and requirements contracts are well established in both case law and the U.C.C.[70] More recently, corporations have attempted to contract around these established principles to enhance their commercial positions by not stating a quantity in contracts and attempting to avoid breaches due to sudden increases or decreases in requirements.[71] Courts have struggled with properly interpreting these contracts, and precedent has failed to reconcile the discrepancies between open quantity contracts and the foundational contract formation requirements of the U.C.C.[72]

B. Master Purchase Orders and Buyer's Option Contracts

Courts have recognized MPAs as enforceable, non-exclusive, open quantity contracts.[73] In MPAs, buyers do not commit to any specified quantity.[74] Rather, these agreements state terms and conditions governing how parties are to conduct business in the future without obligating a buyer to buy any goods or a seller to sell any goods.[75]

Upon submission of a purchase order, the terms of the MPA are incorporated into the purchase order but are only binding for the quantity of goods stated in the purchase order.[76] After completion of the purchase order, the buyer and seller do not need to buy or sell any goods unless another

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[67] Waste Stream Env't, Inc. v. Lynn Water & Sewer Comm'n, 2003 Mass. Super. LEXIS 43, at *35 (Mass. Dist. Ct. Jan. 3, 2003); *see also* U.C.C. § 2-306 cmt. 2 (stating that increases in requirements after an increase in market price when the parties are in a fixed price contract is a factor in determining good faith).

[68] U.C.C. § 2-306 cmt. 2.

[69] *Id.* ("[A] sudden expansion of the plant by which requirements are to be measured would not be included within the scope of the contract as made but normal expansion undertaken in good faith would be within the scope of this section.").

[70] *See* U.C.C. § 2-201. *See generally* U.C.C. § 2-306.

[71] *See, e.g.*, Brooklyn Bagel Boys, Inc., v. Earthgrains Refrigerated Dough Prods., Inc., 212 F.3d 373, 378–80 (7th Cir. 2000); BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co., 804 F.3d 1229, 1231–33 (7th Cir. 2015); Miller v. McLean Cnty. Unit Dist. No. 5 (In re Modern Dairy, Inc.), 171 F.3d 1106, 1108 (7th Cir. 1999); Crown Battery Mfg. Co. v. Club Car, Inc., No. 3:12CV2158, 2014 U.S. Dist. LEXIS 18907, at *10–12 (N.D. Ohio Feb. 14, 2014); City of Cuba v. City of Canton, No. 3-11-0066, 2011 Ill. App. Unpub. LEXIS 2541, at *11 (Ill. App. Ct. Oct. 18, 2011).

[72] *See, e.g.*, *Brooklyn Bagel Boys, Inc.*, 212 F.3d at 378–80; *BRC Rubber & Plastics, Inc.*, 804 F.3d 1229 at 1231–33; *Miller*, 171 F.3d at 1108; *Crown Battery Mfg. Co.*, 2014 U.S. Dist. LEXIS 18907, at *10–12; *City of Cuba*, 2011 Ill. App. Unpub. LEXIS 2541, at *11–12.

[73] Smith, *supra* note 13, at 942. MPAs are also referred to as "Blanket Purchase Orders." *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

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purchase order is accepted.[77] Ultimately, this gives the seller discretion to reject purchase orders, because an MPA is not binding for any quantity beyond what has already been accepted or paid for.[78]

Modern case law has blurred the line between MPAs and requirements contracts with the emergence of buyer's option contracts.[79] A buyer's option contract is a non-exclusive agreement giving the buyer the option to purchase at the buyer's discretion.[80] *Brooklyn Bagel Boys* was the second case to coin the phrase "buyer's option."[81]

In *Brooklyn Bagel Boys*, the Seventh Circuit found Earthgrains, the buyer, contracted for the right to purchase from Brooklyn Bagel, the seller, while reserving the option to purchase from other sellers or manufacture their own bagels.[82] The contract did not require a specific quantity of bagels; instead, Brooklyn Bagel was to process and package the "ordered quantity" of bagels.[83] Earthgrains agreed to provide a non-binding forecast three months in advance of purchase orders.[84]

Brooklyn Bagel sued when Earthgrains stopped ordering bagels prior to terminating the contract and argued the agreement was ambiguous and should be interpreted as a requirements contract.[85] The contractual language even used the word "requirements," stating "Earthgrains was to provide Brooklyn Bagel [with] 'a written forecast (in such form as may be agreed to by the parties) of Earthgrains' anticipated requirements.'"[86] Despite the explicit contractual language, the court held the contract did not require Earthgrains to purchase all, or any, specified quantity of its requirements from Brooklyn Bagel because the contract lacked a promise of exclusivity and a requirement for Earthgrains to purchase any goods from Brooklyn Bagel.[87] The court analyzed and interpreted the contract as an enforceable long-term contract, but never addressed the statute of frauds or whether the seller was

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[77] *Id.*

[78] *Id.* at 944. The theory behind MPAs models one of the exceptions to the U.C.C. statute of frauds. U.C.C. § 2-201(3)(c). "A contract which does not satisfy the requirements of [the statute of frauds] but which is valid in other respects is enforceable . . . with respect to goods for which payment has been made and accepted or which have been received or accepted." U.C.C. § 2-201(3)(c). Thus, these contracts are enforceable for purchase orders accepted or paid for, but not for purchase orders that have yet to be accepted or paid for. U.C.C. § 2-201(3)(c).

[79] *See generally* Brooklyn Bagel Boys, Inc., v. Earthgrains Refrigerated Dough Prods., Inc., 212 F.3d 373 (7th Cir. 2000).

[80] *See, e.g.*, *id.* at 378; BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co., 804 F.3d 1229, 1232 (7th Cir. 2015); Miller v. McLean Cnty. Unit Dist. No. 5 (In re Mod. Dairy, Inc.), 171 F.3d 1106, 1109 (7th Cir. 1999).

[81] *Brooklyn Bagel Boys, Inc.*, 212 F.3d at 378.

[82] *Id.* at 376–77.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Prods., Inc., No. 98 C 4421 1999 U.S. Dist. LEXIS 11229, at *18 (N.D. Ill. July 15, 1999).

[87] *Id.* at *19; *Brooklyn Bagel Boys, Inc.*, 212 F. 3d at 379; *see also* BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co., 804 F. 3d 1229, 1232 (7th Cir. 2015).

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obligated to sell upon submission of purchase orders.[88] The court noted the contract could not be a requirements contract without exclusivity and a requirement for Earthgrains to purchase goods from Brooklyn Bagel.[89]

Similarly, in *Modern Dairy*, the Seventh Circuit recognized an agreement as a buyer's option contract when a seller's bid was selected to fulfill a purchaser's requirements in quantities to be determined by the buyer.[90] Two school districts, the buyers, claimed Modern Dairy, the seller, was required to supply all their milk requirements for a school year.[91] The schools invited bids, provided the milk would be supplied in quantities determined by the school.[92]

The court found approving bids did not obligate the schools to buy exclusively from Modern Dairy.[93] Rather, the contractual language gave the districts the option to purchase from Modern Dairy.[94] The court stated the schools should have argued against the seller's refusal to honor the buyer's option because Modern Dairy's submission of a bid may have obligated them to supply the school district's milk requirements if selected.[95] However, this was dicta since the schools' argument was grounded on an exclusivity theory.[96] The court found the contract was not a requirements contract, and since the schools failed to argue this was a buyer's option contract, the seller did not have to supply the ordered quantity of milk.[97]

The Fifth Circuit took a different approach in *Merritt*. Although not classified as a buyer's option, the parties attempted to contract for the option to buy based on the principles of a traditional option contract.[98] A traditional option contract under the U.C.C. gives the buyer "the right to purchase, at [the buyer's] election, within an agreed period, at a named price, which presumably was considered satisfactory by the [seller] in case the option should be exercised at any time during the option term."[99] Additionally, the buyer must pay consideration for the option to buy.[100] The court found an option contract for the sale of goods is governed by the U.C.C., and without

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[88] *See generally Brooklyn Bagel Boys, Inc.,* 212 F. 3d 373; *Brooklyn Bagel Boys, Inc.,* No. 98 C 4421, 1999 U.S. Dist. LEXIS 11229.

Brooklyn Bagel Boys, Inc., 212 F.3d at 379; *Brooklyn Bagel Boys, Inc.,* No. 98 C 4421, 1999 U.S. Dist. LEXIS 11229, at *19.

[90] Miller v. McLean Cnty. Unit Dist. No. 5 (In re Mod. Dairy, Inc.), 171 F.3d 1106, 1108–09 (7th Cir. 1999).

[91] *Id.* at 1107.

[92] *Id.* at 1108.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 1109. "[I]t might seem that the districts should be complaining not of the breach of a requirements contract but of the dairy's refusal to honor the option." *Id.*

[96] *Id.*

[97] *Id.*

[98] Merritt-Campbell, Inc. v. RxP Prods., Inc., 164 F.3d 957, 963 (5th Cir. 1999).

[99] *Id.* (quoting Maxwell v. Lake, 674 S.W.2d 795, 798 (Tex. Ct. App. 1984)).

[100] *Id.*

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a quantity, is unenforceable under the statute of frauds.[101]

In *Merritt*, the buyer, Merritt, paid consideration for the option to purchase RxP Gas Kickers at a set price for five years.[102] Eventually, RxP, the seller, refused purchase orders.[103] In response, Merritt brought a claim and RxP argued the agreement was unenforceable under the statute of frauds for lack of a written quantity.[104] The court classified this contract as an option contact but held it was unenforceable for failing to state a quantity.[105]

More recently, in *Crown Battery*, the United States District Court for the Northern District of Ohio, while interpreting New York law, recognized an enforceable buyer's option contract under a right to first refusal approach, much different from the approaches used in *Brooklyn Bagel Boys*, *Modern Dairy*, and *Merritt*.[106] However, the court remained consistent with the Seventh Circuit buyer's option analysis and heavily relied on the Seventh Circuit's justifications in determining the elements of a buyer's option contract.[107]

In *Crown Battery*, a contract required Crown Battery, the seller, to manufacture 12,000 batteries to hold available.[108] Club Car, the buyer, had a right of first refusal to purchase some amount of those batteries from Crown Battery's inventory each week.[109] Additionally, the parties agreed Club Car would provide an expected forecast "to aid C[rown Battery] in planning purposes only."[110] Club Car argued it could purchase from multiple suppliers and did not need to purchase exclusively from Crown Battery.[111] Conversely,

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[101] *Id.*
[102] *Id.* at 959.
[103] *Id.*
[104] *Id.* at 960.
[105] *Id.* at 963; *see also* U.C.C. § 2-201(1).
[106] Crown Battery Mfg. Co. v. Club Car, Inc., No. 3:12CV2158, 2014 U.S. Dist. LEXIS 18907, at *14 (N.D. Ohio 2014). The court in *Crown Battery* found the buyer's option issue was indistinguishable from the issue in *Johnson Controls. Id.* at *14; *see generally* Johnson Controls, Inc. v. Anson Stamping Co., No. 3:97CV-500-S, 2000 U.S. Dist. LEXIS 22602 (W.D. Ky. Oct. 19, 2000). In *Johnson Controls,* the contract was upheld as enforceable. *Johnson Controls*, 2000 U.S. Dist. LEXIS 22602, at *21. *Johnson Controls* ultimately decided the issue for the court in *Crown Battery. Crown Battery Mfg. Co.,* No. 3:12CV2158, 2014 U.S. Dist. LEXIS 18907, at *14.
[107] *Crown Battery Mfg. Co.*, 2014 U.S. Dist. LEXIS 18907, at *10, 12.
[108] *Id.* at *9.
[109] *Id.* A right of first refusal means a company has the option to decide how many goods to purchase from a supplier's inventory before any other company may buy from such an inventory. *Right of First Refusal: Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/right-of-first-refusal (last visited Sept. 24, 2022). A right of first refusal can be advantageous for a buyer, because the buyer can request a high quantity to always be available. *See generally Crown Battery Mfg. Co.*, 2014 U.S. Dist. LEXIS 18907. If the buyer's requirements increase, the buyer can purchase more goods without breaching the contract. *Id.* If the buyer's requirements decrease, the buyer can purchase less goods, and the left-over goods will be resold to a subsequent buyer. *Id.* Sellers may opt for right of first refusals, because a right of first refusal (for the most part) ensures business with a particular buyer and sets a predictable price. *Right of First Refusal: Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/right-of-first-refusal (last visited Sept. 24, 2022). However, as will be discussed throughout this Comment, a right of first refusal carries significant risk for a seller and should be avoided.
[110] *Crown Battery Mfg. Co.*, 2014 U.S. Dist. LEXIS 18907, at *12.
[111] *Id.* at *8–9.

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Crown Battery insisted the contract was a requirements contract and Club Car was required to exclusively purchase some quantity of its battery requirements from Crown Battery.[112]

The court found the contract unambiguously stated Club Car's right of first refusal did not obligate Club Car to purchase any quantity of batteries from Crown Battery, even if it reduced its requirements to zero and purchased from other suppliers.[113] The good faith requirement was not at issue under U.C.C. Section 2-306 because this contract was not a requirements contract.[114] Rather, this contract was classified as a "buyer's option contract," giving Club Car the right to purchase as many or as few batteries as desired from Crown Battery and reserving the right to use other suppliers as needed.[115] Accordingly, a buyer's option contract is enforceable if it states a written maximum quantity while providing for a right of first refusal to the buyer.[116]

As demonstrated by the cases in this Section, buyers have taken a variety of approaches in forming buyer's option contracts. Courts have not instituted a predictable test or standard in deciding whether these contracts are enforceable, which is why buyer's option contracts are being interpreted on a case-by-case basis. This also leaves the question of whether these agreements satisfy the statute of frauds. However, parties can avoid the statute of frauds roadblock altogether by waiving the statute of frauds under U.C.C. Section 1-302.

C. Variation by Agreement

"Freedom of contract" is the theory that parties should be free to formulate contracts with the terms they desire without interference from courts or other branches of government.[117] Following this logic, U.C.C. Section 1-302 permits variation of almost any U.C.C. provision upon the mutual assent of contracting parties.[118] A U.C.C. provision can be varied if both parties agree and act in good faith.[119] "[P]rovisions of the [Uniform Commercial Code] may be varied by agreement [except for] the obligations of good faith, diligence, reasonableness, and care."[120] The parties may determine their own standards of performance if those standards are not

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112 *Id.* at *9.
113 *Id.*
114 *Id.* at *12–13.
115 *Id.* at *10–12.
116 *See id.*
117 *Freedom of Contract*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/freedom_of_contract (last visited Sept. 24, 2022).
118 *See generally* U.C.C. § 1-302.
119 *See* U.C.C. § 1-302(a)–(b).
120 *Id.*

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unreasonable.[121]

Although the following case did not pertain to contract formation and enforceability, an example of variation by agreement in practice is illustrated by *Stavinsky*.[122] The issue was whether Stravinsky was required to pay maintenance charges according to the terms of a sales agreement on a proprietary lease that Stravinsky won at an auction.[123] The sales contract required Stravinsky to pay maintenance arrears upon submission of a winning bid rather than the secured party.[124] The court stated the default position of the U.C.C. is for maintenance charges to be paid from proceeds of sales by the secured party—in this case, Legal Title Trust.[125] Stravinsky argued that despite the U.C.C. default position being waived, it was statutorily mandatory for the secured party to pay maintenance charges.[126]

The court disagreed with this argument, affirming variation in good faith was permissible under U.C.C. Section 1-302.[127] U.C.C. Section 9-610 stated a secured party may act in a commercially reasonable way regarding the sale and leasing of collateral, which was ultimately the test for good faith.[128] The court found deviation from the industry norm was not commercially unreasonable since the terms were unambiguous and expressly stated Stravinsky was obligated to pay the maintenance charges.[129] Therefore, under U.C.C. Section 1-302, clear and unequivocal waivers made in good faith are enforceable.[130]

The U.C.C. commentary acknowledges "freedom of contract is a principle of the Uniform Commercial Code."[131] An agreement of variation must state the rules governing the agreement in place of the provisions being varied.[132] Phrases like "unless otherwise agreed" are typically used to avoid controversy, but do not prohibit variation or negate provisions that have been varied.[133] "[T]he general and residual rule is that the effect of all provisions of the Uniform Commercial Code may be varied by agreement."[134] As seen from the provision itself and the commentary, U.C.C. Section 1-302 is broad

[121] Stavinsky v. Prof–2013–S3 Legal Tit. Trust, 60 Misc. 3d 410, 418 (N.Y. Sup. Ct. 2018).
[122] *See generally id.* Note that the case name is *Stavinsky* but the court refers to the plaintiff as Stravinsky. *Id.* at 412.
[123] *Id.* at 414.
[124] *Id.*
[125] *Id.* at 414, 418; *see also* U.C.C. § 9-615(a)(1) ("A secured party shall apply or pay over for application the cash proceeds of disposition . . . the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing.").
[126] *Stavinsky*, 60 Misc. 3d at 414, 418.
[127] *Id.* at 418; *see also* U.C.C. 9-610(a). ("Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable.").
[128] *Stavinsky*, 60 Misc. 3d at 418.
[129] *Id.* at 419.
[130] *Id.* at 418.
[131] U.C.C. § 1-302 cmt. 1.
[132] *Id.* § 1-302 cmt. 2.
[133] *Id.* §1-302(c); s*ee also id.* § 1-302 cmt. 3.
[134] *Id.* § 1-302 cmt. 3.

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and limits the exceptions of variation to "good faith, diligence, reasonableness, and care."[135]

III. THE FLAWS OF THE BUYER'S OPTION CONTRACT

Given these various forms of U.C.C. contracts, the buyer's option case law shows an attempt to bypass U.C.C. Section 2-201's quantity requirement, while at the same time avoiding U.C.C. Section 2-306's exclusivity requirement.[136] *Brooklyn Bagel Boys* held this type of contract to be an enforceable long-term contract.[137] *Modern Dairy* stated the same conclusion may have been reached, had it been argued, and further alluded to the possibility that a seller may be obliged to meet all purchase orders made in good faith.[138] However, the Seventh Circuit should have declared both contracts unenforceable for failure to state a quantity.[139] These contracts should have been interpreted as MPAs, in which terms are unenforceable beyond the quantity of goods already accepted in purchase orders.[140]

The Seventh Circuit's buyer's option case law is unclear on whether the seller is required to accept purchase orders.[141] An examination of foundational contract formation principles shows a seller in a buyer's option contract, drafted exactly like an MPA, can refuse purchase orders.[142] Despite the contract not stating a quantity or promising exclusivity, the statute of frauds was never discussed in *Brooklyn Bagel Boys*. Brooklyn Bagel likely did not raise this defense because it was the seller seeking enforcement of the contract and wanted to reserve the right to conduct business with Earthgrains in the future. As the buyer, Earthgrains would have had a much easier path to victory had it raised the statute of frauds defense, and it should have raised the defense because the contract was void as a matter of law for failure to state a quantity.[143] One way to reconcile why the defense was not raised is understanding Earthgrains may have had a potential business reason for enforcing the contract. However, given Earthgrains opened their own production plant and had no reason to buy from Brooklyn Bagel again, it is more likely Earthgrains' attorneys simply forgot to plead the defense.[144]

The contract in *Brooklyn Bagel Boys* should have been interpreted as

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[135] *See id.* § 1-302.
[136] *See id.* § 2-201(1); *see also id.* § 2-306(2).
[137] Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Prods., Inc. 212 F.3d 373, 379 (7th Cir. 2000).
[138] Miller v. McLean Cnty. Unit Dist. No. 5 (In re Mod. Dairy, Inc.), 171 F.3d 1106, 1109 (7th Cir. 1999).
[139] *See* U.C.C. § 2-201.
[140] Smith, *supra* note 13, at 944; *see also* U.C.C. § 2-201(3)(c).
[141] *See Miller*, 171 F.3d at 1108–09; *see generally Brooklyn Bagel Boys, Inc.*, 212 F.3d 373.
[142] *See* Smith, *supra* note 13, at 944; *see also* U.C.C. §2-201(3)(c).
[143] *See* U.C.C. § 2-201(1).
[144] Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Prods., Inc., No. 98 C 4421, 1999 U.S. Dist. LEXIS 11229, at *4–5 (N.D. Ill. July 19, 1999).

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an MPA. The failure to raise the statute of frauds defense may be evidence the parties intended this to be a requirements contract.[145] The word "requirements" was used in the contract, which showed intent to enter a requirements contract.[146] Despite this, an essential element of a requirements contract without an estimate is exclusivity.[147] No promise of exclusivity was made.[148] Moreover, there was no obligation for Earthgrains to buy goods or Brooklyn Bagel to sell goods.[149] Therefore, the contract was not a requirements contract. But, the Seventh Circuit should have rendered the contract entirely unenforceable beyond goods already accepted and received, since the contract contained all the characteristics of an MPA and lacked a specified quantity.[150]

The court should have analyzed the contract in *Brooklyn Bagel Boys* as follows. As described in the discussion on MPAs in Section II, the terms were set out by the parties to apply to their future dealings and should not have been enforceable until the seller accepted a purchase order.[151] Once a purchase order was accepted, the terms of the MPA were incorporated into the purchase order, but the terms only applied to quantities listed in accepted purchase orders.[152] At that point, the purchase order became an enforceable contract governed by the terms of the MPA but was only enforceable for the quantity stated in a given purchase order.[153] *Brooklyn Bagel*'s incorrect analysis of the contract in question started a dangerous line of precedent interpreting contracts lacking consideration, a stated quantity, and a promise of exclusivity as enforceable.

The Seventh Circuit did not analyze the buyer's option contract as an MPA.[154] If the issue of enforceability was raised, the court should have found

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[145] *See Brooklyn Bagel Boys, Inc.*, 212 F.3d at 376.

[146] *Brooklyn Bagel Boys, Inc.*, 1999 U.S. Dist. LEXIS 11229, at *14, *18, *20.

[147] *See id.* at *18–19; Int'l Com. Res., Ltd. v. Jam. Pub. Servs. Co., Ltd., 612 F.Supp. 1153, 1155 (S.D.N.Y. 1985); *see also* U.C.C. § 2-306(2).

[148] *Brooklyn Bagel Boys, Inc.*, 1999 U.S. Dist. LEXIS 11229, at *19; *Brooklyn Bagel Boys, Inc.*, 212 F.3d at 379.

[149] *Brooklyn Bagel Boys, Inc.*, 212 F.3d at 379. Not only is the failure to address the statute of frauds a discrepancy in the buyer's option cases, but the court never addresses consideration either. *See generally id.* Earthgrains promise is illusory and lacks consideration because they never had to purchase anything. This leaves the argument that the court actually did view this contract as an MPA made enforceable by firm offers. However, this is countered because both the District Court and 7th Circuit stated this was a buyer's option contract instead of saying what they should have, that there was no contract at all. *See Brooklyn Bagel Boys, Inc.*, 1999 U.S. Dist. LEXIS 11229; *See generally Brooklyn Bagel Boys, Inc.*, 212 F.3d at 379.

[150] Smith, *supra* note 13, at 944.

[151] *Id.* at 933.

[152] *Id.* at 944.

[153] *Id.*

[154] *See generally Brooklyn Bagel Boys, Inc.*, 212 F.3d 373. It can further be seen from the court's analysis of the validity of the termination provision, that this was interpreted as an enforceable long-term contract by the court. *See id.* at 381. The termination provision should have never been analyzed because it is unenforceable since the contract is unenforceable. *See* U.C.C. § 2-201(1). If the court interpreted this agreement correctly (as an MPA), it would not have analyzed the termination provision, because under the statute of frauds, a contract is terminated by either the buyer's refusal to submit additional purchase orders or a seller's refusal to accept additional purchase orders. *See* U.C.C. § 2-201(3)(c). The absence of these

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that neither party was bound, because the contract was unenforceable beyond the quantity of goods in purchase orders already accepted.[155] While the court never discussed whether Brooklyn Bagel was required to accept purchase orders, the conclusion on the issue is straightforward.[156] Since the agreement did not state a quantity and was not a requirements contract, Brooklyn Bagel was not obligated to accept purchase orders because no enforceable contract existed.[157]

The contract in *Modern Dairy* was also classified as a "buyer's option."[158] The court found the buyer did not have to purchase all, let alone any, milk needs from the seller, which made the contract a non-exclusive buyer's option.[159] The opinion alluded to the possibility of a different conclusion on the enforceability of the contract if the schools argued the contract was a buyer's option contract breached by the seller failing to meet purchase orders.[160] However, this is incorrect.[161] The contract should have been interpreted as an unenforceable MPA, since the contract was not a requirements contract and did not state an estimated quantity.[162] No contract existed beyond the purchase orders already accepted.[163]

This further illustrates why buyer's option contracts, drafted in this manner, run a significant risk of being interpreted as MPAs, which can disadvantage a buyer in a contract if the seller chooses not to accept purchase orders. Despite the Seventh Circuit's findings, buyer's option agreements, drafted like the ones in *Brooklyn Bagel Boys* and *Modern Dairy*, are unenforceable as a matter of law for failure to state a quantity.[164]

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statements in the court's opinion is direct evidence the 7th Circuit believed this was an enforceable long-term contract binding both parties, which is incorrect.

155 *See* U.C.C. § 2-201(1).

156 *See id.*

157 Smith, *supra* note 13, at 944.

158 Miller v. McLean Cnty. Unit Dist. No. 5 (In re Mod. Dairy, Inc.), 171 F.3d 1106, 1108 (7th Cir. 1999).

159 *Id.*

160 *Id.* at 1109–10. Another way to exercise a buyer's option is by a seller submitting a firm offer to supply the buyer's needs despite a buyer making no reciprocal commitment to purchase any goods from said seller. *Id.* at 1110. A firm offer is "[a]n offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open [and] is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time." U.C.C. § 2-205. The issue with crafting a buyer's option that is contingent on a seller's firm offers is a period of irrevocability cannot exceed three months without a subsequent firm offer being submitted. U.C.C. § 2-201 cmt. 15. This solution is not being proposed because it is a temporary solution and permits a seller to reject purchase orders submitted after the three-month irrevocability period. *See id.* A firm offer does not obligate a seller to renew the firm offer. *See id.* Therefore, a seller submitting a firm offer would be a temporary solution and does not amount to an enforceable long-term contract. *See id.*

161 *See* U.C.C. § 2-201(1); *see also* Smith, *supra* note 13, at 944. Even if *Modern Dairy*'s statement that the seller may be obligated to sell was based on a firm offer theory, the statement is wrong; because a seller cannot promise irrevocability beyond three months, which is much shorter than a school year. *See* Miller, 171 F.3d at 1109–10; *see also* U.C.C. § 2-205.

162 U.C.C. § 2-201 cmt. 1; *see also* Smith, *supra* note 13, at 944.

163 *See* U.C.C. § 2-201(1).

164 *See* U.C.C. § 2-201 cmt. 1.

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IV. DRAFTING AROUND THE BUYER'S OPTION FLAWS

Are all future buyer's option contracts doomed to be unenforceable as a matter of law? If drafted exactly like an MPA, the answer is a resounding yes.[165] However, if drafted correctly, an alternate conclusion should be reached. The simple solution is taking the right of first refusal approach in *Crown Battery* by setting a maximum supply to always be available and providing the option to refuse ordering some, or even all, of the stored supply.[166] This type of contract does not violate the statute of frauds because a maximum quantity is stated, satisfying the statute of frauds quantity requirement.[167] However, this solution is not a viable long-term method of contracting for two reasons. First, it is not available for buyers seeking specially manufactured goods, because it is unlikely a seller will agree to keep parts in storage that they will be unable to resell if the buyer elects not to purchase the entire supply. Second, this creates an extreme likelihood of severe economic waste resulting when a buyer, requiring an extraordinarily large amount of supply to be available, rightfully refuses to purchase all of it.[168]

To combat these issues, the most effective solution is to form a traditional option contract while waiving the statute of frauds quantity requirement and including an understanding in writing that the buyer can purchase none, some, or all of its requirements from a given seller.[169] This solution limits economic waste because it does not require goods to always be available. The solution also enables the seller to adjust production upon receiving notification that a buyer intends to deviate from the normal quantity or use an alternate supplier.[170] Additionally, a buyer whose requirements significantly increase, or even double, can use multiple suppliers

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[165] *See id.*; *see supra* text accompanying note 13.

[166] *See generally* Crown Battery Mfg. Co. v. Club Car, Inc., No. 3:12CV2158, 2014 U.S. Dist. LEXIS 18907 (N.D. Ohio 2014); *see also* BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co., 804 F.3d 1229, 1231–33 (7th Cir. 2015) (finding that a meet or release provision did not obligate buyer to purchase exclusively). A meet or release provision is relevant when a buyer in a requirements contract receives a new offer from an alternate seller with terms better than the terms of the contract that the buyer has with the original seller. *See BRC Rubber & Plastics, Inc.*, 804 F.2d at 1231–32. This is like a right of first refusal, because upon receiving the better offer, the seller is obligated to either match the terms of the better offer or release itself from the agreement. *See id.* at 1232. If the seller chooses to release itself from the agreement, the original agreement terminates, and the buyer can contract with the new seller without breaching the original agreement. *See id.* at 1232. The buyer's option is contingent on a better offer being submitted by another seller. *See id.* at 1231–32. This type of contract is not being discussed because the contract terminates upon a seller's refusal of matching the better offer, which does not allow buyer to use multiple sellers simultaneously or switch suppliers. *See id.* However, sellers should consider negotiating for provisions permitting termination upon extreme increases in requirements to protect their interests.

[167] *See* U.C.C. § 2-201(1).

[168] Although not discussed in *Crown Battery*, consideration may be at issue with this contract as well. The buyer's promise in a right to first refusal appears to be illusory because a buyer does not have to purchase anything at all and has not paid consideration upfront for such a right. *See generally Crown Battery Mfg. Co.*, 2014 U.S. Dist. LEXIS 18907.

[169] *See generally* Merritt-Campbell, Inc. v. RxP Prods., Inc., 164 F.3d 957 (5th Cir. 1999); *see also* U.C.C. § 1-302(a)–(b).

[170] *See generally Crown Battery Mfg. Co.*, 2014 U.S. Dist. LEXIS 18907.

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simultaneously, reducing the risks of substantial requirements needed from one supplier or the buyer being liable for breach due to requirements being unreasonably disproportionate from an estimated quantity.[171]

The proposed contract is the following. Through careful drafting, buyer's option contract issues can be bypassed by paying consideration for the option to buy at the buyer's discretion for a set period.[172] First, parties contracting for the option to purchase non-exclusively should expressly state their intentions to permit a buyer to purchase non-exclusively, which eliminates the risk of the contract being interpreted as a requirements contract.[173] Second, the option should state the seller must comply with all purchase orders proposed in good faith to limit uncertainty of the seller's obligations. This obligates a seller to accept purchase orders and eliminates the risk a buyer may be unable to obtain supply to meet demand. Third, non-binding forecasts can be provided to assist the supplier in manufacturing and other preparation necessary for the sale of goods. While forecasts are not a mandatory component, they can be helpful to the seller.[174] Fourth, the parties should agree to waive the statute of frauds quantity requirement in writing and accompany the waiver with an understanding that the buyer can purchase none, some, or all of the buyer's requirements from the given seller. Fifth, consideration should be paid up front for the option to buy at buyer's discretion. With this, corporations can anticipate significant benefits to their contracting positions and the supply chain in general.

The contract proposed by this Comment was illustrated in *Merritt*, where consideration was paid for the option to buy at a stated price for a five-year period at the buyer's discretion.[175] In *Merritt*, the contract failed because of the statute of frauds.[176] A solution not used in *Merritt* is an agreement by the parties to waive the statute of frauds quantity requirement clearly and unequivocally under U.C.C. Section 1-302. If this waiver had been incorporated into the contract in *Merritt*, it should have changed an unenforceable contract into an enforceable buyer's option contract.

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[171] *See* U.C.C. § 2-306(1).

[172] *See Merritt-Campbell, Inc.*, 164 F.3d at 961. The agreement in Merritt was an option contract, because "[Merritt] purchased from RxP, for consideration of $10.00, the right to purchase RxP Gas Kicker[s] for a specified price over five years from the date of first order." *Id.* The court did not analyze whether nominal consideration was at issue. *See generally id*. Note that the adequacy of nominal consideration varies by jurisdiction. *See generally* Edmund Polubinksi Jr., *The Peppercorn Theory and the Restatement of Contracts,* 10 WM. & MARY L. REV. 201 (1968).

[173] *See* City of Cuba v. City of Canton, No. 3-11-0066, 2011 Ill. App. Unpub. LEXIS 2541, *13 (Ill. App. Ct. 2011). The Illinois Appellate Court found the contract to be a requirements contract because of an absence of clear intent to enter a buyer's option contract. *Id.* at *13–14. Paragraph C.4 stated, "Canton must supply Cuba with 'quantities of water required by the Purchaser.'" *Id.* at *12–13. The court found C.4 dispositive of intent to enter a requirements contract. *Id.* at *13. If the parties "had [] contemplated that Cuba would obtain water from other sources . . . [they] would have indicated that in such an instance of decreased water supply, Cuba would have to turn to its alternate suppliers." *Id.*

[174] *City of Cuba*, 2011 Ill. App. Unpub. LEXIS 2541, at *12.

[175] *Merritt-Campbell, Inc*., 164 F.3d at 959–60.

[176] *Id.* at 963.

Examination of U.C.C. Section 1-302 and the theory behind freedom of contract shows written waiver of the statute of frauds quantity requirement should be permitted.[177] Although this solution has not yet been litigated, utilizing this waiver can drastically change commercial contracting for the better.

The purpose of the statute of frauds is to prevent fraud and limit "he said, she said" arguments being made over the terms of complicated commercial contracts not memorialized in writing.[178] Commercial entities are not engaging in fraud at formation if they utilize attorneys, negotiate, agree, pay consideration, and memorialize their terms in a written contract. Additionally, the parties are sophisticated enough to understand what their agreement entails. If corporations are expressly committing to a non-exclusive option for the buyer to purchase at will and assenting to these terms in a written contract, they have effectively bargained for this type of agreement, and it should not be ignored or altered by the courts because doing so unfairly inhibits their freedom to contract.[179]

In a U.C.C. option contract, the seller is the offeror and must sign the agreement for it to be effective, which further reiterates the parties are not engaging in fraud and have adequate knowledge of the terms to which they are agreeing.[180] Variation by agreement under the U.C.C. follows the principle that sophisticated parties should have the discretion to vary and waive U.C.C. provisions.[181] U.C.C. Section 1-302 states the parties may waive any U.C.C. provision except the duty of good faith.[182]

The omission of a prohibition of written waiver of the statute of frauds quantity requirement in the commentary of U.C.C. Section 1-302 provides evidence that a written waiver is permitted.[183] The U.C.C. commentary only states oral waiver of the statute of frauds is unenforceable.[184] The commentary explains:

> This principle of freedom of contract is subject to specific exceptions found elsewhere in the Uniform Commercial Code and to the general exception stated here. The specific exceptions vary in explicitness: the statute of frauds found in Section 2-201, for example, does not explicitly preclude oral waiver of the requirement of a writing, but a fair reading

[177] *See* U.C.C. § 1-302(a); *see also Freedom of Contract*, *supra* note 117.
[178] *Statute of Frauds in California Contracts*, *supra* note 23.
[179] Michael Madison, *The Real Properties of Contract Law*, 82 B.U.L. REV. 405, 409 (2002).
[180] *Merritt-Campbell, Inc*., 164 F.3d at 964.
[181] *See* U.C.C. § 1-302 cmt. 1; *see also Freedom of Contract*, *supra* note 117.
[182] U.C.C. § 1-302(a)–(b).
[183] *See* U.C.C. § 1-302 cmt. 1; *see also Commonly Applied Rules of Statutory Construction*, COLO. GEN. ASSEMB., https://leg.colorado.gov/agencies/office-legislative-legal-services/commonly-applied-rules-statutory-construction (last visited Sep. 24, 2022).
[184] *See* U.C.C. § 1-302 cmt. 1.

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> denies enforcement to such a waiver as part of the 'contract' made unenforceable . . . .[185]

In other words, incorporating an oral waiver of the statute of frauds is, essentially, including an unenforceable clause into an unenforceable contract.[186] The specification of oral waiver raises the argument that it was intended for the waiver of the statute of frauds quantity requirement to be available in written agreements.[187]

In understanding why written waiver should be permitted, not only is it important to understand omissions of written waiver and the theory behind freedom of contract, but the prohibition of oral waiver also justifies the policy behind permitting written waiver. If oral waiver were permitted, then almost any legal dispute raising the statute of frauds as a defense could lead to the argument that the parties orally agreed to waive the statute of frauds.[188] The statute of frauds would become superfluous because any contract for the sale of goods over $500 could waive the statute of frauds and not be put in writing.[189]

For example, a buyer could orally propose to buy 1,000 widgets at a fixed price of $1 a widget. Then, the parties could agree to waive the statute of frauds and not put the agreement in writing.[190] If the market price for widgets increases to $2, the buyer could argue the terms stated the buyer would purchase 2,000 widgets. Thus, if oral waiver were permitted, the statute of frauds would not serve the purpose of prohibiting fraud. Substantial litigation would ensue because the parties could declare contract terms state almost anything. Moreover, ambiguity in oral terms could allow for two parties to have different interpretations of the agreement and potentially result in a more sophisticated party taking advantage of a smaller corporation through superior bargaining power. Without preclusion of oral waiver, the statute of frauds would serve no purpose.

On the other hand, carefully written buyer's option contracts between represented corporations engaging in months, or even years, of negotiations do not present the same, let alone any, threat to the validity of the statute of frauds. The type of contract proposed is already in writing, meeting the essence of the statute of frauds and eliminating the ability for parties to misinterpret or alter the terms of agreements. The only variation is the quantity requirement of the statute of frauds.

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[185] *Id.*
[186] *Id.*
[187] *See Commonly Applied Rules of Statutory Construction*, *supra* note 183 ("[T]he express mention of one thing excludes all others.").
[188] Clark Remington, *Llewellyn, Antiformalism and the Fear of Transcendental Nonsense: Codifying the Variability Rule in the Law of Sales*, 44 WAYNE L. REV. 29, 67 (1998).
[189] *Id.* at 65–66.
[190] *Id.* at 66.

Even with the quantity being varied in the contract proposed, corporations do not pose threats to the validity of the statute of frauds since they both mutually assented to terms permitting the buyer to purchase as many goods, or as few goods, as requested in good faith. The rationale behind the strictness of the quantity requirement of the statute of frauds likely follows the same concerns of oral waiver.[191] Even with all other terms present, one party could always argue X quantity was agreed upon, while the other party could argue Y quantity was agreed upon, which is a probability considering the complexity of ongoing contract negotiations. However, this issue is not relevant in a contract where parties have an understanding memorialized in writing that a buyer can purchase none, some, or all of its requirements from a given supplier.[192] Quantity becomes immaterial because the risk has been properly allocated, bargained for, and memorialized in writing.[193]

Returning once more to *Crown Battery*, the type of contract proposed in this Comment is, essentially, the same as the one that was held enforceable in *Crown Battery*.[194] In both contracts, buyers have the discretion to purchase as many or as few goods as the buyer desires and may use alternative suppliers if needed.[195] The only difference is *Crown Battery* sets an extraordinarily high maximum quantity for a seller to always have available.[196] The contract in *Crown Battery* is lawful and enforceable under both case law and the U.C.C.[197] This is concerning. The contract in *Crown Battery* presents not only a possibility, but a near certainty, that severe economic waste will result from a buyer's ability to refuse purchasing goods entirely, despite a contract requiring a seller to always have these goods available.[198] This further allows sophisticated corporations to take advantage of sellers with inferior bargaining power and possibly even bankrupt them.[199] The law cannot incentivize corporations to continue experimenting with the buyer's option in this way.

The contract proposed by this Comment negates this risk entirely. Small corporations will not go bankrupt because a large corporation can use

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[191] *See id.* at 66. While Mr. Remington argues the statute of frauds is immutable, meaning it cannot be waived, his work only considers the consequences of permitting waiver of the statute of frauds orally and does not discuss the significance and practicability that a waiver of the statute of frauds could have on the supply chain if incorporated into a written contract. *See generally* Remington, *supra* note 188.

[192] *Statute of Frauds in California Contracts*, *supra* note 23.

[193] *See generally* Crown Battery Mfg. Co. v. Club Car, Inc., No. 3:12CV2158, 2014 U.S. Dist. LEXIS 18907 (N.D. Ohio 2014).

[194] *Id.* at *2.

[195] *See id.* at *8–9.

[196] *See id.* at *9.

[197] *See id.* at *12–13. The contract in *Crown Battery* states a quantity meeting all the requirements of the statute of frauds. *See id.* at *8–9; *see also* U.C.C §2-201(1).

[198] *See* D. Federico Co., Inc. v. New Bedford Redevelopment Authority, 723 F.2d 122, 131 (1st Cir. 1983); *see also* E. Allen Farnsworth, *Legal Remedies for Breach of Contract,* 70 COLUM. L. REV. 1445 (1970).

[199] *Common Law Option Contract: Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/common-law-option-contract (last visited September 24, 2022).

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market leverage to require an unconscionably high supply of goods to be available and subsequently refuse to purchase all of them. Instead, large corporations can utilize smaller corporations under the proposed contract. Small corporations can protect their interests by drafting provisions permitting termination when requirements significantly vary from what is contemplated.

Even if large corporations choose not to buy requirements under the contract, smaller corporations can still engage in other business, because they do not risk producing an extraordinarily large quantity that can be rightfully rejected and difficult to resell. Moreover, the proposed contract incentivizes competition because smaller corporations can enter contracts with large corporations. Society can reap the benefits of the buyer's option contract without the threat of the issues illustrated in *Crown Battery*.[200] The bottom line is waiver of the statute of frauds quantity requirement in the proposed contract is not only supported by the law, but also policy.[201]

When two corporations in good faith agree on a buyer's option contract waiving the statute of frauds quantity requirement, they have formed an enforceable contract for the duration stated in the writing. This is supported by the law and policy behind U.C.C. Section 1-302.[202] Following the U.C.C.'s language, allowing parties to vary U.C.C. terms by agreement, two sophisticated corporations should be permitted to form a written contract without a quantity if the intent behind the agreement is for the buyer to have the ability to purchase as many goods, or as few goods, as desired.[203]

V. THE BENEFITS OF NON-EXCLUSIVE OPEN QUANTITY CONTRACTING

Not only does law and policy justify the proposed buyer's option contract, but the burden on the supply chain does as well.[204] As stated previously, buyer's option contracts are beneficial for buyers in the supply chain because buyers may need a steady stream of a certain good that is necessary to manufacture another product.[205] The product will then be resold to either another corporation or consumers. If the good is not available to manufacture the product, corporations risk breaching third party contracts. The proposed contract permits use of other suppliers if one supplier is unable to meet requirements needs or a buyer's requirements significantly increase.

A supply chain crisis was prompted by the Coronavirus pandemic,

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[200] *See Crown Battery Mfg. Co.*, 2014 U.S. Dist. LEXIS 18907, at *11–12.
[201] *Cf. id.*; *Common Law Option Contract: Everything You Need to Know*, *supra* note 199.
[202] U.C.C § 1-302.
[203] *Id.*
[204] *See generally* Farrer, *supra* note 1.
[205] *See* Goodman, *supra* note 22 ("Factories generally need to bring in components to make the things they export.").

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and experts fear it could persist for years.[206] Russia's attack on Ukraine has caused more panic and unpredictability in the future of the domestic supply chain for key American industries like electronics, semiconductors, energy, oil, and other minerals.[207]

Most notably, oil prices globally have soared because countries are no longer importing oil from Russia.[208] Countries that buy oil from Russia must now find another source.[209] This source will most likely be the Organization of the Petroleum Exporting Countries ("OPEC").[210] The increase in demand for OPEC oil will lead to a significant increase in the price of oil.[211] The oil supply crisis is especially problematic for the United States, which buys hundreds of millions of barrels from OPEC.[212] As of March 13, 2022, the average price for gas in America was $4.33 per gallon.[213] Unless America finds other sources for oil, American gas prices will continue to increase.[214] Although global oil contracts are not governed by the U.C.C., the oil crisis illustrates the problems monopolies and lack of competition cause for domestic industries governed by the U.C.C.

The rigidity of the U.C.C. quantity requirement and uncertainty surrounding how certain workarounds may be interpreted in the courts has been no help in solving domestic supply chain issues.[215] Global shipping operations are not expected to return to normal until the end of 2022.[216] Inflation and the supply chain crisis have caused consumer prices in November of 2021 to jump 6.8% compared to prices in 2020.[217] Since this crisis is grounded on labor shortages, many businesses have been unable to perform their contracts with buyers.[218] Buyers in a requirements contract are

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[206] Farrer, *supra* note 1.

[207] LM Staff, *Russia's Invasion of Ukraine Creates Myriad Supply Chain Issues and Challenges*, LOGISTICS MGMT. (Feb. 25, 2022), https://www.logisticsmgmt.com/article/russias_invasion_of_ukraine_creates_myriad_supply_chain_issues_and_challeng.

[208] Julianne Pepitone, *Why Are US Gas Prices Soaring When America Barely Uses Russian Oil?*, CNN BUS. (Mar. 13, 2022, 7:40 AM), https://www.cnn.com/2022/03/12/energy/us-gas-prices-russia-oil/index.html.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *See generally id.* Although the OPEC situation relates primarily to international oil concerns that do not implicate the U.C.C., it is being used as an illustration of how domestic monopolies governed by the U.C.C. affect the supply chain.

[215] *See generally Exclusive Dealing or Requirements Contracts*, *supra* note 19.

[216] Chris Stokel-Walker, *Good Luck Trying to Fix the Supply Chain Crisis*, WIRED (Nov. 24, 2021, 7:00 AM), https://www.wired.com/story/supply-chain-crisis-future/.

[217] Max Ufberg, *Here's How Inflation and a Supply Chain Crunch are Already Affecting the Holidays*, FORTUNE (Dec. 18, 2021, 11:22 AM), https://fortune.com/2021/12/18/inflation-supply-chain-holiday-spending/.

[218] Tom Church, *Breach of Contract Claims and Coronavirus (COVID-19) Pandemic*, PATE, JOHNSON & CHURCH (April 6, 2020), https://www.pagepate.com/breach-of-contract-claims-and-the-coronavirus-covid-19-pandemic/; Farrer, *supra* note 1.

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then stuck searching for a new supplier. Additionally, one corporation's inability to supply another corporation in a requirements contract could have a substantial effect on collateral contracts with third party corporations.

Take, for example, an illustration on how requirements contracts can contribute to the supply chain crisis: Corporation A sells iPhones to Corporation B. Corporation A needs widgets to make iPhones. Corporation A is in a requirements contract to buy widgets from Corporation C. Due to labor shortages, Corporation C cannot meet requirements. Corporation A must breach its contract with Corporation B because it is unable to seek out another supplier of widgets due to the exclusivity rule of requirements contracts. Even if it anticipatorily repudiates and sues Corporation C for breach, there is no guarantee it will have the necessary widgets in time to comply with its contract with Corporation B.[219] Corporation B may have to breach collateral contracts to sell iPhones to other corporations. The latter corporations may have to breach other collateral contracts, and so on. This causes substantial litigation and termination of crucial contracts needed to lift the burdens on the supply chain.[220] Moreover, this situation gives corporations an ultimatum to decide which contract(s) to breach. This is called a supply chain crisis.

As a result, consumer prices continue to climb.[221] The law of supply and demand explains why.[222] Economists' most fundamental model of explaining the market is known as "perfect competition" in which "no barriers prevent new suppliers from entering the market" leaving market prices unaffected.[223] In situations with just one seller, known as a monopoly, a seller can increase prices if demand is high enough, causing prices to be much higher than in a perfect competition scenario.[224] Price increases like these are how OPEC is taking advantage of the global oil shortage.[225] Moreover, corporate monopolies dominate many key industries in the United States' domestic supply chain.[226] These monopolies profit off of limited competition.[227]

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[219] *See* U.C.C § 2-306(2). Timothy J. Feldhausen, *Anticipatory Breach of Contracts May Become More Common in a Time of Uncertainty*, NAT. L. REV. (March 26, 2020), https://www.natlawreview.com/article/anticipatory-breach-contracts-may-become-more-common-time-uncertainty.

[220] *See* Michael Stocks, *What Are the Legal Implications of the Supply Chain Crisis?*, SUPPLY MGMT. (Oct. 8, 2021), https://www.cips.org/supply-management/opinion/2021/october/what-are-the-legal-implications-of-the-supply-chain-crisis/.

[221] Ufberg, *supra* note 217.

[222] Irena Asmundson, *Supply and Demand: Why Markets Tick*, INT'L MONETARY FUND, https://www.imf.org/external/pubs/ft/fandd/basics/suppdem.htm (last visited Sept. 24, 2022).

[223] *Id.*

[224] *Id.*

[225] Pepitone, *supra* note 208.

[226] *See* Paige Sutherland and Meghna Chakrabarti, *More Than Money: The Monopoly on Meat*, WBUR (Feb. 14, 2022), https://www.wbur.org/onpoint/2022/02/14/more-than-money-monopoly-and-meat-processing (discussing the monopoly on beef).

[227] Asmundson, *supra* note 222.

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Under perfect competition, the equilibrium price is the price where supply and demand intersect because the market components of supply and demand are balanced.[228] Without competition, the quantity demanded becomes higher than the quantity supplied.[229] This creates a shortage.[230] When a shortage exists, consumers choose to pay a higher price to get the product they want.[231] As for the supply chain crisis, scarcity has caused the price of goods to increase as inflation remains stubbornly high.[232] While requirements contracts have benefits, like encouraging predictability, they tend to reduce competition.[233]

Now, to illustrate how this change in contracting plays out on a larger economic scale, examine Table 1 below: Widget Seller A and Widget Seller B sell widgets. Manufacturer is in a requirements contract with Widget Seller A to buy 100 widgets per week. Manufacturer is the only corporation that manufactures iPhones and needs 100 widgets to manufacture 100 iPhones. Manufacturer is in a contract with Retailer A, who is a retailer of iPhones, in which Manufacturer supplies 100 iPhones per week to Retailer A. Retailer A sells these iPhones to consumers. However, Retailer B enters the market and wants to sell iPhones because consumer demand for iPhones has increased.

Retailer B wants to contract with Manufacturer to purchase 100 iPhones per week, doubling Manufacturer's requirements to 200 widgets to manufacture 200 iPhones. Since Manufacturer is in a requirements contract with Widget Seller A, Manufacturer risks breaching the duty of good faith by either ordering an unreasonably disproportionate number of widgets or violating exclusivity with Widget Seller A by purchasing widgets from Widget Seller B to meet the increased demand.[234] Therefore, Manufacturer must either refuse to contract with iPhone Retailer B or breach its contract with Widget Seller A.[235]

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[228] *Id.*; *How Demand and Supply Determine Market Price, supra* note 22.

[229] *How Demand and Supply Determine Market Price, supra* note 22; Asmundson, *supra* note 222.

[230] *How Demand and Supply Determine Market Price, supra* note 22.

[231] *Id.*

[232] Peter S. Goodman, *supra* note 22.

[233] *Exclusive Dealing or Requirements Contracts*, *supra* note 19.

[234] *See* U.C.C. § 2-306(1)–(2); *see also* U.C.C. § 2-306 cmt. 2.

[235] The most likely scenario in this circumstance is Manufacturer would refuse to contract with Retailer B. If Manufacturer chooses to breach the contract with Widget Seller A, Manufacturer is left in the same position. Widget Seller A would be no longer obligated to sell widgets, and Widget Seller B may be unable to supply more than 100 widgets. Additionally, Widget Seller B is unlikely to supply widgets immediately because formal negotiations for a contract between Manufacturer and Widget Seller B may last for an extended period, which raises the threat of Manufacturer not being able to supply either corporation with iPhones. Therefore, it is unlikely Manufacturer would choose to breach the contract, because if they choose to breach, there is a strong possibility they will still be unable to obtain the necessary widgets to supply enough iPhones for both Retailer A and Retailer B.

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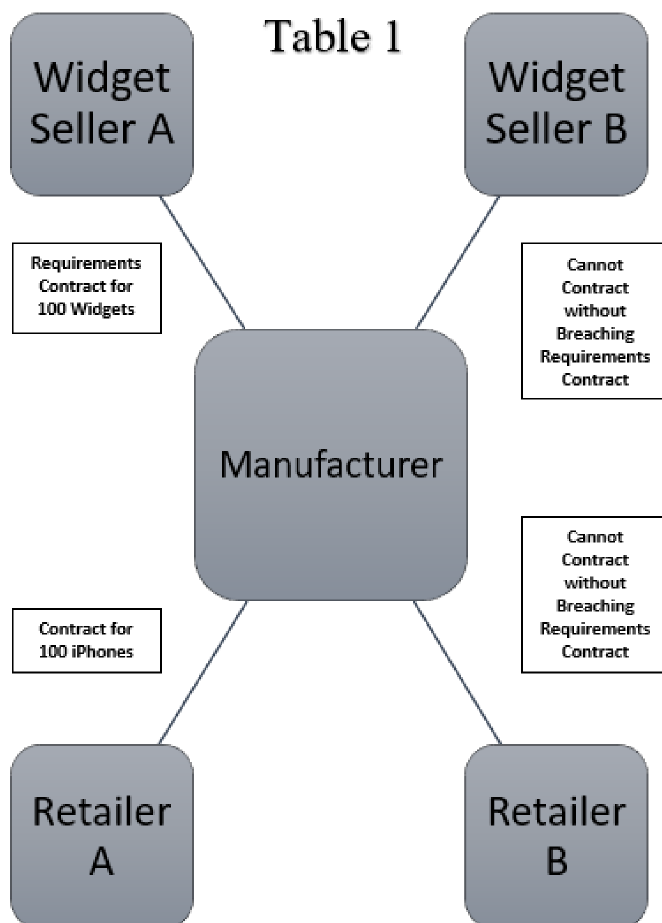

If they refuse to contract with Retailer B, Widget Seller B and Retailer B cannot enter the market. Demand remains higher than supply, as illustrated below. Moreover, Retailer A has such a high demand for iPhones that it can increase its price for iPhones, and consumers are still willing to buy the product at an unfair price.[236]

[236] *See How Demand and Supply Determine Market Price, supra* note 22.

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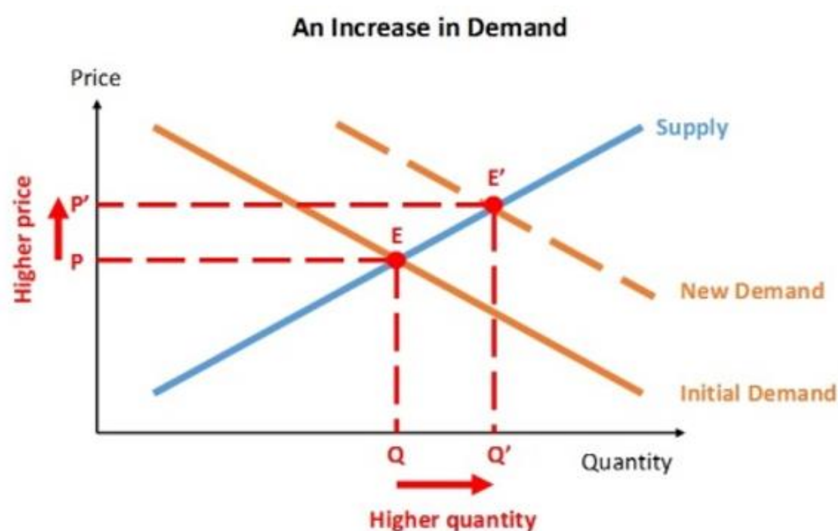

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Three issues arise. First, a lack of competition in the market creates monopolies.[238] Second, not enough iPhones are available to meet consumer demand.[239] Third, an unfair price is reflected onto consumers and may burden the economy since consumers have less money to spend on other goods.[240] Now imagine this scenario playing out between hundreds of corporations every single day. Once again, this is called a supply chain crisis.[241]

On the contrary, now assume Manufacturer and Widget Seller A are in the proposed buyer's option contract as illustrated in Table 2 below.

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[237] Steven Clarke, *Supply and Demand – Part 2*, STEVEN CLARKE'S BLOG (Nov. 3, 2013, 4:40 PM), https://stevenclarkesblog.wordpress.com/2013/11/03/supply-and-demand-part-2/.

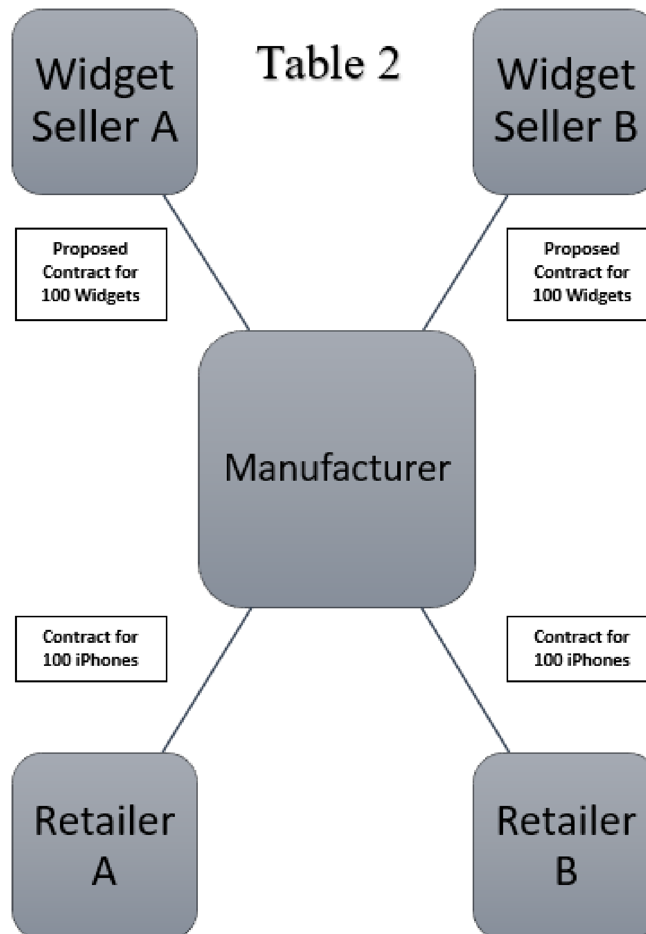
[238] *See* Asmundson, *supra* note 222.

[239] *See How Demand and Supply Determine Market Price, supra* note 22.

[240] *Supply Determine Market Price*, *supra* note 22; Asmundson, *supra* note 222; Goodman, *supra* note 22.

[241] One might ask oneself why are requirements contracts so common given these supply chain constraints? It is difficult to provide a definite answer since each corporation has their own business reasons for contracting decisions. When looking at this question generally, one answer is businesses choose requirements contracts because of the predictability that requirements contracts provide. However, another reason may be because requirements contracts have become so common in trade and industry that most companies do not think of taking a different approach. This Comment argues tradition is why companies have not yet deviated from requirements contracts. Moreover, no one wants to be the first to test a new legal concept in the courts. But, as this Comment has shown, law and policy support the proposed contract, and by establishing a new norm, corporations can see significant economic benefits from more leeway in contracting.

Manufacturer can now purchase 100 widgets from Widget Seller A and 100 widgets from Widget Seller B, which gives Manufacturer the ability to manufacture 200 iPhones without breaching any contracts.



Widget Seller B becomes competitive with Widget Seller A, lowering the equilibrium price of widgets sold to Manufacturer, and reducing the price of iPhones sold to Retailer A and Retailer B.[242] Retailer B can now enter the market. Retailer A and Retailer B also must lower the price of iPhones to compete.[243]

[242] *See How Demand and Supply Determine Market Price*, *supra* note 22.
[243] *See How Demand and Supply Determine Market Price*, *supra* note 22; Asmundson, *supra* note 222.

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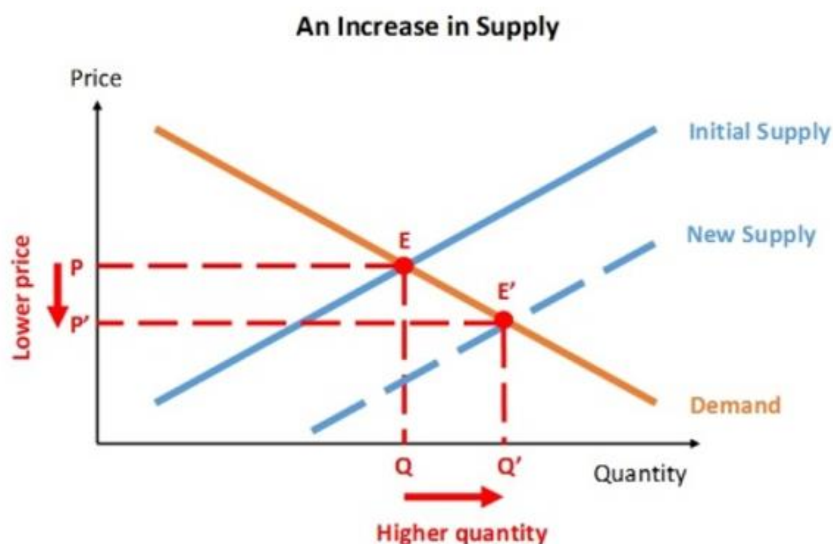

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The adjustment from a requirements contract to a buyer's option contract mitigates the burdens on the domestic economy and supply chain by encouraging competition. With this simple change in commercial contracting, benefits can be anticipated, not only for corporations, but also everyday citizens engaged in the market trying to support themselves and their families.

VI. CONCLUSION

The proposed buyer's option contract is an immediate change that can lift the burdens of the global supply chain crisis and prevent future episodes of similar challenges caused by supply chain shortages. While governments are attempting to fix problems with consumer demand through tightening economic policy, a drop in consumer demand will not end this crisis.[245] This Comment does not contend that proposed contracts will end the supply chain crisis. No one change will end this crisis.[246] Nor is this Comment claiming requirements contracts should be eliminated, because corporations may have other business reasons for choosing requirements contracts over buyer's option contracts. However, the proposed buyer's option contract should be utilized when practicable. This solution can reduce the burdens on the supply chain, lower consumer prices, and reduce the likelihood that this crisis will

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[244] Clarke, *supra* note 237.
[245] Stokel-Walker, *supra* note 216.
[246] *See id.* ("Just as no one thing broke the global supply chain, no one thing can fix it.").

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extend into 2023.[247]

Even when this supply chain crisis does eventually end, supply chain issues can, and certainly will, occur again. Without competition and supply increasing to meet consumer demand, the economic struggles corporations and ordinary citizens have encountered throughout the pandemic are only just beginning.[248] Corporations cannot remain complacent in contracting. The law cannot remain apathetic to supply chain shortages. "[T]he law is malleable."[249] With that said, the law, as is, supports the proposed buyer's option contract.[250] Freedom of contract principles, as well as the spirit (and, arguably, the letter) of the U.C.C., support waiving the statute of frauds quantity requirement in written contracts.[251] Waiver of the statute of frauds is not a mere conjecture.[252] A buyer's option contract waiving the statute of frauds quantity requirement is a well-reasoned reality under the law and policy.[253]

Innovation in the world of contracting is critical to reducing the burdens of the supply chain crisis. Innovation with the proposed buyer's option contracts is a necessary solution. However, if large corporations continue to value the predictability of requirements contracts over the potential of an enhanced position through the proposed buyer's option contract when practicable, they have failed themselves, the supply chain, and the everyday consumer. With this change, the supply chain can effectively take a step in the right direction towards meeting consumer demand, lowering prices, and providing the ability for consumers to, once again, support both their families and their pursuit of livelihoods.

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[247] *See How Demand and Supply Determine Market Price*, *supra* note 22; *see also* Stokel-Walker, *supra* note 216.

[248] Farrer, *supra* note 1.

[249] Steven Cromack, *The Malleability of "the Law*," THE HIST. SOC'Y (Feb. 13, 2012), http://histsociety.blogspot.com/2012/02/malleability-of-law_13.html.

[250] U.C.C. § 1-302.

[251] *Id.*; *see also Freedom of Contract*, *supra* note 117.

[252] U.C.C. § 1-302; *see also Freedom of Contract*, *supra* note 117.

[253] *See* U.C.C. § 1-302(a)–(b); *see also Freedom of Contract*, *supra* note 117.

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