

DRAFT

FOR DISCUSSION ONLY

**REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 2 - SALES**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

DECEMBER 1, 1998

**REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 2 - SALES**

WITH COMMENTS

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TABLE OF CONTENTS

PART 1 GENERAL PROVISIONS	1
SECTION 2-101. SHORT TITLE	1
SECTION 2-102. DEFINITIONS	1
SECTION 2-103. SCOPE	10
SECTION 2-104. TRANSACTION SUBJECT TO OTHER LAW	12
SECTION 2-105. UNCONSCIONABLE CONTRACT OR TERM	13
SECTION 2-106. INTEREST AND PART INTEREST IN GOODS	14
SECTION 2-107. GOODS TO BE SEVERED FROM REAL PROPERTY; RECORDING	15
SECTION 2-108. EFFECT OF AGREEMENT	16
PART 2 FORM, FORMATION, TERMS, AND READJUSTMENT OF CONTRACT ..	17
[A. In General]	17
SECTION 2-201. FORMAL REQUIREMENTS	17
SECTION 2-202. PAROL OR EXTRINSIC EVIDENCE	20
SECTION 2-203. SEALS INOPERATIVE	23
SECTION 2-204. FORMATION IN GENERAL	23
SECTION 2-205. FIRM OFFERS.	26
SECTION 2-206. OFFER AND ACCEPTANCE	27
SECTION 2-206A. UNENFORCEABLE TERMS IN CONSUMER CONTRACTS ..	30

SECTION 2-207. EFFECT OF ADDITIONAL OR DIFFERENT TERMS IN	
RECORDS.	31
SECTION 2-208. COURSE OF PERFORMANCE OR PRACTICAL	
CONSTRUCTION	36
SECTION 2-209. MODIFICATION, RESCISSION, AND WAIVER	37
B. Electronic Contracting	39
SECTION 2-210. LEGAL RECOGNITION OF ELECTRONIC RECORDS AND	
AUTHENTICATIONS	40
SECTION 2-211. COMMERCIAL REASONABLENESS OF ATTRIBUTION	
PROCEDURE	40
SECTION 2-212. EFFECT OF REQUIRING COMMERCIALY	
UNREASONABLE ATTRIBUTION PROCEDURE	40
SECTION 2-213. DETERMINING TO WHICH PERSON AN ELECTRONIC	
AUTHENTICATION, MESSAGE, RECORD, OR PERFORMANCE	
ATTRIBUTED; RELIANCE LOSSES.	40
SECTION 2B-114. ATTRIBUTION PROCEDURE FOR DETECTION OF	
CHANGES AND ERRORS; EFFECT OF USE	41
SECTION 2B-115. ELECTRONIC ERROR: CONSUMER DEFENSES	42
SECTION 2-216. AUTHENTICATION PROOF; ELECTRONIC AGENT	
OPERATIONS	43
SECTION 2-217. ELECTRONIC MESSAGES: TIMING OF CONTRACT;	
EFFECTIVENESS OF MESSAGE; ACKNOWLEDGING MESSAGES	43

SECTION 2-218. OFFER AND ACCEPTANCE; ELECTRONIC AGENTS	44
PART 3 GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT	46
SECTION 2-301. HOW CONTRACT PRICE PAYABLE	46
SECTION 2-302. PERFORMANCE AT SINGLE TIME	47
SECTION 2-303. OPEN-PRICE TERM	48
SECTION 2-304. OUTPUT, REQUIREMENTS, AND EXCLUSIVE DEALING	50
SECTION 2-305. ABSENCE OF SPECIFICATION OF PLACE FOR DELIVERY ...	52
SECTION 2-306. TIME FOR PERFORMANCE NOT SPECIFIED	53
SECTION 2-307. OPTIONS AND COOPERATION RESPECTING PERFORMANCE	54
SECTION 2-308. FAILURE TO PAY BY AGREED LETTER OF CREDIT.	56
SECTION 2-309. SHIPMENT TERMS; SOURCE OF MEANING	57
SECTION 2-310. TERMINATION; SURVIVAL OF OBLIGATIONS AND TERMS	58
SECTION 2-311. TERMINATION; NOTIFICATION	59
SECTION 2-312. SALE BY AUCTION	61
PART 4. WARRANTIES	64
SECTION 2-401. DEFINITIONS	64
SECTION 2-402. WARRANTY OF TITLE AND AGAINST INFRINGEMENT; BUYER'S OBLIGATION AGAINST INFRINGEMENT	66

SECTION 2-403. EXPRESS WARRANTY TO IMMEDIATE BUYER	69
SECTION 2-404. IMPLIED WARRANTY OF MERCHANTABILITY; USAGE OF TRADE	72
SECTION 2-405. IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE	76
SECTION 2-406. DISCLAIMER OR MODIFICATION OF WARRANTY	77
SECTION 2-407. CUMULATION AND CONFLICT OF WARRANTIES	80
SECTION 2-408. EXPRESS WARRANTY OBLIGATION TO REMOTE BUYER AND TRANSFEREE	81
SECTION 2-409. EXTENSION OF EXPRESS OR IMPLIED WARRANTY	86

PART 5 TRANSFERS, IDENTIFICATION, CREDITORS, AND GOOD-FAITH

PURCHASERS	91
SECTION 2-501. PASSING OF TITLE; RESERVATION FOR SECURITY	91
SECTION 2-502. INSURABLE INTEREST IN GOODS; MANNER OF IDENTIFICATION OF GOODS	93
SECTION 2-503. ASSIGNMENT OF RIGHTS; DELEGATION OF DUTIES	96
SECTION 2-504. POWER TO TRANSFER; GOOD-FAITH PURCHASE OF GOODS; “ENTRUSTING	100
SECTION 2-505. RIGHTS OF SELLER'S CREDITORS AGAINST GOODS SOLD	102

SECTION 2-506. SALE ON APPROVAL AND SALE OR RETURN; SPECIAL INCIDENTS	104
PART 6 PERFORMANCE	107
SECTION 2-601. GENERAL OBLIGATIONS	107
SECTION 2-602. SELLER'S TENDER OF DELIVERY	107
SECTION 2-603. SHIPMENT BY SELLER	111
SECTION 2-604. SELLER'S SHIPMENT UNDER RESERVATION	113
SECTION 2-605. RIGHTS OF FINANCING AGENCY	115
SECTION 2-606. EFFECT OF SELLER'S TENDER; DELIVERY ON CONDITION	116
SECTION 2-607. TENDER OF PAYMENT BY BUYER; PAYMENT BY CHECK	117
SECTION 2-608. PAYMENT BY BUYER BEFORE INSPECTION	118
SECTION 2-609. BUYER'S RIGHT TO INSPECT GOODS	119
SECTION 2-610. WHEN DOCUMENTS OF TITLE DELIVERABLE ON ACCEPTANCE OR PAYMENT	121
SECTION 2-611. OPEN TIME FOR PAYMENT OR RUNNING OF CREDIT; AUTHORITY TO SHIP UNDER RESERVATION	122
SECTION 2-612. RISK OF LOSS	123

PART 7 BREACH, REPUDIATION, AND EXCUSE	127
SECTION 2-701. BREACH OF CONTRACT GENERALLY; SUBSTANTIAL IMPAIRMENT	127
SECTION 2-702. WAIVER OF BREACH; PARTICULARIZATION OF NONCONFORMITY	129
SECTION 2-703. BUYER'S RIGHTS ON NONCONFORMING DELIVERY; RIGHTFUL REJECTION	133
SECTION 2-704. EFFECT OF EFFECTIVE REJECTION AND JUSTIFIABLE REVOCATION OF ACCEPTANCE	135
SECTION 2-705. MERCHANT BUYER'S DUTIES; BUYER'S OPTIONS AS TO SALVAGE	137
SECTION 2-706. WHAT CONSTITUTES ACCEPTANCE OF GOODS	139
SECTION 2-707. EFFECT OF ACCEPTANCE; NOTICE OF BREACH; BURDEN OF ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE OF CLAIM OR LITIGATION TO PERSON ANSWERABLE OVER	141
SECTION 2-708. REVOCATION OF ACCEPTANCE	144
SECTION 2-709. CURE	146
SECTION 2-710. INSTALLMENT CONTRACT: BREACH	148
SECTION 2-711. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE ..	151
SECTION 2-712. ANTICIPATORY REPUDIATION	153

SECTION 2-713. RETRACTION OF ANTICIPATORY REPUDIATION	154
SECTION 2-714. CASUALTY TO IDENTIFIED GOODS	155
SECTION 2-715. SUBSTITUTED PERFORMANCE	156
SECTION 2-716. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS	158
SECTION 2-717. PROCEDURE ON NOTIFICATION CLAIMING EXCUSE	160
SECTION 2-718. PRESERVING EVIDENCE OF GOODS IN DISPUTE	161
 PART 8 REMEDIES	 162
[A. IN GENERAL]	162
SECTION 2-801. SUBJECT TO GENERAL LIMITATIONS	162
SECTION 2-802. BREACH OF CONTRACT; PROCEDURES	163
SECTION 2-803. REMEDIES IN GENERAL	163
SECTION 2-804. MEASUREMENT OF DAMAGES IN GENERAL	165
SECTION 2-805. INCIDENTAL DAMAGES	167
SECTION 2-806. CONSEQUENTIAL DAMAGES	168
SECTION 2-807. SPECIFIC PERFORMANCE	169
SECTION 2-808. CANCELLATION; EFFECT	170
SECTION 2-809. LIQUIDATION OF DAMAGES; DEPOSITS	173
SECTION 2-810. CONTRACTUAL MODIFICATION OF REMEDY	174
SECTION 2-811. REMEDIES FOR MISREPRESENTATION OR FRAUD	177
SECTION 2-812. PROOF OF MARKET PRICE	177

SECTION 2-813. LIABILITY OF THIRD PERSONS FOR INJURY TO GOODS ..	178
SECTION 2-814. STATUTE OF LIMITATIONS	179
[B. SELLER'S REMEDIES]	183
SECTION 2-815. SELLER'S REMEDIES IN GENERAL	183
SECTION 2-816. SELLER'S RIGHT TO WITHHOLD DELIVERY OF GOODS OR TO RECLAIM GOODS AFTER DELIVERY TO BUYER	184
SECTION 2-817. SELLER'S RIGHT TO IDENTIFY GOODS TO CONTRACT DESPITE BREACH OR TO SALVAGE UNFINISHED GOODS	187
SECTION 2-818. SELLER'S REFUSAL TO DELIVER BECAUSE OF BUYER'S INSOLVENCY; STOPPAGE IN TRANSIT OR OTHERWISE	187
SECTION 2-819. SELLER'S RESALE	190
SECTION 2-820. PERSON IN POSITION OF SELLER	193
SECTION 2-821. SELLER'S DAMAGES FOR BREACH BASED ON MARKET PRICE, LOST PROFIT, OR RELIANCE	193
SECTION 2-822. ACTION FOR PRICE	195
[C. BUYER'S REMEDIES]	197
SECTION 2-823. BUYER'S REMEDIES IN GENERAL	197
SECTION 2-824. BUYER'S RIGHT TO GOODS	198
SECTION 2-825. COVER; BUYER'S PURCHASE OF SUBSTITUTE GOODS	199
SECTION 2-826. BUYER'S DAMAGES FOR BREACH BASED ON MARKET PRICE	200

SECTION 2-827. BUYER'S DAMAGES FOR BREACH REGARDING ACCEPTED	
GOODS	202
SECTION 2-828. DEDUCTION OF DAMAGES FROM PRICE	203
SECTION 2-829. RECOVERY OF PRICE; BUYER'S SECURITY INTEREST ...	204

REVISED ARTICLE 2-SALES

**NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

December 1, 1998 Draft

PART 1

GENERAL PROVISIONS

SECTION 2-101. SHORT TITLE. This article may be cited as Uniform Commercial Code - Sales.

Source: Section 2-101.

Comments

The phrase “shall be known and” has been deleted from former 2-101 to conform to Revised Article 3, Revised Article 4, Article 4A, Article 5 and Article 8.

SECTION 2-102. DEFINITIONS.

(a) Unless the context otherwise requires, in this article:

(1) “Attribution procedure” means [2B-102(a)(2) (August, 1998)]

(2) “Authenticate” means to sign, or to execute or adopt a symbol or sound, or

encrypt a record in whole or in part, with intent to (i) identify the party; (ii) adopt or accept a record or term; or (iii) establish the authenticity of a record or term that contains the authentication or to which a record containing the authentication refers. Unless the circumstances indicate that a party intends less than all of these effects, authentication is intended to establish the party's identity, its adoption and acceptance of the record or term, and the authenticity of the record or term as of the time of the authentication.

[This definition will be conformed to 2B-102(a)(3) (August, 1998)]

(3) "Automated transaction" means [2B-102(a)(4)]

(4) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

[Source: Conforms to 2-104(3)]

(5) "Buyer" means a person that buys or contracts to buy goods.

[Source: 5-103(1)(a)]

(6) "Cancellation" occurs when either party puts an end to a contract for breach by the other party.

[Conforms to 2-106(4), first clause. See 2-808 for when a party may cancel and the effect of cancellation.]

(7) "Commercial unit" means a unit of goods which by commercial usage is a single whole for purposes of sale and whose division materially impairs its character or value in the relevant market or in use. A commercial unit may be a single article, such as a machine; a set of articles, such as a suite of furniture or a line of machinery; a quantity, such as a gross or carload; or any other unit treated in use or in the relevant market as a single whole.

[Follows 2-105(6), with style revisions. The word “bale” is omitted to conform to 2A-103(1)(c). The word “relevant” in the first sentence is added to conform to usage in the second sentence.]

(8) "Conforming" goods or conduct, including any part of a performance, means goods or conduct that are in accordance with the obligations under the contract.

[Follows 2-106(2).]

(9) “Computer” means [2B-102(a)(5)]

(10) “Computer program” means [2B-102(a)(6)]

(11) (A) "Conspicuous", with reference to a term or clause, means so written, displayed or presented that a reasonable person against whom it is to operate ought to have noticed it or, in the case of an electronic message intended to evoke a response without the need for review by an individual, in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the message by an individual.

(B) In a written record:

(i) A heading is conspicuous if it is all capitals (as: NEGOTIABLE BILL OF LADING) equal to or greater in size than the surrounding text;

(ii) A term or clause in the body of a record or display is conspicuous if it is in larger or other contrasting type or color than other language;

_____ (iii) Any term or clause in a telegram or other similar communication is conspicuous.

(C) In an electronic record or display a term or clause is conspicuous if it is so positioned that a party cannot proceed without taking some additional action with respect to the term or any prominent reference thereto.

Notes

1. Further efforts to conform this definition with 2B-102(a)(9) (August, 1998) are required. See Revised 1-201(11).

2. The Drafting Committee agreed that there should be a “safe harbor” for conspicuous and that the safe harbor should vary depending upon the medium used in the record. Thus, sub (B) proposes a safe harbor for a written record and sub (C) proposes a safe harbor for an electronic record.

Questions to be resolved: (1) Should the definition be the same for Articles 2, 2A and 2B? (2) If so, what is the better definition? (3) Should a common definition for all be in Article 1?

(12) “Consumer” means an individual who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household use.

[New. Follows the first sentence of 2B-102(a)(10) (August, 1998).

(13) “Consumer contract” means a contract for sale between a [merchant] seller regularly engaged in the business of selling and a consumer. **[New]**

(14) “Contract for sale” means both a present sale of goods and a contract to sell existing or future goods at a future time.

[Follows 2-106(1), with a clarification that “contract for sale” includes a contract to sell future goods.]

(15) “Delivery” means the transfer of physical possession or control of goods.

[New.]

(16) “Electronic” means [2B-102(a)(18)]

(17) “Electronic agent” means a computer program or other automated means used by a person to independently initiate or respond to electronic messages or performances on

behalf of that person without review by an individual or electronic agent.

(18) "Electronic message" means a record that is stored, generated, or transmitted by electronic, optical, or similar means for purposes of communication to another person. The term includes electronic data interchange, electronic or voice mail, electronic display, facsimile, telex, telecopying, scanning, and similar communications.

(19) "Electronic transaction" means a transaction formed by electronic messages in which the messages of one or both parties will not be reviewed by an individual as a routine step in forming the contract.

(20) "Financing agency" means a bank, finance company, or other person that, in the ordinary course of business, makes advances against goods or documents of title, or that by arrangement with either the seller or the buyer intervenes in the ordinary course of business to make or collect payment due or claimed under a contract for sale, as by purchasing or paying the seller's draft, making advances against it, or merely taking it for collection, whether or not documents of title accompany the draft. The term includes a bank or other person that similarly intervenes between persons in the position of seller and buyer with respect to the goods.

(21) "Foreign exchange transaction" means a transaction in which one party agrees to deliver a quantity of a specified money or unit of account in consideration of the other party's agreement to deliver another quantity of different money or unit of account either currently or at a future date, if delivery is to be through funds transfer, book entry accounting, or other form of payment order, or other agreed means to transfer a credit balance. The term includes a transaction of this type involving multiple moneys and spot, forward, option, or other products derived from underlying moneys and any combination of these transactions. The term

does not include a transaction involving multiple moneys in which one or both of the parties is obligated to make physical delivery, at the time of contracting or in the future, of banknotes, coins, or other form of legal tender or specie. [New.]

(22) "Future goods" means goods that are neither existing nor identified.

[Follows 2-105(2)]

(23) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

[Follows 3-103(a)(4). Accord: 2B-102(a)(22) (August, 1998).]

(24) "Goods" means all things, including specially manufactured goods, that are movable at the time of identification to a contract for sale and, unless the context otherwise requires, future goods. The term includes the unborn young of animals, growing crops, and other identified things to be severed from real property under Section 2-107. The term does not include money in which the price is to be paid, the subject of foreign exchange transactions, information and software, documents, letters of credit, letter of credit rights, instruments, investment property, accounts, chattel paper, deposit accounts and general intangibles.

[Follows 2-105(1), with revisions for greater clarity and to broaden the exclusion of various forms of Article 9 collateral.]

(25) "Information processing system" means an electronic system or facility for generating, sending, receiving, storing, displaying, or processing electronic information.

(26) "Letter of credit" means an irrevocable letter of credit as defined in Section 5-102(a)(10), issued by a financing agency of good repute and, if the shipment is overseas, of good international repute.

[Follows 2-325(3), first sentence. See 5-102(a)(10). The term “confirmed credit” is not defined in Revised Article 2.]

(27) "Lot" means a parcel or single article that is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

[Follows 2-105(5). See 2A-103(1)(s).]

(28) "Merchant" means a person that deals in goods of the kind involved in the transaction, a person that by occupation purports to have knowledge or skill peculiar to the practices or goods involved in the transaction, or a person to which knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary that purports to have the knowledge or skill.

[Follows 2-104(1), with minor revisions to neutralize gender and to achieve parallel structure. See 2B-102(a)(33) (August, 1998).]

(29) "Present sale" means a sale that is accomplished by the making of a contract.

[Follows 2-106(1)]

(30) "Receipt":

(A) with respect to goods, means to take delivery; and

(B) in the case of an electronic notification, means to come into existence in an information processing system in a form capable of being processed by or perceived from a system of that type, if the recipient uses, or otherwise has designated or otherwise holds out that system as a place for the receipt of such notices.

[Subsection (A) follows 2-103(1)(c) and supplements the definition of “receives” in 1-201(26). “Delivery” is defined in 2-102(a)(11).]

(31) "Record" means information that is inscribed on a tangible medium, or that is

stored in an electronic or other medium and is retrievable in perceivable form.

[Accord: 5-102(a)(14), 2b-102(a)(39) (August, 1998).]

(31A) “Remedial promise means a promise by the seller to take action, including to repair or replace the goods or to refund the price if the goods do not conform to the contract or upon the happening of a specified future event.

(32) "Sale" means the passing of title to goods from a seller to a buyer for a price.

[Follows 2-106(1). “Means” is substituted for “consists in.”]

(33) "Seller" means a person that sells or contracts to sell goods.

[Follows 2-103(1)(d), with Gender revisions.]

(34) “Send with respect to an electronic message means to initiate operations that in the ordinary course will cause the record to come into existence in an information processing system in a form capable of being processed by or perceived from a system of that type, if the recipient uses or by agreement or otherwise has designated or held out that system as a place for the receipt of such communications.

(35) “Termination means to end a contract or a part thereof by an act by a party under a power created by agreement or law, or by operation of the terms of the agreement for a reason other than for breach by the other party. Terminate has a corresponding meaning.

[Source: 2-106(3). See 2B-102(a)(47).]

(b) Other definitions applying to this Article or to specified Parts thereof and the sections in which they appear are: **[Conforms to 2-103(3).]**

“Acceptance of goods. Section 2-706

“Assignment. Section 2-503(a).

“Attribution. Sections 2-210(a), 2-211(a).

“Breach of contract. Sections 2-701(a), (b).

“Consequential damages. Section 2-806.

“Cover. Section 2-825(a).

“Delegation. Section 2-503(b).

“Entrusting. Section 2-504(c).

“Incidental damages. Section 2-805.

“Identification. Section 2-502.

“Immediate buyer. Section 2-401(a).

“Installment contract. Section 2-710(a).

“Insurable interest. Section 2-502.

“Person in position of seller. Section 2-604.

“Remote purchaser. Section 2-401(a).

“Repudiation. Section 2-712(b).

“Sale on approval. Section 2-506(a).

“Sale or return. Section 2-506(a).

“Substantial impairment. Section 2-701(c).

“Waiver. Sections 2-210, 2-702.

(c) The following definitions in other articles apply to this article:

“Accounts. Section 9-102(a)(2)

“Chattel Paper. Section 9-102(a)(11)

“Check. Section 3-104(e).

“Deposit Accounts. Section 9-102(a)(29)

“Dishonor. Section 3-502.

“Draft. Section 3-104(e).

“General Intangibles. Section 9-102(a)(42)

“Information. Section 2B-102(a)(25)

“Injunction against honor. Section 5-109(b).

“Instruments. Section 3-104(b)

“Investment Property . Section 9-102(a)(49)

“Letter of Credit. Section 5-102(a)(10).

“Letter of Credit Rights. Section 9-102(a)(51)

“Software. 2B-102(a)(44)

(d) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article. **[Conforms to 2-103 (4).]**

SECTION 2-103. SCOPE.

(a) This article applies to transactions in goods, [including the enforcement of remedial promises.]

(b) If a transaction involves a license or software contract and goods, this article applies to that part of the transaction involving the goods but not to the information, informational rights, copies that contain the information, its packaging, and its documentation. However, this article applies to a sale of a computer program as part of a sale of goods that contain the computer programs unless:

(1) the goods are merely a copy of the program;

(2) the goods are a computer or computer peripheral; or

(3) giving the purchaser of the goods access to or use of the computer program is a material purpose of the transaction.

(c) Except as otherwise provided in subsection (b), to the extent that another article of this [Act] applies to a transaction in goods, this article does not apply to [the part of the transaction governed solely by the other article] [the subject matter or related rights and remedies governed by the other article].

(d) This article does not apply to a foreign exchange transaction.

Comments

1. Subsection (a) follows the first clause of 2-102 except that the phrase “Unless the context otherwise requires” is deleted. The second clause of 2-102 is treated in subsection (c).

The phrase “transactions in goods” means contracts for the sale of goods in sections where the word “contract” or the phrase “contract for sale” are used. In other settings, “transaction” could include a sale, a bailment or consignment or a contract where both goods and services are provided, such as a contract to deliver and install goods or an agreement to maintain, service and repair goods after installation. This Draft provides no guidance on when Article 2 should apply to these mixed transactions and the issue is left for judicial inclusion or exclusion under the “predominant purpose” test.

2. Subsection (b), which is new, conforms to 2B-103(b) and 2B-104(3) (August, 1998). From the standpoint of Article 2B, in a mixed transactions disputes over the part involving goods are ceded to Article 2 even though information and services may predominate. Under Article 2, however, the “predominant purpose” test developed by the courts in mixed goods and services contracts still controls. Thus, if services predominate, the entire transaction is outside of Article 2 even though the gravamen of the dispute involves goods.

The “however” language treats the case where a software or computer program is contained in the goods sold. In general, Article 2 applies unless one or more the three exceptions stated applies. 2B-104(3).

____ Revised 9-102(a)(44) deals with a computer program integrated into goods by a broad inclusion into the definition of goods:

The term [goods] also includes a computer program structurally integrated with goods, any informational content included in the program, and any supporting information provided in connection with a transaction relating to the program or informational content if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person would acquire a right to sue the program in connection with the goods. The term does not include a program integrated with goods that consist solely of the medium with which the program is integrated.

____ 3. Subsection (c) is new and replaces the language after the colon in 2-102 up to the word “nor : “[I]t does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a secured transaction. See 2B-103(b), which provides a scope rule for transactions to which more than one article apply.

4. Subsection (d) is new. “Foreign exchange transaction is defined in 2-102(a)(17).

SECTION 2-104. TRANSACTION SUBJECT TO OTHER LAW.

(a) A transaction subject to this article is also subject to:

(1) [list any certificate of title statutes covering automobiles, trailers, mobile homes, boats, farm tractors, or the like], except as to the rights of a buyer in the ordinary course of business under Section 2-504(c) whose rights arise before a certificate of title covering the goods is effective in the name of any other buyer;

(2) any applicable law which establishes a different rule for consumers; or

(3) any other law of this State to which the subject matter of this article is subject, such as laws dealing with the sale of agricultural products, the transfer of blood, blood products, human tissues and organs, the consignment or transfer by artists of works of art or fine prints, distribution agreements, franchises and other relationships through which goods are sold, liability for products which cause injury to person or property, the making and disclaimer of warranties, the misbranding or adulteration of foods products and drugs, and dealers in particular products, such as automobiles, motorized wheelchairs, agricultural equipment and hearing aids.

(b) Except for the rights of a buyer in the ordinary course of business in subsection (a)(1), in the case of a conflict between this article and any law referred to in subsection (a), that law governs.

(c) With respect to this Act, failure to comply with the laws referred to in subsection (a) has only the effect specified therein.

Comments

1. Subsection (a), which follows the form but not the substance of 2A-104(1), is new. See 2B-104 (August, 1998).

Subsection (a)(1) coordinates Article 2 with state certificate of title statutes.

Subsection (a)(2) and subsection (a)(3) replace the language beginning with “nor in 2-102: “[N]or does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers. Thus, (a)(2) cedes authority to “any applicable law establishing a different rule for consumers and (a)(3) gives a complete but not exhaustive list of other possible state law that might provide different rules. Unless stated otherwise, “law includes any statute, regulation, administrative ruling, judicial decision, etc., in the state.

2. Subsection (b), which is new, provides a rule of priority in cases of conflict. Subsection (c), on the other hand, states that failure to comply with an applicable law “has only the effect stated therein.

SECTION 2-105. UNCONSCIONABLE CONTRACT OR TERM.

(a) If a court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any term of the contract may be unconscionable the parties must be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Comments

1. When may a court determine that a contract or a term is unconscionable?

Comment 1 to 2-302 stated: “The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Further: “The principle is one of the prevention of oppression and unfair surprise...and not of disturbance of allocation of risks because of superior bargaining power. Finally, the determination is to be made after a hearing where the “parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Proposed Comment by American Automobile Manufacturers Association

A particularized application of this principle may be found in consumer contracts, which often are characterized by the use of standard forms prepared by a merchant seller. Example of unconscionable consumer contract terms are obscure and deceptive terms which eliminated the essential purpose of the contract, conflict with other material terms to which the parties have expressly agreed, or impose grossly unreasonable risk or cost on the buyer under the circumstances. However, this section does not render unenforceable an otherwise enforceable term disclaiming or modifying an implied warranty or a warranty of title, and does not empower a court to invalidate conscionable terms on the ground that they were not within the reasonable expectations of the parties.

2. The general standard in 2-105 is particularized for consumer contracts in the following sections: 2-108(a)(8), (9); 2-104(a)(2); 2-206A; 2-209(b); 2-402(d); 2-406(c), 2-407(3), 2-408(b)(2)(a); 2-409(a); 2-810(b); 2-810(c); and 2-814(a). Unless stated otherwise in the particular section, compliance with the particular section does not foreclose the application, where justified, of the general standard in 2-105.

SECTION 2-106. INTEREST AND PART INTEREST IN GOODS.

(a) Goods must be both existing and identified before an interest in them may be transferred.

(b) A part interest in existing, identified goods may be sold.

(c) A purported present sale of an interest in future goods is a contract to sell.

(d) An undivided share in an identified bulk of fungible goods is sufficiently described to

be sold although if the quantity of the bulk is not determined. Any proportion of the bulk or quantity agreed upon by number, weight, or other measure, may, to the extent of the seller's interest in the bulk, be sold to the buyer, who then becomes an owner in common.

Comments

This section illustrates the effort in revised Article 2 to improve style, grammar and clarity without affecting substance. For example:

1. Subsection (a) follows 2-105(2), first sentence. The phrase “can pass” is deleted and is replaced by the phrase “may be transferred.”

2. Subsection (b) follows 2-105(3), and is stated in the active voice.

3. Subsection (c) follows 2-105(a)(2), the last sentence. The phrase is revised to clarify the referent and to replace “operates as” with “is.” “Future goods” are defined in 2-102(a)(18).

4. Subsection (d) follows 2-105(4). For clarity, “described” is substituted for “identified” and the word “agreed” is deleted.

SECTION 2-107. GOODS TO BE SEVERED FROM REAL PROPERTY; RECORDING.

(a) A contract for the sale of minerals, oil, gas, or similar things to be extracted, or a structure or its materials, to be removed from real property, is a contract for the sale of goods if they are to be severed by the seller. Until severance, a purported present sale of those things, other than a sale that is effective as a transfer of an interest in the real property, is only a contract to sell future goods.

(b) Subject to subsection (a), a contract for the sale, apart from an interest in real property, of growing crops, timber to be cut, or other things attached to real property and capable of severance without material harm to the real property, is a contract for the sale of goods, whether the thing is to be severed by the buyer or seller and even if it forms part of the real

property at the time of contracting. The parties may effect a present sale before severance by identification of the goods.

(c) The rights of a buyer and seller under this section are subject to rights of third parties under the laws relating to records of real property. A contract for sale may be executed and recorded as a document transferring an interest in real property. The recording constitutes notice to third parties of the buyer's rights under the contract for sale.

Comments

1. Section 2-107 of Revised Article 2 follows former 2-107. The phrase “real property” has been substituted for words like “realty” and “land” for consistency. Other revisions in style, grammar and punctuation are for clarity.

2. Revised Article 9 includes in the definition of goods: “(i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, . . . (iv) crops grown, growing or to be grown, even if the crops are produced on trees, vines, or bushes. . . . 9-102(a)(44). This is consistent with 2-107(b).

Revised 9-102(a)(44), however, excludes “oil, gas, or other minerals before extraction from the definition of goods, regardless of whether the owner is to extract or not. There is a definition of “As-extracted collateral” in 9-102(a)(6) for purposes of creating and perfecting security interests in minerals before extraction.

SECTION 2-108. EFFECT OF AGREEMENT.

(a) Except as otherwise provided in Section 1-102(3) and this article, the effect of any provision may be varied by agreement.

(b) The absence of a phrase such as “unless otherwise agreed” does not by itself preclude the parties from varying the provision by agreement.

(c) Where this article allocates a risk or imposes a burden between the parties, an agreement may shift the allocation and also apportion the risk or burden.

Comments

1. Subsection (a) restates the principle of variance by agreement contained in 1-103(3) and is subject to the limitations stated in that subsection. The principle is also subject to any specific exceptions stated in Article 2 but, unlike 2B-106(a)(1) (August, 1998), those exceptions are not stated in the statute.

Unlike Article 6 of CISG, this section does not state that the parties can contract out of Article 2 when it applies. Nor does it state that the parties can contract into Article 2 when it does not apply. Presumably the parties have some power to contract in or contract out, but the limitations of that power are not clear. See 2B-107 (August, 1998), validating choice of law agreements.

2. Subsection (b) states affirmatively the “unless otherwise agreed” principle in 1-102(4): The “absence” of such a phrase does not by itself preclude variance by agreement. Thus, this phrase has been deleted from revised Article 2.

3. Subsection (c) follows 2-303 and is repositioned in 2-108, which deals with the effect of an agreement. . The phrase “unless otherwise agreed” is deleted from the original 2-303 because Revised Article 2 does not use that phrase. See 2B-106(c)(1) (August, 1998), in accord.

PART 2

FORM, FORMATION, TERMS, AND READJUSTMENT OF CONTRACT

[A. In General]

SECTION 2-201. FORMAL REQUIREMENTS.

(a) A contract for the price of \$5,000 or more is not enforceable by way of action or defense against a person that denies facts from which an agreement can be found, unless there is a record authenticated by the party against which enforcement is sought which is sufficient to indicate that a contract has been made between the parties. A record is not insufficient merely because it omits a term, including a quantity term, or incorrectly states a term agreed upon. If the record contains a quantity term, however, the contract is not enforceable beyond the quantity of goods shown in the record.

(b) If within a reasonable time a record in confirmation of the contract and sufficient

against the sender under subsection (a) is received by a merchant party and the merchant has reason to know of its contents, the confirmation satisfies the requirements of subsection (a) against the merchant unless notice in a record objecting to the contents of the confirmation is sent within 10 days after it is received.

(c) An otherwise valid contract that does not satisfy the requirements of subsection (a) is nevertheless enforceable if:

(1) the goods are to be specially manufactured or processed for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or processing or commitments for their procurement;

(2) the conduct of both parties in performing the agreement recognizes that a contract was formed; or

(3) the party against whom enforcement is sought admits in pleading or testimony in court or otherwise under oath facts from which an agreement can be found.

(d) An enforceable contract under this section is not made unenforceable on the ground that it is not capable of being performed within one year or any other applicable period after its making.

SOURCE: Section 2-201.

Comments

1. Under subsection (a), a party may raise the statute of frauds defense to an alleged contract the price of which is \$5,000 or more by denying "facts from which an agreement can be found. The defense is not successful if the alleged price is less than \$5,000 or there is a record

authenticated by the defendant which is sufficient to indicate that a contract has been made between the parties. The record may omit or incorrectly state terms agreed upon. The record may be sufficient if it omits a quantity term, but if a quantity term is stated in the record the contract is not enforceable beyond the quantity stated.

To illustrate, if Buyer draws a check to the order of Seller in the amount of \$10,000 and states on the check “this is payment for the computers, the statute of frauds is satisfied. The seller must then prove the terms of the contract, including the quantity ordered. On the other hand, if a record signed by the buyer stated “this confirms our contract for 30 computers but did not state a price, the statute of frauds is satisfied but the seller cannot enforce the contract for more than 30 computers, even if the buyer claims that the quantity terms was incorrectly stated.

2. Subsection (b) retains the principle that a record sufficient against the sender under subsection (a) which is sent in confirmation of the contract to and received and not objected to in a timely manner by the other party precludes the other party from raising the statute of frauds defense. Only the party to whom the confirmation is sent need be a merchant. Under this subsection, a merchant is a person “that by occupation purports to have knowledge or skill peculiar to the practices or goods involved in the transaction. Thus, a farmer may be a merchant because the practice of objecting to an improper confirmation ought to be familiar to any person in business.

3. Subsection (c) states three statutory exceptions to cases where the defense is otherwise available under subsection (a).

First subsection (c)(1) restates the “specially manufactured or processed goods exception in former 2-201(3)(a)..

Second, subsection (c)(2) expands the “part performance exception in former 2-201(3)(c). Conduct by both parties in performing agreement in whole or in part that recognizes that a contract has been formed takes the case out of the statute. Enforcement is not limited to the quantity involved in the part performance.

Third, subsection (c)(3) follows former UCC 2-201(3)(b), with two changes. The admission (1) may be made by testimony in court or “otherwise under oath , and (2) an admission of facts from which an agreement can be found removes the statute of frauds bar and permits proof of the entire agreement even though the quantity was not admitted.

The statement of three statutory exceptions to subsection (a) does not foreclose the possibility that a promisor will be estopped to raise the statute of frauds defense in appropriate cases. See Revised 1-102(b). For example, suppose a farmer orally agrees to delivery 5,000 bushels of corn after harvest to a dealer for \$5 per bushel. The dealer resells the corn to a third party for \$6 per bushel but neglects to send the farmer a confirmation. Under Section 139 of the Restatement (Second) of Contracts, the farmer may be estopped by the oral promise to deliver

that induces reliance by the dealer, especially where the reliance “corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence. See Subsection §139 (2)(c).

4. Subsection (d), which is new, repeals the “one year statute of frauds provision for contracts for sale. The phrase “any other applicable period recognizes that some state statutes apply to periods longer than one year. The confused and contradictory interpretations under the so-called “one year clause are illustrated in *C.R. Klewin, Inc. v. Flagship Properties, Inc.*, 600 A.2d 772 (Conn. 1991) (Peters, J).

5. Under 2-209, if the original contract satisfies the statute of frauds a modification of that contract need not satisfy the statute. The parties, however, can agree that an attempted modification is not enforceable unless made in an authenticated record. See 2-209(b).

6. **CISG.** There is no statute of frauds in CISG. Article 11 provides: “A contract for sale need not be concluded in or evidenced by a writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses. The United States did not preserve the statute of frauds by making the declaration permitted under Article 12.,

SECTION 2-202. PAROL OR EXTRINSIC EVIDENCE.

(a) Terms on which the confirmatory records of the parties agree, or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to the included terms, may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. However, terms in such a record may be supplemented by evidence of:

(1) non-contradictory [consistent] additional terms unless the court finds that:

(A) the record was intended as a complete and exclusive statement of the terms of the agreement; or

(B) the terms if agreed upon by the parties would certainly have been included in the record; and

(2) course of performance, usage of trade, or course of dealing.

(b) Terms in a record may be explained by evidence from course of performance, usage of trade, or course of performance without a preliminary determination by the court that the language used is ambiguous. Terms in a record may also be explained by evidence from the surrounding circumstances and other sources as determined by a court.

SOURCE: Sales, Section 2-202.

Comments

1. The operation of subsection (a) depends upon the intention of both parties, either inferred or expressed in a merger clause, that terms in “confirmatory records” or “a record” are the “final expression of their agreement with respect to the included terms. Without this mutual intention to integrate the record, the so-called parol evidence rule does not apply to exclude other terms allegedly agreed to prior to or contemporaneously with the writing. These alleged terms are provable as part of the agreement by relevant evidence from any credible source.

2. The best evidence of intention to have a total integration, i.e., that the record was intended as a complete and exclusive statement of all of the terms of the agreement, is the so-called “merger” clause. Although a merger clause is strong evidence of intention, it is not necessarily conclusive. A court may conduct a preliminary hearing to determine whether both parties intended a total integration. See *Betaco, Inc. v. Cessna Aircraft Co.*, 103 F.3d 1281 (7th Cir. 1996).

The effect of a total integration is clear under subsection (a). The record may not be contradicted or supplemented by “evidence of any prior agreement or of a contemporaneous oral agreement. Alleged terms from these sources are excluded even though they are perfectly consistent or are in harmony with those in the record. However, terms may be supplemented by evidence of course of performance, usage of trade, and course of performance. Thus, unless carefully negated in the merger clause, evidence from trade usage may always be admitted to supplement a term in the record. The conditions of 1-205, however, must be satisfied.

To illustrate, suppose that a totally integrated record contains a fixed price term. An alleged term agreed in the negotiations to provide upward price escalation if certain costs increased would be excluded even though it merely supplemented the fixed price term. On the other hand, a usage of trade otherwise established under 1-205 that price escalation is available under certain conditions would be admitted to supplement the price term unless specifically excluded. The assumption is that the inclusion of terms from this source was taken for granted when the record was prepared.

3. In the absence of a merger clause, the intention to integrate a record with regard to

some of all of the terms must be inferred from the circumstances. The inference will be strongest where the parties have assented to a record that appears to be complete on its face. Nevertheless, the court should conduct a hearing to confirm that inference and to determine what other terms, if any, should be included in the agreement.

If a record without a merger clause is presumed to be integrated with regard to some terms and contains a term fixing the per unit price at \$500, the following results follow under subsection (a):

If the plaintiff claims that the parties agreed to a \$600 price term in the pre-contract negotiations, that evidence will be excluded. The price term in the integrated record cannot be contradicted by evidence of a prior agreement.

If the plaintiff claims that the parties agreed to an upward escalation clause in the pre-contract negotiations and this evidence does not contradict the fixed price term, the evidence is admissible unless the escalation clause, if agreed to, would certainly have been included in the record. If so, and this depends upon inferences from the circumstances, the evidence is excluded. This test, which is taken from comment 3 to former 2-202, operates against the presumption of an integration in the absence of a merger clause. A term that would not certainly have been included in the record may be admitted to supplement that record.

The record, even if partially integrated, may be supplemented by course of performance, usage of trade, or course of dealing.

4. Subsection (b) states that terms in an record, whether integrated or not, may be explained by evidence from course of performance, usage or trade, or course of dealing without a preliminary determination by the court that the terms are ambiguous. Terms in a record may also be explained by evidence from the “surrounding circumstances” and other sources as determined by the court.

The admissibility of evidence from circumstances other sources is normally determined by the court after a preliminary hearing, during which the court may conclude that the evidence is not relevant to the meaning claimed by one party. See *Winet v. Price*, 6 Cal. Rptr.2d 554, 557 (Cal. App. 1992), where the court said:

The decision whether to admit parol evidence [to interpret a term] involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions to determine “ambiguity, i.e., whether the language is “reasonably susceptible” to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is “reasonably susceptible” to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step--interpreting the contract.

See Sections 212, 200-203 of the Restatement, Second, of Contracts; Margaret N. Kniffen, *A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality*, 74 Oregon L. Rev. 643 (1995).

4. In addition to evidence relevant to the meaning of terms in an integrated record, 2-202 does not exclude evidence introduced to show that the contract should be avoided for fraud, mistake, or duress or that a term is unenforceable under 2-105 or 2-206A. Similarly, 2-202 does not operate to exclude evidence of a contract modification under 2-209(a) or that, for purposes of granting an excuse under 2-714 or 2-716, both parties assumed that a certain event would not occur or that performance as agreed has become impracticable.

5. **CISG.** There is no comparable provision for parol evidence in CISG. CISG Art. 8, however, provides standards for the interpretation of statements by and conduct of parties to a contract for sale. See UPICC Art. 2.17, which states the effect of a merger clause.

SECTION 2-203. SEALS INOPERATIVE. The affixing a seal to a record evidencing a contract for sale or to an offer to buy or sell goods does not make the record a sealed instrument. The law with respect to sealed instruments does not apply to the contract or offer.

Source: Sales 2-203.

SECTION 2-204. FORMATION IN GENERAL.

(a) A contract may be made in any manner sufficient to show agreement, including by offer and acceptance or conduct of both parties or operations of electronic agents which recognize the existence of a contract.

(b) If the parties so intend, an agreement sufficient to constitute a contract may be found even if the time of its making is undetermined, one or more terms are left open or to be agreed upon, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms.

(c) Even if one or more terms are left open, a contract does not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for an appropriate

remedy.

(d) Language which expressly conditions the intention to contract upon agreement by the other party to terms proposed prevents contract formation unless the required agreement is given or there is conduct by both parties that recognizes the existence of a contract. However, language of express condition contained in a record must be conspicuous.

(e) If the seller proposes terms to a buyer in a record that add to an existing contract between them and the proposal is furnished after the buyer has paid for the goods but no later than when the seller delivers the goods, the following rules apply:

(1) If the seller did not notify the buyer before the goods were paid for or were delivered that additional terms would be proposed, the record containing the additional terms is deemed to be a confirmation of the contract. Whether the additional terms are part of the contract is determined by Section 2-207(c).

(2) If the seller, by conspicuous language in a record, notifies the buyer before payment or delivery that additional terms will be proposed, the buyer may either accept the terms and include them in the contract or reject the additional terms and return the goods. Subject to 2-104(a) and 2-206A, additional terms may be accepted by any method reasonable under the circumstances.

(3) The buyer has a right, upon returning goods to the seller, to:

(A) a refund; and

(B) reimbursement of any reasonable expenses incurred related to the return and complying with any instructions of the seller for return or, in the absence of instructions, return postage or similar reasonable expenses in returning the goods.

Comments

1. Subsection (a) states the flexible principle that a contract may be made “in any manner sufficient to show agreement. This includes but is not limited to offer and acceptance and the conduct of both parties or the operations of electronic agents which recognize the existence of a contract.

This subsection should be read in light of the common law of contract formation. For example, the concepts of “offer” and “acceptance” are not defined in Article 2 and not all of the rules of contract formation are spelled out. Thus, one must resort to other state law to determine what an offer is or when an offer is terminated and when an acceptance is effective. Moreover, there is no explicit requirement of consideration for contract formation in Part 2, although that concept is implicit in the definition of “agreement” as a “bargain in fact. Thus, the words or conduct of the parties that show an agreement are sufficient to create a contract without the need for proof that the agreed exchange was bargained for.

Except for 2-105 and 2-206A, Article 2 says nothing about the validity of the agreement reached by the parties. Thus, defenses such as fraud, mistake, duress, and incompatibility with public policy are determined by non-code law.

2. Subsections (b) and (c) should be read together, especially where the agreement leaves one or more terms open. If the parties do not intend to form a contract until all of certain material terms are agreed and they are not agreed, there is no contract. Sometimes this intention is clear, such as cases where formation is expressly conditioned on agreement to certain terms, see subsection (d), and sometimes it must be inferred. Put differently, if a party knows or has reason to know that the other party does not intend to conclude the bargain until certain terms are agreed, there is no contract until the agreement is reached.

The best evidence of mutual intention where the records do not establish a contract is conduct by both parties that recognizes the existence of a contract. For example, the seller ships and the buyer accepts goods, the buyer sends a check in part payment which the seller cashes, or the actions or inactions of the parties in light of a prior course of dealing manifest agreement. In these cases, the fact that one or more terms are left open is not fatal. The question is whether there is a “reasonably certain basis for an appropriate remedy. Subsection (c). The answer depends upon whether there is a sufficient “gap filler” in Part 3.

3. Subsection (d) states the obvious: A party who expressly conditions intention to contract upon agreement by the other party to proposed terms is free from contract until such agreement is reached. The offeror is master of its offer. If that language is in a record however, the language must be conspicuous. The offeree should not be surprised by the condition.

Nevertheless, if one or both parties expressly conditions their willingness to contract but the seller ships and the buyer accepts the goods, there is a contract under this section. The so-

called “my way or the highway” conditions can be waived by conduct. In such a case, the terms of the contract are determined under 2-207.

4. Subsection (e) deals with formation issues in direct marketing sales where the seller is unable or unwilling to disclose all terms of the deal before payment or before the time of delivery. Thus, after payment the seller proposes terms additional to those already agreed or, if payment has not been made, proposes them with the delivery of the goods. Assuming the terms are otherwise enforceable if agreed to, the seller gives the buyer a choice to accept the terms by not objecting to them within a stated period of time or returning the goods for a refund. The buyer who is unable to find the terms before payment is disadvantaged by this practice. Either it is unaware of the choice given and fails to object (thus becoming bound by terms of which it was unaware or did not understand) or must bear the burden of returning the goods and getting a refund plus expenses incurred in the return.

In the absence of timely notice that additional terms are forthcoming, see subsection (e)(2), subsection (e)(1) assumes that a contract has been formed between the parties and treats the additional terms as part of a confirmation of the contract. Under 2-207(c), the additional terms do not become part of the contract unless the buyer expressly agrees to them. Use of the goods without more is not an express agreement.

Assuming that a timely, conspicuous notice has been given by the seller, subsection (e)(2) treats the transaction as creating a “rolling contract.” The buyer is given a choice to accept the additional terms with the goods or to reject them and return the goods. There is no middle ground here: A buyer on notice that additional terms are coming cannot accept the goods and reject the additional terms. Subject to the provisions on unconscionable contracts and unenforceable terms, a buyer on notice accepts the terms by any manner reasonable under the circumstances.

If the additional terms are rejected and the goods are returned, subsection (e)(3), following 2B-208(b), states that the buyer is entitled to a refund on the price paid and reimbursement for certain expenses.

Subsection (e) does not foreclose efforts by the seller to improve the time and quality of any disclosure of terms, to facilitate informed choices by the buyer, or to reduce the cost of return and insure a prompt refund of the price.

5. CISG.

SECTION 2-205. FIRM OFFERS. An offer by a merchant to buy or sell goods made in an authenticated record that by its terms gives assurance that the offer will be held open is not revocable for lack of consideration during the time stated. If no time is stated, the offer is

irrevocable for a reasonable time not exceeding three months. A term of assurance in a form record supplied by the offeree to the offeror is ineffective unless the term is conspicuous.

SOURCE: Sales, Section 2-203, 2-205.

Comment

1. Section 2-205 enables a merchant offeror to create an irrevocable offer, i.e., an option, by a signed record that assures or promises the offeree that the offer will be held open for a stated time or a reasonable time. Within that period, the offeror cannot revoke the offer and the offeree can accept even though it knows that the offeror no longer wants to contract.

To reduce the risk of unfair surprise, if the offeree provides the offeror with a form record containing a term of assurance, the term must be conspicuous.

Subsection (a) supplements rather than displaces other methods by which option contracts are created, such as with consideration or by reliance. See Restatement, Second, Contracts §87(2).

2. **CISG.** Article 16(a) provides that an offer “cannot be revoked...if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable...or if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

SECTION 2-206. OFFER AND ACCEPTANCE.

(a) Unless otherwise unambiguously indicated by the language or circumstances:

(1) An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances. A definite and seasonable expression of acceptance operates as an acceptance even though it contains terms that add to or differ from the offer.

(2) An order or other offer to buy goods for prompt or current shipment shall be construed to invite acceptance by either a prompt promise to ship or a prompt or current shipment of conforming goods or non-conforming goods. However, a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(b) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror that is not notified of acceptance within a reasonable time may treat the contract as discharged.

SOURCE: Sales, Section 2-206.

Comments

1. Assuming that an offer has been made, 2-206(a)(1) through the first sentence states the basic principle regarding the manner and medium of acceptance: Unless unambiguously indicated by the “language or circumstances”, the offer invites acceptance in “any manner and by any medium reasonable under the circumstances.” Thus, if the seller offers to sell goods in a letter communicated to the buyer and does not define or restrict the manner or medium of acceptance, the buyer can create a contract by making a promissory acceptance in a letter mailed to the seller, or in any other medium reasonable in the circumstances, such as by Fax or telegram or even by e-mail.

Section 2-206(a)(1) does not say when the acceptance becomes effective, upon posting or sending the acceptance or upon receipt. If the reasonable medium of communication involves a delay in transmission, the common law rule is that the contract is created upon posting or sending. If electronic contracting is involved, however, the contract is not formed until the

acceptance is received.

2. The second sentence in subsection (a)(1) follows former 2-207(1) up to the comma. A “definite and seasonable acceptance creates a contract even though the acceptance contains terms that add to or differ from the offer. As a practical matter, this occurs where there is language or conduct that assents to the offer and the varying terms are in the offeree’s standard forms which are attached to the acceptance. It is less likely to occur when there is disagreement over negotiated terms, such as price, quantity and credit. It is hard to envision a buyer accepting an offer to sell for \$500 by saying “I accept your offer to sell for \$600. In any event, an offeree can condition its willingness to deal upon agreement by the other party to the additional or difference terms. See 2-204(d).

3. Subsection (a)(2) follows 2-206(1)(b). To illustrate, suppose the offeror offers to buy 1,000 units for prompt shipment. The offer is construed to permit acceptance either by promptly shipping or by promising to promptly ship 1,000 units. Suppose, however, that the seller promptly ships 900 units. Under this subsection, the shipment of non-conforming goods accepts the offer to buy and creates a contract to ship 1,000 units unless the seller states that the shipment is for accommodation to the buyer. Without notice of an intended accommodation, the non-conforming shipment is normally to be understood as intended to close the bargain, even though it proves to have been at the same time a breach. The effect is to avoid price speculation by the seller during shipment by binding the seller to a contract.

4. Subsection (b) follows former §2-206(2) except that the offeror who is not promptly notified of acceptance by beginning performance may treat the contract formed as discharged rather than the offer as having lapsed. This is consistent with the Restatement, Second, of Contracts, which treats performance invited by the offeror as an acceptance by promise, §62, but treats the failure of the offeree to notify the offeror of the acceptance as a discharge of the offeror’s contractual duty. §54(2).

To illustrate, suppose that after negotiations the buyer offers to buy manufactured goods from the seller with delivery in three months. The offer in context suggests that the seller may accept by commencing performance. Commencing performance is an acceptance and a promise to complete and deliver is implied. The seller, however, must notify the buyer within a reasonable time after acceptance.

4. **CISG. Article 18(1) recognizes** that an offer may be accepted by a “statement...or other conduct by the offeree indicating assent to the offer. Subsection (2) states when an acceptance by a statement (promise) becomes effective and subsection (3) deals with when the offeree may “indicate assent by performing an act. In the former case, an acceptance by statement or promise is usually effective when received (there is no “mailbox rule), and in the latter case the acceptance is effective when the act is performed if the offeror has indicated or the parties have agreed that notice to the offeror is not required. Apparently, an acceptance by an act is ineffective if notice to the offeror is not dispensed with.

2-206A. UNENFORCEABLE TERMS IN CONSUMER CONTRACTS

(a) In a consumer contract, a court may refuse to enforce a standard term in a record the inclusion of which was materially inconsistent with reasonable commercial standards of fair dealing in contracts of this type, or, subject to Section 2-202, conflicts with one or more agreed terms.

(b) When it is claimed or appears to the court that any term of a consumer contract may be unenforceable, the parties, to aid the court in making the determination, must be afforded a reasonable opportunity to present evidence as to the term's commercial setting, purpose and effect or whether it was consistent with reasonable commercial standards of fair dealing in contracts of this type.

(c) This subsection does not apply to a term disclaiming or modifying an implied warranty which complies with Section 2-406 of this article.

Source: New.

Comments

1. Section 2-206A supplements 2-105(a) by stating when a court may refuse to enforce certain standard terms in consumer contracts. To declare a term unenforceable, the following conditions must be met:

The term must be in a consumer contract. 2-102(a)(9). An individual who buys goods that at the time of contracting are not intended to be used "primarily for personal, family, or household use" is not a consumer. 2-102(a)(9). On the other hand, if the goods are consumer goods when purchased and later are used in a business operation, there is a consumer contract. See 2B-102(a)(10).

The term must be a "standard term" included in a record. Article 2 does not define standard term or standard form. See 2B-102(46), defining "standard form." The assumption is that the standard term is drafted in advance for inclusion in the record, that the consumer was unable to influence the substance of the terms in advance, and that the term was not individually negotiated with the consumer before assent. In short, it is the

classic term offered on a “take it or leave it” basis.

The inclusion of the term in the record was “materially inconsistent with reasonable commercial standards of fair dealing in contracts of this type. Under this contextualized standard, either the method by which the term was included or the content of the term may justify non-enforcement. For example, a term of which a party had no real opportunity to review or understand would be unenforceable if the process of inclusion was materially inconsistent with reasonable commercial standards of fair dealing. Similarly, an included term that was beyond what a reasonable seller in a competitive market would include in contracts of that type might be denied enforcement. See Restatement, Second, Contracts §211(3), and comments.

A standard term that conflicts with one or more agreed (non-standard) terms may also be unenforceable. For example, suppose the parties agree that the goods are to be delivered within 30 days of the contract and that time is handwritten into a blank space for delivery. On the back of the record is a standard term that permits the seller unilaterally to extend the time for performance without notice to the buyer. Or suppose the agreed terms of the contract state that the balance of the price is due on the day when the goods are to be delivered. A standard term, however, gives the seller power to demand payment on that date even though the goods have not been tendered. Both of these standard terms are unenforceable.

2. Subsection (b), following 2-105(b), requires a hearing to aid the court in the application of subsection (a).

3. If a seller, in disclaiming or modifying an implied warranty, satisfies the requirements of Section 2-406, Section 2-206A does not apply. In short, a disclaimer that complies with 2-406 cannot be unenforceable under 2-206A. It is possible, however, that the disclaimer may still be unconscionable under the broader standard of 2-105(a).

SECTION 2-207. EFFECT OF ADDITIONAL OR DIFFERENT TERMS IN RECORDS.

_____(a) This section is subject to Section 2-206A.

(b) If a contract is formed by offer and acceptance and the acceptance is by a record containing terms additional to or different from the offer or by conduct of the parties that recognizes the existence of a contract but the records of the parties do not otherwise establish a contract for sale, the contract includes:

(1) [standard] terms in the records of the parties to the extent that the records agree;

(2) non-standard terms, whether or not in a record, to which the parties have otherwise agreed;

(3) [standard] terms in a record supplied by a party to which the other party has expressly agreed; and

(4) terms supplied or incorporated under any provision of this [Act].

(c) if a contract is formed by any manner permitted under this article and either party confirms or both parties confirm the agreement by a record, the contract includes:

(1) [standard] terms in the records, including the confirmations, of the parties to the extent that they agree;

(2) non-standard terms, whether or not in the confirming records, to which the parties have otherwise agreed;

(2) [standard] terms in a confirming record that add to or differ from the prior agreement to which the other party has expressly agreed; and

(4) terms supplied or incorporated under any provision of this [Act].

Source: Section 2-207

Comments

1. Revised 2-207 depends upon contract formation under other sections of Article 2. There are no formation rules in revised 2-207, which deals exclusively with what the terms of the contract are. The rules of term inclusion and exclusion under 2-207 do not depend upon how the contract was formed or whether the records of the parties were standard records or whether the terms were standard terms. Finally, the application of 2-207 is not affected by whether any additional or different terms in the transaction materially vary the terms of any offer or agreement made or materially vary from the default rules of Article 2. The result is a less complicated and

more direct approach to a difficult problem. It is now clearer what terms are excluded from the contract and what a party desiring to include a term must do to include it.

2. Subsection (a) states that 2-207 is subject to 2-206A, dealing with unenforceable terms in consumer contracts. See also 2-204(e), providing special rules for contracts where additional terms are proposed after payment for and at the delivery of the goods.

3. Subsection (b) is the core of revised 2-207. If a contract has been formed under the circumstances stated in the language up to the colon, the terms of that contract are determined by the language after the colon. The two most important principles are in (b)(1), which excludes terms in the records of the parties to the extent that the records do not agree, and (b)(4), which includes terms in one party's form record otherwise excluded under (b)(1) to which the other party has expressly agreed. The phrase "expressly agreed" is used without definition. In over 35 years of litigation under former 2-207 the courts have always been able to differentiate form contracts from others and to decide when a party has expressly agreed to a term in a form. See former 2-205 and 2-209(2) where the word "form" is used without definition and the comments to 2-207 where both "forms" and "expressly agreed" are used.

The operation of revised 2-207 does not depend upon whether one or both parties are merchants, whether terms that vary the offer are additional or different, or whether terms excluded under subsection (b)(1) materially alter the contract.

4. Subsection (c) follows language in former §2-207(a) and elaborates on the effect of a confirmation of a contract by a record.

5. **CISG.** The principle underlying revised 2-207 is rejected in Article 19 of CISG. In essence, a purported acceptance of an offer which contains additions, limitations or other modifications is a rejection and a counteroffer unless the reply contains "additional or different terms which do not materially alter the terms of the offer." Art. 19(2) Thus, the counteroffer is the offeree's "last shot" which can be accepted by "conduct...indicating assent" to the offer. Art. 18(1). CISG contains no protection against unfair surprise and provides no explicit method of determining what are the terms of a contract formed by mutual conduct.

Revised Section 2-207: A Road Map.

Assume that some contract has been formed under Article 2, Part 2. What are its terms? Note that some of the terms will be agreed at the time of contract formation and other terms may be included later. Even though terms included later are modifications, Section 2-207 rather than Section 2-209(a) may provide the applicable principles for inclusion. In short, 2-207 and 2-209(a) must be read together.

Caveat: To illustrate the probability that standard form terms create the greatest risk of unfair surprise or provide the greatest opportunity for opportunistic advantage taking, the

Roadmap will use the phrase “standard terms. The statute brackets the phrase “standard terms to illustrate where it should be inserted for purposes of this exercise.

(a) All standard terms are expressed in one record to which the parties have assented.

Section 2-207 does not apply here. The single record is probably integrated and subject to 2-202. For consumer contracts, see 2-206A. For commercial contracts, the usual principles of agreement apply, subject to Section 2-105(a).

(b) No standard terms are expressed in a record.

Section 2-207 does not apply here. If the agreement is oral, the statute of frauds probably applies. See 2-201. If not and there are no standard terms, the usual principles of agreement apply. If a confirmation of a contract is made in a record, however, 2-207(c) will apply.

(c) Some standard terms in the record of only one party.

Section 2-207(b) applies where the contract is formed by offer and acceptance.

For example, suppose the buyer makes an offer that is oral or is in a record with no standard terms and the seller makes a definite acceptance in a record that contains standard terms that add to or differ from the offer. A contract is formed, see 2-206(a)(1), and the seller’s varying standard terms are not part of the agreement. There is a contract on the terms in the buyer’s offer which the seller has accepted.

Suppose, further, that the seller ships and the buyer accepts the goods. Does the buyer’s conduct in accepting the goods equal agreement to the seller’s varying standard terms? Under subsection (b)(4), the answer is no where there is a record: The buyer must expressly agree to the standard term. As a practical matter, the courts have distinguished between negotiable and standard terms and have required a higher quality of assent to incorporate the boilerplate.

Finally, suppose the buyer makes an offer in a record that contains some standard terms. The seller accepts in a record that contains no standard terms. In this version of the “first shot rule, the seller’s standard terms are not part of the contract unless the records of the parties agree on the term or the seller has expressly agreed to them.

(d) Both parties exchange records with standard terms.

Subsection (b) applies if the contract is created by offer and acceptance and both the offer and the acceptance are in records and both records include some standard terms. All standard terms are “knocked out to the extent that the records do not agree. Both the “first and “last shot are neutralized and ambiguous conduct, such as shipping or accepting the goods, does not bring excluded terms back into the agreement. There must be express agreement. Similarly, if

the offeror's record says nothing about a particular issue and the offeree's acceptance states an additional term, the offeree's terms is excluded without having to determine whether it materially varied the offer or was objected to in advance by the offeror. This avoids the painful analysis required by the interaction of former 2-207(1) and 2-207(2). See *Jom, Inc. v. Adell Plastics, Inc.*, ___ F.3d ___, 36 UCC Rep. Serv.2d 1 (1st Cir. 1998)

Subsection (b) also applies if the contract is formed by conduct rather than by offer and acceptance. Again, if terms in the records are excluded because the records do not agree in substance, those excluded terms are not brought into the agreement by ambiguous conduct. Thus, if the seller seeks to include a term in its record and the buyer also has a record, the seller's term is out to the extent that the records do not agree. They would not agree unless both parties had a term on the same matter, e.g., notice time for breach of warranty, and the terms agreed in substance, e.g., 20 days vs. 18 days. This is the "knock out" rule in current 2-207(3) and Article 2.22 of the UNIDROIT Principles, except that the "knock out" does not explicitly depend upon standard terms. Hence, revised 2-207 deals with the "battle of the records." In these cases, the crucial question is how to treat the excluded terms. Can they still become part of the agreement? The answer is found in subsection (b)(4): If a form record is involved, the answer is yes if, after their initial exclusion, the parties expressly agree to them.

(e) Confirmations.

Section 2-207(c) deals specifically with records that confirm a contract previously made. Compare 2-201(b), dealing with confirmations for purposes of the statute of frauds.

Suppose Seller and Buyer conclude an oral contract not subject to the statute of frauds or a contract for sale through "informal" correspondence. Later, Seller sends a record confirming the agreement and containing terms that add to or differ from the contract. What is the effect of the varying terms?

Original 2-207(1) provided that a "written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those...agreed upon." Thus, the confirmation was treated as an acceptance rather than a proposal to modify the contract and the additional or different terms became part of the contract only if 2-207(2) was satisfied. The problem was complicated where an earlier oral agreement was unenforceable under the statute of frauds and the writing both satisfied the statute between merchants, see 2-202(2), and proposed additional or different terms. Furthermore, a confirmation proposing additional or different terms and expressly conditioning the contract upon agreement to them is probably a repudiation rather than an acceptance or a proposal for modification.

Under subsection (d), terms in the confirmation that add to or differ from the previous agreement and are expressly agreed to by the other party become part of the contract. Otherwise, they are excluded. This analysis applies if either or both parties attempt to confirm the earlier

agreement. See 2-204(e).

(f) “My way or no way.”

Section 2-204(d) recognizes that a party may condition its willingness to contract upon the other party’s agreement to terms proposed and states that language of express condition in a record must be conspicuous. The subsection also states that the express condition does not prevent contract formation if there is “conduct of both parties recognizing the existence of a contract. What are the terms of that contract?

The reporters believe that the default rule in 2-207(b) should also prevail over the express condition. The “knockout” rule eliminates terms upon which the writings do not agree and the requirement of express agreement prevents terms that were excluded from being incorporated simply because the parties have performed part or all of the agreement. In principle a party who expressly conditions its willingness to contract on agreement to specific terms and then ships the goods or accepts the goods without first obtaining that agreement should be precluded from relying on the condition and is governed by 2-207(b).

In essence, the primary reason for a 2-207 is to prevent unfair surprise and advantage taking by the use of forms in transactions where all of the terms are not contained in a single record. See UPICC Art. 2.18 - 2.22.

SECTION 2-208. COURSE OF PERFORMANCE OR PRACTICAL CONSTRUCTION.

(a) A “course of performance” is a sequence of conduct between the parties to a particular transaction that exists if:

(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party;

(2) that party performs on one or more occasions; and

(3) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

(b) A course of performance between the parties is relevant to ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may

supplement [or qualify] the terms of the agreement.

(c) Except as otherwise provided in subsection (d), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such construction is unreasonable:

(1) express terms prevail over course of performance, course of dealing, and usage of trade;

(2) course of performance prevails over course of dealing and usage of trade; and

(3) course of dealing prevails over usage of trade.

(d) Subject to Section 2-209, course of performance is relevant to show a waiver or modification of a term inconsistent with the course of performance.

SOURCE: Sales, Section 2-208; Revised 1-304 (September, 1997).

Comments

Revised Section 2-208 is derived from former §2-208 and follows Revised 1-304. Ultimately, 2-208 will be deleted from Article 2 and appear only in Article 1.

SECTION 2-209. MODIFICATION, RESCISSION, AND WAIVER.

(a) An agreement made in good faith modifying a contract under this article needs no consideration to be binding.

(b) Except in a consumer contract, an authenticated record containing a term that excludes modification or rescission except by an authenticated record may not be otherwise modified or rescinded. Such a term in a form record supplied by a merchant to a non-merchant must be conspicuous. A party whose language or conduct is inconsistent with the exclusion term is precluded from asserting the term if the language or conduct induced the other party to change

its position reasonably and in good faith.

(c) Except as provided in subsection (b), a condition in a contract may be waived by the party for whose benefit it was included. Language or conduct, including a course of performance between the parties, is relevant to show a waiver. A waiver affecting an executory portion of a contract, however, may be retracted by reasonable notification received by the other party that strict performance will be required of any term waived, unless the waiver induced the other party to change its position reasonably and in good faith.

SOURCE: Sales, Section 2-209.

Comments

1. Subsection (a) follows former 2-209(1), except that the requirement of a good faith modification, previously found in a comment 2, is explicitly stated in the statute. This follows the cases, see, e.g., *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983), and avoids the argument that a contract modification is not a "performance or enforcement" of a contract under 1-203. See 2B-303(a) (August, 1998), where the revision is rejected.

2. Second, subsection (3) of former 2-209 has been deleted. That subsection stated that the requirements of the statute of frauds "must be satisfied if the contract as modified is within its provisions. After the deletion it is clear that if the original agreement satisfies the statute of frauds, 2-201, the modification is enforceable even though it is within the statute and does not comply with subsection (a). It is less clear what happens if neither the original agreement nor the modification were in excess of \$5,000 but together they are. Arguably, the phrase "contract for sale in 2-201(a) is broad enough to include a contract as modified and the statute of frauds would apply.

3. Subsection (b) follows former §2-209(2), except as follows.

First, consumer contracts are excepted.

Second, a NOM term in a form supplied by a merchant to a non-merchant must be conspicuous. This follows the last clause of former 2-209(2), but changes the requirement of "between merchant and substitutes "conspicuous for "separately signed. See 2-204(a).

Third, the party for whose benefit the NOM term was included is precluded from enforcing it if language or conduct inconsistent with the NOM clause have induced reasonable,

good faith reliance by the other party on an oral modification. See *Brookside Farms v. Mama Rizzo's, Inc.*, 873 F. Supp. 1029 (S.D. Tex. 1995).

3. The first sentence of subsection (c) draws upon former §2-208(3) and 2-209(4) to state a general principle of "election waiver where conditions (other than the NOM condition) are involved. Express conditions for the benefit of one party, such as notice, may be waived by that party by failing to insist upon them after the condition fails. No reliance by the other party is necessary.

The second sentence of subsection (c) follows former §2-209(5), except that the reliance exception is revised to conform to subsection (b). In this so-called reliance waiver, the party for whose benefit a condition is included states that he will not insist upon the occurrence of a condition in the future. Here, however, the waiver may be retracted unless the other party has changed its position "reasonably and good faith." Subsection (c), last sentence.

In a third type of waiver not covered by revised 2-209, the court simply excuses the condition when its nonoccurrence would cause "disproportionate forfeiture" and the occurrence of the condition was not a "material part of the agreed exchange." Restatement, Second, Contracts §229. See *Aetna Casualty and Surety Co. v. Murphy*, 538 A.2d 219 (Conn. 1988)(burden on party seeking excuse to prove that condition was not a material part of exchange).

To illustrate, suppose the contract contains a NOM term and a schedule for installment deliveries by the seller. The seller encounters production problems, misses a due date and requests an extension of delivery time from the buyer.

First, suppose the buyer states that it will not insist on the NOM condition and orally agrees to a time extension. The seller does not request a written modification and proceeds to deliver under the modified schedule. Later, the seller invokes the NOM clause and sues for damages caused by late delivery. Here, the NOM clause is waived under subsection (b) by language inconsistent with the term which induced reasonable, good faith reliance and the agreed modification of the delivery schedule is enforceable if in good faith under subsection (a).

Second, suppose the buyer does not insist on a written modification and simply accepts the late installment without objection. Later, the buyer invokes the NOM clause and sues the seller for damages arising from late delivery. Once again, the NOM clause is waived under Subsection (b). Whether accepting the late delivery without objection is a waiver of seller's breach is determined under 2-702.

[B. Electronic Contracting]

The following sections follow Article 2B (August, 1998)

SECTION 2-210. LEGAL RECOGNITION OF ELECTRONIC RECORDS AND AUTHENTICATIONS. A record or authentication may not be denied legal effect solely on the ground that it is electronic.

SECTION 2-211. COMMERCIAL REASONABLENESS OF ATTRIBUTION PROCEDURE.

The commercial reasonableness of an attribution procedure is to be determined by the court. In making that determination, the following rules apply:

(1) An attribution procedure established by statute or regulation is commercially reasonable for transactions within its coverage. . . .[balance omitted]

SECTION 2-212. EFFECT OF REQUIRING COMMERCIALLY UNREASONABLE ATTRIBUTION PROCEDURE.

[See 2B-115 (August, 1998)]

SECTION 2-213. DETERMINING TO WHICH PERSON AN ELECTRONIC AUTHENTICATION, MESSAGE, RECORD, OR PERFORMANCE ATTRIBUTED; RELIANCE LOSSES.

(a) Subject to subsection (b), an electronic authentication, message, record, or performance is attributable to a person if:

(1) it was in fact the action of that person or the person's electronic agent;

(2) the receiving person, in accordance with a commercially reasonable attribution procedure for identifying a person, reasonably concluded that it was the action of the other person or the person's electronic agent.

(b) Attribution under subsection (a) (2) has the effect provided by the statute, regulation

or agreement and, in the absence of provisions in the statute or regulation, or terms in the agreement creates a presumption that the authentication, message, record or performance was that of the person to which it is attributed.

(c) If the presumption in subsection (b) applies and a person rebuts the presumption, that person is nevertheless liable for losses of the other party in the nature of reliance if the losses occur because:

(1) the person rebutting the presumption failed to exercise reasonable care;

(2) the other party reasonably relied on the belief that the person was the source of an electronic authentication, message, record, or performance;

(3) the reliance resulted from acts of a third person that obtained access numbers, codes, computer programs, or the like from a source under the control of the person rebutting the presumption; and;

(4) the use of the access numbers, codes, computer programs, or the like, created the appearance that it came from the person rebutting the presumption.

SECTION 2B-114. ATTRIBUTION PROCEDURE FOR DETECTION OF CHANGES AND ERRORS; EFFECT OF USE. If the parties use a commercially reasonable attribution procedure to detect errors or changes in an electronic record, as between the parties the following rules apply:

(1) The effect of the procedure is determined by the agreement or, in the absence of terms about the effect, by this section or the law establishing the procedure.

(2) An electronic authentication, message, record or performance that the attribution procedure indicates was unaltered since a point in time is presumed to have been

unaltered since that time.

(3) An electronic authentication, message, record, or performance created or sent pursuant to the attribution procedure is presumed to have the content intended by the person creating or sending it as to portions to which the procedure applies.

(4) If the sender complied with the attribution procedure, but the receiving party does not, and the change or error would have been detected had the receiving party also complied, the sender is not bound by a change or error.

(5) If the sender receives a notice required by the attribution procedure which describes the content as received, the sender must review the notice and report any error detected by it in a commercially reasonable manner.

SECTION 2B-115. ELECTRONIC ERROR: CONSUMER DEFENSES.

(a) In this section, "electronic error" means an error created by an information processing system, by electronic transmission of a record, or by a consumer using an electronic system, if a means for correction or avoidance of such errors was not reasonably provided.

(b) In an automated consumer transaction, the consumer is not bound by an electronic message that the consumer did not intend and that was caused by an electronic error if the consumer:

(1) promptly on learning of the other party's reliance on the message:

(A) in good faith notifies the other party of the electronic error and that the consumer did not intend the original message; and

(B) delivers all copies of any information it receives to the other party or delivers or destroys all copies pursuant to any reasonable instructions received from the other

party; and

(2) has not used or received a benefit from the information or informational rights or caused the information or value to be made available to a third party.

SECTION 2-216. AUTHENTICATION PROOF; ELECTRONIC AGENT OPERATIONS.

(a) Operations of an electronic agent constitute the authentication or manifestation of assent or performance of a person if the person used the electronic agent for such purpose.

(b) Compliance with a commercially reasonable attribution procedure for authenticating a record authenticates the record as a matter of law. Otherwise, authentication may be proven in any manner including by showing that a procedure existed pursuant to which a party or an electronic agent must have engaged in conduct or operations that authenticated the record or term in order to proceed further in the use it made of the information or informational rights.

(c) Unless the circumstances indicate otherwise, authentication is deemed to have been done with the intent to establish the person's identity, its adoption or acceptance of the record or term, its acceptance of the contract, and the integrity of the records or terms as of the time of the authentication.

SECTION 2-217. ELECTRONIC MESSAGES: TIMING OF CONTRACT; EFFECTIVENESS OF MESSAGE; ACKNOWLEDGING MESSAGES.

(a) Except as provided in subsection (b), an electronic message is effective when received even if no individual is aware of its receipt. If an offer in an electronic message initiated by a person or an electronic agent evokes an electronic message in response, a contract is formed exists:

(1) when an acceptance is received; or

(2) if the response consists of furnishing the information or access to the information, when the information or notice of access is received, unless the originating message required acceptance in a different manner.

(b) If the originator of an electronic message requests or has agreed with the addressee that receipt be acknowledged electronically, the following rules apply:

(1) A message expressly conditioned on receipt of an acknowledgment does not bind the originator until acknowledgment is received. The message is no longer effective if the acknowledgment is not received within the time specified for receipt or, in the absence of a specified time, within a reasonable time after the message was sent.

(2) If the message was not expressly conditioned on electronic acknowledgment and the acknowledgment is not received within the time specified for receipt or, in the absence of a specified time, within a reasonable time after the message was sent, the originator, on notice to the other party may:

(A) treat the message as no longer effective; or

(B) specify a further time for acknowledgment and, if acknowledgment is not received within that time, treat the message as no longer effective.

(c) Receipt of an electronic acknowledgment that creates a presumption that the message was received, but the acknowledgment does not in itself establish that the content sent corresponds to the content received.

SECTION 2-218. OFFER AND ACCEPTANCE; ELECTRONIC AGENTS. In an automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents. A contract is formed if the interaction results in the electronic agents engaging in operations that confirm or indicate the existence of a contract.

(2) A contract may be formed by the interaction of an electronic agent and an individual. A contract is formed if an individual has reason to know that the individual is dealing with an electronic agent and the individual takes actions that

(A) the individual has reason to know will cause the agent to perform, provide benefits, or permit use or access that is the subject of the contract, instruct a person or an electronic agent to do so; or

(B) the circumstances clearly indicate will constitute an acceptance regardless of other expressions or actions by the individual to which the electronic agent cannot react.

(3) The terms of the contract formed under paragraph (2) are determined under Section ---, as applicable, but do not include terms provided by the individual in a manner to which the electronic agent could not react.

(4) A party is bound by the operations of its electronic agent even if no individual was aware of or reviewed the agent's actions or their results.

Comments to Part B

Given the development of comprehensive approaches to electronic contracting by the proposed Uniform Electronic Transactions Act and Article 2B, the question is how much of this legislation is needed in Article 2 and how much should be left to other law or Article 1?

One approach is to say nothing about electronic contracting in Article 2 and leave it all to Article 1 or the UETA. If "hub and spoke" thinking makes sense anywhere, electronic contracting is that place.

Another approach is to duplicate completely the electronic contracting provisions of

Article 2B [or the UETA] in Article 2 or modify them to fit the sales context. This makes little sense from a “hub and spoke” perspective but, as a practical matter, may be necessary if Article 2 is enacted before Article 2B or the UETA. If so, there must be an effective process to coordinate and harmonize these common rules.

A middle approach for Article 2 is to include the definitions and provisions relevant to contract formation and to recurring problems of sending and receiving electronic messages and authenticating records. This would leave to other law the varied problems of (1) attribution procedures, reasonable and unreasonable, (2) to whom should an electronic message be attributed and reliance losses, (3) procedures for detection of changes and errors, and (4) electronic error.

A first cut at this limited coverage would include:

Selected definitions.

Transactions subject to other law, 2-104(d)

Formation by operation of electronic agents, 2-204(a)

Legal recognition of electronic records, 2-210

Electronic messages: timing, effectiveness, acknowledgments, 2-216.

Offer and acceptance; electronic agents, 2-217

Subpart (b) in the December, 1998 Draft simply replicates the electronic contracting provisions of the August, 1998 Draft of Article 2B without comment.

PART 3

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

SECTION 2-301. HOW CONTRACT PRICE PAYABLE.

(a) The contract price can be made payable in money or otherwise. If the price is payable in whole or in part in goods, each transferor is a seller of the goods transferred.

(b) If all or part of the contract price is payable in an interest in real property, this article applies to the transfer of goods but not to the transfer of the interest in real property or the transferor's obligations in connection therewith..

SOURCE: Sales, Section 2-304.

Substantive changes: None

Comments

1. Part 3 on “General Obligation and Construction of Contract” assumes, in most cases, that a contract has been formed between the parties and that they are obligated to perform in accordance with the contract. 2-601. Further, the sections on Part 3 normally apply unless otherwise agreed by the parties. See 2-108. Thus, most sections in Part 3 supply “gap fillers that are not, strictly speaking, “terms of the “agreement as those words are defined. See 1-201(3), (42). Nevertheless, the “gap fillers are supplied terms of the contract that are reasonable in the circumstances and will be enforced as if the parties had agreed to them. See Restatement, Second, Contracts §204.

2. In most contracts for sale, the buyer agrees to pay in money. This is the expected price. Under subsection (a), however, the parties may agree that the price may be paid in goods, or services or an interest in real property. A barter is permitted. If goods are sold in exchange for goods, both parties are sellers of the goods transferred and their obligations are governed by this article. Thus, a party who trades in a used car to purchase a new car is a seller of the used car and would make a warranty of title under 2-402.

Subsection (b) applies when goods are sold in exchange for an interest in real property. Article 2 does not apply to the transfer of real property or any obligations connected with the transfer. In this transaction, therefore, Article 2 applies to the goods transfer and the law of real property applies to the real property transfer. The same analysis follows if the goods are sold in exchange for the performance of services: Article 2 does not apply to the service obligation.

This transaction should be distinguished from the contract where the seller is to both deliver goods and perform services in exchange for money. In this mixed transaction, Article 2 applies if the sale of goods predominates but not if the dominate feature is the performance of services. See 2-103(a), comment 1.

3. **CISG.** Article 53 states that the buyer “must pay the price for the goods and take delivery of them as required by the contract and this Convention. Articles 54 through 59 then deal with the buyer’s responsibility to comply with required formalities to enable the price to be paid and provide default rules for open price contracts and where and when the price is to be paid.

SECTION 2-302. PERFORMANCE AT SINGLE TIME.

(a) If all of a seller's performance can be rendered at one time, full performance must be tendered. The buyer’s duty to accept and pay arises only on tender of all of the goods or on the completion of full performance.

(b) If circumstances give either party the right to make or demand performance in parts or over a period of time, payment, if it can be apportioned, may be demanded for each part performance.

SOURCE: Sales, Section 2-307.

Comments

1. Subsection (a) covers the seller's performance of the contract, which may include tender of the goods and their assembly or installation. Full performance at one time by the seller is required, unless the parties have agreed to an installment contract, see 2-710(a), or subsection (b) applies, and full performance is a condition to the buyer's duty to accept and pay.

If the seller's performance takes time to complete, the completed performance must be tendered before the buyer has a duty to accept and pay. See 2-606(a).

2. Subsection (b) provides an exception based upon the circumstances of the case. In short, the circumstances may justify a tender of less than full performance and create what amounts to an installment contract. In this case, a partial performance is not subject to rejection if the circumstances do not indicate a repudiation or default by the seller as to the balance due or do not give the buyer grounds for suspending performance because of insecurity under 2-711. However, the undelivered balance or incomplete performance must be forthcoming within a reasonable time and in a reasonable manner.

If circumstances do not justify the exception, subsection (a) applies and payment is not due until the seller has tendered all of the goods or completed full performance.

For example, suppose the seller is to deliver 10,000 tons of coal at \$25 per ton by November 1. The goods are to be shipped to the buyer. Due to a temporary shortage of rail cars, the seller was able to ship only 5,000 tons on October 24. The balance was shipped on October 27 and arrived by November 1. Under subsection (b), circumstances gave the seller the right to make performance in parts and to demand payment for each part. The buyer cannot reject the first shipment on the deficiency in quantity alone.

3. **CISG.** The seller's obligations regarding delivery of the goods are covered in Articles 30 through 33.

SECTION 2-303. OPEN-PRICE TERM.

(a) The parties, if they so intend, may form a contract for sale even though the price is

not agreed. In these cases, the price is a reasonable price at the time for delivery if:

(1) nothing is said as to price;

(2) the price is left to be agreed by the parties and they fail to agree; or

(3) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third party or agency and it is not so set or recorded.

(b) A price to be fixed by the seller or the buyer means a price to be fixed in good faith.

(d) If a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party, the other party at its option may treat the contract as canceled or may fix a reasonable price.

(e) Where the parties intend not to be bound unless the contract price is fixed or agreed and it is not fixed or agreed, there is no contract. In that case, the buyer must return any goods already received or, if unable to do so, must pay their reasonable value at the time of delivery, and the seller must return any portion of the contract price paid on account.

SOURCE: Sales, Section 2-305.

Substantive changes: None

Comments

1. Subsection (a) deals with agreements where the parties intend to contract even though the price is not agreed, or is left to be agreed in the future, or is left to be fixed by external standards. These open price agreements should be contrasted with contracts where the price is fixed, with or without various forms of escalation. Section 2-303 does not apply in these cases.

Assuming that the parties intended to contract, see 2-204(a), and the price is not agreed or fixed, the price is a “reasonable price at the time of delivery. This “gap filler insures that the contract does not fail for indefiniteness because there is a “reasonably certain basis for an appropriate remedy. 2-204(c).

The primary purpose of open price contracts is to keep the price in touch with changing

market conditions. This is especially important in contracts with extended duration. For example, under a fixed price installment contract for a five year duration market fluctuations could create incentives for either party to breach. Thus, in rising markets the seller would prefer to sell to other buyers at the market price and in falling markets the buyer would prefer to buy from other sellers at the market price. The fixed price prevents this and locks the parties into the deal.

To illustrate, suppose the parties enter into a ten year installment contract for the delivery of 10,000 tons of steel. The price is to be fixed by an external source every for months based upon current market conditions. If that price is not fixed, the parties agree to agree on the price. If the external source fails to fix the price, the parties are unable to agree, and the parties still intended to contract, the price is a “reasonable price at the time of delivery. Note that the price is still a reasonable price even though the parties fail to agree in good faith.

2. Subsection (b) deals with agreements conferring on either the seller or the buyer discretion to fix the price. A price fixed in good faith, i.e., with honesty in fact and the observance of reasonable commercial standards of fair dealing, supplies the price term for the contract. Subsection (a) does not apply.

If the price is fixed in bad faith or is not fixed through the fault of one party, subsection (b) rather than subsection (a) applies. The other party has an option to cancel the contract or to fix a reasonable price. If the price were to be fixed by agreement of the parties and it was not agreed or one party was in bad faith, subsection (a) applies.

3. Subsection (d) deals with the case where the parties intend not to be bound unless the price is fixed by an external standard or agreed by the parties. If the unless clause is not satisfied, there is no contract and both parties are entitled to restitution as stated.

4. **CISG.** Article 55 provides that if the parties have concluded a valid contract but have failed to fix or make a provision for fixing the price, they are “considered...to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

SECTION 2-304. OUTPUT, REQUIREMENTS, AND EXCLUSIVE DEALING.

(a) A term that measures the quantity of goods by the output of the seller or the requirements of the buyer means the actual output or requirements that may occur in good faith. If there are actual outputs or requirements in good faith, a party may not tender or demand a quantity unreasonably disproportionate to a stated estimate or, in the absence of a stated estimate,

to any normal or otherwise comparable previous output or requirements.

(b) An agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

SOURCE: Sales, Section 2-306.

Substantive changes: Clarified to state that a party with no output or requirements in good faith is not subject to the unreasonably disproportionate standard.

Comments

1. 2-304 accomplishes the following objectives.

First, it states the meaning of "output" and "requirements" terms when used in a contract for sale. Such terms do not cause a contract to fail for indefiniteness. See 2-204(c). The parties may agree upon a fixed quantity or no quantity or something in between. But unless the parties agree to measure all or part of the quantity by "output" or "requirements," 2-304(a) does not apply. See *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, 925 S.W. 2d 759 (Tex. 1996)(holding that contested quantity term was not a requirements or output contract).

Second, it imposes a duty of good faith on the exercise of discretion by either party to determine the level of output or requirements. Section 2-306(a), however, does not require that there must be an exclusive dealing arrangement before an output or requirements term is enforceable. Although some states require exclusive dealing, see *Essco Geometric v. Harvard Industries*, 46 F.3d 718 (8th Cir. 1995)(Missouri law), this extreme position is rejected. The term should be enforceable where the seller or buyer agrees to supply or demand all or part of its output or requirements to or from the other. See *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991)(non-exclusive requirements term satisfies statute of frauds); Restatement (Second) Contracts §79(c)(where consideration requirement is met there is no additional requirement of mutuality of obligation). For example, a term where the buyer agrees to buy 10% of its actual requirements in good faith from the seller should be enforceable. On the other hand, the buyer would not have the additional obligation to use "best efforts" unless there was an exclusive dealing contract. §2-304(2). See *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119 (3d Cir. 1992).

Third, it clarifies that if there are no actual output or requirements in good faith, the party has no duty to perform even though there are estimates in the contract or there were prior output or requirements. The question is whether the lack of output or requirements occurred in good faith, not whether the lack of actual output or requirements was "unreasonably disproportionate."

This follows the interpretation of prior §2-306(1) in *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333 (7th Cir. 1988), but rejects the court's dictum that the unreasonably disproportionate limitation is not applicable to any decrease in quantity or requirements. See also, *Brewster of Lynchburg, Inc. v. Dial Corp.*, 35 F.3d 355 (4th Cir. 1994); *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119 (3d Cir. 1992).

Fourth, the question when a party with no actual output or requirements has acted in good faith is more difficult to answer. Some courts have drawn the line between decisions made because the contract is simply unprofitable or too costly (bad faith) and those made because an event external to the contract has adversely affected the viability of the entire enterprise (good faith). The traditional definitions of good faith, see §2-103(1)(b) of the 1990 Official Text, do not clearly respond to this problem. At least one court has held, however, that bad faith is established if the party claiming no actual requirements fails to offer a reason for that situation. See *Empire Gas Corp.*, *supra*.

Fifth, in cases where there are some actual output or requirements in good faith, §2-304(a) further controls the exercise of discretion by requiring a reasonable proportion between agreed estimates or prior comparable output or requirements and the goods actually supplied or ordered. Suppose, for example, that the buyer estimated its requirements to be 50,000 units per year. Over a five year period, the buyer's orders averaged between 45,000 to 55,000 per year. In the 6th year, buyer's actual requirements in good faith were 80,000 per year. If 80,000 units were ordered, the question is whether the quantity is "unreasonably disproportionate" to the stated estimate and this question is answered more by the size of the variations and whether they were reasonably foreseeable at the time of the contract than the motives of the buyer or seller. See *Orange & Rockland v. Amerada Hess Corp.*, 397 N.Y.S.2d 814 (N.Y.A.D. 1977).

2. Subsection (b) states the effect of an exclusive dealing agreement which is otherwise valid under anti-trust or other laws: The parties must use best efforts to supply the goods or to promote their sale. Although "best efforts" is not defined in the statute, the duty of good faith and the standard of commercial reasonableness apply to judge the effort or lack of effort by a party. When exclusive dealing is coupled with a requirements term, a buyer who has no requirements in good faith may still have failed to use best efforts to promote the sale.

SECTION 2-305. ABSENCE OF SPECIFICATION OF PLACE FOR DELIVERY.

(a) The place for delivery of goods is the seller's place of business or, if there is none, its residence.

(b) In a contract for sale of identified goods that to the knowledge of the parties at the time of contracting are in some place other than that described in subsection (a), that place is the

place for their delivery.

(c) Documents of title may be delivered through customary banking channels.

SOURCE: Sales, Section 2-308.

Substantive changes: None.

Comments

1. If the seller is not expected or required to ship the goods by carrier, subsection (a) states the place where the buyer is to go to take delivery: The seller's place of business or residence. The seller must first tender delivery under 2-602(a).

If the goods are identified and both parties know they are located at some other place, that other place is where the buyer must go to take delivery. The goods, for example, could be in a storage facility owned by the seller in another city or could be in the possession of a warehouse or another bailee. If the goods are in the possession of a bailee and are to be delivered without being moved, the seller's tender of delivery must comply with 2-602(c).

2. Subsection (b) states only that a document of title may be delivered through customary banking channels. If so delivered, customarily the bank will notify the buyer when the document has arrived and the buyer bears the expense of picking up the document from the bank and taking delivery of the goods from the carrier or warehouse. If the contract requires payment against documents and a bank purchases or agrees to collect a sight draft, the collection duties in Article 4, Part 5 will apply. If a letter of credit is involved, Article 5 deals with duties regarding the document of title. See 5-108.

2. **CISG.** Article 31 states the place where goods are to be delivered and Article 34 deals with the delivery of documents.

SECTION 2-306. TIME FOR PERFORMANCE NOT SPECIFIED.

(a) Except as otherwise provided in this article, the time for performance or any other action under an agreement in which a time for performance is not specified is a reasonable time.

(b) Where an agreement provides for successive performances but is indefinite in duration, the duration is a reasonable time. Subject to Section 2-311, either party may terminate the contract at any time.

SOURCE: Sales, Section 2-309(1) and (2)

Comments

1. Subsection (a), which substitutes "performance" for the phrase "shipment or delivery," states that the time for performance if not otherwise specified is a reasonable time. See 1-204(2). The time for performance may be otherwise specified in the agreement or another section in this article. See 2-205.

2. Subsection (b) states that an agreement for successive performances where the duration is indefinite is terminable at will by either party if the notice requirements of 2-311 are satisfied. Subsection (b) does not apply where the goods are to be delivered in a single lot but does apply to installment contracts. For example, a contract to deliver 1,000 units without stating a time for delivery would be governed by subsection (a). On the other hand, a contract for the buyer's monthly requirements without stating a duration would be governed by subsection (b).

3. **CISG.** The time for delivery of goods by the seller is stated in Article 33 and the time for payment of the price is stated in Article 58.

**SECTION 2-307. OPTIONS AND COOPERATION RESPECTING
PERFORMANCE.**

(a) An agreement that is otherwise sufficiently definite to form a contract is not made unenforceable because it leaves particulars of performance open, or to be specified by one of the parties, or to be fixed by agreement. If one party is to specify the particulars of performance, the specification must be made in good faith and within limits of commercial reasonableness. [If terms are left to be fixed by agreement, the parties shall make a good faith effort to reach agreement.]

(b) An agreement providing that performance by the seller shall be to the satisfaction of the buyer without specifying the standard of performance requires the performance to be such that a reasonable person in the position of the buyer would be satisfied.

(c) A specification relating to an assortment of goods is at the buyer's option. Except as

otherwise provided in subsection (d), a specification or arrangement relating to shipment is at the seller's option.

(d) Where a specification by one party would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party, in addition to all other remedies:

(1) is excused for any resulting delay in its own performance; and

(2) may proceed to perform in any reasonable manner or, after the time for a material part of the party's own performance, treat the failure to specify or cooperate as a breach by failure to deliver or accept the goods.

SOURCE: Sales, Section 2-311.

Comments

1. Subsection (a) follows former 2-311(1), but is broadened to include a contract that leaves particulars of performance to be fixed by agreement. This is consistent with the principle in 2-204(c) and 2-303. If the parties do not intend to form a contract until gaps are filled or particulars are specified, the agreement is not enforceable. 2-204(c), 2-303(d).

The last sentence in subsection (a), which is subject to review by the Drafting Committee, makes clear that if the agreement leaves particulars of performance to be fixed by agreement, the parties shall, at a minimum, make a good faith effort to reach agreement. If they fail to agree in good faith, the gap can be filled by the court if the parties still intended to contract. Bad faith in negotiating, however, is a breach of contract.

2. Subsection (b) is new. It establishes an objective test for reviewing the exercise of discretion under a condition of satisfaction. Thus, if a party is honestly dissatisfied but a reasonable person would be satisfied, the other party's performance is conforming to the contract.

3. Subsection (c) is revised to eliminate reference to shipment terms in former 2-319.

Those terms have been removed from Article 2.

4. Subsection (d) follows former 2-311(3). It makes explicit some aspects of the duty of good faith performance and states particular remedies in addition to those normally available for breach of contract.

5. There is no comparable provision in **CISG**.

SECTION 2-308. FAILURE TO PAY BY AGREED LETTER OF CREDIT.

(a) If the parties agree that the primary method of payment shall be by letter of credit, the buyer's obligation to pay is suspended by seasonable delivery to the seller of a letter of credit issued or confirmed by a financing agency of good repute in which the issuer and any confirmer undertakes to pay against presentation of documents evidencing delivery.

(b) Failure of a party seasonably to furnish a letter of credit as agreed is a breach of the contract for sale.

(c) If the letter of credit is wrongfully dishonored or repudiated, the seller on seasonable notification may require payment directly from the buyer.

SOURCE: Sales, Section 2-325.

Substantive changes: Revised to conform to Article 5.

Comments

1. Former 2-325 has been revised to conform to the terminology of Article 5. See 2-102(a)(21). There are no definitions in Article 2 of such terms as "letter of credit," or "banker's credit," or "confirmed credit."

2. Subsection (a) states the effect of the tender to the seller of a letter of credit agreed by the parties to be the primary method of payment. As with the issue of an instrument, 3-310, the buyer's duty to pay is suspended until the letter or credit is honored or dishonored. Note that the financing agency, see 2-102(a)(16), which is typically a bank, must be in good repute and be obligated to pay upon presentation of documents evidencing delivery. If the delivery is overseas, the financing agency must be of good international repute. Once the obligation is suspended, all other aspects of the transaction until the letter of credit is honored or dishonored are governed by

Article 5.

3. Under subsection (b), the failure of the buyer to seasonably furnish a letter of credit as agreed is a breach of contract. See 2-701(a), (b)(2). For the seller's remedial options, see 2-815.

4. Subsection (c) states the seller's remedy if the letter of credit is repudiated or wrongfully dishonored: The seller may require payment directly from the buyer. In short, the seller may recover the agreed price, see 2-822, even if the goods are still in transit or have not been inspected by the buyer.

5. Section 2-605 states the rights of a financing agency that has honored a letter of credit or purchased a draft presented with necessary documents. The Drafting Committee must still decide whether those rights should be stated in Article 2 or left to Article 5. To avoid redundancy and potential conflict, the latter course is preferable. Similarly, 2-610 provides a default rule on the time when documents of title must be delivered to the issuer of a letter of credit. Is it necessary to state this rule in Article 2?

Section 2-611, which deals with the time and place for payment, is not intended to cover letters of credit.

6. There is no comparable provision in **CISG**.

SECTION 2-309. SHIPMENT TERMS; SOURCE OF MEANING. The effect of a party's use of shipment terms such as “FOB”, “CIF”, or the like, must be interpreted in light of applicable usage of trade and any course of performance or course of dealing between the parties..

SOURCE: Sales, Sections 2-319, 2-320, 2-321, 2-322, 2-324.

Comments

1. Sections 2-319 through 2-324 of current Article 2 are out of date with commercial practice and have been repealed. Revised 2-309 directs the courts to interpret shipping and delivery terms in the same manner as other contract terms, with particular reference to usage of trade, course of performance and course of dealing. The Incoterms of the International Chamber of Commerce, frequently used in international sales, may be relevant to the meaning of these terms.

2. There are new commercial delivery terms which have come into use, especially in international transactions, since the drafting of the original Article 2. These terms evolve over

time, and a statutory definition cannot easily respond adequately to changes in commercial practice.

Under the original Article 2, “FOB” could be used to refer either to “FOB place of shipment” or “FOB place of destination,” so that it could be used in either a shipment or a destination contract. Where it was used in a shipment contract, the norm has been for the seller to arrange transportation and insurance. It could be used with any type of carriage--land, sea or air.

The I.C.C.’s Incoterms are often used in international transactions and have a more restricted meaning for FOB, so that it should be used only with water-borne contracts of carriage. Under Incoterms FOB commercial term, the seller is obligated to deliver the goods on board a ship arranged for and named by the buyer at a named port of shipment. Thus, the seller must bear the costs and risks of both inland transportation to the named port of shipment and loading the goods on the ship. The seller has no obligation to arrange transportation or insurance, but does have a duty to notify the buyer at the time the goods have been delivered on ship. The risk of loss transfers to the buyer at the time the goods have passed the ship’s rail. The seller must provide a commercial invoice, or its equivalent electronic message, an necessary export license, and usually a transport document that will allow the buyer to take delivery--or an equivalent electronic data interchange message. For a broader treatment, see John A. Spanogle, *Incoterms and UCC Article 2--Conflicts and Confusions*, 31 *The International Lawyer* 111(1997).

SECTION 2-310. TERMINATION; SURVIVAL OF OBLIGATIONS AND TERMS.

(a) Except as otherwise provided in subsection (b), on the termination of a contract all obligations that are still executory on both sides are discharged.

(b) The following survive termination of a contract:

- (1) a right based on a previous breach or performance of the contract;
- (2) a term limiting the scope, manner, method, or location of the exercise of rights in the goods;
- (3) an obligation of confidentiality, non-disclosure, or non-competition;
- (4) an obligation to return or dispose of goods or return any unearned part of the price;

(5) a choice of law or forum ;

(6) an obligation to arbitrate or otherwise resolve disputes through alternative dispute resolution procedures;

(7) a term limiting the time for commencing an action or for providing notice;

(8) an indemnity term;

(9) a limitation of remedy or modification or disclaimer of warranty;

(10) any term limiting disclosure of information; and

(11) other rights, remedies, or limitations if in the circumstances such survival is necessary to achieve the purposes of the parties.

(c) The obligation under subsection (b)(4) must be promptly performed.

SOURCE: Licenses, Section 2B-626.

Comments

Section 2-310 is new and follows 2B-626 (August, 1998.) “Terminate” means “to end a contract or a part thereof by an act by a party under a power created by agreement or law , or by operation of the terms of the agreement for a reason other than for breach by the other party. 2-102(a)(29). This section is still subject to review by the Drafting Committee.

SECTION 2-311. TERMINATION; NOTIFICATION.

(a) Except on the happening of an agreed event, such as the expiration of the stated term, a party may not terminate a contract unless the other party receives notice of the termination and is given a reasonable time before the termination is effective.

(b) A term dispensing with notification is invalid if its operation is unconscionable.

However, a term specifying standards for the nature and timing of notification is enforceable if the standards are not manifestly unreasonable.

SOURCE: Sales, Section 2-309(3).

Comments

1. Section 2-311 follows former 2-509(3) with the following clarifying revisions: (1) An "agreed event" in subsection (a) includes a stated expiration term or date; (2) A notice of termination must be received and must give the terminated party a reasonable time before the termination is effective; and (3) The parties may agree to standards for the nature and timing of notice if they are not manifestly unreasonable.

2. Section 2-311 operates as follows. Assuming that a party has power to terminate the contract, 2-311(a) states when notice is a condition precedent to termination and subsection (b) limits agreements attempting to dispense with the notice requirement. See former 2-309(3). In short, the power to terminate at will is conditioned upon the receipt by the other party of "notification" which gives a reasonable time before the termination is effective. "Reasonable time," in turn, "depends on the nature, purpose and circumstances of such action." §1-204(2).

There are three exceptions to this important default rule.

First, notice is not required if the contract provides that termination will occur on the "happening of an agreed event." For example, if the parties in a requirements contract agree that the contract is terminated if the buyer has no actual requirements in good faith, a termination notice is not required.

Second, the parties can agree on what is reasonable notification, if the agreement is not "manifestly unreasonable." Section 1-204(1). Franchise and distributorship contracts typically provide for 30, 60 or 90 days notice and the courts have generally upheld such time provisions as reasonable.

Finally, the parties can agree to dispense with notification, unless the "operation" of that agreement "is unconscionable." Compare 2-105(a), which ties unconscionability to the time of contracting, but gives a court power to "limit the application of any unconscionable term as to avoid any unconscionable result."

The last two limitations relate to the other party's investment in the contract and the opportunity to salvage and reinvest after termination. Thus, if the contract investment is substantial and the reinvestment process is difficult, the more likely it is that, say, an agreed 10 day notice is unreasonable or that an agreement dispensing with notice operates in an unconscionable manner. The assumption is that except for part performance under the contract, the terminated party assumes the financial risk of a proper termination.

Without more, the exercise of an agreed power to terminate is also subject to the duty of good faith, 1-203, which cannot be disclaimed by agreement. 1-102(3). Many courts, however,

have found good faith where the terminating party follows the terms of an otherwise conscionable termination clause. Under this approach, the motive of the terminating party is irrelevant and the agreed termination is effective if a reasonable notice is given. This does not, however, foreclose proof of other conduct that amounts to bad faith in performance or in attempting to recapture opportunities that were foreclosed upon the making of the contract. See *Sons of Thunder, Inc. v. Borden, Inc.*, 690 A.2d 575 (N.J. 1997), which made the distinction between a good faith termination under the contract and bad faith in performance prior to the termination.

SECTION 2-312. SALE BY AUCTION.

(a) In a sale by auction, if goods are put up in lots each lot is the subject of a separate sale.

(b) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in any other customary manner. If a bid is made during the process of completing the sale but before a prior bid is accepted, the auctioneer may in its discretion reopen the bidding or declare the goods sold under the prior bid.

(c) A sale by auction is subject to the seller's power to withdraw the goods unless at the time the goods are put up or during the course of the auction it is announced in express terms that the power to withdraw the goods is not reserved. In an auction where power to withdraw the goods is reserved, the auctioneer may withdraw the goods at any time until completion of the sale is announced. In an auction where power to withdraw the goods is not reserved, after the auctioneer calls for bids on an article or lot, the article or lot may not be withdrawn unless no bid is made within a reasonable time. In either case, a bidder may retract a bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(d) If an auctioneer knowingly receives a bid on a seller's behalf or the seller makes or procures a bid, and notice has not been given that authority for such bidding is reserved, the

buyer at the buyer's option may avoid the sale or take the goods at the price of the last bid made in good faith before the completion of the sale. This subsection does not apply to a bid at an auction required by law.

SOURCE: Sales, Section 2-328.

Comments

1. Section 2-311 makes three changes in former 2-328. First, subsection (b) clarifies that the auctioneer's discretion to reopen the bidding applies regardless of the method of completing the sale. Second, at the request of the auction industry, the concept of "power to withdraw the goods" is substituted for the phrase "with reserve" in subsection (c). The meaning of the latter phrase is ambiguous. Finally, subsection (d) clarifies the meaning of a forced sale. There are relatively few cases under former 2-328 and they reveal no significant problems of interpretation. For a focused analysis, see Jorge Contreras, *The Art Auctioneer: Duties and Assumptions*, 13 Hastings Comm./Ent. L. J. 717 (1991); Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 Wm. & Mary L. Rev. 501 (1988).

2. Operation and effect.

Subsection (a). In a "sale by auction" the auctioneer "invites price offers from successive bidders which it may accept or reject." Restatement (Second), Contracts §28(1). Although not specifically stated, an auctioneer can condition delivery upon payment for all goods sold, even if the sale is in separate lots. If each lot is a separate sale, bidders who arrive late are on constructive notice of the terms of later sales. Restatement (Second), Contracts § 28(2).

Subsection (b). In subsection (b), the quaint phrase "fall of the hammer" is preserved in the first sentence but not thereafter. The more inclusive phrase "during the process of completing the sale" is used rather than "while the hammer is falling."

Subsection (c). Under subsection (c), the default rule is that the sale is "subject to the seller's power to withdraw the goods." Thus, the auctioneer invites bids (offers), reserves the power to accept or reject them and bidders assume the risk that the goods will be withdrawn before the sale is concluded. The contract is concluded, however, when the completion of the sale is announced. See *Sly v. First Nat'l Bank of Scottsboro*, 387 So.2d 198 (Ala. 1980); Restatement (Second), Contracts §§ 26, 28, Comment b.

If it is announced in "express terms" that the auction is not subject to the seller's power to withdraw the goods, a contract is not formed until some bid is made within a reasonable time and not withdrawn by the bidder before the auctioneer announces the completion of the sale. Both parties have some discretion (the auctioneer's is more limited) after the bid is made. This

supports the conclusion that the contract is formed at the place where the auctioneer accepts the bid, rather than at the point where the bid is made, whether made by mail or through EDI.

Because of different usage, the phrases “with reserve” and “without reserve” are no longer used in the text. Nevertheless, auction sales subject to the seller’s power to withdraw the goods are known as sales “with reserve,” while auction sales where the seller has no power to withdraw the goods are known as sales “without reserve” or “absolute” sales.

The assumption is that a seller, at a minimum, must give notice if it bids at an “unforced auction and some auctioneer’s believe that the seller should not be able to bid at all at a sale where the seller has no power to withdraw the goods. Suppose, during the course of an auction where the seller reserves power to withdraw the goods, the auctioneer expressly announces that the seller no longer reserves power to withdraw the goods. Original 2-328(3) did not recognize this conversion possibility, which exists in practice. Such a conversion, in effect, announces a “reserve bid” in that the goods will not be sold below the last bid before the conversion. Presumably, a sale “without reserve” can also be converted to a sale “with reserve” during the course of the auction. For a case holding that the goods were not in “explicit terms” put up without reserve where the auctioneer stated that there was no minimum bid and the goods would be sold to the highest bidder, see *Miami Aviation Serv. v. Greyhound Leasing & Finance Corp.*, 856 F.2d 166 (11th Cir. 1988).

Subsection (c) does not deal with the so-called conditional sale, where final approval after the sale is concluded is reserved to the seller, a secured party or a court. These conditions are enforced by the courts. *Lawrence Paper Co. v. Rosen & Co.*, 939 F.2d 376 (6th Cir. 1991). Language dealing with the “conditional sale,” a third method of sale by auction, has not been added.

Subsection (d). A sale where the seller reserves power to withdraw the goods at any time should be distinguished from bids by the seller without proper notice. The latter problem, which raises questions of rigged or fraudulent bidding, is addressed in subsection (d). See *Vanier v. Ponsoldt*, 833 P.2d 949 (Kan. 1992)(bid rigging).

Although subsection (d) is silent, the courts have required a bidder to take action to avoid the sale or take the goods at the last good faith bid within a reasonable time after he discovered or should have discovered the operative facts.

The last sentence of 2-328(4) of the 1995 Official Text states that the subsection does not apply to a “forced sale.” To avoid conflicts with auction sales under Article 9 and 2-819(c), this phrase has been replaced by “an auction required by law.” Resales under Article 2 and dispositions under Article 9 are permitted, not required by law. It is assumed that creditors can bid at auctions required by statute or court order without giving notice, unless notice is required by applicable law. Note, however, that in a public auction to implement a resale following a breach of contract, the requirements of 2-819(c) must be met before the seller is entitled to the

remedy in 2-819(a).

3. Auctions, warranties and disclaimers.

In Part 4, Warranties, “Seller” is defined to include “an auctioneer or liquidator that fails to disclose that it is acting on behalf of a principal. 2-401(6). There is no requirement that the auctioneer disclose the name or names of any principals before or after the sale.

An auctioneer who does not disclose that it is acting on behalf of a principal may make any warranty described in Part 4, including a warranty of title. Otherwise, applicable warranties are made to the buyer by the seller, the auctioneer’s principal.

Section 2-403 provides that express warranties may be made by a seller (auctioneer or principal) to an immediate buyer (the bidder), both through representations made at or just prior to the auction or in a “medium for communication to the public, including advertising. As a practical matter, implied warranties are rarely made at auctions and, in any event, it is the usual practice of the auction industry to offer goods “as is, where is” with no implied warranties made by the auctioneer. This practice is validated and facilitated in revised 2-406(b).

PART 4.

WARRANTIES

SECTION 2-401. DEFINITIONS. In this part:

(1) "Damage" means all loss resulting from a breach of warranty, including incidental and consequential damages.

(2) "Goods" includes a component incorporated in substantially the same condition into other goods.

(3) "Immediate buyer" means a buyer in a contractual relationship with the seller.

(4) "Remote buyer" means a buyer from a person other than the seller against which a claim for breach of warranty is asserted.

(5) “Representation” means a description of the goods, an affirmation of fact or a promise about the quality or performance of the goods to be delivered, or a sample or model of

the goods

(6) “Seller includes an auctioneer or liquidator that fails to disclose that it is acting on behalf of a principal.

Comments

Source: New

1. In Revised Article 2 the warranty provisions are placed in a separate Part 4. The primary objective has been to clarify or restate the law of warranty, not to expand the seller’s liability or to make it more difficult for a seller to control or limit what is said about the goods, whether to an immediate buyer or the public, or to limit or exclude a warranty made.

Nevertheless, at least two developments support a revision that is sensitive to the interests of the buying public.

The first is the almost universal acceptance of the so-called “economic loss” rule. Under a common version of this judge-made doctrine, the law of torts does not apply if the non-conforming goods cause only disappointed expectations [economic loss] or damage to the goods sold. In these cases, it is the law of contracts, represented by Article 2, that controls. See, e.g., *Alloway v. General Marine Indus., L.P.*, 694 A.2d 264 (N.J. 1997); *Bocre Leasing Corp. v. General Motors Corp.*, 645 N.E.2d 1195 (N.Y. 1995); American Law Institute, *Restatement of the Law Torts: Products Liability* §1, 21 (1998). Thus, the buyer of goods manufactured by a remote seller but purchased from a retailer or dealer who suffers economic loss from a non-conformity is limited by the Code’s contract rules on privity, notice, disclaimers and the statute of limitations unless it has sufficient bargaining power to protect itself. In consumer contracts, many question whether consumers have sufficient bargaining power to adequately protect their interest.

The second is the increasing use by sellers of advertising and other methods of electronic communication to stimulate sales, whether made directly to buyers or through retailers and dealers. Since the original Article 2 was based upon a different model of how contracts for sale were negotiated and concluded, revisions should consider whether the older model of sales law is still viable. For example, since many sales are concluded after advertising to the public or through warranties passed through a dealer by a manufacturer, Article 2 has been revised to codify the existing case law in this area rather than leave it to the common law process. See Section 2-408.

2. Remedial promises. Section 2-401, which is new, provides common definitions for use in Part 4. Among other things, a distinction is drawn between promises which are treated as representations, 2-401(5), and “remedial promises,” defined in 2-102(a)(31A). The former, like affirmations of fact, determine the quality of goods that the buyer can expect on delivery or, if a

promise for future performance is made, determine post-delivery expectations. The latter involves the seller's commitment to take remedial action, such as to repair or replace defective parts of workmanship, if the goods do not conform to warranties made. See *Flagg Energy Development Corp. v. General Motors Corp.*, 709 A.2d 1075, 1080 (Conn. 1980).

It seems clear that although a remedial promise is not a warranty and it does require distinct treatment. Remedial promises are frequently made in connection with express and implied warranties and are part of the package that a manufacturer or dealer might offer to an immediate buyer or pass through to a remote buyer. Assuming that it is made clear that a remedial promise is not a warranty and should be treated separately for purposes of remedy and accrual of a cause of action, the treatment in the December, 1998 Draft includes a definition, 2-102(a)(31A), inclusion of remedial promises and their enforcement within the scope of Article 2, 2-103(a), integration where appropriate in Part 4, a statement of what remedies are available upon breach, see 2-804 or 2-827, and a statement in 2-814 when the cause of action for breach of a remedial promise accrues. These additions for remedial promises are underlined.

3. There is no comparable definition section in Article 2B.

**SECTION 2-402. WARRANTY OF TITLE AND AGAINST INFRINGEMENT;
BUYER'S OBLIGATION AGAINST INFRINGEMENT.**

(a) In a contract for sale the seller warrants that:

(1) the title conveyed is good and its transfer is rightful and does not, because of any colorable claim to or interest in the goods, unreasonably expose the buyer to litigation; and

(2) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(b) A seller who is a merchant that regularly deals in goods of the kind sold warrants that the goods will be delivered free of the rightful claim of any third party by way of infringement or the like. However, a buyer that furnishes specifications to the seller holds the seller harmless against any claim of infringement or the like that arises out of compliance with the specifications.

(c) A warranty under this section may be disclaimed or modified only by specific language or by circumstances which give the immediate buyer reason to know that the seller does

not claim title or purports to sell only such right or title as the seller or a third party may have, or sells subject to any claims of infringement or the like. In an electronic transaction that does not involve review of the record by an individual, language to be sufficient must also be conspicuous and related to the warranty of title or against infringement.

(d) A right of action for breach of warranty under this section accrues as provided under Section 2-814.

SOURCE: Sales, Section 2-312.

Comments

1. In Section 2-402 and Part 4, seller includes an “auctioneer or liquidator that fails to disclose that it is acting on behalf of a principal. 2-401(6). See *Jones v. Ballard*, 573 So.2d 783 (Miss. 1990). There is no requirement, however, that the auctioneer or liquidator reveal the name of its principal either before or at the time of the auction. See Section 2-312 on auctions.

2. The seller warrants that (1) the title conveyed is good and (2) the transfer is rightful and does not unreasonably expose the buyer to litigation. An unreasonable exposure to litigation occurs when a third person has or asserts a “colorable claim to or interest in the goods. Until the colorable claim is resolved, the market value of the goods is impaired.

A warranty that the "title conveyed is good and its transfer rightful" covers cases where the title is good but the transfer is not rightful. A good example is where a merchant bailee to whom goods are entrusted for repair sells them to a buyer in the ordinary course of business. See 2-504(c); *Sumner v. Fel-Air, Inc.*, 680 P.2d 1109 (Alaska 1984). Further protection is needed, however, where title is burdened by colorable "clouds" that affect the value of the goods. See, e.g., *Frank Arnold KRS, Inc. v. L.S. Meier Auction Co., Inc.*, 806 F.2d 462 (3d Cir. 1986)(two law suits contest title); *Jeanneret v. Vichey*, 693 F.2d 259 (2d Cir. 1982)(export restrictions in country from which painting was taken affect value); *Colton v. Decker*, 540 N.W.2d 172 (S.D. 1995)(conflicting vehicle identification numbers). As one court put it, there "need not be an actual encumbrance of the purchaser's title or actual disturbance of possession to permit a purchaser to recover for a breach of warranty of title when he demonstrates the existence of a cloud on his title, regardless of whether it eventually develops that a third party's title is superior." The policy is that a purchaser "should not be required to engage in a contest over the validity of his ownership." *Maroon Chevrolet, Inc. v. Nordstrom*, 587 So.2d 514, 518 (Fla.App. 1991)(conflicting vehicle identification numbers). Revised Article 2 follows this principle.

3. Subsection (b) continues the warranty against infringement in former 2-312(3). The

warranty can be disclaimed or modified under subsection (c). See *Bonneau Co. v. AG Industries, Inc.*, 116 F.3d 155 (5th Cir. 1997), which holds that if the buyer furnishes specifications to a seller who follows them, there is no warranty against infringement under 2-312(3). This limitation is retained here. See 2B-401 (Aug. 1998), which deals with a merchant licensor's warranty and obligations concerning the quiet enjoyment and non-infringement of information and information rights delivered to a licensee. Licenses of patents are excluded. Although 2B-401 follows the general structure of 2-402, it focuses on the special problems of information and information rights.

4. Subsection (c) deals with the disclaimer or modification of the warranty of title or against infringement. The first sentence, which follows former 2-312(2), states the general standard that must be met to disclaim or modify against an immediate buyer. The language need not be conspicuous or in a record.

The warranty against "infringement" can also be disclaimed under subsection (c).

There are no safe harbors for disclaimers under this section. See 2-406(c).

The standard for disclaimers in electronic transactions that does not involve review of a record by an individual, however, is somewhat higher: The language must also be conspicuous.

5. Whether a warranty of title or against infringement extends beyond the immediate buyer is determined by 2-409(a): Unless disclaimed, there is a limited extension beyond an immediate consumer buyer. There are relatively few cases on whether lack of privity is a defense in warranty of title suits. See Note, 45 Bus. Lawyer 2289, 2300 (1995); *Mitchell v. Webb*, 591 S.W.2d 547 (Tex.Civ.App. 1979)(lack of privity no defense).

6. Subsection (d) states that a cause of action for breach of warranty of title or against infringement accrues for purposes of the statute of limitations as determined under 2-814(c). The accrual time is when the buyer "discovers or should have discovered the breach" not when the goods are tendered. Thus, the buyer has four years from that discovery to bring a law suit. 2-814(a). No tolling period is imposed. Thus, if the buyer should have first discovered the breach 10 years after delivery, the cause of action accrues then and the buyer still has 4 years to bring suit. On this issue, no distinction is drawn between the warranty of title and the warranty against infringement.

Without subsection (d), a cause of action for breach of warranty under subsection (a) would accrue when the breach occurred even though the plaintiff did not have knowledge of the breach. 2-814(b)(1). Under the Uniform Sales Act the statute ran from the time of delivery or when quiet possession was disturbed. See *Menzel v. List*, 246 N.E.2d 742 (N.Y. 1969). Former Article 2 did not impose a warranty of quiet possession. Thus, if the warranty was breached upon tender of delivery but the owner did not replevy the goods until five years later, the statute of limitations had run unless the seller made an express warranty explicitly extending to future

performance. Some courts have stretched to achieve this result. See *Balog v. Center Art Gallery-Hawaii, Inc.*, 745 F. Supp. 1556 (D.Haw. 1990)(warranty that art work "genuine" explicitly extended to future performance). Subsection (d) resolves this problem.

7. **CISG.** CISG Art. 41 provides simply that the seller “must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to the right or claim. Art. 42(1), a more complex provision, gives the buyer some protection against goods delivered by the seller which are subject to claims of a third party “based on industrial property or other intellectual property if the seller “knew or could not have been unaware of the claim and the claim is based on the law of a State where the parties contemplated that the goods would be used or resold. There is no obligation, however, if the buyer “knew or could not have been unaware of the right or claim or the buyer furnished technical drawings or designs of the goods with which the seller complied. CISG Art. 42(1).

SECTION 2-403. EXPRESS WARRANTY TO IMMEDIATE BUYER.

_____ (a) Any representation made by the seller to the immediate buyer, including a representation made in any medium of communication to the public, including advertising, which relates to the goods and become part of the basis of the bargain creates an express warranty that the goods will conform to the representation or, with respect to a sample, that the whole of the goods will conform to the sample.

_____ (b) It is not necessary to create an express warranty that the seller use formal words such as “warranty or “guarantee or have a specific intention to make a warranty. However, a representation merely of the value of the goods or an affirmation purporting to be merely the seller’s opinion or commendation of the goods does not create an express warranty under subsection (a).

_____ (c) A representation, including a representation made in any medium of communication to the public, including advertising, made to the immediate buyer and which relates to the goods becomes part of the basis of the bargain unless:

(1) the immediate buyer knew that the representation was not true;

(2) a reasonable person in the position of the immediate buyer would not believe that the representation was part of the agreement; or

_____ (3) in case of a representation made in any medium of communication to the public, including advertising, the immediate buyer did not know of the representation at the time of the sale.

(d) A right of action for breach of warranty under this Section accrues as provided under Section 2-814.

Proposed Explanatory Comment

_____ A reasonable person in the position of the immediate buyer would not believe that a seller's representation became part of the basis of the bargain if no such reasonable person would have been influenced by or relied on the representation in entering the contract or any modification thereof.

SOURCE: Sales, Section 2-313.

Comments

1. Under subsection (a), express warranty obligations are created through representations, including advertising, made by sellers to immediate buyers that become part of the basis of the bargain. The assumption is that the bargain is otherwise enforceable as a contract. See 1-201(3), (9). For the extent to which representations protect others besides the immediate buyer, see 2-408, 2-409.

The definition of representation in 2-401(5) includes a promise by the seller about the quality or the performance of the goods. Thus, a seller may either affirm to the buyer that the goods are X or may promise that the goods when delivered will be X, or may promise that the goods will perform like X after delivery. All are terms in the contract, but are treated as representations under Part 4.

See 2B-402(a) (August, 1998), dealing with express warranties made by a licensor to a licensee which relates to "information to be furnished under the agreement. Subsections (a) and (b) of 2B-402 and 2-403 now agree in substance.

2. **Puffing.** Subsection (b) follows 2-313(2) of current Article 2. Although preserving the distinction between express warranty and puffing, subsection (b) does not provide a clear test

to distinguish the two. Presumably a buyer must first be reasonable under the circumstances in believing that a representation rather than puffing was made and then argue that the representation became part of the basis of the bargain.. See 2-408(b) and (c). However, a representation or affirmation that is “puffing” is not a representation under subsection (a) that can become part of the basis of the bargain.

There are a number of factors relevant to drawing the line between affirmations and puffing. For example, the buyer might be unreasonable if the seller's representations taken in context (1) were verbal rather than written, (2) were general rather than specific, (3) related to the consequences of buying rather than the goods themselves, (4) were "hedged" in some way, (5) related to experimental rather than standard goods, (6) concerned some aspects of the goods but not a hidden or unexpected non-conformity, (7) were phrased in terms of opinion rather than fact, or (8) were not capable of objective measurement. See *Federal Signal Corp. v. Safety Factors, Inc.*, 886 P.2d 172 (Wash. 1994), where the court held that the trial court erred in not making findings of fact where the seller stated that a new product was "better than" an earlier, comparable model. See also, *Jordan v. Pascar, Inc.*, 37 F.3d 1181 (6th Cir. 1994) (representations about strength of fiberglass roof which shattered and caused personal injury when the truck rolled over were "puffing" as a matter of law). See also, Ivan L. Preston, *Regulatory Positions Toward Advertising Puffery of the Uniform Commercial Code and the Federal Trade Commission*, 16 J. Public Policy & Marketing 336 (1997).

3. The “part of the basis of the bargain” requirement stated in 2-313(1)(a) is retained in subsection (a). Unlike current 2-313, however, subsection (c) states when a representation becomes part of the basis of the bargain and this should help to resolve the disagreement over what that phrase means. See e.g., Holdych & Mann, *The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties*, 45 De Paul L. Rev. 781 (1996). Although the text is neutral on who has what burden of proof, there is no intention to change the interpretation of 2-313 and comments that an affirmation of fact becomes part of the basis of the bargain unless one of the exceptions in subsection (c) is established. *Buettner v. R.W. Martin & Sons, Inc.*, 47 F.3d 116 (4th Cir. 1995) (Virginia law); *Tomie Farms, Inc. v. J.R. Simplot, Inc.*, 862 P.2d 299 (Idaho 1993); *Weng v. Allison*, 678 N.E.2d 1254 (Ill.App. 1997).

Subsection (c) states that a representation, including representations by advertising, becomes part of the basis of the bargain unless one or more of the three conditions are satisfied.

Subsection (c)(1) excludes if the immediate buyer to whom the representation was made knew that the representation was not true. If, however, the buyer had doubts about the truth or accuracy of the representation but the seller continued to affirm, an express warranty can be created. See *Rogath v. Siebenmann*, 129 F.3d 261 (2d Cir. 1997) (buyer’s doubt about accuracy of representation does not preclude express warranty).

Subsection (c)(2) states another defense, that a “reasonable person” in the position of the immediate buyer would not believe that the representation was part of the agreement. Thus, the

buyer can know of and believe the representation but still be unreasonable in that belief. For example, if the buyer brings its own expert to the bargaining table and relies upon her judgment that the goods are of quality X, it is unlikely that the buyer was influenced by or relied upon the seller's affirmation that the quality was Y rather than X. Such an assertion or belief, under the circumstances, would be unreasonable.

Subsection (c)(3) states that when the immediate buyer claims an express warranty created by advertising there is no express warranty if the immediate buyer did not know of the representation at the time of the sale. This gives a bit more protection to sellers who represent through advertising than when other representations are involved.

4. "Agreement" is defined as the "bargain of the parties in fact." 1-201(3). So "basis of the bargain" is another way of saying "basis of the agreement." Since agreements can be made both before and after a contract is formed, there is no artificial time at which an express warranty must be made. Thus, a representation, including those made by advertising, made before or after contract formation can become part of the basis of the bargain. If the representation is made after the contract is formed, the requirements for a modification in 2-209(1) must be satisfied. See *Downie v. Abex Corp.*, 741 F.2d 1235 (10th Cir. 1984).

5. When a cause of action accrues under this section for purposes of the statute of limitations is stated in 2-814.

6. **CISG.** CISG covers express warranty problems with spare language that does not mention the word "warranty." Article 35(1) provides that the seller "must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract." Article 35(2)(c) provides that unless the parties have agreed otherwise, goods do not conform to the contract unless they "possess the qualities of goods which the seller has held out to the buyer as a sample or model."

SECTION 2-404. IMPLIED WARRANTY OF MERCHANTABILITY; USAGE OF TRADE.

(a) Subject to Sections 2-406 and 2-407, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

Under this section the serving for value of food or drink to be consumed on the premises or elsewhere is a sale.

(b) Goods to be merchantable must at least:

- (1) pass without objection in the trade under the agreed description;
 - (2) in the case of fungible goods, be of fair, average quality within the description;
 - (3) be fit for the ordinary purposes for which goods of that description are used;
 - (4) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;
 - (5) be adequately contained, packaged, and labeled as the agreement or circumstances may require; and
 - (6) conform to any representations made on the container or label.
- (c) Subject to Section 2-406, other implied warranties may arise from course of dealing or usage of trade.

SOURCE: Sales, Section 2-314.

Comments

1. Subsection (a) conforms to former 2-314(1). The seller must be a merchant “with respect to goods of that kind” before a warranty of merchantability is implied in a contract for sale. This is the most exacting definition of merchant. See 2-102(a)(23). The serving for value of food or drink for consumption on the premises or elsewhere is treated as a sale. Thus, both the patron in a restaurant and a buyer of “take out” food are protected by the implied warranty of merchantability.

Note that the implied warranty of merchantability may be disclaimed or modified to the extent provided in 2-406, and may be subordinated by an express warranty, see 2-407(3).

2. Subsection (b) follows 2-314(2) with the following changes: (a) The phrase “agreed description” rather than “contract description” is used in (b)(1); (b) The phrase “goods of that description” rather than “for which such goods” is used in (b)(3). This emphasizes the importance of the agreed description in determining fitness for ordinary purposes; (c) The phrase “or circumstances” is added after “the agreement” in (b)(5). The “circumstances” may indicate to the seller that the buyer might be misled about the goods and require an adequate label; and (d) The word “any” replaces “the” in the first line and the phrase “if any” is deleted.

Subsection (b) states the minimum standards of merchantability which are derived, in

large part, from the agreed description of the goods. These standards supplement 2-403(a), where a description of the goods may be a representation that creates an express warranty. For example, suppose that the seller describes the goods as a “3 horse power lawn mower that will start on the first pull and cut grass up to five inches tall. More than a core description is involved here. The seller represents the ease of starting and the capabilities of the mower. On the other hand, suppose the agreed description is simply “power lawn mower and there are no other representations. If the power mower does not start on the first pull or will only cut grass up to two inches tall, the buyer cannot rely on 2-403 for recovery and must fall back on 2-404. Note, however, that many of the merchantability standards still overlap with representations that could be express warranties under 2-403.

For the “power mower to be merchantable:

It must pass without objection in the trade under the agreed description. Would sellers and buyers in the trade and familiar with trade descriptions object to goods described as a power mower that would not start on the first pull? See *Agoos Kid Co., Inc. v. Blumenthal Import Corp.*, 184 N.E. 279 (Mass. 1993) (trade description under Uniform Sales Act).

In a lot of 50 identical lawn mowers, it must be of “fair average quality within the description. Thus, if 49 lawn mowers started on five pulls or less and one took 20 pulls, that “one would be unmerchantable.

The goods must be fit for the “ordinary purposes for which goods of that description are used. Here, evidence of ordinary purposes is required. What do goods described as a “power lawn mower do and what would a reasonable buyer expect it to do? A power mower that would not start in less than 20 pulls or would not cut an ordinary lawn or created a danger of injury to the operator might be unmerchantable.

If the agreement permits variations of kind or quality, the particular goods must be within those variations. Thus, if a commercial buyer buys 20 power lawnmowers and the agreement states that the seller can furnish three different makes and that all makes must start in five pulls or less, a lawnmower of a different make or a lawnmower that won’t start in less than 10 pulls is unmerchantable.

The goods must be adequately contained, packaged or labeled as required by the agreement or the circumstances.

The goods must conform to any representation made on the container or label.

3. Subsection (c) follows 2-314(3). An implied warranty may arise from a course of dealing or usage of trade.

4. **CISG.** Article 35(2) provides that unless the parties have agreed otherwise, goods do not conform with the contract unless they are “fit for the purposes for which goods of the same description would ordinarily be used or are adequately contained and packaged. CISG, however, “does not apply to the liability of the seller for death or personal injury caused by the goods to any person. Art. 5.

5. Personal injuries

Suppose that an unmerchantable lawn mower caused personal injuries to the buyer, who was operating the goods. Without more, the immediate buyer can sue the seller for breach of the implied warranty of merchantability and recover for injury to person or property “proximately resulting from the breach. 2-806.

This opportunity does not resolve the tension between warranty law and tort law where goods cause damage to person or property. The primary source of that tension arises from disagreement over whether the concept of defect in tort and the concept of merchantability in Article 2 are coextensive where personal injuries are involved, i.e., if goods are merchantable under warranty law can they still be defective under tort law and if goods are not defective under tort law can they be unmerchantable under warranty law. The answer to both questions is yes if the contract standard for merchantability, e.g., reasonable expectations, and the tort standard for defect are different. Even though the outcome under different standards will be the same in most cases, i.e., unmerchantable goods are frequently defective and defective goods are frequently unmerchantable, there are a few exceptions, especially where design defects are involved. See *Castro v. QVC Network, Inc.*, 139 F.3d 114 (2d Cir. 1998) (goods not defective in tort may be unmerchantable in warranty under New York law).

The tension between merchantability in warranty and defect in tort where personal injuries or damage to property are involved should be resolved as follows:

When recovery is sought for injury to person or property, whether goods are merchantable is to be determined by applicable state products liability law.

When, however, a claim for injury to person or property is based on an implied warranty of fitness under Section 2-406 or an express warranty under Sections 2-403 or 2-408, this Article determines whether an implied warranty of fitness or an express warranty was made and breached, as well as what damages are recoverable under Section 2-806.

To illustrate, suppose that the seller makes a representation about the safety of the lawn mower that becomes part of the basis of the buyer’s bargain. The buyer is injured when the gas tank cracks and a fire breaks out. If the lawnmower without the representation is not defective under applicable tort law, it is not unmerchantable under 2-404. On the other hand, if the lawnmower did not conform to the representation about safety, the seller has made and breached

an express warranty and the buyer may sue under Article 2.

SECTION 2-405. IMPLIED WARRANTY OF FITNESS FOR PARTICULAR

PURPOSE. Subject to Section 2-406, if a seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods are fit for that purpose.

SOURCE: Sales, Section 2-315.

Comments

1. This section covers the case where the buyer has particular purposes or needs for goods and there is no express warranty that the goods will meet those purposes or the particular purposes are not ordinary purposes for which goods of that description are used and the implied warranty of merchantability, therefore, will not apply.

The seller need not be a merchant. Any seller can make an implied warranty of fitness.

The seller at the time of contracting must have reason to know of any particular purpose for which the goods are required. Normally, this purpose must be communicated by the buyer to the seller.

The seller at the time of contracting must also have reason to know that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. Thus, if the buyer furnishes detailed specifications for goods that satisfy particular purposes and asks the seller to follow them, the buyer is not relying on the seller's skill and judgment and the seller has reason to know it.

If the buyer's particular purpose and the ordinary purpose for which such goods are used are the same, there may be a breach of both the implied warranty of merchantability and fitness. Even so, the elements of both warranties must be properly plead and proved. See *Van Wyck v. Norden Laboratories, Inc.*, 345 N.W.2d 81 (Iowa 1984).

The implied warranty of fitness may be disclaimed under 2-406.

2. **CISG.** Article 35(2)(b) provides that unless the parties have otherwise agreed, goods do not conform with the contract unless they are "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the

circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement.

SECTION 2-406. DISCLAIMER OR MODIFICATION OF WARRANTY.

(a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to disclaim or modify an express warranty must be construed wherever reasonable as consistent with each other. Subject to Section 2-202 with regard to parol or extrinsic evidence, words or conduct disclaiming or modifying an express warranty are inoperative to the extent that this construction is unreasonable.

_____ (b) [Subject to subsection (c), Alternative A] An implied warranty arising under Sections 2-404 and 2-405 is disclaimed or modified by:

(1) Language or conduct that makes it clear to the buyer that there is no implied warranty or that there is a modified implied warranty. Unless the circumstances indicate otherwise, expressions like "as is" or "with all faults" or other language or conduct are effective to disclaim or modify an implied warranty if in common understanding such expressions make it clear to the buyer that the seller assumes no responsibility or only a limited responsibility for the quality or fitness of the goods;

(2) In a consumer contract, conspicuous language or expressions [must be] in a record that [satisfies] the requirements of subsection (b)(1); or

(3) Course of performance, course of dealing, or usage of trade.

(c) In any contract, including a consumer contract, conspicuous language in a record disclaiming or modifying an implied warranty satisfies the requirements of subsection (b) if:

Alternative A

(1) In the case of the implied warranty of merchantability, the language states that “the seller makes no representations about and is not responsible for the quality of the goods, except as otherwise provided in this contract;

Alternative B

_____[(c)(1) In the case of the implied warranty of merchantability, the language states that “the seller makes no representations about and is not responsible for the quality of the goods, except as otherwise provided in this contract. Notwithstanding subsection (b), however, in a consumer contract, language, expressions or conduct, no matter how conspicuous or clear, are not effective to disclaim or modify an implied warranty that goods are fit for the ordinary purposes for which goods of that description are used.]

(2) In the case of the implied warranty of fitness, the language states that the seller makes no representations that the goods will be fit for any particular purpose for which you may be purchasing these goods, except as otherwise provided in this contract.

(d) In other than consumer contracts, conspicuous language in a record disclaiming or modifying an implied warranty is sufficient under subsection (b) if:

(1) in the case of the implied warranty of merchantability, the language mentions merchantability;

(2) in the case of the implied warranty of fitness, the language states that “the goods are not warranted to be fit for any particular purpose , or words of similar import.

(e) When the buyer before entering into the contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have

revealed to the buyer.

(f) Remedies for breach of warranty may be limited in accordance with this article with respect to liquidation or limitation of damages and contractual modification of remedy.

SOURCE: Sales, Section 2-316.

Comments

1. Subsection (a) follows 2-316(1), with minor revisions for style and clarity. The words “disclaim and “modify replace “negate and “limit to conform with the section title and usage throughout revised Article 2. 2B-406(a) is in accord.

A seller need not make an express warranty beyond some description of the goods. But if the seller represents that the goods are X and will perform Y, it is difficult subsequently to disclaim the express warranty. The court is first directed to construe the express warranty and the disclaimer “where ever reasonable as consistent with each other. To the extent this construction is unreasonable the disclaimer is “inoperative.

Under Section 2-202, however, an express warranty made prior to or contemporaneously with a writing intended by both parties to be a final and exclusive statement of some or all of the terms of the agreement may be discharged. It is not part of the final agreement. Thus, the effectiveness of 2-406(1) to neutralize the disclaimer depends upon the operation of the parol evidence rule.

2. Subsection (b), which is derived from 2-316(3)(a), states the general standards that must be met to disclaim or modify implied warranties in commercial and consumer contracts. The language or conduct must make it clear to the buyer that there is no implied warranty or that the implied warranty is modified. This includes certain expressions, such as “as is, where is which in common understanding make it clear to the buyer that the seller assumes no or a limited responsibility for the quality or fitness of the goods.

Subsection (b) does not provide a safe harbor. In a consumer contract, however, language of disclaimer or modification contained in a record must be conspicuous and satisfy the requirements of subsection (b)(1). See 2B-406(c), which accords with subsection (b)(1).

Subsection (b)(3) follows 2-316(3)(c). 2B-406(b) is in accord.

Disclaimers and modifications of the warranty of title are treated in 2-402(b).

3. Subsection (c), which is new, establishes a safe harbor for both commercial and consumer contracts. To be sufficient, the language must be in a record, be conspicuous, and

satisfy the specified content requirements. Language that does not meet the requirements of subsection (c), however, may still satisfy the more general standards of subsection (b).

Sellers to consumers at auctions can disclaim implied warranties under either the general language of subsection (b) or the “safe harbor” language of subsection (c).

Alternative B to subsection (c)(1) gives as option to the states to invalidate any attempt to disclaim or modify an implied warranty under 2-404 that the goods are fit for the ordinary purposes for which goods of that description are used. This is federal law under the Magnuson-Moss Warranty Act and is the law in several states. If Alternative B is not enacted, disclaimers of implied warranties in consumer contracts must satisfy either subsection (b) or (c).

4. Subsection (d), which is derived from 2-316(2), establishes a safe harbor for other than consumer contracts. Again, language that fails to satisfy the requirements of subsection (d) may meet the more general requirements of subsection (b).

See 2B-406(b) (Aug. 1998), establishes a more complex, integrated safe harbor. 2B-406(b)(1), (2) is consistent with 2-406(d). 2B-406(b)(4) is similar to that in 2-406(c)(1). 2B-406(b)(6) requires conspicuous language in a mass market transaction. 2B-406(b)(5) states if a disclaimer is sufficient under Article 2 or Article 2A to disclaim implied warranties under those articles it is also sufficient to disclaim implied warranties arising under 2B-403, 2B-404 and 2B-505 under 2B

5. Subsection (e) follows 2-316(3)(b). See 2B-406(d). This subsection applies to examinations of the goods before the contract is made and does not apply to express warranties. See *Maine Farmers Exchange v. McGillicuddy*, 697 A.2d 1266 (Me. 1997).

6. Subsection (f) follows 2-316(f). See 2B-406(g). Article 2 draws a clear distinction between terms that disclaim or limit liability and terms that vary or limit the remedies for breach. See 2-808.

7. **CISG.** There is no provision comparable to 2-406 in CISG. Under Article 35, however, quality terms must be “required by the contract. Arguably, 2-406, which regulates disclaimers to require adequate disclosure, involves the “validity of the contract, a matter that is excluded from CISG. Art. 4(a).

SECTION 2-407. CUMULATION AND CONFLICT OF WARRANTIES.

Warranties, whether express or implied, shall be construed as consistent with each other and as cumulative. However, if that construction is unreasonable, the intention of the parties shall determine which warranty prevails. In ascertaining that intention, the following rules apply:

(1) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(2) A sample from an existing bulk or a model prevails over inconsistent general language of description.

(3) Except in consumer contracts, express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

SOURCE: Sales, Section 2-317.

Notes

1. This section follows 2-317, with the following exceptions: (a) It is suggested that the word “prevails” is more appropriate than “dominant” in the first sentence; and (b) The phrase “or a model” is added in (2) to maintain consistency with language used in (1). See 2B-408, in accord.

2. In most cases, express and implied warranties in a contract will be construed as consistent with each other. All will be part of the agreement. See *Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co.*, 980 F. Supp. 187 (W.D. Va. 1997). If an express and an implied warranty of merchantability cover the same subject matter and the express warranty gives less than the implied warranty, a rule of construction (to determine the intention of the parties) is that an express warranty displaces an inconsistent implied warranty of merchantability. 2-407(3). See *Commonwealth v. Johnson Insulation*, 682 N.E.2d 1323 (Mass. 1997) (commercial contract, no displacement on facts). This rule of construction does not apply in consumer contracts, however. As a practical matter, the inconsistent express warranty acts as a disclaimer without the disclosure and other requirements of 2-406(b) and (c). Thus, it should not so operate unless 2-406 is satisfied.

____ SECTION 2-408. EXPRESS WARRANTY OBLIGATION TO REMOTE BUYER AND TRANSFEREE.

____(a) In this section, “goods” means new goods and goods sold as new goods in a sale to a remote buyer.

(b) If a seller makes a representation in a record packaged with or accompanying the

goods and the seller reasonably expects the record to be furnished to a remote buyer and the record is so furnished, the following rules apply:

(1) The seller has an obligation to the remote buyer that the goods will conform to the representation unless:

(A) A reasonable person in the position of the remote buyer would not believe that the representation created an obligation; or

(B) The representation is merely of the value of the goods or is an affirmation purporting to be merely the seller's opinion or commendation of the goods.

(2) A seller's obligation to a remote buyer created under subsection (b)(1) and any remedial promise also extends to:

(A) any member of the family or household unit or any invitee of a remote consumer buyer;

(B) a transferee from the remote consumer buyer and any subsequent transferee. However, for purposes of subsection (b)(2), the seller may limit its obligation to the remote consumer buyer or may limit extension to a particular person or transferee or a class of persons or transferees, provided that the limitation is furnished to the remote consumer buyer with the record that makes the representation or at the time of the sale, whichever is later.

_____(c) If a seller makes a representation in a medium for communication to the public, including advertising, the seller has an obligation to a remote buyer that the goods will conform to the representation or the seller will perform as promised if:

(1) The remote buyer purchased the goods from a person in the normal chain of distribution with knowledge of the representation and with the expectation that the goods will

conform to the representation;

(2) A reasonable person in the position of the remote buyer with knowledge of the representation would expect the goods to conform to the representation; and

(3) The representation is not merely of the value of the goods or is not an affirmation purporting to be merely the seller's opinion or commendation of the goods.

(d) An obligation may be created under this section even though the seller does not use formal words, such as "warranty" or "guaranty."

_____ (e) A right of action for breach of express warranty under this section accrues as provided under Section 2-814.

_____ (f) The following rules apply to the remedies for breach of an obligation created under this section and, unless otherwise stated, under Section 2-409, or any remedial promise:

(1) A seller under this section may modify or limit the remedies available to persons to whom an obligation is created, provided that the modification or limitation is furnished to the remote buyer with the representation no later than the time of sale.

(2) Damages may be proved in any manner that is reasonable. Unless special circumstances show proximate damages of a different amount, the measure of damages if the goods do not conform to a representation is the value of the goods as represented less the value of the goods as delivered; and

(3) Subject to any enforceable modification or limitation of remedy, a seller in breach under this Section is liable for incidental or consequential damages under Sections 2-805 and 2-806, but is not liable for consequential damages for lost profits;

(4) The measure of damages for breach of a remedial promise is the value of the

promised performance less the value of any performance made.

SOURCE: New.

Comments

1. **Overview.** Section 2-408, which was substantially revised at the March and September, 1998 meetings of the Drafting Committee, follows case law and practice in extending a seller's express warranties regarding new goods to remote buyers and others under subsection (b), dealing with "pass through" warranties, and subsection (c), dealing with advertising and other communications to the public. The structure and test for establishing an obligation follows that stated in 2-403(b). Subsection (e) states when the obligation is breached and subsection (f) states what remedies are available to the remote buyer against the seller. Although no direct contract exists between the parties, the obligations and remedies are stated to the extent feasible as if there were a contract. Thus, if the remote buyer's immediate seller does not make a warranty but the manufacturer of the product makes a representation on a record included with the goods, the remote buyer may sue the manufacturer if the goods do not conform to the representation or perform as promised.

The definition of "representation" in 2-401(6) includes a promise about the quality of the goods. The phrase "remedial promise" refers to undertakings made to deal with goods after they failed to conform to representations made. 2-102(a)(31A).

There is no comparable provision in Article 2B or CISG.

2. Subsection (b) deals with so-called "pass through" warranties made by manufacturers through dealers to remote buyers. It states when the obligation is created, to whom the obligation extends, what the obligations are, and the defenses to liability. The theory is that a remote buyer and others to whom the obligation is extended gets the warranty package, no more and no less. Thus, the seller can define the scope of the express warranty made, limit the remedies for breach and limit the persons other than the first user to whom the warranty extends. Subsection (b)(2). Unless otherwise stated in the package, the remote buyer or other protected persons may pursue remedies under subsection (f) directly against the seller.

3. At the March, 1998 meeting, the Drafting Committee returned to the so-called "Vermont Compromise" for obligations created by sellers to remote buyers through communications [descriptions, representations, promises] to the public, including advertising.

First, the remote buyer must have knowledge of the communication.

Second, the remote buyer must purchase the goods from a person in the normal chain of distribution, usually a retailer.

Third, the remote buyer must have an expectation that the goods will conform to the communication.

Fourth, the seller has an obligation to only the remote seller that the goods will conform unless a reasonable person in the remote buyer would not expect the goods to conform.

Fifth, the representation must not be “puffing.

Finally, the seller may modify or limit available remedies to the remote buyer for breach if the limitation is communicated to the remote buyer no later than the time of sale. See subsection (f)(1). Otherwise, the seller is directly liable to the remote buyer under subsection (f).

3. Who besides the remote buyer is entitled to protection under 2-408?

Under subsection (b) the warranty extends to the remote buyer and also to the family, household or guests of a remote consumer buyer and to transferees of any remote buyer. This extension, however, is subject to the seller’s limitation of user contained in the warranty package.

Under subsection (c), an obligation created by advertising is made only to a remote buyer who qualifies under subsection (c).

4. Subsection (e) states when an obligation created under 2-408 is breached. Assuming that the goods do not conform to a representation at the time they left the seller’s control, the breach occurs when they are received by the remote buyer or when any promise relating to the goods after the non-conformity is not performed. For statute of limitation purposes, the cause of action accrues when the obligation is breached whether or not the remote seller knows of the breach. See 2-814(a).

5. Subsection (f) states the statutory remedies that are available to a remote buyer for breach of an obligation created under 2-408.

Subsection (f)(1) provides that a seller may modify or limit remedies available for breach of the limitation under either subsection (b) or (c) but requires disclosure at the time of the representation or no later than at the time of sale. In short, the benefits and limitations of the express warranty are treated as a package.

The relationship between 2-408(b) and proposed 2-204(e) where, in a direct contractual relationship, the seller can disclose or communicate additional terms after the duty to pay arises which become part of the contract if the buyer assents with knowledge or after an opportunity to review, should be clarified.

Subsection (f)(2) states the general measure of direct damages for breach. See Sections 2-804 and 2-827, from which these principles are derived. See also, 2-803.

Subsection (f)(3) permits the remote buyer and other protected persons to recover incidental and consequential damages under the standards in 2-805 and 2-806 except for “consequential damages for a remote buyer’s lost profit. Thus, the remote buyer can recover under 2-806 for consequential reliance expenditures incurred before or after the breach but cannot recover for gains prevented by the breach. But remote buyer and other persons to whom the obligation is extended can still recover for damages to person or property proximately resulting from a breach of warranty under 2-806(b).

6. For statute of limitations purposes, subsection (f)(4) refers to 2-814, subsection (a) of which refers to 2-408(e). Thus, an action under 2-408 accrues as stated in subsection (e) and is timely under 2-814 if it is commenced within four years of the breach as defined.

7. Manufacturer’s implied warranty.

The representations in 2-408, which include descriptions of the goods, may include elements of quality normally associated with the implied warranty of merchantability. 2-404. But goods that conform to the description or pass without objection under the description may not be fit for the ordinary purposes for which goods of that description are used. Section 2-408 does not cover claims of that sort. Moreover, the courts have been unwilling to impose liability on the manufacturer in these cases without privity of contract.

Should 2-408 be revised to protect remote buyers from unmerchantable goods in cases not covered by representations?

SECTION 2-409. EXTENSION OF EXPRESS OR IMPLIED WARRANTY.

(a) In a consumer contract, a seller's express or implied warranty made to an immediate consumer buyer extends to any member of the family or household or an invitee of the immediate consumer buyer or a transferee from the immediate consumer buyer that may reasonably be expected to use or be affected by the goods and that suffers damage other than injury to the person resulting from a breach of warranty. As to damages other than injury to person, the operation of this section may not be excluded, modified, or limited unless the seller has a substantial interest based on the nature of the goods in having a warranty or a remedial promise extend only to the immediate consumer buyer.

(b) Damages for personal injury to an individual other than the immediate buyer that

proximately result from any breach of warranty may be recovered by: [States to choose one Alternative]

Alternative A

Any individual [natural person] who is in the family or household of the immediate buyer or who is a guest in the immediate buyer's home if it is reasonable for the seller to expect that such person may use, consumer or be affected by the goods. A seller may not exclude or limit the operation of this section.

Alternative B

Any individual [natural person] who may reasonably be expected to use, consume or be affected by the goods. A seller may not exclude or limit the operation of this section.

(c) The scope of any warranty extended under this section to other than the immediate buyer and the remedies for breach may be limited by the enforceable terms of the contract between the seller and the immediate buyer. To the extent not limited, the scope of the warranty is determined by Sections 2-402, 2-403, 2-404 and 2-405 and the remedies for breach of warranty or a remedial promise for other than the immediate buyer are determined by Section 2-408(f)(2) and (3).

(d) Nothing in this Article diminishes the rights and remedies of any third party beneficiary or assignee under the law of contracts or of persons to which goods are transferred by operation of law or displaces any other law that extends a warranty to or for the benefit of any other remote buyer, transferee, or person.

(d) A right of action for breach of warranty or a remedial promise under this section accrues as provided under Section 2-814.

SOURCE: Sales, Section 2-318.

Comments

1. Subsection (a) follows but is narrower than Alternative C to 2-318. Warranties, including the warranty of title, made by a seller to an immediate consumer buyer are extended to a defined class around an immediate consumer buyer and transferees from the immediate consumer buyer if these protected persons “may reasonably be expected to use or be affected by the goods and are damaged other than by injury to the person by breach of warranty.

The immediate consumer buyer has the protection provided to any buyer under Article 2.

There is no extension of warranties under this subsection when the immediate buyer is not a consumer. Express warranties, however, may be extended to remote buyers and others under 2-408 or one of the Alternatives in Subsection (b). The implied warranty of merchantability is not extended by Article 2 in commercial cases but may be extended under other state law. See subsection (c).

Damage under this subsection includes damage to property, including property other than the goods sold, but does not include personal injuries.

The extended warranty under this subsection is a derivative warranty: Its existence, scope and enforcement depends upon the enforceable terms of the contract between the seller and the immediate consumer buyer. Thus, if there is an enforceable disclaimer of warranty or exclusion of consequential damages in that contract, the persons to whom warranties are extended are bound by those limitations. See subsection (c). Otherwise, the scope of warranties created is determined by Part 4 and the remedies available to protected persons are set forth in 2-408(f).

Transferees include persons to whom the goods have been delivered by the immediate consumer buyer and who have title or some other property interest in the goods. This includes a child who is permitted to use the goods as if they were hers or a person to whom a gift has been made. The warranty, however, is breached at the time of tender to the immediate buyer, not when possession is given to a transferee.

The extension under this subsection is based upon public policy and the presumed intention of the seller and the immediate buyer.

Under this subsection, the operation of this section can be limited by agreement if the seller has a “substantial interest based upon the nature of the goods in having a warranty extend only to the immediate consumer buyer.

2. Subsection (b), with the two Alternatives for state enactment, restates Alternatives A

and B of 2-318. Alternative A was enacted in ____ states and Alternative B was enacted in ____ states.

Both alternatives deal with the liability of a seller to individuals [natural persons] other than the immediate buyer, who need not be a consumer, for personal injuries proximately resulting from breach of warranty made to the immediate buyer. The scope of the liability, however, varies with which Alternative is enacted. Alternative A protects persons in the so-called household unit of the immediate buyer, including invitees, and Alternative B protects any natural person.

To illustrate, suppose that a parent buys a power lawn mower for use at home. The lawn mower is unmerchantable and results in person injury to the buyer's son, who was operating the mower, a neighbor's son who was on the buyer's property at the son's invitation, and the next door neighbor who was standing on her property. The seller could reasonably expect that all three might use, consume, or be affected the goods. Under Alternative A the son and the invitee are protected but the neighbor is not. Under Alternative B, all three are protected.

The relationship between warranty theory and tort law where products cause personal injuries to buyers and others is suggested by comment 4 to 2-404. Goods that are not defective under applicable tort law are not unmerchantable under 2-404. There would be no breach of warranty in those cases. If the goods are defective under applicable tort law they could be unmerchantable and support an action for breach of warranty under Article 2. If an express warranty or an implied warranty of fitness are made and the breach proximately causes personal injuries to a protected person, an action under Article 2 is proper even though the goods are not defective under applicable tort law.

3. Subsection (c) has been added to clarify that the rights and remedies of protected persons under subsections (a) and (b) can be limited by enforceable terms in the contract between the seller and the immediate buyer. Thus, a term enforceable against the immediate buyer disclaiming the implied warranty of merchantability or excluding all liability for consequential damages is effective against protected persons. If there are no valid limitations, however, the scope of warranties extended is determined by the warranty sections, 2-402, 2-403, 404 and 405, and the remedies of the protected persons are determined by the provisions of 2-408(f)(2) and (3). Thus, after it is determined that a warranty is extended and breached under 2-409 and that remedies are not limited by the contract between the seller and the immediate consumer buyer, the protected person has the same remedies against the seller as a protected person would have under 2-408(f).

Under 2-810(c), an agreement limiting or excluding damages for injury to person in a consumer contract is prima facie unconscionable.

4. Subsection (c) states that 2-408 does not diminish or displace other applicable law extending express or implied warranties from a seller to an immediate buyer to any other remote

buyer or other protected persons. For example, a true third party beneficiary of a warranty would be protected, as would the assignee of a warranty made by the seller to the immediate buyer. In addition, the courts in some states have eliminated or modified the privity requirement beyond the extensions in 2-409 or 2-408. There is no intention in this section or 2-408 to preempt or discourage these judicial developments.

5. Subsection (d) refers to 2-814 for the applicable accrual rule for purposes of the statute of limitations. The statute begins to run no later than when non-conforming goods are delivered to the immediate buyer unless one the exceptions in 2-814(c) applies.

5. There is no comparable provision in **CISG**.

Under CISG, a fair reading is that a seller's obligation to deliver goods that conform to the contract is made to the buyer and none other. There is no extension, express or implied, of that obligation to a resale buyer or any other person. See Art. 1, 35. Suppose, however, that a Canadian Seller sells goods to a New York buyer for resale in the United States. Without more, CISG applies to the contract of sale between these parties. In this import transaction:

The seller under CISG is also a seller under Article 2. 2-102(a)(28). Apart from applicable conflict of laws principles, Article 2 is not limited to purely domestic transactions. Furthermore, it is unlikely that international sales law preempts domestic sales law in resale transactions in the chain of distribution. Thus, Article 2 should govern the relationship, if any, between the Canadian seller and the remote buyer from the New York buyer.

A seller subject to CISG who makes "pass through express warranties or makes affirmations in advertising has potential liability to remote buyers and others in the United States under 2-408. In fact, that seller's obligation is created and enforced under Article 2.

In most cases, CISG does not apply to sales of goods "bought for personal, family or household use. " Art. 2(a). Thus, if the New York buyer was a consumer buyer, CISG would not apply to the contract. Without more, Article 2 would apply, along with the potential for warranty extension under 2-409(a).

CISG does not apply to the "liability of the seller for death or personal injury caused by the goods to any person. Art. 5 Again, either Article 2 or applicable tort law would apply to claims for personal injury damages resulting from a breach of warranty or defective products by either the immediate buyer or someone downstream.

Finally, CISG is not concerned with the "validity of the contract or of any of its provisions or of any usage. Arguably, controls imposed by 2-406 on the validity of disclaimers or 2-810 on the validity of clauses excluding liability for consequential

damages, including personal injuries, are not covered by CISG. Again, they are covered by Article 2.

PART 5

TRANSFERS, IDENTIFICATION, CREDITORS, AND GOOD-FAITH

PURCHASERS

SECTION 2-501. PASSING OF TITLE; RESERVATION FOR SECURITY.

(a) Each section of this article with regard to the rights, obligations, and remedies of the seller, the buyer, purchasers, or other third parties applies regardless of title to the goods or any statute or rule of law that possession or the absence of possession is fraudulent, unless expressly provided otherwise.

(b) Subject to Section 2-104(a)(1), if matters concerning title become material, the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract. Unless otherwise explicitly agreed, the buyer acquires by their identification a special property interest as limited by this article [Act].

(2) Any retention or reservation by the seller of title in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.

(3) Subject to this subsection and Article 9, title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed to by the parties.

(4) Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be

delivered at a different time or place.

(5) Despite any reservation of a security interest by the bill of lading:

(A) if the contract requires or authorizes the seller to send goods to the buyer but does not require the seller to deliver them at destination, title passes to the buyer at the time and place of shipment; [but]

(B) if the contract requires delivery at destination, title passes on tender there.

(c) Unless otherwise explicitly agreed, where delivery is to be made without moving goods;

(1) if the seller is to deliver a document of title, title to the goods passes at the time when and the place where the seller delivers the document; or

(2) if the goods are at the time of contracting already identified and no documents are to be delivered, title to the goods passes at the time and place of contracting.

(d) A rejection or other refusal by the buyer to accept or retain the goods, whether or not rightful, or a justified revocation of acceptance revests title to the goods in the seller. Revesting occurs by operation of law and is not a sale.

Source: Sales, Section 2-401.

Changes: No substantive changes.

Comments

1. Subsection (a) states that the location of title to or possession of goods is irrelevant to the application of this article unless expressly provided in a particular section. Thus, title does not determine the risk of loss to goods sold, 2-612, or whether the seller can recover the price upon breach by the buyer, 2-822. Other commercial factors must be considered. On the other hand, title is expressly made relevant under 2-504, dealing with power to transfer interests in

goods, and possession of the goods is expressly made relevant under 2-505, dealing with the rights to creditors of the seller to goods sold.

The location of title to goods may be relevant in transactions not directly covered by this article. For example, coverage under an insurance policy may depend upon who has title to the goods or the application of a state personal property tax may depend upon where title is without defining when title passes. By stating what a “sale” is and when title passes, this article provides assistance if a court determines that regulatory or other legislation incorporates the terms and definitions of this article.

2. If the location of title to goods is relevant, subsection (b) provides rules for when title passes. In most cases, these rules apply unless “otherwise explicitly agreed. See 2-108.

Subsection (b)(1) states that title cannot pass before the goods are identified to the contract under 2-502(a). See 2-106(a). The parties may explicitly agree that title to goods passes upon identification. If there is no explicit agreement, identification gives the buyer a special property interest in the goods under 2-502(b) but not title unless one of the rules in 2-501(b)(4) or (c) are satisfied. For example, if the goods are to be delivered without being moved, are identified at the time of contracting, and delivery is to be by documents of title, title passes at the time of contracting.

Subsection (b)(2) continues the rule that a retention or reservation of title by the seller in goods shipped or delivered is treated as creating a security interest under Article 9. See 1-201(37), defining security interest. Until the buyer obtains possession of the goods, however, the security interest arises under Article 2 and would have priority over a conflicting security interest in the same goods created by the buyer (debtor). See 9-110.

Subsection (b)(4) states the basic title passing rule and subsections (b)(5) and (c) state exceptions for different contexts. Thus, the “physical delivery” rule in (b)(4) does not apply when the seller is authorized to ship the goods to the buyer, subsection (b)(5), or where delivery is to be made without moving the goods, subsection (c).

3. Subsection (d) states the effect when a buyer rejects a tender of delivery or revokes an acceptance. Whether the action is wrongful or justified, title, if it has passed, reverts in the seller by operation of law. The reversioning, however, is not a sale.

4. **CISG.** Unless otherwise expressly provided, the Convention “is not concerned with...the effect which the contract may have on the property in the goods sold. CISG Art. 4(b).

SECTION 2-502. INSURABLE INTEREST IN GOODS; MANNER OF IDENTIFICATION OF GOODS.

(a) Identification of existing goods as goods to which a contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs:

(1) when the contract is made, if the contract is for the sale of already existing goods;

(2) if the contract is for the sale of future goods other than those described in paragraph (3) or (4), when the goods are shipped, marked, or otherwise designated by the seller as goods to which the contract refers;

(3) when the crops are planted or otherwise become growing crops, if the contract is for the sale of crops to be harvested within 12 months or the next normal harvest season after contracting, whichever is longer; or

(4) when the young are conceived, if the contract is for the sale of the unborn young of animals to be born within 12 months after contracting.

(b) A buyer obtains a special property interest and an insurable interest when existing goods are identified to the contract, even if the identified goods are nonconforming and the buyer has an option to return or reject them.

(c) A seller has an insurable interest in identified goods as long as title to or a security interest in the goods is retained. If the identification is by the seller alone, the seller may substitute other goods for those identified until breach of contract or insolvency or notification to the buyer that the identification is final.

(d) This section does not impair any insurable interest recognized under any other law.

Source: Sales, Section 2-501.

Changes: Rephrased with no change in substance.

Comments

1. “Identification means that existing goods, by explicit agreement or by the circumstances stated in subsection (a), have been designated as those to which the contract refers. To illustrate, the goods are identified in the following examples:

Seller and buyer explicitly agree that the #1 yellow corn in Silo A is intended for the contract. There is also #1 yellow corn in Silos B and C. The corn in Silo A is identified to the contract.

Seller has 10,000 bushels of #1 yellow corn in three silos. The buyer purchases 1,000 bushels of #1 yellow corn from any silo, to be delivered in 10 days. The description of goods in bulk is sufficient, see 2-106(d), and the corn is identified when the contract is made. 2-502(a)(2).

Buyer needs 1,000 bushels of #1 yellow corn. Seller, a dealer, has no #1 yellow in stock but agrees to obtain the corn from another source and sell it to buyer. Seller obtains the corn and puts it on his truck to be “delivered to the buyer. The corn is identified. Subsection (a)(2).

Seller, in March, agrees to sell Buyer 1,000 bushels of #1 yellow corn “to be grown in my fields for October delivery. When Seller plants the corn on May 15, the goods are identified to the contract.

An identification “by the seller alone may not be final. Subsection (c) provides that the seller may substitute other goods for those identified “until breach of the contract or insolvency or notification to the buyer that identification is final.

2. Under Article 2, identification of goods to the contract is relevant or important in the following circumstances. [To be discussed]

[Buyer in ordinary course of business, 1-201(37)

Definition of goods, 2-102(a)(20)

Interest and part interest in goods, 2-106

Goods to be severed, 2-107(b)

Place for delivery, 2-305(b)

Title, 2-501

Identification, 2-502

Seller’s creditors, 2-505(b), (c)

Sale on approval, 2-506(b)

Shipment by seller, 2-603(a)

Shipment by seller, 2-604
Inspection, 2-609
Risk of loss, 2-612(3)
Loss or casualty to goods, 2-714
Incidental damages, 2-805
Liability of third party, 2-813
Seller's remedies, 2-815(3)
Seller's right to identify, 2-817
Resale, 2-819
Action for price, 2-822(a)(3), (b)
Buyer's remedies, 2-823
Prepaying buyer, 2-824]

3. Insurable interest. A buyer obtains an insurable interest when existing goods are identified, even though the goods are nonconforming or the buyer has an option to return them. Subsection (b). The seller retains an insurable interest in identified goods "so long as title to or a security interest in the goods is retained. Subsection (c). These principles are important in cases where identified goods are lost or damaged during shipment. If both parties have insurable interests, they can purchase insurance to protect their respective interests in the goods. See 2-614.

These insurable interests expand but do not impair "any insurable interest recognized under any other law. Subsection (d).

4. Special Property interest. The buyer also obtains a special property interest when existing goods are identified to the contract. Subsection (b). This interest can arise before the buyer has possession of or title to the goods and provides some limited remedial protection. Thus, a buyer with a special property interest can sue a third person who causes injury to the goods, 2-813, and has some rights to the goods as against the seller in possession and the seller's creditors. 2-505(a), 2-824.

4. **CISG.** CISG does not use the concepts of "identification" or "special property interest.

SECTION 2-503. ASSIGNMENT OF RIGHTS; DELEGATION OF DUTIES.

(a) Subject to paragraph (3), if a seller or buyer assigns contract rights, the following rules apply:

(1) all rights of either seller or buyer can be assigned unless the assignment would materially change the duty of the other party, increase materially the burden or risk imposed on

that party by the contract, or impair materially that party's likelihood of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of its entire obligation can be assigned despite an agreement otherwise.

(2) Subject to 9-406, an assignment of rights under subsection (a)(1) is effective even if a contractual term prohibits the assignment of rights, but the assignment is a breach of contract for which damages under this article are available, whether or not the contract so provides.

(3) The creation, attachment, perfection, or enforcement of a security interest in the seller's interest [rights] under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's chance of obtaining return performance within the purview of this subsection. This subsection does not apply to the extent that [the seller retains material contract duties owed to the buyer or] enforcement results in a delegation of a material performance of the seller.

(b) If a seller or buyer delegates contract duties, the following rules apply:

(1) A party may delegate to another person its duty to perform a contract for sale unless the other party has a substantial interest in having the original promisor perform or control the performance required by the contract. A delegation of performance does not relieve the delegating party of any duty to perform or any liability for breach.

(2) Acceptance of a delegation of duties by an assignee constitutes a promise by the assignee to perform those duties. The promise is enforceable by either the assignor or the other party to the original contract.

(3) The other party to the contract may treat any assignment or transfer that delegates a duty to perform as creating reasonable grounds for insecurity and may, without prejudice to the party's rights against the assignor, demand adequate assurance of due performance from the assignee.

(4) A contractual term prohibiting the delegation of duties otherwise delegable under subsection (b)(1) is enforceable, and an attempted delegation is not effective. Unless the circumstances otherwise indicate, a prohibition of assignment or transfer of "the contract" must be construed as barring only the delegation to the assignee or transferee of the assignor's duty to perform.

(c) An assignment or transfer of "the contract" or "all my rights under the contract", or an assignment or transfer in similar general terms, is an assignment of rights and, unless the language or the circumstances indicate the contrary, as in an assignment for security, is also a delegation of the assignor's duty to perform the contract.

Sources: Sales, Section 2-210.

Changes: Reorganized, rephrased and coordinated with Article 9.

Comments

1. **Assignment of Rights.** Subsection (a) treats the effect of an assignment by either the seller or the buyer of rights arising under the contract for sale. These rights may be effectively assigned to a third person even if the contract prohibits the assignment. Subsection (a)(2). Although the assignment is effective, between the parties the assignment is a breach of the prohibition for which damages can be recovered. See 2A-303.

An assignment, however, is not effective if it would "materially change the duty of the other party, increase materially the burden or risk imposed on that party by the contract, or increase materially that party's likelihood of obtaining return performance. Subsection (a)(1). The cases where these limitations apply are rare. For example, a seller who has fully performed the contract should always be able to assign the right to payment. This is the basis for most accounts receivable financing. If, however, the contract is still executory, the assignment of the

right to payment to a third person might decrease the seller's incentive to perform and, thus, increase the buyer's risk. Similarly, the buyer's assignment of the right to receive a fixed quantity of goods should not usually be objectionable but if the parties have a "requirements contract, the assignment could increase materially the seller's risk.

Subsection (a)(3) clarifies when the assignment by a seller of the right to payment materially changes the duty or risk of the buyer. When this assignment creates a security interest under Article 9 and the seller does not still owe the buyer a material performance duty, there is no material change. [If, after the assignment, the seller still owes the buyer a material performance duty, subsection (a)(1) applies.]

2. Delegation of duties. Occasionally a seller or buyer will delegate their duties under the contract without also assigning their rights. For example, a dealer might delegate its duty to procure and deliver a fixed quantity of goods to the buyer to a third party. In these cases, subsection (b) states the limitations on that power.

First, unlike an assignment of rights, a contract term prohibiting the delegation of duties is enforceable. An attempted delegation is not effective. Subsection (b)(4).

Second, if the third person accepts the delegation, an enforceable promise is made to both the delegator and the person entitled under the contract to perform those duties. Subsection (b)(2). In short, as to the person entitled under the contract a third party beneficiary contract is created. However, the delegator's duty to perform under the contract is not discharged unless the person entitled to performance agrees to substitute the delegatee for the delegator (a novation). See subsection (b)(1), last sentence.

Third, the person entitled under the contract may treat any delegation of duties as reasonable grounds for insecurity and may demand adequate assurance of due performance for the assignee-delegatee. Subsection (b)(3). See 2-711.

Finally, in any event, a delegation of duties is not effective if the person entitled under the contract has a "substantial interest in having the original promisor perform or control the performance required by the contract. Subsection (b)(1). See 2-409(e).

3. Transfer of the contract. Subsection (c) provides rules of interpretation as to when one party to a contract has both assigned rights and delegated duties arising from the contract. If the intention to transfer the entire contract is clear, the treatment of the rights assigned and the duties delegated is covered by subsections (a) and (b). In cases where ambiguous language is used, such as an "assignment for security, the preference is to construe the language to cover an assignment of rights only. See subsection (c). Compare 2-409(c).

4. In general, Article 9 applies to the sale of accounts, chattel paper and payment intangibles. 9-109(a)(3). The transactions are treated as creating security interests. The definitions of "account , 9-102(a)(1), and "payment intangible , 9-102(a)(61), are quite broad.

To the extent that these transactions are not excluded from Article 9 under 9-109(c) or 9-109(c)(3-9), in a contract for sale the effectiveness of the transfer is determined by 2-503(a)(3) and the effectiveness of a contractual restriction on transfer is determined by 9-406(d). In either case, the purpose is to promote free alienability.

SECTION 2-504. POWER TO TRANSFER; GOOD-FAITH PURCHASE OF GOODS; “ENTRUSTING”.

(a) A purchaser of goods acquires all title that the transferor had or had power to transfer. A purchaser of a limited interest in goods, however, acquires rights only to the extent of the interest purchased.

(b) A person with voidable title has power to transfer good title to a good-faith purchaser for value. Under this subsection, voidable title is acquired when the goods have been delivered under a transaction of purchase even though:

- (1) the transferor was deceived as to the identity of the purchaser;
- (2) the delivery was in exchange for a check later dishonored;
- (3) it was agreed that the transaction was to be a cash sale; or
- (4) the delivery was procured through fraud punishable as larceny under criminal

law.

(c) Any entrusting of possession of goods to a merchant that deals in goods of that kind gives the merchant power to transfer all rights to the goods or to transfer the goods free of any interest of the entruster to a buyer in the ordinary course of business.

(d) Entrusting includes any delivery and any acquiescence in retention of possession of the goods by a person with title to or an interest in them, regardless of any condition expressed between the parties to the delivery or acquiescence or whether the procurement of the entrusting

or the possessor's disposition of the goods was punishable as larceny under criminal law.

SOURCE: Sales, Section 2-403.

Changes: Rephrased and clarified.

Comments

1. Subsection (a) states the common law rule that a “purchaser of goods acquires all title that the transferor had or had power to transfer. In the paradigm transaction, a thief steals goods from an owner and, without either title or power to transfer title, purports to sell them to a buyer who pays the price and takes delivery. Regardless of the buyer’s bona fides, the sale and any subsequent sale is not effective and the true owner, who has not voluntarily relinquished possession of the goods, may replevy the goods or recover for conversion. The buyer’s recourse is against the seller for breach of a warranty of title. 2-402.

2. Subsection (b) states the so-called “voidable title exception to the common law rule. In the paradigm transaction, the owner intends to sell the goods but is induced to transfer possession by the purported buyer’s fraud. In this case, the fraudulent buyer is given power, as a seller, to transfer good title to a good faith purchaser for value to whom the goods have been delivered. See 2-102(a)(11), defining delivery to mean the “transfer of physical possession or control. The terms “good faith, “purchaser , and “value are defined in other parts of the UCC.

The line between “voidable and “void title, like the difference between “real and “personal defenses in the law of negotiable instruments, is often difficult to draw. In a paradigm case of “void title, the owner delivers goods to another person relying on that person’s material misrepresentation that the record signed by both was a bailment rather than a sale. Here the risk is put on a good faith purchaser, even though the owner voluntarily transferred possession of the goods to a non-merchant. As between an owner deceived as to the nature of the transaction and the good faith purchaser for value, the owner prevailed at common law. Subsection (b) preserves that fragile distinction, but states four borderline situations where possession is transferred that are treated as “voidable title cases. In all voidable title cases, the goods must be delivered to the purported buyer by the seller.

3. Subsection (c) states the so-called entrustment exception to the common law rule and subsection (d) provides a broad definition of entrustment. In a paradigm case, the owner entrusts goods to a “merchant who deals in goods of that kind for repair. The transaction is a bailment not a sale. The merchant, however, sells the goods to a “buyer in the ordinary course of business, a term that is defined in Article 1. In this case, the merchant has power to “transfer all rights of the entruster and the buyer prevails. Note that the owner has voluntarily transferred possession to a merchant and the buyer is in the ordinary course of business, not just a GFP.

Subsection (c) also clarifies the protection that a buyer would have from a security

interest perfected by the entruster in the goods. Even though the biocob might not be protected under the relevant provisions of Article 9, subsection (c) provides that the biocob takes free of an interest in the goods created by an entruster in the goods who has a security interest in the goods entrusted.

Here are some problems that illustrate the basic principles.

S owns a valuable, small sculpture by Rodin. T breaks into S's house, avoiding the security system, steals the Rodin and sells it to M, an art dealer, for \$50,000. M, in turn, sells the Rodin to B, a biocob, for \$75,000. S claims the Rodin. S wins under subsection (a). Neither subsection (b) or (c) apply on these facts. The biocob is not protected.

S wants to sell the Rodin. She consigns it to a man claiming to be Mr. Southby from London. The man, who is in fact a con artist named Joe Zilch from New Jersey, sells it to B, who is a GFP for value. If a consignment is a "purchase of goods", B wins over S under subsection (b)(1). If not, S wins under subsection (a). The question is the meaning of purchase. If a broad meaning is intended, almost any transaction where goods delivered for value is a "purchase of goods."

S entrusts the Rodin to M, a dealer, for the purpose of restoration. No power to sell is given. If M sells to a B who is a biocob, good title is transferred under subsection (c). B is a buyer in the ordinary course of business from a merchant to whom goods have been entrusted. Subsequent buyers from B will take good title even though they are not biocobs.

S sells the Rodin to B but retains title and possession as a perfected security interest. S entrusts the Rodin to M for repairs. M sells the Rodin to a biocob. The biocob takes good title and takes free of the security interest created by S and B, even though the security interest was not created by the biocob's seller, M. See 9-320(a).

SECTION 2-505. RIGHTS OF SELLER'S CREDITORS AGAINST GOODS

SOLD.

(a) Except as provided in subsection (b), the rights of creditors of the seller with respect to goods identified to a contract for sale and retained by the seller are subject to the buyer's rights under Sections 2-807, 2-822, and 2-824, if the buyer's rights vest before a creditor's claim in rem attaches to the goods.

(b) A creditor of a seller may treat a sale or an identification of goods to a contract for

sale as void if as against the creditor a retention of possession or identification by the seller is fraudulent under any law of the state where the goods are situated. However, the retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(c) Except as otherwise provided in subsection (a) or Section 2-504(c), this article does not impair rights of creditors of the seller:

(1) under Article 9; or

(2) where identification to the contract or delivery is not made in current course of trade but is made in satisfaction of or as security for a pre-existing claim for money, security or the like under circumstances which under any law of the state where the goods are situated would, apart from this Article, constitute a fraudulent transfer or a voidable preference.

SOURCE: Sales, Section 2-402.

Changes: The phrase “rights of unsecured creditors” in 2-402(a) is revised to read “rights of creditors.”

Comments

1. Sellers frequently retain possession of goods after they are identified to the contract for sale. In some cases the goods conform to the contract and are “laid away” until the price is paid and in other cases they are retained for the convenience of the buyer. In some transactions, the goods may be in the process of being manufactured for buyer who is making advances. The components are identified but do not conform to the contract. If the seller breaches and the buyer has not perfected a security interest in the goods, the buyer’s limited Article 2 rights to the goods against the seller are stated in 2-807(a) (specific performance), 2-822(b) (action for the price), 2-824(a) (pre-paying buyer), and 2-824(b) (replevin). With the exception of 2-824(a), these sections simply restate the goods oriented remedies of the buyer in original Article 2.

Subsection (a) extends the buyer’s rights against the seller to the goods to creditors of the seller “if the buyer’s rights vest before a creditor’s claim in rem attaches to the goods. “Creditor” is defined in 1-201 to include unsecured creditors, secured creditors, lien creditors and the trustee in bankruptcy. This is broader than the phrase “unsecured creditors” in former 2-402(1).

To illustrate, suppose that a creditor obtains a judicial lien on the goods. If the lien attaches before the buyer's rights vest under any of the three listed sections, the buyer is subject to the lien. If the buyer's rights vest before the judicial lien attaches, the buyer is entitled to the goods from the seller free of the judicial lien. Similarly, if the security interest of the seller's secured party attaches before the buyer's right vests, the buyer is subject to the security interest. If the buyer's right vests first, the buyer may claim the goods from the seller free of the security interest without the need to comply with Article 9.

There are two critical questions here. First, when do the buyer's rights attach to the goods? Second, if the creditor's right attaches before the buyer's right vests, when is the earliest time that the buyer could be a buyer in the ordinary course of business and take free of the attached right?

Under 2-824(a), a revision of current 2-502, a pre-paying consumer buyer's rights vest "upon acquisition of a special property, even if the seller had not then repudiated or failed to delivery. A similar vesting time is proposed for consumers who seek to replevin goods under 2-824(b). Thus, the right vests upon identification even though the seller is not yet in breach.

If the creditor interest attaches before vesting, a buyer in the ordinary course of business may take free of that interest, particularly a security interest. How early in the transaction may a buyer be in the ordinary course? Amended 1-201(9) provides: "Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 may be a buyer in the ordinary course of business. A "right to recover, however, is not the same as identification. Thus, a buyer's rights may vest earlier than the time when the buyer can be in the ordinary course, usually when the right vests and the seller is in breach.

2. Subsection (b) follows former 2-401(2). Most retention of goods by a seller will satisfy the requirements of the second sentence and not be fraudulent. A retention outside of the protection of the second sentence may be void against creditors of the seller if fraudulent "under any law of the state where the goods are situated. There has been little litigation of significance under this provision.

3. Subsection (c) emphasizes the limited role that this article plays in determining the rights of the seller's creditors under Article 9 or where fraudulent conveyances or voidable preferences are involved.

SECTION 2-506. SALE ON APPROVAL AND SALE OR RETURN; SPECIAL INCIDENTS; CONSIGNMENTS.

(a) If goods delivered by a seller to a buyer conform to the contract and may be returned by the buyer, the transaction is:

(1) a sale on approval, if the goods are delivered primarily for use; or

(2) a sale or return, if the goods are delivered primarily for resale.

(b) Under a sale on approval:

(1) the risk of loss and the title to goods identified to the contract do not pass to the buyer until acceptance;

(2) use of the goods consistent with the purpose of trial is not an acceptance, but a failure seasonably to notify the seller of election to return the goods is an acceptance, and acceptance of any part of conforming goods is an acceptance of the whole; and

(3) after seasonable notification of election to return, the return is at the seller's risk and expense, but a merchant buyer shall follow any reasonable instructions.

(c) Under a sale or return:

(1) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition but must be exercised seasonably; and

(2) the return is at the buyer's risk and expense.

(d) An "or return" term of a contract for sale shall be treated as a separate contract for sale within the statute of frauds, Section 2-201, and as negating the sale aspect of a contract within the provisions of this article on parol or extrinsic evidence, Section 2-202.

(e) Goods held on approval are not subject to claims of a buyer's creditors until acceptance. However, goods held on sale or return are subject to those claims while in the buyer's possession.

SOURCE: Sales, Sections 2-326, 2-327.

Changes. All incidents of sales on approval or return are combined without substantive change into one section. The law of consignments is not covered.

Comments

1. Section 2-506 integrates former sections 2-326 and 2-327.

2. Subsection (a) , following 2-326(1), defines sale on “approval and “sale or return. In both cases, there is a contract for sale between a seller and buyer with a return condition. The reason for the return, however, differs. The former goes to the buyer’s satisfaction with the goods and the latter goes to the buyer’s ability to resell them.

3. Subsection (b), which follows 2-327(1), elaborates aspects of the sale on approval other than whether goods are subject to claims of creditors of the buyer. See subsection (e). The question is whether the buyer in possession elects to accept or return the goods. During the period of inspection or trial, the risk of loss remains on the seller and if a timely notice to return the goods is given the return is at the seller’s risk and expense. Upon acceptance of the goods, however, the return condition is discharged and the normal principles apply.

4. Subsection (c), which follows 2-327(2), elaborates aspects of the sale or return other than issues of creditor’s rights.

5. Subsection (d) follows 2-326(4).

5. Subsection (e), which follows 2-326(2), deals with creditor’s rights against goods in the buyer’s possession under an approval or return condition.

6. In light of Article 9's expanded treatment of consignments, former 2-326(3), which stated when consigned goods were subject to creditors of the consignee, has been deleted. Treatment of the narrow class of “true consignments excluded from the Article 9 definition of consignment is left to the common law or state legislation dealing with special types of consignments, such as those by artisans or those where the value of the goods is less than \$1,000.

Consignment is defined in 9-102(a)(20) as follows:

“Consignment means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

(A) the merchant:

(i) deals in goods of that kind under a name other than the name of the person making delivery;

(ii) is not an auctioneer; and

(iii) is not generally known by its creditors to be substantially engaged in selling the goods to others;

(B) with respect to each delivery, the aggregate value of the goods is \$1,000 or more at the time of delivery;

(C) the goods are not consumer goods immediately before delivery; and

(D) the transaction does not create a security interest that secures an obligation.

PART 6
PERFORMANCE

SECTION 2-601. GENERAL OBLIGATIONS. Parties are obligated to perform in accordance with the contract.

Source: Sales, Section 2-301

Comment

1. This section is based upon former section 2-301 which provided that the seller was obligated to transfer and deliver the goods and that the buyer was obligated to accept and pay for the goods in accordance with the contract. This section was rephrased to apply to all of the parties' obligations under the contract. This change recognizes commercial practices in contracting which often couple non-goods related obligations with obligations related to delivery and payment for the goods. Such contracts and obligations may fall within the scope of Article 2 under a jurisdiction's application of the predominant purpose test or other tests for determining the scope of Article 2's application to "transactions in goods. Section 2-103.

2. To determine the parties' obligations under the contract requires an inquiry into the parties' agreement, defined in section 1-201(3), applicable sections of the U.C.C. and other applicable rules of law. Section 1-201(11). Determination of the parties' contractual obligations thus includes usage of trade, course of dealing and performance and the general background of circumstances in order to determine the meaning of words the parties may have used to set forth any conditions or duties.

3. This article contains many provisions that can be used to determine the parties' obligations under the contract if the parties do not agree otherwise. For example, section 2-606 provides that the seller's obligation to tender delivery is a condition to the buyer's duty to accept and pay for the goods. Unless otherwise agreed, the seller is obligated to tender delivery first but the seller need not complete delivery until buyer has tendered payment according to the contract. If the buyer tenders payment, then the seller is obligated to complete delivery. Section 2-607. See e.g. section 2-303 (open price term); section 2-305 (absence of specification of place for delivery).

SECTION 2-602. SELLER'S TENDER OF DELIVERY.

(a) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposal and give the buyer any notification reasonably necessary to enable the buyer to

take delivery. A tender of delivery includes the performance of any agreement to install or assemble the goods. The agreement and this article determine the manner, time and place for tender and, in particular:

(1) Tender must be at a reasonable hour.

(2) A tender of goods must be kept available for the period reasonably necessary to enable the buyer to take delivery of the goods.

(3) The buyer shall furnish facilities reasonably suited to receive the goods.

(b) If the seller is required or authorized to send the goods to the buyer, the following rules apply:

(1) If the agreement does not require delivery at a particular destination, tender requires that the seller deliver conforming goods to the carrier and comply with Section 2-603.

(2) If the agreement requires the seller to deliver at a particular destination, tender requires compliance with subsection (a) and, in an appropriate case, the tender of documents of title pursuant to subsections (c) and (d). The seller need not deliver at a particular destination unless required by a specific agreement or by the commercial understanding of the terms used by the parties.

(c) If conforming goods of a seller are in the possession of a bailee and are to be delivered to a buyer without being moved, the following rules apply:

(1) Tender requires the seller to tender a negotiable document of title covering the goods or to procure an acknowledgment by the bailee to the buyer of the buyer's right to possession of the goods.

(2) Tender to the buyer of a non-negotiable document of title or of a record

directing the bailee to deliver is sufficient tender unless the buyer seasonably objects. However, risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document of title or direction. A refusal by the bailee to honor the document of title or to obey the direction defeats the tender. Except as provided in Revised Article 9, receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third parties.

(d) If a contract requires a seller to deliver a document of title, the following rules apply:

(1) All required documents of title must be tendered in correct form[, except as provided in this article with respect to bills of lading in a set].

(2) Tender through customary banking channels is sufficient, and dishonor of a draft or other demand for payment accompanying the documents of title constitutes nonacceptance or rejection.

Source: Sales, Section 2-503

Comment

1. This section continues the rules on tender of delivery from former section 2-503 with the following changes. First, subsection (a) makes clear that tender of delivery includes any agreed installation or assembly. See *Baker v. DEC International*, 580 N.W.2d 894 (Mich.1998). Second, subsection (b)(2) provides that a destination contract is one where the parties' agreement requires delivery to a particular destination. This agreement can be evidenced by specific provisions or by the commercial understanding of the shipment terms used in the agreement. Thus, this section continues the presumption under former section 2-503 that the parties intend a shipment contract in the absence of a specific agreement to a destination contract. Third, subsection (c)(1) provides that the bailee's acknowledgment must be to the buyer. See *Jason's Foods, Inc. v. Peter Eckrick & Sons, Inc.*, 774 F.2d 214 (7th Cir. 1985). Fourth, subsection (c)(2) provides an exception to when mere notification fixes rights as to third parties to bring this subsection in line with the recent revisions to Article 9, Revised Article 9, Section 9-313. Finally, former section 2-503(5)(a) provided that documents must be in correct form except as provided regarding bills of lading in a set in former section 2-323. That exception has been

deleted to accord with the deletion of provisions governing shipping terms in Article 2. See comment to section 2-309.

2. Tender of delivery has several important consequences. First, tender of delivery is a necessary condition to the buyer's duty to accept and pay for the goods unless the parties agree otherwise. Section 2-606. Unless the buyer has waived the right to inspect the goods prior to payment, see section 2-608 and section 2-609, the buyer has a right to inspect the goods prior to payment as provided in section 2-609 and the seller must allow such inspection to avoid impairing the tender of delivery. The seller need not complete delivery until the buyer has tendered payment. Sections 2-606 and 2-607. Second, tender of delivery is relevant to determining the passage of the risk of loss under section 2-612 when goods are shipped by carrier or are in the hands of a bailee. The provisions in section 2-612 are in accord with the provision of this section in those two situations except that the goods need not conform to the contract in order for the risk of loss to pass to the buyer. See comment to section 2-612. Third, tender of delivery is the time for testing whether the goods conform to the contract for purposes of the buyer's right of rejection under section 2-703 and for accrual of a claim for breach of warranty as provided in section 2-814, which provides that a cause of action accrues for a breach of warranty at the time nonconforming goods are tendered unless the warranty expressly extends to the performance of the goods after delivery.

3. Subsection (a) restates the rules from former section 2-503(1) with the addition of language that makes clear that if the parties have agreed to an installation or assembly of the goods, adequate tender of delivery requires the performance of that agreement. The requirement that the seller put and hold the conforming goods for the buyer means that the goods must conform to the contract throughout the reasonable time that the seller is holding the goods for the buyer to take possession or control. The seller's tender of delivery requires that the seller have the ability to perform and offer to do so. A seller may make an appropriate tender under subsection (a) by tendering documents of title which give the buyer complete control of the goods. Usage of trade, course of performance, and course of dealing, as well as the other circumstances of the particular case, are relevant to determining the reasonableness of the tender and the notice to the buyer that enables the buyer to take delivery. Delivery is defined in section 2-102 as the "transfer of physical possession or control of the goods." If the seller's tender complies with the requirements of this section, the buyer must proceed in some manner or be in breach of contract. The buyer's obligation to provide suitable facilities is not part of the seller's tender but part of the buyer's obligation to cooperate with the seller in making the tender of delivery. See section 2-307. A buyer's failure to furnish suitable facilities to receive the goods in an appropriate case may constitute a breach of contract by the buyer. If the seller's tender does not comply with the requirements of this section, then the seller has breached the contract. Of course, the parties are free to agree to terms different than what is provided in this section regarding how tender of delivery should be made.

4. Subsection (b) continues the rules from former section 2-503(2) and (3) and the presumption that the parties intend a shipment contract unless they specifically agree otherwise. Subsection (b)(2) specifies a test for determining when the parties have agreed to a destination

contract that follows comment 5 to former section 2-503.

5. Subsection (c) continues the rules from former section 2-503(4) making it clear that the bailee's acknowledgment must be to the buyer and that a notification to the bailee fixes rights as against the bailee and third parties except as provided in revised Article 9.

6. Subsection (d) continues the rules from former section 2-503(5) except that no exception is stated for bills of lading in a set. Subsection (d) applies only when documents are required by the contract, not when documents are authorized. Whether the documents are in correct form depends upon the form the contract requires. Thus the parties' agreement as well as usage of trade, course of performance, course of dealing and other circumstances will determine whether the documents are in the correct form. If a prescribed document cannot be procured, the provisions of this article on substitute performance should be consulted to determine whether the agreed manner of delivery is commercially impracticable or whether a substitute manner of delivery is commercially reasonable.

SECTION 2-603. SHIPMENT BY SELLER.

(a) If a seller is required or authorized to send the goods to the buyer and the contract does not require delivery at a particular destination, the following rules apply:

(1) The seller shall put the goods in the possession of a carrier. However, unless requested by the buyer or required by usage of trade, the seller need not make a contract for their transportation or obtain and deliver any documents of title necessary to enable the buyer to obtain possession or control of the goods.

(2) If the seller is so requested or required to make a contract for transportation or to obtain and deliver documents under subsection (1), the following rules apply:

(A) The seller shall make a contract for the transportation of the goods as may be reasonable having regard to the nature of the goods and other circumstances of the case, and

(B) The seller shall obtain and promptly deliver or tender in due form any documents of title necessary to enable the buyer to obtain possession of the goods or otherwise

required by the agreement or by usage of trade.

(3) The seller shall promptly notify the buyer of the shipment if the goods are not clearly identified to the contract by markings on the goods, shipping documents, or otherwise.

(b) A seller's failure to notify the buyer of the shipment or to make a proper contract for transportation, if so required by subsection (a), is a ground for rejection only if material delay or loss results.

Source:, Sales, Section 2-504

Comment

1. This section is based upon former section 2-504 regarding the seller's obligation for carriage in a shipment contract but makes two significant changes from the former law. First, this section does not require the seller to make a contract for transportation or to obtain and deliver documents of title unless the buyer requests the seller to do so or applicable usage of trade requires the seller to do so. If the seller is required or requested to make the transportation contract or to obtain and deliver documents, this section continues the seller's obligation to make a reasonable contract and to promptly obtain and to deliver the documents of title. Second, this section requires the seller to notify the buyer of the shipment only if the goods are not clearly identified to the contract by markings on the goods, shipping documents or otherwise. Both of these changes are designed to make this Article's rules on shipment contracts to be in accord with the international practice. See Convention on Contracts for the International Sale of Goods Art. 31 and Art. 32. Of course, the parties are free to agree to other arrangements for shipping than what is provided in this section.

2. This section applies to shipment contracts, not destination contracts. Whether a contract is a shipment or destination contract depends upon whether the parties have specifically agreed or the commercial understanding of the terms is such that agreement requires the seller to deliver to the particular destination. See section 2-602 and section 2-309. Proper tender of delivery in a shipment contract means that the seller must also comply with the requirements of this section. Section 2-602(b)(2). Compliance with this section is also a necessary step in passing the risk of loss to the buyer in a shipment contract. Section 2-612(b)(2)(A).

3. Under subsection (a), the parties may agree to shipment terms subject to any substitution necessary under section 2-715. The parties' agreement as to shipment both as to the contract for transportation and the obligation to obtain and deliver documents must be read in light of commercial understanding. In the absence of an express agreement otherwise and if the seller has an obligation to make the contract for transportation, the reasonableness of any contract of transportation including choice of carrier and routing is determined by the nature of the goods

and the circumstances of the case. Regardless of whether the shipment is at the buyer's or seller's expense, the seller who is requested or required to make the contract of transportation must make any arrangements reasonable under the circumstances in light of the nature of the goods. These arrangements could include refrigeration or heating, specialized containers, or sending necessary personnel to tend to the goods. The seller acts unreasonably if the seller agrees to a valuation below the true valuation of the goods which cuts off the buyer's ability to recover from the carrier in the event of a loss given that the risk of loss will pass upon delivery to the carrier in the usual shipment contract. Section 2-612(b)(2)(A). If the seller has an obligation to obtain and to deliver documents, that obligation may be in addition to the seller's obligation to arrange a reasonable contract for transportation.

4. The parties may expressly agree that the seller shall promptly notify the buyer of any shipment with the rule of subsection (a)(3) applying only in the absence of such an agreement. Similarly, the parties may also expressly agree that the failure to notify is a ground for rejection in all cases, not just in the case of material delay or loss. Unless the parties agree to a notification requirement, notification is required only when the goods are not clearly identified to the contract by markings on the goods, shipping documents or otherwise. This provision, modeled on the Convention on Contracts for the International Sale of Goods Article 32, requires notification so that the buyer may procure insurance covering the goods in transit in those instances where the goods are not clearly identified as the buyer's goods and the seller has not agreed to procure such insurance. See John O. Honnold, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 212-213 (2d ed. 1991).

5. Under subsection (b), if the seller is required to make a contract for transportation or give notice to the buyer under subsection (a), the buyer may reject the goods if the seller's failure to do so is in fact followed by material delay or damage. The seller has the burden to establish that the seller's failure to follow the requirements of this section have not been followed by events which justify rejection of the goods.

SECTION 2-604. SELLER'S SHIPMENT UNDER RESERVATION.

(a) If a seller has identified goods to the contract by or before shipment, the following rules apply:

(1) The seller's procurement of a negotiable bill of lading reserves in the seller a security interest in the goods. The seller's procurement of the bill to the order of a financing agency or the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(2) The seller's procurement of a nonnegotiable bill of lading to the seller or its

nominee reserves possession of the goods as security. However, except in a case of conditional delivery, a nonnegotiable bill of lading naming the buyer as consignee does not reserve a security interest, even if the seller retains possession of the bill of lading.

(b) If a shipment by a seller with reservation of a security interest breaches the contract for sale, the shipment constitutes an improper contract for transportation under Section 2-603. However, the shipment does not impair the rights given to the buyer by shipment and identification of the goods to the contract or the seller's powers as a holder of a negotiable document of title.

Source: Sales, Section 2-505

Comment

1. This section is the same in substance as former section 2-505 and states the effect of the seller's procurement of either a negotiable bill of lading or a non negotiable bill of lading unless otherwise agreed by the parties to the contract for sale. This section does not address whether the seller can ship under reservation, when payment is due, or the buyer's ability to inspect the goods. Those matters are addressed in section 2-611. This section also does not address when title to the goods passes from the seller to the buyer, see section 2-501, or passage of the risk of loss for the goods, see section 2-612. This section also does not address the rights or obligations of the carrier who issued the bill of lading. See Article 7 on Documents of Title.

2. If goods are identified to the contract and the seller obtains a negotiable bill of lading, the seller has reserved a security interest in the goods. The security interest created in this manner is a mechanism for the seller to enforce its rights under the sales contract against the buyer and is not effected by the passage of title. Section 2-501. The parties' agreement on passage of title does not alter the operation of this section. That security interest is a security interest arising under Article 2 and is governed by revised Article 9, section 9-110.

3. A nonnegotiable bill of lading to the seller or its nominee means that the seller has possession of the goods as security for performance of the sales contract. If the seller seeks to withhold the goods improperly, the buyer may tender its obligations under the sales contract and recover the goods. Unless there is a conditional delivery under section 2-606, if the seller obtains a nonnegotiable bill of lading naming the buyer as the consignee, the seller does not have either a security interest under this section or possession of the goods as the seller has relinquished its control over the goods except in those situations where the seller has a right to stop delivery. Section 2-818. In the case of a conditional delivery under section 2-606, the seller has the right

to demand payment upon delivery of the goods or documents and the seller has the right to withhold delivery until paid or reclaim the goods as provided in section 2-816. In any event, the buyer has a right to inspect before payment as provided in section 2-609. Section 2-611(b).

4. Under subsection (b), the seller's reservation of a security interest does not allow the seller whose reservation of a security interest is a breach of the sales contract to obtain more than the seller is due under the sales contract. However, the fact that the seller's reservation of a security interest breached the sales contract does not impair the seller's rights as a holder of a negotiable document of title.

SECTION 2-605. RIGHTS OF FINANCING AGENCY.

(a) A financing agency, by paying or purchasing for value a draft that relates to a shipment of goods, acquires, to the extent of the payment or purchase and, in addition to its own rights under the draft and any document of title securing it, any rights of the shipper in the goods, including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(b) The right to reimbursement of a financing agency that in good faith has honored or purchased the draft under commitment to or authority from the buyer is not impaired by later discovery of defects in any relevant document of title that was apparently regular on its face.

(c) The rights of a financing agency that honors a presentation under a letter of credit are governed by Article 5.

Source: Sales, Section 2-506

Comment

1. This section is the same in substance as former section 2-506 except for the addition of a new subsection (c) that provides that a financing agency that honors a presentation under a letter of credit has the same rights as provided in Article 5.

2. Subsection (a) provides that the financing agency acquires the shipper's rights to the goods in addition to the financing agency's own rights under a draft or document of title when the financing agency purchases or pays a draft or honors a presentation under a letter of credit. Paying includes any situation where the financing agency, by arrangement with the buyer or other consignee on a draft, pays a draft for the price of the goods regardless of whether it is drawn on that party, whether it is a sight or time draft, or whether the payment is viewed as conditional or

absolute. Purchasing for value is similarly broad and does not recognize any distinction between a purchase, discount, or advance against collection or similar situations. The financing agency's right to have the draft honored is against the buyer and not other parties unless another party has a separate obligation to the financing agency. The draft must relate to a shipment of goods and includes drafts against invoices or delivery orders. After shipment, the shipper's rights in the goods are rights that secure payment for the goods and are subject to the buyer's right to force delivery upon payment of the price. Those rights may be limited if the goods are covered by a document of title and that document has been transferred or negotiated to a third party. See Article 7 on rights of transferees and holders of documents of title. Similarly, the financing agency has only the rights of the shipper to stop delivery as provided in section 2-818.

3. Subsection (b) addresses the rights of a financing agency in the situation where the documents of title have defects that were not on the face of the documents. This rule parallels the rule found in former section 5-114(2) in former Article 5 and in current section 5-109(a) of revised Article 5.

SECTION 2-606. EFFECT OF SELLER'S TENDER; DELIVERY ON CONDITION.

(a) The seller's tender of delivery is a condition to a buyer's duty to accept and to pay for the goods. Tender entitles the seller to acceptance of the goods and to payment according to the contract. The seller shall tender first but need not complete delivery until the buyer has tendered payment.

(b) Subject to Section 2-816, if payment is due and demanded on the delivery to the buyer of goods or documents of title, a buyer's right against the seller to retain or to dispose of them is conditional upon the buyer making the payment due.

Source: Sales, Section 2-507

Comment

1. This section is derived from former section 2-507 on tender of delivery as a condition to the buyer's obligation to accept and pay for the goods. Even though the conditions of tender of delivery and tender of payment are presumed to be concurrent conditions, unless otherwise agreed, the seller should tender delivery first. The seller's tender of delivery in accord with section 2-602 entitles the seller to the buyer's acceptance and payment of the goods according to the terms of the contract which includes the parties' agreement and applicable law such as

provisions on failure of agreed manner of payment. See section 2-715. Even if payment is due and demanded upon tender of delivery of the goods, the buyer still has the right to inspect the goods as provided in section 2-609.

2. Subsection (b) addresses the conditional delivery of goods when payment is due and demanded upon delivery of the goods. Conditional delivery does not prevent the passage of title as provided in section 2-501. Sections 2-504 and 2-816 protect the rights of third parties who obtain rights in the goods from the buyer. The seller's right in the goods delivered in a conditional delivery is in the nature of a lien and the seller's right to reclaim the goods from the buyer's possession is determined under section 2-816. A seller may waive rights granted by this section, section 2-209, or be precluded from exercising its rights under this section by estoppel or ratification of the buyer's right to keep the goods without payment. Section 1-103.

SECTION 2-607. TENDER OF PAYMENT BY BUYER; PAYMENT BY CHECK.

(a) Subject to Section 2-606(a), tender of payment by a buyer is a condition to the seller's duty to complete a delivery.

(b) Tender of payment by a buyer is sufficient if made by any means or in any manner current in the ordinary course of business unless the seller demands payment in money [or funds] and gives any extension of time reasonably necessary to procure it.

Source: Sales, Section 2-511

Comment

1. This section is derived from former section 2-511. In accord with the rule from section 2-606, subsection (a) provides that the seller need not complete delivery until the buyer tender's payment unless the parties otherwise agree. See section 2-611 on when and where payment is due, section 2-602 on tender of delivery, and section 2-305 on place for delivery. This section should also be read in light of the provisions on the buyer's right to inspect. Sections 2-608 and 2-609.

2. Subsection (b) follows the rule from former section 2-511(2) that the buyer may tender payment in the ordinary course of business. The seller may demand money, section 1-201(24). A party may satisfy the obligation to pay with money by making a funds transfer under Article 4A, section 4A-406(b). If the seller demands payment in money, the seller must give a reasonable extension of time to procure the money. This provision avoids undue surprise of the buyer.

3. Subsection (3) of former section 2-511 is omitted as unnecessary. Section 3-310

provides the effect of dishonor of a check on the underlying obligation to pay for the goods. Payment by drafts, including checks, is a commercially reasonable and ordinary manner of payment for goods. Making a payment by a non-post dated check is a conditional payment that is treated as a cash transaction. If the check is subsequently dishonored, the payment for the goods has been defeated as provided in section 3-310 and the seller may proceed on its rights on the check as well as its rights under this article. See section 2-816 regarding the seller's right to reclaim the goods.

SECTION 2-608. PAYMENT BY BUYER BEFORE INSPECTION.

(a) If the contract requires payment before inspection, non-conformity of the goods does not excuse the buyer from so making payment unless:

(1) the nonconformity appears without inspection; or

(2) despite tender of the required documents of title, the circumstances would justify injunction against honor under Article 5.

(b) Payment pursuant to subsection (a) is not an acceptance of goods and does not impair the buyer's right to inspect or other remedies of the buyer.

Source: Sales, Section 2-512

Comment

1. Section 2-608 continues the rules from former section 2-512 without substantive change.

2. Subsection (a) provides a limited right of the buyer to refuse to make payment prior to inspection of the goods in the situation where the contract requires payment prior to inspection. If the contract provides that the buyer is to pay before inspection, the buyer takes the risk of paying first and litigating later as to any defects in the goods. Subsection (a)(1) states an exception to that general rule, that if the non-conformity is apparent upon taking delivery, the buyer need not pay prior to inspection. Subsection (a)(2) provides an analogous rule for defects in the required documents of title.

3. Subsection (b) states the rule that if payment is required before inspection, that payment is not an acceptance of the goods under section 2-706, does not alter the buyer's right to inspect the goods under section 2-609 in any other way, and does not preclude the exercise of any of the buyer's remedies for the seller's breach, section 2-823. If payment is required prior to inspection, the buyer need not comply with the provision on reservation of rights, section 1-207,

in making payment in order to assert its rights as to any nonconformity in the goods.

4. This section should be read in conjunction with section 2-609 which states the usual rule that the buyer may inspect the goods prior to payment or acceptance of the goods unless the contract provides otherwise. As to the relationship between inspection, acceptance of the goods, payment, passage of title, and risk of loss, see the comment to section 2-609.

SECTION 2-609. BUYER'S RIGHT TO INSPECT GOODS.

(a) Subject to subsection (c), if goods are tendered, delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. If the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(b) Expenses of inspection must be borne by the buyer, but may be recovered as incidental damages if the buyer is entitled to such damages.

(c) The buyer is not entitled to inspect the goods before payment of the price if the contract provides for:

(1) delivery "C.O.D.", "C.I.F.", or "C. & F." or delivery on terms that under applicable course of dealing, usage of trade, or course of performance are interpreted as precluding inspection before payment; or

(2) payment upon tender of required documents of title, unless payment is due only after the goods become available for inspection.

(d) A place, method, or standard of inspection fixed by the parties is presumed to be exclusive. However, unless otherwise expressly agreed, the fixing of a place, method, or standard of inspection does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection must be made as provided in this section unless the place, method, or standard fixed was clearly intended as an indispensable

condition failure of which avoids the contract.

Source: Sales, Section 2-513

Comment

1. Section 2-609 continues the rules from former section 2-513 with three substantive changes. First, subsection (b) allows recovery of expenses of inspection anytime the buyer is entitled to recover incidental damages, not just when the buyer rejected the goods as under former section 2-513(2). Second, with the deletion of delivery terms from Article 2, the determination of whether the contract provides that the buyer will make payment prior to inspection depends upon the commercial interpretation of the shipping terms used as provided in section 2-309. Third, complying with a standard of inspection as a condition to further performance of the contract has been added to subsection (d). Just as with the place or method of inspection, the parties may intend that the standard of inspection is an indispensable condition of the contract.

2. In the case where the contract does not require the buyer to pay before inspection, the buyer has a right to inspect the goods as provided in subsection (a). That inspection need not take place at the point at which the seller tenders delivery under section 2-602 in a shipment contract but may be after arrival of the goods at the buyer's destination. See section 2-611(b). If payment is due when the buyer receives the goods under section 2-611(a), this section allows the buyer to inspect prior to making payment. The buyer's right to inspect must be exercised in a reasonable manner and at a reasonable place and time. The reasonableness of each of these factors is determined by trade usages, course of dealing, course of performance and other relevant circumstances.

3. Acceptance of the goods under section 2-706 does not take place unless the buyer has a reasonable opportunity to inspect the goods unless the buyer has waived its inspection right by signifying that it will take the goods or does an unreasonable act inconsistent with the seller's ownership or inconsistent with the buyer's claim of rejection or revocation of acceptance which act is ratified by the seller as an acceptance. Compare section 2-706. As stated in section 2-608, in a contract where the buyer has agreed to payment before inspection, payment is not an acceptance of the goods. If the buyer has not agreed to payment before inspection, payment does not waive the right to inspect before acceptance of the goods as the rule of subsection (a) applies to give the buyer a right to inspect "before payment or acceptance.

4. The buyer's right to inspect in subsection (a) is unaffected by passage of title under section 2-501 or by passage of the risk of loss under section 2-612. As provided in subsection (d), unless the parties expressly agree otherwise, title passes to the buyer as provided in section 2-501 and the risk of loss passes to the buyer under section 2-612 regardless of the buyer's right to inspect under this section.

5. Inspection under this section is inspection designed to determine whether the seller has

complied with the contract requirements regarding the goods and should not be confused with the buyer's examination of the goods prior to formation of the contract under section 2-406(e), in regard to implied warranties.

6. Subsection (b) provides that inspection expenses are normally expenses of the buyer unless the parties otherwise agree. The buyer has a right to recover inspection expenses as incidental damages in the event of seller's breach. Section 2-823 and section 2-805.

7. Subsection (c) provides for circumstances in which the commercial understanding is that the buyer has agreed to postpone its right to inspect until after payment. A documentary transaction falls within the exception to subsection (c)(2) providing for payment after the goods become available for inspection in situations where the parties agree that the payment is to await arrival of the goods, where the parties agree that the documents are to be held until arrival, or where payment is to be made against storage documents or delivery orders.

8. Under subsection (d), the question of whether the place, method or standard of inspection was an indispensable condition of the contract is one of the parties' intent. If the parties agree to a place of inspection, the buyer's failure to inspect may be a waiver of the right to inspect and thus an acceptance of the goods with such defects as an inspection would have revealed. Agreements on the time allowed for inspection of the goods must be a reasonable time. Section 2-306. A standard of inspection as an express condition to performance is not the same as a promise or warranty that the goods will perform up to the standard.

SECTION 2-610. WHEN DOCUMENTS OF TITLE DELIVERABLE ON ACCEPTANCE OR PAYMENT.

(a) Documents of title against which a draft is drawn must be delivered to the drawee that honors the draft on acceptance of the draft if the draft is payable more than [a reasonable time] [three days] after presentment. Otherwise, delivery of the documents of title is required only on payment.

(b) Article 5 governs the rights of a person that honors a draft drawn on a letter of a credit.

Source: Sales, Section 2-514

Comment

This section continues the rule from former section 2-514 with the addition of subsection

(b) to govern drafts presented under a letter of credit. This section states a presumption as to when documents of title must be released to the drawee of the draft and parallels the rules found in section 4-503. Acceptance of the draft means acceptance as defined in section 3-409.

**SECTION 2-611. OPEN TIME FOR PAYMENT OR RUNNING OF CREDIT;
AUTHORITY TO SHIP UNDER RESERVATION.**

(a) Payment is due at the time and place at which the buyer is to receive the goods, even if the place of shipment is the place for tender of delivery.

(b) If a seller is required or authorized to send the goods, the seller may ship them under reservation and may tender the documents of title. However, the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract.

(c) If tender of delivery is agreed to be made by way of documents of title other than under subsection (b), payment is due at the time and place at which the buyer is to receive the documents of title, regardless of where the goods are to be received.

(d) If the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment. However, post-dating the invoice or delaying its dispatch correspondingly delays the starting of the credit period.

Source: Sales, Section 2-310

Comment

1. This section continues the rules from former section 2-310 without substantive change. This section states rules concerning the time of payment for shipments on credit in the event the parties have not agreed otherwise.

2. Subsection (a) provides that payment is due at the time and place the buyer receives the goods even if the seller tenders delivery at an earlier time or at a different place as provided in the section 2-602 on tender of delivery. This rule allows for the buyer to inspect prior to payment as provided in section 2-609. The time and place of payment does not effect the

passage of the risk of loss for the goods as provided in section 2-612.

3. Subsection (b) protects the seller in the case where a credit sale is not contemplated by allowing the seller to ship under reservation as provided in section 2-604 so that the seller need not give up the goods until paid, but the buyer may still inspect the goods prior to payment unless the parties have agreed otherwise. Section 2-609. Subsection (c) must also be read in light of the buyer's inspection right. Under section 2-609(c)(2), agreeing to pay upon tender of documents of title waives the buyer's right to inspect prior to payment unless the parties have agreed that payment will wait until after the goods are available for inspection.

4. Subsection (d) is based upon the commercial understanding that an agreed credit period runs from the time of shipment. An invoice usually represents the date of shipment. Delay in sending the invoice or in post-dating the invoice deprives the buyer of notice of the time in which the buyer should be prepared to make payment.

SECTION 2-612. RISK OF LOSS.

(a) This section is subject to Section 2-506(b) and (c).

(b) Except as otherwise provided in subsection (c), risk of loss passes to the buyer regardless of the conformity of the goods to the contract as follows:

(1) Subject to this subsection, the risk of loss passes to a buyer upon receipt of the goods. If a buyer does not intend to take possession, risk of loss passes when the buyer receives control of the goods.

(2) If the contract requires or authorizes the seller to ship goods by carrier, the following rules apply:

(A) If the contract does not require delivery at a particular destination, the risk of loss passes to the buyer when the goods are delivered to the carrier as required by Sections 2-602 and 2-603, even if the shipment is under reservation.

(B) If the contract requires delivery at a particular destination and the goods arrive there in the possession of the carrier, the risk of loss passes to the buyer when

goods are tendered in the manner required by Section 2-602.

(3) If goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer:

(A) on the buyer's receipt of a negotiable document of title covering the goods with any required indorsement;

(B) on acknowledgment by the bailee to the buyer of the buyer's right to possession of the goods ; or

(C) after the buyer's receipt of a nonnegotiable document of title or record directing delivery, as provided in Section 2-602(c)(2).

(c) A breach of contract by either party affects risk of loss only in the following cases:

(1) If the buyer rightfully rejects the goods or justifiably revokes acceptance of the goods, the seller has the risk of loss from the time when the rejection or revocation is effective.

(2) If the seller has tendered nonconforming goods so that the buyer would have the right to reject the goods or revoke acceptance of the goods, the goods are damaged or lost before the buyer effectively rejects or revokes acceptance, and the risk of loss has otherwise passed to the buyer, the seller has the risk of loss to the extent the nonconformity of the goods caused the damage or loss.

(3) If conforming goods are identified to the contract when the buyer repudiates or is otherwise in breach and the risk of loss has not otherwise passed to the buyer, the buyer has the risk of loss for those goods for a commercially reasonable time after the breach or repudiation.

Source: Sales, Sections 2-509 and 2-510

Comment

1. This section is derived from former sections 2-509 and 2-510 but has made several substantive changes in the rules regarding passage of the risk of loss for the goods from the seller to the buyer. The underlying theory of this section is that risk of loss passes to the buyer at a stated point in time based upon assumptions about who is in the best position to prevent the harm to the goods or to insure against that harm regardless of who has title to the goods or who has a property interest in the goods and regardless of whether either party is in breach of contract except for the limited circumstances in subsection (c). Thus the conformity or non conformity of the goods to the contract is not relevant to the passage of the risk of loss for the goods except as provided in subsection (c). Whether one or both parties have insured against the loss is not relevant to determine who has the risk of loss for the goods.

The effect of the seller having the risk of loss for the goods is that if the goods are lost or damaged, the seller must still deliver goods conforming to the contract or answer in damages for breach of contract. Similarly, if the buyer has the risk of loss for the goods, the buyer must perform its obligations under the contract or answer in damages for breach of contract. Of course, the obligations of either the buyer or the seller may be excused in an appropriate case under sections 2-714 through 2-717 on excuse. As under former law, the parties may agree to passage of the risk of loss at a time different than what is provided in this section. Section 2-108; Section 1-201(3) on the meaning of agreement which includes course of dealing, course of performance and usage of trade.

2. Subsection (a) continues the rule that the risk of loss rules in this section are subject to the rules on risk of loss found in section 2-506 for sales on approval or sales and return.

3. Subsection (b)(1) changes the previous rule that provided that risk of loss passed upon tender of delivery in case of a nonmerchant seller, instead adopting the rule for merchant sellers that risk of loss passes upon buyer's receipt of the goods as the appropriate rule for all sales. Receipt is defined in section 2-102(a)(25) as taking delivery of the goods and delivery is defined in section 2-102(a)(11) as transfer of physical possession of the goods. If the buyer does not intend to take possession, then risk of loss will pass when the buyer takes control of the goods. This rule that passes risk of loss to the buyer upon physical possession or control of the goods applies when the goods are not shipped by carrier as authorized or required under the contract, when the goods are held by a bailee to be delivered without being moved, and when none of the circumstances in subsection (c) apply. The goods need not be conforming goods for the buyer to have the risk of loss under this section. Assume the seller tenders nonconforming goods and the buyer takes possession of the goods. At this point the risk of loss for the goods is on the buyer under subsection (b)(1). If the goods are destroyed before the buyer has accepted the goods or rejected the goods, the buyer has the risk of loss unless the destruction of the goods was caused by the nonconformity, subsection (c)(2).

4. Subsection (b)(2) continues the rules regarding passage of the risk of loss in shipment and destination contracts as under former law with only one change, that is, the goods need not

be conforming at the point of delivery to the carrier in the case of a shipment contract or delivery by the carrier in the case of a destination contract, for the risk of loss to pass to the buyer. In every other respect except as to the conformity of the goods, however, the seller or carrier as the case may be must comply with the sections on tender of delivery and obligations in the case of a shipment contract, section 2-602 and 2-603, in order for the risk of loss to pass at the point stated in subsection (b)(2). Thus the seller, if obligated to make a contract for carriage in a shipment contract, must make a reasonable contract under section 2-603 in order for the risk of loss to pass to the buyer at the time the goods are placed in the possession of the carrier. As under former law, if the goods are already in transit when the contract for sale is made, the risk of loss cannot pass until the goods are identified to the contract and absent special agreement passage of the risk of loss should not be made retroactive to the time of shipment.

A carrier within the meaning of this section is generally an entity that is separate from the seller and not controlled by the seller.

5. Subsection (b)(3) continues the rules from former law regarding risk of loss for goods in the hands of a bailee with two subsequent clarifications; first the risk of loss passes when the negotiable documents are indorsed if an indorsement is required for negotiation and second, the acknowledgement must be to the buyer in accord with the changes to the tender of delivery rules in section 2-602.

Under current law, controversy has arisen whether a seller who continues to hold possession of the goods after sale is a bailee under the rules in subsection (b)(3). In the usual case, if the continued possession after sale made the seller a bailee, the general rule of subsection (b)(1) would be undermined and thus in the usual case, the seller should not be a bailee within the meaning of this subsection. See *Silver v. Wycombe, Meyer & Co., Inc.*, 477 N.Y.S.2d 288 (Civil Court, City of N.Y. 1984). In some cases, however, the seller may qualify as a bailee if the seller and the buyer have entered into a separate agreement for bailment.

6. Subsection (c) addresses three situations where the risk of loss depends not only upon who has possession of the goods but also on whether the contract has been breached. In all cases, regardless of who has the risk of loss for the goods, the aggrieved party has an action against the breaching party for breach of contract. Subsection (c)(1) has a limited rule to pass the risk of loss back to the seller after an effective and rightful rejection of the goods or justifiable revocation of acceptance of the goods. This makes the risk of loss rule compatible with the rules on the buyer's obligation to take reasonable care of the goods in section 2-704. If the goods are destroyed while in buyer's possession after the buyer has effectively and rightfully rejected the goods or justifiably revoked acceptance of the goods, the buyer is liable to the seller only if the buyer has failed to take reasonable care of the goods. Passing the risk of loss back to the seller in this situation encourages the seller to take action to regain possession of the goods.

7. If the goods are destroyed prior to the rightful and effective rejection or revocation of acceptance, the seller has the risk of loss only to the extent the nonconformity caused the

destruction. Subsection (c)(2). If the nonconformity did not cause the destruction, the buyer has the risk of loss for the goods prior to the effective rejection or revocation of acceptance and also a cause of action against the seller for the nonconformity that operates as an offset for the liability caused by having to bear the risk of loss.

8. If the seller tenders conforming goods, the buyer takes possession of the goods, the buyer wrongfully but effectively rejects those goods, and then the goods are destroyed, the buyer retains the risk of loss and is liable for the price under section 2-822(a)(2). If in that case, the seller took possession of the goods back from the buyer and then the goods were destroyed, the buyer may also be liable for the price if the destruction took place within a commercially reasonable time after the seller repossessed the goods. Section 2-822(a)(2). If the destruction of the goods takes place outside the commercially reasonable time, the seller still has a cause of action for breach against the buyer based upon the wrongful rejection.

9. Subsection (c)(3) allows the risk of loss to be placed on the buyer if the buyer has repudiated or breached the contract after conforming goods are identified to the contract in order to protect the seller in the case of a surprise breach and allow the seller time to adequately protect the goods. The primary effect of this subsection is to entitle the seller to the price under section 2-822(a)(2) if the goods are destroyed within the commercially reasonable time provided in subsection (c)(3). The seller still has a cause of action for breach of contract against the buyer even if the buyer does not have the risk of loss under this subsection.

PART 7

BREACH, REPUDIATION, AND EXCUSE

SECTION 2-701. BREACH OF CONTRACT GENERALLY; SUBSTANTIAL IMPAIRMENT.

(a) Whether a party is in breach of contract is determined by the contract.

(b) A breach of contract occurs in the following circumstances, among others:

(1) A seller is in breach if it wrongfully fails to deliver, wrongfully fails to perform a contractual obligation, makes a nonconforming tender of performance, or repudiates the contract.

(2) A buyer is in breach if it wrongfully rejects a tender of delivery, wrongfully

1 attempts to revoke acceptance, repudiates the contract, fails to make a required payment, or
2 wrongfully fails to perform a contractual obligation.

3 (c) To determine whether the value of an installment or the whole contract has been
4 substantially impaired by a breach of contract under Sections 2-708, 2-710, or 2-712, the court
5 may consider:

6 (1) the extent to which the aggrieved party has been deprived of the benefit that it
7 reasonably expected under the contract

8 (2) the extent to which the aggrieved party can be compensated for the benefit of
9 which it has been deprived;

10 (3) whether cure of the breach is permitted and likely;

11 (4) whether adequate assurance of due performance has been given;

12 (5) whether the party in breach acted in good faith; and

13 (6) whether the party in breach will suffer a forfeiture.

14 (d) The cumulative effect of individual, insubstantial breaches of contract may
15 substantially impair the value of the whole contract to the other party .

16 **SOURCE: Sales, Sections 2-703, 2-711; Restatement (Second) of Contracts Section 241.**

17 **Comments**

18 1. Section 2-701 is a new section that is derived, in part, from former sections 2-703 and
19 2-711 which defined breach as part of the index to the remedies sections and from the
20 Restatement (Second) of Contracts section 241 statement of factors to determine material breach.

21 2. Subsection (a) corresponds to the statement of the parties' obligation in section 2-601
22 which provides that the parties are obligated to perform in accord with the requirements of the
23 contract. Subsection (a) provides that if a party does not perform in accord with the contract
24 requirements, the party has breached the contract. The contract's requirements are the total legal
25 obligation of the parties, section 1-201(11), which includes the parties' agreement, section 1-

201(3), and the provisions of applicable law including the provisions of this Article.

3. Section 2-701(b) identifies those events that are usually breaches of contract and correspond to those breaches identified in former section 2-703 and 2-711. The buyer's breach includes failure to pay after delivery as well as "payment due on or before delivery" as provided in former section 2-703. If the failure after acceptance is a default under a security agreement, Article 9 would govern enforcement of the security interest. In addition, subsection (b) identifies that the failure to perform any obligation under the contract is a breach. Neither section 2-703 or section 2-711 contained that definition of breach. Section 2-815 (seller's remedies) and section 2-823 (buyer's remedies) merely index the remedies that either the seller or buyer is entitled to exercise if there is a breach of contract. This Article rejects any doctrine of election of remedies as a fundamental policy and thus the remedies indexed in section 2-815 and section 2-823 are cumulative in nature. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case. This section defining breach must be read in light of the sections on excuse of an obligation to perform (sections 2-714 through 2-717), on cure (section 2-709), and on waiver (section 2-702).

4. Subsection (c) is a new section based upon Restatement (Second) of Contracts section 241 which defines material breach. *See Midwest Mobile Diagnostic Imaging v. Dynamics Corp. of America*, 965 F. Supp. 1003, 1012 (W.D. Mich 1997). The substantial impairment concept is relevant only to the installment contract situation (section 2-712), the anticipatory repudiation situation (section 2-710) and the revocation of acceptance situation (section 2-708). In those circumstances, the question of whether the rights of the aggrieved party are substantially impaired can be determined by the factors listed in this subsection.

5. Subsection (d) adopts the position of the cases which hold that substantial impairment of the value of the whole contract may be the result of the cumulative effect of insubstantial breaches. *See Oberg v. Phillips*, 615 P.2d 1022 (Ct. App. Okla. 1980).

SECTION 2-702. WAIVER OF BREACH; PARTICULARIZATION OF NONCONFORMITY.

(a) Except as otherwise provided in subsection (c), a party that knows that the other party's performance constitutes a breach of contract but accepts that performance and fails within a reasonable time to object is precluded from relying on the breach to cancel the contract. Except as otherwise provided in subsection (c), acceptance of that performance and failure to object do not preclude a claim for damages unless the party in breach has changed its position reasonably

1 and in good faith in reliance on the aggrieved party's inaction.

2 (b) Failure to object to a nonconforming performance under subsection (a) does not
3 preclude objection to the same or similar breach of the contract in future performances of like
4 kind unless the party precluded expressly so states. A statement waiving future performance
5 may be retracted by seasonable notification received by the other party that strict performance
6 will be required unless the waiver has induced the other party to change its position reasonably
7 and in good faith.

8 (c) A party is precluded from relying on a nonconforming performance as follows :

9 (1) Payment upon tender of documents of title made without reservation of rights
10 waives the right to recover the payment for defects apparent on the face of the document of title.

11 (2) The buyer's failure to state, in connection with a rejection under Section
12 2-703, a particular nonconformity that is ascertainable by reasonable inspection precludes
13 reliance on the unstated nonconformity to justify rejection or to establish a breach of contract if:

14 (A) the seller, upon a seasonable particularization, had a right to cure
15 under Section 2-709 and could have cured the non-conformity or breach; or

16 (B) between merchants, the seller after rejection has made a request in a
17 record for a full and final statement in a record of all non-conformities on which the buyer
18 proposes to rely.

19 (3) The buyer's failure to state, in connection with a revocation of acceptance
20 under Section 2-708, the nonconformity that justifies the revocation precludes the buyer from
21 relying on the nonconformity to justify the revocation or to establish breach of contract if the
22 seller had a right to cure under Section 2-709 and could have cured the non-conformity or breach.

Source: Sales, Section 2-605.

Comment

1. This section is new and states the rules regarding waivers of breach. Former section 2-209 has been criticized as an unclear effort to both incorporate and control waiver in the context of Article 2.

2. Both this section and section 2-209(c) do not operate on a clean slate in terms of determining when there is a waiver and what the effect of a waiver is on the parties' rights and obligations. Under section 1-103 principles of both waiver as developed at common law operate to supplement Article 2 provisions. It is unrealistic to preclude completely common law principles of waiver by attempting a complete and full statement of waiver principles within Article 2. Rather the approach taken in this section and section 2-209(c) is to clarify particular effects of application of the waiver concept without defining what is a waiver for all cases.

3. Section 2-209(c) clarifies that a party may waive an express condition to its own performance obligation. The effect of that waiver of an express condition is that the performance obligation arises even if the condition does not come to pass. If that condition is not also a performance obligation of the party, the failure of the condition is not a breach of contract. Restatement (Second) Contracts §225. Often it is difficult to tell whether the contract term is merely a condition to performance of the other party or whether it is also a performance obligation of that first party.

For example, S agrees to sell goods to B for \$5,000 with delivery on May 1. Is delivery May 1 a condition to B's duty to pay or is delivery May 1 a promise that S will deliver on May 1? If, in the unlikely event the term is interpreted to be a condition, then if S does not deliver on May 1, B has no duty to perform its obligation to pay. S, however, has not breached the contract. B's conduct or words, however, may have indicated that B waived the condition of delivery May 1. In that case, because the condition is waived, B's obligation to pay arises, even if delivery is not by May 1. B has no cause of action for breach against S because the condition was not a performance obligation of S.

Assume, however, that the delivery term is a promise to perform by delivering on May 1. S's promise to perform is assumed to be dependent upon B's promise to perform and vis versa. Restatement (Second) of Contracts § 232. If S does not deliver on May 1, S has breached the contract. B would be able to pursue its remedies for breach against S, including canceling the contract and damages for breach. If B, by B's conduct or words, waives performance of the promise to deliver on May 1, at common law, the effect of the waiver is that B could not cancel the contract, but could recover damages for S's breach by failing to deliver on May 1. See Restatement (Second) of Contracts § 246.

Unless it is very clear that a term is only an express condition to performance and not a performance obligation, courts should employ the presumption that terms in a contract are

1 performance obligations and not mere conditions. See Restatement (Second) of Contracts § 227.

2 4. Subsection (a) implements the common law rule that a party may waive a performance
3 obligation and by doing so loses the right to cancel the contract but not the right to recover
4 damages unless the other party detrimentally relies on the failure to object. To illustrate the
5 operation of this section, assume that S agrees to sell goods to B, with delivery on May 1. S
6 communicates to B that S can deliver the goods on May 5, but cannot make the delivery on May
7 1. The contract does not include a no oral modification or an anti-waiver clause. B accepts
8 delivery on May 5 and does not object. Delivery on May 1 should be presumed to be a promise,
9 not a mere condition to B's performance obligation, unless the contract clearly provides
10 otherwise. S's failure to deliver on May 1 is a breach of S's performance obligation. B's
11 acceptance of B's performance and failure to object to S's late delivery means that B cannot
12 cancel the contract, but may pursue B's claim for damages caused by S's late delivery, unless S
13 has detrimentally relied on B's failure to object. In an installment contract, the party who
14 receives nonconforming performance but who accepts that performance should object to the
15 nonconformity in order to preserve the right to use that nonconformity to assert a substantial
16 impairment of the value of the whole contract. Section 2-710(c).

17 5. Subsection (b) addresses the effect of a waiver under subsection (a) of a previous
18 performance obligation on future performance obligations. Assume that in the contract above, S
19 agreed to deliver goods the first of every month for 6 months. S's first delivery is late and not
20 delivered until May 5. B accepts the delivery and does not object to its lateness. S's obligation to
21 deliver the next month's installment on time on the first of June is intact. B's failure to object to
22 the first late delivery is not a waiver of future timely deliveries under subsection (b) nor does it
23 preclude an ability to request adequate assurance of performance. Section 2-711. Assume,
24 however, that B accepts the late delivery on May 5 and tells S that as long as the deliveries are
25 made before the 5th of every month, B will take the deliveries. That may be a statement waiving
26 future performance of timely deliveries. In order to retract that waiver of future performance, B
27 would have to give seasonable notice to S before S relied on the waiver to S's detriment.

28 6. Subsection (c) states three situations where failure to object does waive the right to
29 establish breach based upon the particular nonconforming performance. Subsections (c)(1) and
30 (c)(2) are from former section 2-605 with no change in substance. If payment is required against
31 documents, the documents will be inspected prior to payment and payment constitutes
32 acceptance of the documents and waiver of the right to assert defects in the documents that are
33 apparent on the face of the documents. Acceptance of the documents, however, is not acceptance
34 of the goods. See section 2-609. Subsection (c)(2) is the same as former section 2-605(1) with
35 one substantive change to require the seller to have had a right to cure in subsection (c)(2)(A), a
36 concept perhaps implicit in the former section 2-605(1)(a). As under former law, the policy is to
37 allow the buyer to give informal notice of defects without penalizing the buyer for failure to state
38 all defects and at the same time protect the seller in those situations where the failure to state a
39 defect misleads the seller. Thus if the defect is one that could be cured under section 2-709, the
40 buyer will have waived that defect if the buyer does not state it with sufficient particularity to
41 facilitate the seller's exercise of its right to cure as provided in section 2-709. Subsection (c)(3)

1 is a new section included to dovetail with the expansion of the right to cure in the post-revocation
2 situation under section 2-709. The limitation to nonconformities ascertainable by reasonable
3 inspection contained in subsection (c)(2) does not make sense in the revocation situation as the
4 only situation where the seller has a right to cure after revocation is when the defect is not easily
5 discoverable. Thus, subsection (c)(3) is narrowly drawn to require a particularization of the
6 defects justifying revocation that the seller had a right to cure under section 2-109 and could have
7 been cured. Subsection (c)(3) thus parallels subsection (c)(2)(A).

8 Not listed in subsection (c) is the effect of the failure to particularize in the notice of
9 breach in the case of the accepted goods under section 2-707(c)(1). That omission is intentional.
10 A particularization requirement would not facilitate a statutory cure as the seller has no right to
11 cure under section 2-709 when the goods are accepted and acceptance is not revoked. A deemed
12 waiver by failure to particularize would be inconsistent with the prejudice standard in section 2-
13 707 where notice itself is excused unless there is prejudice by failure to notify.

14 To illustrate the operation of subsection (c), assume that S agreed to deliver goods that
15 conformed to an express warranty on May 1. S delivered the goods on May 1 but the goods did
16 not conform to the warranty. B timely rejects the goods under section 2-703. Under subsection
17 (a), B has objected by its rejection to the nonconforming performance. Under subsection (c)(2),
18 if the nonconformity is ascertainable by reasonable inspection and the seller had the right to cure
19 the breach under section 2-709 and could have cured, then B has to particularize the
20 nonconformity or is barred from asserting the nonconformity to establish breach or justify the
21 rejection. If the nonconformity is not ascertainable by reasonable inspection, B need not
22 particularize the defect and will not suffer any adverse consequences from failing to particularize
23 unless B knows of the defect when it accepts S's performance. In that case, subsection (a) will
24 operate to preclude a cancellation and perhaps damages if the second sentence of subsection (a)
25 applies.

26 Assume the same facts but that B did not reject, but accepted. B then timely and properly
27 revoked acceptance under section 2-708(a)(2). B's timely and proper revocation should satisfy
28 the objection required under subsection (a). If S has a right to cure under section 2-709 and
29 could have cured, then B must particularize those defects justifying revocation or not be allowed
30 to assert those defects to justify revocation or establish breach. As to non-conformities not
31 sufficient to justify revocation that B knows about, subsection (a) would operate to determine B's
32 rights.

33 **SECTION 2-703. BUYER'S RIGHTS ON NONCONFORMING DELIVERY;**
34 **RIGHTFUL REJECTION.**

35 (a) Subject to Sections 2-603(b), 2-710, 2-809, and 2-810, if the goods or the tender of
36 delivery fail in any respect to conform to the contract, the buyer may:

1 (1) reject the whole;

2 (2) accept the whole; or

3 (3) accept any commercial units and reject the rest.

4 (b) Rejection of goods must be within a reasonable time after their delivery or tender and
5 is not effective unless the buyer seasonably notifies the seller.

6 **SOURCE: Sales, Section 2-601, 2-602(1)**

7 **Comment**

8 1. Section 2-703 continues the perfect tender rule from former section 2-601. The only
9 substantive change to subsection (a) is to add a cross reference to section 2-603(b) regarding the
10 ability to reject if required to give notice in a shipment contract and material loss or delay results.
11 This does not change the current law as it relates to the right to reject, it only makes the rejection
12 rule from that section visible (former section 2-504).

13 2. Under subsection (a), the buyer's right to reject is determined by whether the goods or
14 delivery fail to conform to the contract, the parties' total legal obligation, which includes the
15 parties' bargain in fact, applicable course of performance, course of dealing and usage of trade,
16 as well as terms incorporated from the U.C.C. and other applicable law. Section 1-201(11). The
17 buyer's right to reject must be exercised in good faith. Section 1-203. A rejection made in bad
18 faith is wrongful. Even if the buyer rightfully rejects, the buyer's ability to cancel the contract
19 or pursue other remedies is tempered by the seller's right to cure in section 2-709. If the seller
20 has the right to cure under section 2-709, the buyer has an obligation to allow the seller to make
21 the cure. If the seller properly cures, the buyer's ability to force the goods back on the seller
22 through rejection is defeated. Generally, a buyer will have the right to inspect the goods prior to
23 making the decision whether to accept or reject the goods. Section 2-609 and section 2-706.
24 Acceptance of the goods or a tender that does not conform to the contract does not preclude the
25 buyer from pursuing the seller for a remedy for breach of contract. See section 2-701(b) on
26 breach and section 2-823 for an index of buyer's remedies.

27 Partial acceptance of commercial units is permitted whether the part of the goods
28 accepted conforms or not. The obligation of good faith in acceptance or rejection requires that a
29 partial acceptance not unreasonably impair the value of the remaining portion of the goods. If a
30 partial acceptance occurs and the price can be apportioned, section 2-302, the buyer is obligated
31 to pay the price for the goods accepted. Section 2-822.

32 Once the buyer accepts the goods under section 2-706, the buyer may no longer reject the
33 goods. The buyer may, however, notify the seller that the goods are rejected and then later
34 retract that rejection if the seller still has the tender of the goods open. If the buyer has

possession of the goods and has retracted the rejection, the seller has the ability to treat actions of the buyer that are inconsistent with the claimed rejection as an acceptance, section 2-704, unless those actions are allowed under section 2-705.

3. Subsection (b) follows former section 2-602(1) without substantive change. The reasonable time for rejection and the seasonable notice to the seller of the rejection must be read in light of the buyer's reasonable time to inspect the goods. Section 2-609. The parties may agree as to the time periods for rejection and notice. Section 1-204. A rejection not permitted under subsection (a) is wrongful and a breach of contract by the buyer even if the buyer gives prompt notice under subsection (b). Thus a rejection may be effective but wrongful. Section 2-701(b)(1). A rejection may be rightful under the standard of subsection (a) but ineffective under subsection (b). A rightful but ineffective rejection is an acceptance under section 2-706. This dichotomy follows current law.

SECTION 2-704. EFFECT OF EFFECTIVE REJECTION AND JUSTIFIABLE REVOCATION OF ACCEPTANCE.

(a) Subject to Sections 2-705 and 2-829(b), after an effective rejection or justifiable revocation of acceptance, a buyer in physical possession of the goods shall hold the goods with reasonable care at the seller's disposition for a sufficient time to permit the seller to remove them. However, the buyer has no further obligation with regard to goods rightfully rejected or to which an acceptance has been justifiably revoked.

(b) If a buyer uses the goods after an effective rejection or justifiable revocation of acceptance, the following rules apply:

(1) Any use by the buyer which is unreasonable under the circumstances and which is either inconsistent with the seller's ownership or inconsistent with the buyer's claim of rejection or justifiable revocation of acceptance is an acceptance if ratified by the seller. If the buyer wrongfully rejected the goods, any use of the goods by the buyer which is inconsistent with the seller's ownership or inconsistent with the buyer's claim of rejection is unreasonable.

(2) If use of the goods is reasonable under the circumstances, such use is not an

1 acceptance and, the buyer, upon returning or disposing of the goods, shall pay the seller the
2 reasonable value of the use to the buyer. The value must be deducted from the sum of the price
3 paid to the seller, if any, and any damages to which the buyer is otherwise entitled under this
4 article.

5 **SOURCE: Sales, Sections 2-602 and 2-608(3).**

6 **Comment**

7 1. Section 2-704 is derived from former sections 2-602 and 2-608(3) and addresses the
8 buyer's obligations as to the goods after an effective rejection and a justifiable revocation of
9 acceptance. Under section 2-703 a buyer may effectively reject the goods by giving notice of a
10 rejection within a reasonable time. That rejection may be rightful as the goods or the tender did
11 not conform to the requirements of the contract. That rejection could be wrongful if the goods
12 and the tender of delivery conformed to the requirements of the contract but still effective if the
13 notice of rejection is given within the appropriate time. Thus a rejection can be either rightful or
14 wrongful but nonetheless effective if the buyer complies with the notice requirement in section 2-
15 703(b). A wrongful but effective rejection is a breach of contract by the buyer. Section 2-701.
16 If the buyer rightfully rejects the goods, of course, the seller has breached the contract by making
17 a non conforming tender. Section 2-701.
18

19 A buyer who has grounds to revoke acceptance under section 2-708 must give the notice
20 required under that section in order to effect the revocation. If the buyer has grounds for
21 revocation, but has not yet given the required notice of revocation, the buyer has not undone its
22 acceptance of the goods. If the buyer attempts to revoke acceptance wrongfully by giving a
23 notice of revocation, the acceptance has not been undone and there is no revocation of
24 acceptance. Thus this section speaks of a justifiable revocation which presumes that the buyer
25 has given the required notice in a case in which the buyer is justified in revoking acceptance
26 under section 2-708. In either case where the buyer has not given notice of a justifiable
27 revocation or where the buyer has given notice of an unjustifiable revocation, the acceptance has
28 not been undone, the goods are the buyer's goods and this section does not apply. An attempt to
29 revoke acceptance when revocation is not justifiable under section 2-708 may be a breach of
30 contract by the buyer. Section 2-701. If the buyer has not given notice of a justifiable revocation,
31 the seller may be in breach of contract for tendering nonconforming goods. Section 2-701.
32

33 2. Subsection (a) states the rule that the buyer who possess the goods after an effective
34 rejection or a justifiable revocation of acceptance must exercise reasonable care in taking care of
35 the goods. That effective rejection may be either rightful or wrongful. The buyer's obligation to
36 take care of the goods is subject to the requirements of the next section and to the buyer's
37 exercise of its security interest in the goods under section 2-829(b). If the rejection is rightful or
38 the revocation of acceptance is justified, the buyer's obligation as to the goods is determined by

1 this section and the requirements of section 2-705 and section 2-829(b). If the rejection is
2 wrongful but nonetheless effective, the buyer may have the risk of loss as to the goods as
3 provided under section 2-612 in addition to the obligations stated in subsection (a). If the
4 attempt to revoke acceptance is unjustified, the buyer has not undone the acceptance and this
5 section does not apply.

6 3. Subsection (b) is derived from former section 2-602(b)(1) but has been revised to deal
7 with the problem of post rejection or revocation use of the goods. The courts have developed
8 several alternative approaches. Under former Article 2, a buyer's post rejection or revocation use
9 of the goods could be treated as an acceptance thus undoing the rejection or revocation, could be
10 a violation of the buyer's obligation of reasonable care, or could be neither an acceptance or a
11 violation of the reasonable care obligation but rather a reasonable use for which the buyer must
12 compensate the seller. Subsection (b) adopts the third approach. If the buyer's use after an
13 effective rejection or a justified revocation of acceptance is both unreasonable under the
14 circumstances and is inconsistent with the rightful rejection, justified revocation of acceptance,
15 or the seller's ownership, the seller has the option to treat the buyer's use as an acceptance of the
16 goods. If the buyer's use is reasonable, however, the buyer's actions cannot be an acceptance
17 and the buyer must compensate the seller for the value of the buyer's use. If the buyer
18 wrongfully but effectively rejected the goods, the buyer's use inconsistent with the seller's
19 ownership is unreasonable and an acceptance of the goods if the seller chooses to treat the use as
20 an acceptance. If the seller does not treat the unreasonable use as an acceptance, the seller may
21 have non-code remedies for conversion.
22

23 **SECTION 2-705. MERCHANT BUYER'S DUTIES; BUYER'S OPTIONS AS TO**
24 **SALVAGE.**

25 (a) Subject to a buyer's security interest under Section 2-829(b), if the seller does not have
26 an agent or place of business at the market where the goods were rejected or acceptance was
27 revoked, a merchant buyer, after an effective rejection or justifiable revocation of acceptance of
28 goods in the buyer's possession or control, shall follow any reasonable instructions received from
29 the seller with respect to the goods. In the absence of such instructions, a merchant buyer shall
30 make a reasonable effort to sell or otherwise dispose of the goods for the seller's account if they
31 are perishable or threaten to decline speedily in value. [In the case of a rightful rejection or a
32 justifiable revocation of acceptance] Instructions are not reasonable if on-demand indemnity for
33 expenses is not forthcoming.

(b) [In the case of a rightful rejection or a justifiable revocation of acceptance] A merchant buyer that sells goods under subsection (a) is entitled to reimbursement from the seller or out of the proceeds for the reasonable expenses of caring for and selling them. If the expenses do not include a sales commission, the buyer is entitled to a commission usual in the trade or, if there is none, to a reasonable sum not exceeding 10 percent on the gross proceeds.

(c) Except as provided in subsection (a), after an effective rejection or a justified revocation of acceptance, a buyer may store the rejected goods for the seller's account, reship them to the seller, or resell them for the seller's account, with reimbursement [in the case of a rightful rejection or a justifiable revocation of acceptance] as provided in subsection (b).

(d) In complying with this section, a buyer shall act in good faith. Conduct in good faith under this section does not constitute acceptance or conversion and may not be the basis of a claim for damages.

SOURCE: Sales, Sections 2-603 & 2-604.

Comment

1. Section 2-705 carries forward the rules from former sections 2-603 and 2-604 with two changes designed to broaden its applicability. This section applies not only in the case of a rightful effective rejection as under former law but also to a wrongful effective rejection and to a justifiable revocation of acceptance.

The bracketed language in subsections (a), (b) and (c) raises for discussion whether reimbursement is appropriate in the case of a wrongful but effective rejection. Logically a buyer who has wrongfully rejected has breached the contract and is liable for damages for the wrongful rejection. The buyer may or may not be entitled to an offset for the expenses of sale or storing the goods post-rejection from the damages it otherwise will owe to the seller but arguably should not be entitled to demand those expenses up front from the seller, or deduct them from the proceeds of sale which would otherwise go to the seller. The buyer who wrongfully rejects, however, should be required under subsection (a) or permitted under subsection (c) to deal with the goods post rejection in accord with the mitigation principle of section 2-803. Consistent with the principle in section 2-704, those post wrongful rejection actions as regards the goods do not constitute an acceptance and

1 are not unreasonable actions with regard to the goods. Thus the principle of subsection (d)
2 applies to all rejections whether rightful or wrongful and justifiable revocations of
3 acceptance.

4 2. Subsection (a) continues the rule that imposes duties on the merchant buyer to take
5 action as regards to the goods in the buyer's possession or control only if the seller has no agent
6 or place of business in the market where the goods were located when rejected or when
7 acceptance was justifiably revoked. The merchant buyer's duties in that case are to follow
8 reasonable instructions or if no reasonable instructions are given to sell the goods if the goods are
9 perishable or threaten to decline in value quickly. As under former Article 2, the merchant buyer
10 has the ability to demand indemnity for expenses the buyer will incur in performing its obligation
11 under this section. A financing agency acting on behalf of the seller in the relevant market is
12 sufficiently the seller's agent to free the merchant buyer from its duties under this subsection. A
13 merchant buyer who has an obligation to act under this section but who fails to do so may be
14 liable for damages that result from its failure to take the required action. Non-merchant buyers
15 have no obligations under subsection (a) but a privilege to act as regards the goods under
16 subsection (c).

17 3. Subsection (b) follows former Article 2, allowing the merchant buyer to be reimbursed
18 or collect from the proceeds of sale the expenses of caring for the goods and the sale of the goods
19 as well as providing for a usual commission.

20 4. Subsection (c) follows former section 2-604 which allows any buyer, merchant or non-
21 merchant to take action as regards the goods to store, reship or resell the goods on seller's
22 account. These are options given to a buyer, not duties imposed upon a buyer. This section
23 applies to merchant buyers who are not required to take action under subsection (a) and to non-
24 merchant buyers in any case. A buyer acting under subsection (c) has the ability to be
25 reimbursed for its expenses as provided in subsection (b).

26 5. Subsection (d) requires a buyer to act in good faith in making the decisions as to what
27 to do with the goods after an effective rejection or a justifiable revocation of acceptance. If the
28 buyer acts in good faith, the buyer's actions are not an acceptance of the goods and do not
29 constitute a conversion of the goods.

30 **SECTION 2-706. WHAT CONSTITUTES ACCEPTANCE OF GOODS.**

31 (a) Goods are accepted when the buyer:

32 (1) receives the goods and states to the seller at any time that the goods conform
33 to the contract or are acceptable;

34 (2) after a reasonable opportunity to inspect the goods, signifies to the seller that

1 the goods conform or will be taken or retained in spite of their nonconformity;

2 (3) after a reasonable opportunity to inspect the goods, fails to make an effective
3 rejection; or

4 (4) does any unreasonable act inconsistent with the seller's ownership or
5 inconsistent with the buyer's claim of rejection or justifiable revocation of acceptance and that act
6 is ratified by the seller as an acceptance.

7 (b) Acceptance of a part of any commercial unit is acceptance of that entire unit.

8 **SOURCE: Sales, Section 2-606.**

9 **Comment**

10 1. Section 2-706 is derived in large part from former section 2-606 with two substantive
11 changes. First, in subsection (a)(1) it allows an acceptance to take place without a reasonable
12 opportunity to inspect if the buyer so states to the seller. Inspection is a condition to acceptance
13 of the goods and subject to waiver by the person benefited by the right. Section 2-209. Second,
14 subsection (a)(4) is redrafted to dovetail with the rights of a buyer who uses the goods post
15 rejection or revocation. Section 2-704. As under former law, acceptance of the goods under this
16 section is completely separate from passage of title to the goods under section 2-501.
17 Acceptance of the goods does not preclude the buyer from exercising any remedies for breach of
18 contract if the goods or the tender of delivery do not conform to the contract's requirements.
19 Section 2-707(b). Of course, if the goods and the tender of delivery conform to the contract, the
20 buyer is obligated to accept the goods or the buyer will have breached the contract. Section 2-
21 701. If the buyer has rejected the goods, the buyer can still accept the goods thereafter if the
22 seller has indicated that the tender is still open to acceptance. See comment to section 2-703.

23 2. Subsection (a)(1) allows a buyer to waive its right to inspect prior to acceptance,
24 section 2-609, by stating that it accepts the goods even if the buyer has not had an opportunity to
25 inspect. In order to protect the buyer's right to inspect, the buyer's statement of acceptance must
26 be explicit and should not be inferred from conduct in taking possession of the goods or other
27 actions.

28 3. Subsection (a)(2) follows former law that allows the buyer a reasonable opportunity to
29 inspect the goods before deciding whether to accept the goods. The buyer's acceptance in this
30 instance may be by conduct after the reasonable time to inspect has expired. If the buyer has not
31 agreed to make payment prior to inspection, payment may be one circumstance to consider in
32 determining whether the buyer has accepted the goods but is not conclusive. If the buyer has
33 waived its right to inspect prior to payment, payment is not an acceptance of the goods under this

1 section, section 2-608(b), the buyer still has a reasonable time to inspect the goods before the
2 buyer's conduct should be construed to constitute an acceptance.

3 4. Subsection (a)(3) follows former law that a buyer who fails to make an effective
4 rejection within the time stated in section 2-703(b) will have accepted the goods. The reasonable
5 time for rejection should be construed in light of the buyer's reasonable time for inspection under
6 section 2-609.

7 5. Subsection (a)(4) dovetails with section 2-704 concerning the buyer's actions with
8 regard to the goods that are inconsistent with the seller's ownership or inconsistent with the
9 buyer's claim of rejection or justifiable revocation of acceptance. The buyer's actions may be
10 either before or after the claim of rejection or justifiable revocation and if both inconsistent with
11 the seller's ownership rights or with the buyer's claim of rejection or revocation and
12 unreasonable, the seller has the ability to treat those actions as an acceptance. The seller may
13 choose to not treat those actions as an acceptance in which case, the seller may have an action for
14 damages against the buyer for violation of the buyer's obligation of reasonable care for the goods
15 or for conversion of the goods. Section 2-704, section 2-501(d). The buyer's actions pursuant to
16 section 2-705, however, are not an acceptance of the goods.

17 6. Subsection (b) follows the rule from former section 2-606(2) that acceptance or
18 rejection must be by commercial unit. Section 2-703.

19
20 **SECTION 2-707. EFFECT OF ACCEPTANCE; NOTICE OF BREACH; BURDEN**
21 **OF ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE OF CLAIM OR**
22 **LITIGATION TO PERSON ANSWERABLE OVER.**

23 (a) A buyer shall pay at the contract rate for any goods accepted.

24 (b) Acceptance of goods by the buyer precludes rejection of the goods accepted but does
25 not by itself impair any other remedy provided by this article for nonconformity.

26 (c) If a tender has been accepted, the following rules apply:

27 (1) [A person entitled to enforce a warranty or] The buyer, within a reasonable
28 time after [a person entitled to enforce a warranty or] the buyer discovers or should have
29 discovered a breach of contract [or warranty], shall notify the party claimed against of the breach.
30 However, a failure to give timely notice bars the [person entitled to enforce the warranty or the]

1 buyer from a remedy only to the extent that the party entitled to notice establishes that it was
2 prejudiced by the failure.

3 (2) If a claim for infringement or the like is made against a buyer for which a
4 seller is answerable over, the buyer shall notify the seller within a reasonable time after receiving
5 notice of the litigation or be barred from any remedy over for liability established by the
6 litigation.

7 (d) A buyer has the burden of establishing a breach of contract with respect to goods
8 accepted. [A person asserting a breach of warranty under section 2-408 or section 2-409 has the
9 burden of establishing warranty was breached.]

10 (e) In a claim for indemnity, breach of a warranty, or other obligation against the buyer
11 for which another party is answerable over, the following rules apply:

12 (1) The buyer may give notice of the litigation to the other party in a record, and
13 the person notified may then give similar notice to any other person that is answerable over. If
14 the notice invites the person notified to intervene in the litigation and defend and states that
15 failure to do so will bind the person notified in any action later brought by the buyer as to any
16 determination of fact common to the two actions, the person notified is so bound unless, after
17 seasonable receipt of the notice, the person notified intervenes in the litigation and defends.

18 (2) If the claim is one for infringement or the like, the original seller may demand
19 in a record that its buyer turn over control of the litigation, including settlement, or otherwise be
20 barred from any remedy over. If the seller also agrees to bear all expense and to satisfy any
21 adverse judgment, the buyer is so barred unless, after seasonable receipt of the demand, control is
22 turned over to the seller.

(f) Subsections (c), (d), and (e) apply to an obligation of a buyer to hold the seller harmless against infringement or the like.

SOURCE: Sales, Section 2-607.

Comment

1. Section 2-707 follows former section 2-607 except for the following three changes. First, subsection (c)(1) provides that a failure to give notice bars a buyer from a remedy for breach of contract only if the party who was entitled to notice suffers prejudice due to the failure to notify. The requirement that the party claimed against establish prejudice is a middle position between stating that the failure to give notice is an absolute bar to recovery and requiring proof of material prejudice. See Restatement (Second) of Contracts §229, excusing a condition where the failure is not material and implementation would result in disproportionate forfeiture. Second, the notice must be given to the “person claimed against” not “the seller” as under current law. This accommodates the notice requirement in the non-privity situations contemplated in Part 4 of this article. Third, the vouching in procedure in subsection (e) has been expanded to include indemnity actions and persons other than the seller who are answerable over.

2. Subsection (a) provides that the buyer must pay at the contract rate for goods accepted. In the case of a partial acceptance, section 2-703 and section 2-706, the price of the portion accepted should be apportioned based upon the contract rate. See section 2-302.

3. Subsection (b) makes clear that the buyer’s acceptance of the goods does not impair any of the buyer’s rights upon a seller’s breach of contract except for the right to reject. After acceptance, if the buyer wants to force the goods back to the seller, the buyer must comply with the provision on revocation of acceptance. Section 2-708. This provision is consistent with the rule from section 2-702 that an acceptance of nonconforming performance does not waive the right to receive conforming performance as to future installments.

4. Subsection (c)(1) continues the rule that the buyer must notify the party claimed against of any breach of contract. **The bracketed language in (c)(1) and (d) raises for discussion whether the rule should be rephrased to include within its application persons who are entitled to enforce warranties under part 4 but who are not buyers.** The requirement that there be notice of a breach means that the notice must indicate that problems have arisen with regard to the goods and does not require any particular form of notice. The notification that preserves remedies for breach need only be such that informs the seller that the transaction is claimed to involve a breach. This notice can be informal, such as a telephone call, or formal, such as initiating a lawsuit. A notice sufficient under this section is also sufficient under section 2-702(a) to avoid waiving any remedies for breach. The time for sending the notice should be judged by taking into account not only the nature of the transaction but also the status of the buyer or person who is asserting a claim and the relationship with the party claimed against. The focus of requiring notice is to avoid bad faith assertions of breach, not to deprive a

1 buyer acting in good faith of a remedy. In line with that philosophy, if the notice is untimely, the
2 buyer is not barred from obtaining a remedy for breach unless the party claimed against
3 demonstrates the failure to timely notify resulted in prejudice to that party. Prejudice could be
4 demonstrated if the delay in giving notice prevented a cure of the problem under section 2-709 or
5 prevented the party claimed against from collecting evidence relevant to the breach. The party
6 who is alleged to have breached the contract [or warranty] is ultimately protected from stale
7 claims by the statute of limitations. Section 2-814.

8 5. Subsection (c)(2) continues the rule that the buyer must notify the seller within a
9 reasonable time of a claim for infringement for which the seller is answerable over in order to
10 give the seller an opportunity to defend against the infringement. This notification obligation
11 works hand in hand with the right conferred on the seller in subsection (e)(2) to control the
12 infringement litigation.

13 6. Subsection (d) continues current law that the person asserting the breach has the
14 burden to establish the party claimed against breached the contract [or warranty].

15 7. Subsection (e)(1) continues the codification of the vouching in process for parties who
16 are answerable over for claims that have been asserted against a buyer. Vouching in does not
17 confer a right on the party notified to intervene, does not confer jurisdiction of any kind on the
18 court over the person answerable over, and does not create a duty to defend on the part of the
19 person answerable over. Those matters continue to be governed by the applicable rules of civil
20 procedure and substantive law outside this section. Vouching in is based upon the principle that
21 the person answerable over is liable for its contractual obligations regarding the quality or title to
22 the goods which the buyer is being forced to defend.

23 8. Subsection (f) continues the rule that if the buyer is liable to the seller for infringement
24 under section 2-402, the provisions of subsections (c), (d), and (e) apply to the seller's claim
25 against the buyer.

26 **SECTION 2-708. REVOCATION OF ACCEPTANCE.**

27 (a) The buyer may revoke acceptance of a lot or commercial unit whose nonconformity
28 substantially impairs its value to the buyer if the lot or unit was accepted:

29 (1) on the reasonable assumption that its nonconformity would be cured and it has
30 not been seasonably cured; or

31 (2) without discovery of its nonconformity if acceptance was reasonably induced
32 either by the difficulty of discovery before acceptance or by the seller's assurances.

(b) A buyer's acceptance must be revoked within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in the condition of the goods which is not caused by their own defects. The revocation is not effective until the buyer notifies the seller of it.

(c) A buyer that justifiably revokes acceptance has the same rights and duties under Sections 2-704 and 2-705 with regard to the goods as if they had been rejected.

SOURCE: Sales, Section 2-608.

Comment

1. Section 2-708 follows former section 2-608. As under former law, revocation of acceptance does not prevent the buyer from exercising other remedies for the seller's breach of contract and is not a rescission or cancellation of the contract. As with rejection, revocation of acceptance is by lot or commercial unit.

2. Subsection (a) continues the policy of the former law that the test is whether the value of the goods to the buyer is in fact substantially impaired not whether the seller knew in advance about the buyer's particular circumstances. The reasonable assumption of cure under subsection (a)(1) is not based upon the seller's right to cure under section 2-709 but rather on communications or other circumstances which lead a buyer to reasonably assume that the seller will cure the nonconformity within a reasonable time. If the seller then fails to do so, the buyer ought not to be forced to keep the goods if the value of the goods to the buyer is substantially impaired. Subsection (a)(2) allows the buyer to revoke acceptance if the nonconformities are difficult to discover or the seller has offered assurances that induce the buyer to delay discovery of the nonconformities. Those assurances may be part of the contract or circumstances at the time of delivery. Explicit assurances may be actionable as fraudulent based upon law other than this Article and the buyer should have the remedies available under this article. Section 2-811.

3. Subsection (b) continues the rule that a buyer must notify a seller to make an effective revocation and that a revocation must be within a reasonable time after discovery. Since this remedy will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time for notification of breach, section 2-707, beyond the time for discovery of nonconformity after acceptance, section 2-702, and beyond the time for rejection after tender, section 2-703. The parties may provide in their agreement the time periods for revocation subject to section 1-204. Except as provided in section 2-702(c)(3), the contents of the notice must be determined based upon considerations of good faith, prevention of surprise and reasonable adjustment. More is required than mere notice of a breach under section 2-707. In addition, section 2-702(c)(3) operates in the circumstance where the

1 seller has a right to cure under section 2-709 after a revocation of acceptance pursuant to
2 subsection (a)(2). The requirements for notification should be applied less stringently in the case
3 of a non merchant buyer.

4 The buyer's ability to revoke is limited to those circumstances where the goods have not
5 materially deteriorated unless that deterioration is caused by the nonconformity of the goods.
6 Worthless goods, however, need not be offered back and minor defects in the goods should be
7 ignored.

8 4. Consistent with sections 2-704 and 2-705, the buyer who justifiably revokes
9 acceptance under this section must comply with those sections in regard to the goods after the
10 revocation. A buyer who is not justified in its revocation under subsection (a) or who does not act
11 effectively under subsection (b) to revoke acceptance has not undone the acceptance and thus
12 may do what it wants with the goods and is not subject to the provisions of sections 2-704 and 2-
13 705.

14 **SECTION 2-709. CURE.**

15 (a) If a buyer rightfully rejects goods or a tender of delivery under Section 2-703 or
16 justifiably revokes an acceptance under Section 2-708(a)(2) and the agreed time for performance
17 has not expired, the seller, upon seasonable notice to the buyer and at its own expense, may cure
18 the breach of contract by making a conforming tender of delivery within the agreed time. The
19 seller is obligated to compensate the buyer for all of the buyer's reasonable and necessary
20 expenses caused by the nonconforming tender and subsequent cure.

21 (b) If a buyer rightfully rejects goods or a tender of delivery under Section 2-703 or
22 justifiably revokes an acceptance under Section 2-708(a)(2) and the agreed time for performance
23 has expired, the seller, upon seasonable notice to the buyer and at its own expense, may cure the
24 breach of contract, if the cure is appropriate and timely under the circumstances, by making a
25 tender of conforming goods. The seller is obligated to compensate the buyer for all of the
26 buyer's reasonable and necessary expenses caused by the nonconforming tender and subsequent
27 cure. [If buyer considers the cure offered to be inappropriate or untimely under the

1 circumstances, the buyer must notify the seller that the offered cure will be refused and the
2 reasons for refusing the offered cure.]

3 **SOURCE: Sales, Section 2-508; Unidroit Principles, Art. 7.1.4; CISG Art. 37, Art. 48.**

4 **Comment**

5 1. Section 2-709 is derived from former section 2-508 and has been substantially
6 influenced by the Unidroit Principles and CISG provisions. The seller's right to cure has been
7 expanded in two ways. First, if the buyer has revoked acceptance under section 2-708(a)(2), the
8 seller may cure. The revocation, however, must be because of non-discovery of the non-
9 conformity under section 2-708(a)(2) and not because of a failure to cure under section 2-
10 708(a)(1). To allow a further cure after revocation of acceptance because of a failure to cure
11 would give the seller two opportunities to cure. Second, if the time for contract performance has
12 expired, the requirement under former section 2-508(2) that the seller have reasonable grounds to
13 believe that the nonconforming tender would be acceptable has been deleted. Instead, the test is
14 whether the cure is "appropriate and timely under the circumstances.

15 The seller's right to cure has been restricted in the following ways. The section makes
16 explicit that the cure is at the seller's expense and the cure must either be a conforming tender
17 (subs. a) or of conforming goods (sub. b). In addition, the seller has a statutory obligation to
18 compensate the buyer for the buyer's reasonable expenses in both subsection (a) and (b). This
19 obligation is not part of the action required to have an effective cure under this section but rather
20 imposed on the seller in order to make the buyer completely compensated for any harm the
21 seller's breach and cure may cause. If the seller has a right to cure and has given timely notice of
22 cure, the buyer may not cancel within the time period for cure. See section 2-808.

23 2. Subsection (a) allows the seller to cure a nonconformity in the goods or the tender of
24 delivery if the buyer has rightfully rejected or justifiable revoked acceptance under section 2-
25 708(a)(2). This presumes that the buyer has effectively rejected or revoked acceptance through
26 timely notification to the seller. The time for performance in which the seller may still make a
27 conforming tender of delivery is determined by the contract of the parties, including any agreed
28 modifications. The seller's notice of an intent to cure must be seasonable. Section 1-204. The
29 closer to the time for the seller's performance to expire, the more prompt the seller must be in
30 notifying the buyer of the seller's intention to cure.

31 3. Subsection (b) expands the seller's right to cure after the time for performance has
32 expired. As under subsection (a), the buyer's rightful rejection or justifiable revocation of
33 acceptance under section 2-708(a)(2) trigger the seller's right to cure. This presumes that the
34 buyer has effectively rejected or revoked acceptance through timely notification to the seller.
35 Former section 2-508(2) was directed toward preventing surprise rejections by requiring the
36 seller to have "reasonable grounds to believe the nonconforming tender was acceptable. The
37 concept of "appropriate and timely" is broad enough to deal with the case of surprise rejection

1 as well as with the “shaken faith” cases and the just in time manufacturing mode of doing
2 business. If the buyer needs to procure substitute goods from another supplier in order to keep
3 the buyer’s process moving, the cure would not be timely. If the seller knows from the
4 circumstances that strict compliance with the contract obligations is expected, the seller’s cure
5 would not be appropriate. [The comment to this section will identify typical cases that have
6 arisen and discuss their resolution under this test in order to give guidance on the meaning of
7 “appropriate and timely.”] Seasonable notice to the buyer and timely cure incorporate the idea
8 that the notice and offered cure would be untimely if the buyer has reasonably changed its
9 position in good faith reliance on the non-conforming tender.

10 The seller’s cure must be of conforming goods. Conforming goods includes not only
11 conformity to the contracted for quality but also as to quantity or assortment or other similar
12 obligations under the contract. Since the time for performance has expired, however, the seller’s
13 tender of conforming goods required to effect a cure under this section could not conform to the
14 contracted for time for performance. Again, as under subsection (a), the seller has an obligation
15 to compensate the buyer’s for harm caused by the non-conforming tender and subsequent cure.
16 This compensation would include compensation for harm caused by the delay in making a tender
17 of conforming goods. **The bracketed language in subsection (b) is included for the**
18 **committee to consider to provide a mechanism for the parties early in the cure process to**
19 **identify the problems involved in the seller’s offered cure.**

20 4. Under former section 2-508, there was some controversy about whether the goods may
21 be made conforming by repair. Whether repair is an acceptable way to cure a breach depends
22 upon whether the repair results in conforming goods, as that is the hallmark of an effective cure
23 under this section.

24 **SECTION 2-710. INSTALLMENT CONTRACT: BREACH.**

25 (a) An "installment contract" means a contract in which the terms require or the
26 circumstances permit the delivery of goods in separate lots to be separately accepted, even if the
27 agreement requires payment other than in installments or contains a term stating "Each delivery
28 is a separate contract" or words of similar import.

29 (b) In an installment contract, the buyer may reject any nonconforming tender of delivery
30 of an installment if the nonconformity of the goods substantially impairs the value of that
31 installment to the buyer [and cannot be cured] or if the nonconformity is a defect in the required
32 documents of title. [However, if a nonconforming tender by the seller is not a breach of the

1 whole contract under subsection (c) and the seller gives adequate assurance of its cure, the buyer
2 shall accept that installment.] [A buyer may reject an installment if the nonconforming tender of
3 delivery of that installment is a breach of the whole contract under subsection (c).]

4 (c) If a nonconformity or default with respect to one or more installments in an
5 installment contract is a substantial impairment of the value to the aggrieved party of the whole
6 contract, there is a breach of the whole contract and the aggrieved party may cancel the contract.
7 However, the power to cancel the contract for breach is waived, or a canceled contract is
8 reinstated, if the aggrieved party accepts a nonconforming installment without seasonably giving
9 notice of cancellation, brings an action with respect to only past installments, or demands
10 performance as to future installments.

11 **SOURCE: Sales, Section 2-612.**

12 **Comment**

13 1. Section 2-710 is derived from former section 2-612.

14 2. Subsection (a) defines an installment contract and adds language that makes clear that
15 how payment is to be made does not determine whether a contract is an installment contract but
16 rather the focus is on the delivery of the goods in lots to be separately accepted. Section 2-302
17 governs the apportionment of the price for installments. As under former law, an installment
18 contract includes installment deliveries tacitly authorized by the circumstances or by the option
19 of either party. See section 2-302. Subsection (a) also continues the policy of former law that
20 clauses that attempt to provide that each delivery is to be considered a separate contract should
21 not be given their literal effect. Consistent with good faith and commercial standards, such
22 clauses should not be permitted to operate contrary to the commercial sense of the situation, that
23 each delivery is an installment under a single contract.

24 3. Subsection (b) allows the buyer to reject a nonconforming installment if the value to
25 the buyer of that installment is substantially impaired. Section 2-701(c). The test for substantial
26 impairment based upon the value to the buyer follows the test used in the revocation of
27 acceptance section. Section 2-708. An installment contract may require accurate conformity as a
28 condition to acceptance either by express provision or by the circumstances. The effect of such a
29 requirement is to define what amounts to a substantial impairment that cannot be cured. Such a
30 condition to acceptance must have a basis in reason to avoid surprise or hardship and may be

1 waived. Section 2-209. Substantial impairment of the value of an installment may turn on
2 quality, timeliness, quantity, assortment or the like and should be judged based similarly to the
3 test under section 2-708. Defects in the required documents of title are not subject to a
4 substantial impairment test but if appropriate documents of title are obtainable, the defects in the
5 tender of documents may be cured.

6 Section 2-709 does not apply to the cure contemplated by this subsection as section 2-709
7 depends first upon a rightful rejection or a justifiable revocation. In this section, the ability to
8 cure the nonconformity in the goods is relevant to whether the value of the installment is
9 substantially impaired. If the nonconformity is curable or the seller gives adequate assurance of
10 cure, the likelihood that there is a substantial impairment of the value of the installment to the
11 buyer is minimal. See section 2-701(c). Cure may be afforded in any reasonable manner and the
12 court should be guided by the other requirements of section 2-709 in determining whether a cure
13 is sufficient to prevent substantial impairment of the value of the installment to the buyer.
14 Adequate assurance of a cure should be measured by the same standard applicable in section 2-
15 711. A buyer need not accept an installment if the value of the whole contract has been
16 substantially impaired as provided in subsection (c).

17 **The bracketed language in subsection (b) raises for discussion whether that language is**
18 **needed given the definition of substantial impairment now contained in section 2-701(c).**
19 **Prior to substantial impairment being defined in the draft, the effect of the last sentence**
20 **was to direct the court to two of the factors used to determine “material breach” under the**
21 **common law. Given the definition of substantial impairment, the issue is whether that**
22 **language is needed in this section.**

23 4. Subsection (c) follows the policy of former law that a party may cancel an installment
24 contract only if the nonconformity of the installments substantially impairs the value of the entire
25 contract. The first sentence makes explicit what was implicit in the former section, that if there
26 is a substantial impairment, the aggrieved party may cancel the contract. The second sentence
27 then provides that the right to cancel is lost or the contract is reinstated if the aggrieved party has
28 already cancelled the contract if the aggrieved party takes one of three actions. These limitations
29 on the right to cancel are consistent with section 2-702(a) on waivers that prevent cancellation.
30 Subsection (c) applies to a buyer’s default as well as a seller’s default in an installment contract.

31 Whether the nonconformity as to any installment results in substantial impairment of the
32 value of the whole contract depends upon more than the aggrieved party’s security as to whether
33 the party in breach of contract will perform adequately in future installments. Section 2-711
34 provides a mechanism for the aggrieved party to get assurances about future performance.
35 Nonconformities in performance are cumulative in effect, section 2-701(d), so that acceptance of
36 prior nonconforming installments does not preclude an aggrieved party from using those prior
37 nonconformities to justify a cancellation based upon substantial impairment of the value of the
38 whole contract.

39 5. The right to cancel is governed further by section 2-808. A reasonable time for an

1 aggrieved party to notify the party in breach of a cancellation should take into account any
2 reasonable time the aggrieved party waits for the party in breach to cure nonconformities in its
3 performance and any time devoted to good faith negotiations to resolve the dispute.

4 **SECTION 2-711. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.**

5 (a) A contract for sale imposes an obligation on each party not to impair the other's
6 expectation of receiving due performance. If reasonable grounds for insecurity arise with respect
7 to the performance of either party, the other party may demand in a record adequate assurance of
8 due performance and, until that assurance is received, if commercially reasonable, may suspend
9 any performance for which the agreed return has not already been received.

10 (b) Between merchants, the reasonableness of grounds for insecurity and the adequacy of
11 any assurance offered is determined according to commercial standards.

12 (c) Acceptance of any improper delivery or payment does not prejudice an aggrieved
13 party's right to demand adequate assurance of future performance.

14 (d) After receipt of a justified demand under subsection (a), failure to provide within a
15 reasonable time, not exceeding 30 days, assurance of due performance which is adequate under
16 the circumstances of the particular case is a repudiation of the contract under Section 2-712(a).

17 **SOURCE: Sales, Section 2-609.**

18 **Comment**

19 1. Section 2-711 follows former section 2-609. This section recognizes that commercial
20 parties bargain for actual performance and provides a process for ascertaining whether the
21 promised performance will be forthcoming. If either party's ability to perform materially
22 deteriorates after contracting and the other party's security and reliance on the promised
23 performance is compromised, this section provides a mechanism for obtaining assurances that
24 the promised performance will be forthcoming. This section should not be used to adjust for
25 risks that were known or apparent at the time the contract was formed. The rights given under
26 this section are analogous to the right of the seller to stop or withhold delivery except for cash in
27 the event of the buyer's insolvency, a circumstance that may impair the seller's reasonable
28 expectation of receiving the buyer's performance. Section 2-818. The parties may agree in their

1 contract to terms that seek to provide a process when insecurity arises. Such clauses may be
2 effective to increase the protection given under this section, to fix the reasonable time for
3 responding to a request for assurances, or to define the adequacy of the assurances. Such clauses,
4 however, cannot set up arbitrary standards for such actions. Of course, the obligation of both
5 parties to act in good faith permeates the operation of this section.

6 2. Under subsection (a), a party must have reasonable grounds for insecurity in order to
7 have a right to demand adequate assurance of due performance. Between merchants, what
8 constitutes reasonable grounds for insecurity should be determined by commercial standards.
9 Subsection (b). Such grounds for insecurity need not arise from the contract at issue or from
10 circumstances surrounding that contract but could result from a party's performance under a
11 different contract with other parties. Reasonable insecurity may also arise based upon
12 trustworthy information from third parties. Assignment of rights under a contract may also
13 impair the prospective of obtaining performance. Section 2-503. A party who attempts to assert
14 grounds for insecurity based upon facts that the party had notice of prior to contracting should
15 not constitute reasonable grounds for insecurity that justifies the demand for assurance unless
16 new circumstances come to light that in combination with the previously known circumstances
17 make it reasonable for the party to be insecure about the other's performance.
18

19 Adequate assurance in each case depends upon the factual circumstances and between
20 merchants, on reasonable commercial standards. Subsection (b). If the other party is trustworthy
21 and has a good reputation, a promise of renewed attention may suffice. In other circumstances,
22 such a promise may be insufficient. Adequate assurance, however, does not depend upon the
23 subjective satisfaction of the party assured but must depend upon objective evidence, reasonable
24 commercial standards and good faith. Of course, if there are repeated delinquencies in
25 performance, the quantum of assurance necessary in order to be an adequate assurance will rise.
26 Similarly, if there are repeated demands for assurance, the basis for such demands must be
27 increasingly obvious.
28

29 When a party has made a justified demand for assurance, the party who demanded such
30 assurance may suspend performance of its own obligation is such suspension is commercially
31 reasonable. Suspension of performance or actions preparatory to such performance may occur
32 while awaiting the requested assurance.
33

34 3. Subsection (c) continues the rule that accepting a defective performance does not
35 preclude a party from requesting assurances about future performance. This principle is also
36 reflected in section 2-702(b).
37

38 4. Subsection (d) provides that after a justified demand for assurance, the failure to
39 provide adequate assurance within a reasonable time not to exceed 30 days is a repudiation.
40 Upon a repudiation, the aggrieved party has the rights as provided in section 2-712. A party may
41 retract a repudiation as provided in section 2-713.
42

43 **SECTION 2-712. ANTICIPATORY REPUDIATION.**

1 (a) If either party to a contract repudiates a performance not yet due and the loss of
2 performance will substantially impair the value of the contract to the other party, the aggrieved
3 party may:

4 (1) await performance by the repudiating party for a commercially reasonable
5 time or resort to any remedy for breach of contract, even if it has urged the repudiating party to
6 retract the repudiation or has notified the repudiating party that it would await the agreed
7 performance; and

8 (2) in either case, suspend its own performance or, if a seller, proceed in
9 accordance with Section 2-817.

10 (b) Repudiation includes language that one party will not or cannot make a performance
11 still due under the contract or voluntary affirmative conduct that reasonably appears to the other
12 party to make a future performance impossible.

13 **SOURCE: Sales, Section 2-610.**

14 **Comment**

15 1. Section 2-712 follows former section 2-610 and adds a new subsection (b) that
16 provides guidance on when a party has repudiated its performance obligation.

17
18 2. Subsection (a) allows an aggrieved party faced with a party's repudiation of its
19 obligation to perform to either await performance or resort to any remedy for breach as well as in
20 either case to stop its own performance. A party faced with a repudiation of performance may
21 take these actions if the repudiation substantially impairs the value of the contract that party.
22 Section 2-701(c) addresses the factors to be used in determining substantial impairment. This is
23 the same test as used in the installment contract for breach of the whole contract. Section 2-
24 710(c). An aggrieved party's actions under this section must be taken in good faith but do not
25 require notice to the repudiating party, unless the aggrieved party has taken some positive action
26 which in good faith requires notice to the other party before pursuing a remedy. An aggrieved
27 party's market price based damages for breach in the case of a repudiation are addressed in
28 sections 2-821 and 2-826. In recovering those damages for breach based upon a repudiation, a
29 commercially reasonable time for awaiting performance should be read in light of the mitigation
30 principle in section 2-803.

1
2 3. Subsection (b) provides guidance on when a party can be considered to have
3 repudiated a performance obligation based upon the Restatement (Second) of Contracts § 250
4 and does not purport to be an exclusive statement of when a repudiation has occurred. As under
5 prior law, repudiation centers upon an overt communication of intention, actions which render
6 performance impossible, or a demonstration of a clear determination not to perform.
7 Repudiation does not require that performance be made utterly impossible, rather, actions which
8 reasonably indicate rejection of the performance obligation suffice. Failure to provide adequate
9 assurance of due performance under section 2-711 also operates as a repudiation. A demand for
10 more than is required under the contract and that is not justified under section 2-711 is not a
11 repudiation unless it amounts to a statement of intention to not perform except on conditions
12 which go beyond the contract requirements.

13 **SECTION 2-713. RETRACTION OF ANTICIPATORY REPUDIATION.**

14 (a) A repudiating party may retract a repudiation until its next performance is due unless
15 the aggrieved party, after the repudiation, has canceled the contract, materially changed its
16 position, or otherwise indicated that the repudiation is considered to be final.

17 (b) A retraction may be by any method that clearly indicates to the aggrieved party that
18 the repudiating party intends to perform the contract. However, a retraction must contain any
19 assurance justifiably demanded under Section 2-711.

20 (c) Retraction reinstates a repudiating party's rights under the contract with due excuse
21 and allowance to the aggrieved party for any delay caused by the repudiation.

22 **SOURCE: Sales, Section 2-611.**

23 **Comment**

24 1. Section 2-713 follows former section 2-611 without substantive change. A
25 repudiating party's ability to retract the repudiation depends upon the retraction taking place
26 before the aggrieved party has taken action on the repudiation. Subsection (a). A repudiation
27 gives an aggrieved party reasonable grounds for insecurity under section 2-711 and the aggrieved
28 party may demand adequate assurances of performance as part of the conditions of accepting the
29 retraction. Subsection (b). After an unambiguous and timely retraction, the aggrieved party
30 should allow a reasonable time for the assurances to be worked out before proceeding to any
31 remedies for breach of contract.
32

1 2. Subsection (c) makes clear that the aggrieved party may take some time to adjust to
2 the repudiating party's intention to continue performance under the contract.

3 **SECTION 2-714. CASUALTY TO IDENTIFIED GOODS.** If the parties to a
4 contract assume the continued existence and eventual delivery to the buyer of goods identified
5 when the contract is made and the goods suffer casualty without the fault of either party before
6 the risk of loss passes to the buyer and no commercially reasonable substitute is available, the
7 following rules apply:

8 (1) The seller shall seasonably notify the buyer of the nature and extent of the loss.

9 (2) If the loss is total, the contract is avoided [terminated].

10 (3) If the loss is partial or the goods no longer conform to the contract, the buyer may
11 nevertheless demand inspection and may treat the contract as avoided [terminated] or accept the
12 goods with due allowance from the contract price for the partial loss or the nonconformity but
13 without further right against the seller.

14 **SOURCE: Sales, Section 2-613.**

15 **Comment**

16 1. Section 2-714 continues the rules from former section 2-613 with three substantive
17 changes. First, the standard of when the section applies has been changed from the contract
18 "requires for its performance goods identified when the contract is made" to the parties "assume
19 the continued existence and eventual delivery to the buyer of goods identified when the contract
20 is made. This test responds to the ambiguity about when does the "contract require the
21 identified goods, the test under prior law, and relaxes that test to focus on the parties'
22 assumptions about what goods will be used to fulfill the contract. To not expand the section
23 beyond its reason, the following limitation is then placed on the ability to use this section, that
24 "no commercially reasonable substitute is available. This limitation means that a seller who is
25 selling stock goods identified when the contract was made and who has a commercially
26 reasonable substitute available could not use this section to avoid delivery and liability. The
27 combination of these two changes keeps the section within its reason of providing an excuse
28 when the parties contemplated that special goods would be used to fulfil the contract without the
29 ambiguity of the phrase "contract requires. Second, the reference to "no arrival, no sale" terms
30 has been deleted in accordance with the decision to not include shipping terms definitions within

1 revised Article 2. Third, the revision requires the seller to give notice to the buyer of the nature
2 and extent of the loss in a seasonable manner. This change is designed to bring this section
3 within the notice requirement of section 2-717. The seller should be obligated to notify the buyer
4 seasonably in order to take advantage of the excuse provided in this section.
5

6 2. This section operates when the seller has the risk of loss (section 2-612), the parties
7 assume the goods identified when the contract is made will continue to exist, and the seller has
8 undertaken the responsibility for the continued existence and condition of the goods through the
9 time of tender of delivery. This section excuses the seller's performance when the goods suffer
10 casualty without the fault of either party. Fault in this context includes negligence not just
11 willful conduct. If the goods are totally destroyed or damaged, the seller is excused from
12 performing as the contract is avoided. If the destruction is partial, the buyer has the choice as to
13 whether to treat the contract as avoided and thus excuse the seller's performance or whether to
14 accept the goods and have an allowance against the price for the value of the harm to the goods
15 without any further remedy against the seller. If this section does not apply, sections 2-715 or
16 sections 2-716 govern excuse from performance obligations.
17

18 3. This section requires the seller to give notice to the buyer of the nature and extent of
19 the loss. The effect of the seller giving the notice is to provide a time limit on the buyer's
20 response to the notice under section 2-717(b).
21

22 **SECTION 2-715. SUBSTITUTED PERFORMANCE.**

23 (a) If, without the fault of either party, agreed berthing, loading, or unloading facilities or
24 an agreed type of carrier becomes unavailable, or an agreed manner of delivery otherwise
25 becomes commercially impracticable, a party may claim excuse under Section 2-716 unless a
26 commercially reasonable substitute is available. In that case, reasonable substitute performance
27 must be tendered and accepted.

28 (b) If an agreed means or manner of payment fails because of domestic or foreign
29 governmental regulation, the seller may withhold or stop delivery until the buyer provides a
30 means or manner of payment which is commercially a substantial equivalent. If delivery has
31 already been made, payment by the means or in the manner provided by the regulation
32 discharges the buyer's obligation unless the regulation is discriminatory, oppressive, or
33 predatory.

SOURCE: Sales, Section 2-614.

Comment

1. Section 2-715 makes only one substantive change to former section 2-614. Subsection (a) provides that if a commercially reasonable substitute is not available, the performance may be excused under section 2-716. This section distinguishes shipping and other delivery obligations where a reasonable substitute if available must be tendered and accepted from performance that goes to the heart of the contract where commercial impracticability will excuse performance. The substitution allowed under this article operates as between buyer and seller and not as against a financing agency or an issuer of a letter of credit who are entitled to exercise their rights under Article 5.

2. Subsection (b) allows the seller to not deliver unless the buyer obtains a commercial reasonable substitute for the agreed means or manner of payment contemplated in the contract but which has failed due to government regulation. However, if the buyer has taken delivery, the seller must take the payment in the means or manner specified in the regulation unless the regulation is discriminatory, oppressive or predatory.

Subsection (b) may have increased importance when the European Union implements on January 1, 2002, the EURO as the common and exclusive currency for those members that have been approved to participate. Under the continental doctrine of *lex monetae*, the euro would be treated as the currency of the country whose currency was displaced. There would be no interruption in the continuity of a contract originally expressed to pay in French Francs just because the currency of France was now the euro. Subsection (b) would normally reach the same result in a less direct manner. Suppose that the conversion from francs to the euro has occurred and the seller has not delivered the goods. The seller can stop delivery until the buyer “provides a means or manner of payment which is commercially a substantial equivalent. Clearly, tender of the euro would satisfy this test. But suppose that the buyer decides not to tender anything and claims excuse from the contract. Subsection (b) does not address this problem. Rather, the excuse question must be answered under either 2-716(a) or the common law: Did both parties assume at the time of contracting that the conversion would not happen and, if so, does the conversion make performance as agreed impracticable? Again, the answer is probably no to one or both questions, but there is some uncertainty. See Michael Gruson, *The Introduction of the Euro and its Implications for Obligations Denominated in Currencies Replaced by the Euro*, 21 *Fordham Int’l L.J.* 65 (1997).

Three states, New York, Illinois, and California, have enacted legislation that preempts Article 2 and declares that in the case of substitution or replacement the euro will be a commercially reasonable substitute and the replacement will not have the effect of discharging or excusing performance under any contract. See N.Y. General Obligations Law, §§ 5-1601 et seq. (1997); Illinois Statutes, Ch. 815, §§ 617.1 et seq. (1997); Civil Code of California §1663, 1998 Cal. Stat. 62, §2 (1998).

1 **SECTION 2-716. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.**

2 (a) Subject to Section 2-715 and subsection (b), delay in performance or nonperformance
3 by the seller is not a breach of contract if the seller's performance as agreed has been made
4 impracticable by:

5 (1) the occurrence of a contingency whose nonoccurrence was a basic assumption
6 on which the contract was made; or

7 (2) compliance in good faith with any applicable foreign or domestic
8 governmental regulation, statute, or order, whether or not it later proves to be invalid.

9 (b) A party claiming excuse under subsection (a) shall seasonably notify the other party
10 that there will be delay or nonperformance. If the claimed excuse affects only a part of the seller's
11 capacity to perform, the seller shall also allocate production and deliveries among its customers
12 in a manner that is fair and reasonable and notify the buyer of the estimated quota made
13 available. In allocating production and deliveries, the seller may include regular customers not
14 then under contract as well as its own requirements for further manufacture.

15 **SOURCE: Sales, Section 2-615.**

16 **Comment**

17 1. Section 2-716 continues the rules for excuse from performance from former section 2-
18 615 with two substantive changes. First, the concept of excuse from "delivery obligations has
19 been broadened to excuse from "performance in recognition that the seller's obligations may
20 include more than delivery of the goods. Second, the phrase "except so far as the seller may
21 have assumed a greater obligation has been eliminated. The parties should be able to agree to
22 either a lesser or greater obligation than what is provided in this default rule. This section
23 governs excuse in situations not within the ambit of section 2-714 on destruction of specific
24 goods and not governed by section 2-715 on substituted performance.

25
26 2. In determining whether the nonoccurrence of a contingency was a basic assumption of
27 the contract, consideration should be made of the risks foreshadowed at the time of contracting
28 sufficiently to be regarded as within the business risks assumed in contracts of the type at issue.

1 Notably, increased cost of performance, changes in the market, or continuation of the usual
2 source of supply are typical business risks that should be contemplated. Severe shortages due to
3 war, embargo or the like, however, may not be reasonably contemplated. An evaluation of
4 whether excuse from performance is justified under this section must be made depending upon
5 the circumstances which existed at the time the contract was formed. At its core, the principle of
6 this section is based upon consideration of how the risk of the contingency was allocated in the
7 contracting process. The more remote the contingency, the more likely this section should be
8 used to reallocate the risk. Of course, the parties are free to expressly agree to provisions in their
9 agreement that allocate the risk of subsequent events occurring in a manner different than
10 provided in this section.

11
12 Although the section is phrased in terms of the seller seeking to be excused from
13 performance, as under prior law, the buyer may in appropriate circumstances seek to be excused
14 from its performance obligation where both parties contemplate that the reason for the sale to the
15 buyer is the buyer's further use or sale of the goods in a specific venture and that venture
16 collapses.

17 If the seller is complying in good faith with a government regulation, statute or order, the
18 seller is excused to the extent the compliance makes the seller's performance commercially
19 impracticable beyond the seller's assumption of the risk of the government action. Of course,
20 good faith would preclude reliance on this provision for an excuse if the seller induced the
21 government action.

22 3. A party that seeks to use an excuse under this section must notify the other party.
23 Subsection (b). As under the former section, the seller must allocate in a fair and reasonable
24 manner any production among both existing and regular customers, both as to contracts in
25 existence at the time of the occurrence of the contingency and ones later in time. The seller's
26 allocation decision must be made in good faith.

27 **SECTION 2-717. PROCEDURE ON NOTIFICATION CLAIMING EXCUSE.**

28 (a) A party that receives notification of a material or indefinite delay in performance or
29 an allocation permitted under Section 2-714 or 2-716 as to any delivery concerned, or if there is a
30 breach of the whole contract under Section 2-710(c), then as to the whole, by notification in a
31 record, may:

- 32 (1) terminate and thereby discharge any unexecuted portion of the contract; or
33 (2) modify the contract by agreeing to take the available allocation in substitution
34 under Section 2-716 or by accepting the goods with due allowance as provided in Section 2-714.

(b) If, after receipt of notification under Section 2-714 or 2-716, a party fails to modify the contract within a reasonable time not exceeding 30 days, the contract is terminated with respect to any performance affected.

(c) This section may be varied by agreement only to the extent that the parties have assumed an obligation different than that provided under Sections 2-714 and 2-716.

SOURCE: Sales, Section 2-616.

Comment

1. Section 2-717 makes the following substantive changes to the rules provided in former section 2-616. First, the notification procedure is made applicable to the excuse provision of section 2-714. Second, subsection (c) is redrafted to allow a different process for notice if the parties assume an obligation other than the obligation provided in the default rules of sections 2-714 and 2-716. If the default rules govern excuse, the parties cannot modify the rules of this section.

2. This section provides a process for the person notified to respond to the notice of excuse under either section 2-714 or section 2-716. The person notified may either agree to modify the contract as provided or terminate the contract. Subsection (a). If the party fails to respond within the reasonable time not exceeding thirty days, the contract is terminated. Subsection (b).

3. Subsection (c) allows the parties to agree to a different process for responding to notice of claimed excuse if the parties have allocated the risks of contingencies differently than the way the risks are allocated in sections 2-714 or section 2-716. This change is not meant to allow the parties to have a contract clause in advance of trouble to require the buyer to stand ready to take deliveries even if the seller is excused from performing.

SECTION 2-718. PRESERVING EVIDENCE OF GOODS IN DISPUTE. To further the adjustment of a claim or dispute, the following rules apply:

(1) Either party to a contract, on reasonable notification to the other party, has a right to inspect, test, and sample the goods for the purpose of ascertaining the facts and preserving evidence. This right includes goods that are in the possession or control of the other party.

(2) Parties to a contract may agree to an inspection or survey by a third party to determine

1 the conformity or condition of the goods and may agree that the findings will be binding upon
2 them in any later litigation or adjustment.

3 **SOURCE: Sales, Section 2-515.**

4 **Comment**

5 1. Section 2-718 follows former section 2-515 without substantive change and is
6 intended to provide a method for aiding the parties in settlement of disputes.

7
8 2. This section should not interfere with the seller's right to resell the goods in the event
9 of buyer's breach, section 2-819, or the buyer's right to sell the goods to enforce its security
10 interest, section 2-829. Rather, the parties who desire to use this section to preserve evidence or
11 ascertain the facts should act promptly to do so. The parties' actions under this section should be
12 taken in good faith. This section does not change the parties' rights as to inspection as provided
13 in sections 2-608 or 2-609.

14
15 3. In subsection (2), conformity of the goods means conformity of the goods to the
16 contract requirements whereas condition of the goods refers to their deterioration or damage.
17 The scope and effect of the inspection or survey by a third party depends upon the parties
18 agreement as to those matters and the admissibility of any report generated depends upon the
19 applicable rules of evidence in any proceeding where it is relevant.

20 **PART 8**

21 **REMEDIES**

22 **[A. IN GENERAL]**

23 **SECTION 2-801. SUBJECT TO GENERAL LIMITATIONS.** The remedies of the
24 seller, buyer, and other protected persons under this article are subject to the general limitations
25 and principles stated in Sections 2-801 through 2-814.

26 **SOURCE: New.**

27 **Comments**

28 1. This section is new and sets out the remedial hierarchy of Part 8. Subpart A (Sections
29 2-801 through 2-814) contain sections that are applicable to buyers, sellers and other persons

entitled to enforce obligations under this article. Persons other than buyers and sellers who are able to enforce obligations under this article include those persons who may enforce warranty obligations under Part 4 of this article. Subpart 8 sets forth remedial policies that control the application of the more specific remedial rules in Subpart B (seller's remedies are set forth in sections 2-815 through 2-822) and Subpart C (buyer's remedies are set forth in sections 2-823 through 2-829). Part 8 follows the organizational structure used in Article 2A, Part 5.

2. **CISG.** Revised Part 8 is consistent with the remedial structure in CISG. Chapter II states the obligations of the seller (Articles 30-44) and the remedies of the buyer upon breach of contract by the seller. Article 45. Buyer's remedies include the "rights" provided in Articles 46-52, which are unique to the buyer, and "damages" claimed under Articles 74-77, which are common to the buyer and the seller. Similarly, Chapter III states the obligations of the buyer (Articles 53-59) and the remedies of the seller upon breach by the buyer. Article 61. Seller's remedies include the "rights" provided in Articles 62-65, which are unique to the seller, and "damages" claimed under Articles 74-77, which are common to both parties. In general, the prefers specific performance over damages and states applicable damage principles in general terms.

SECTION 2-802. BREACH OF CONTRACT; PROCEDURES. If a party is in breach of a contract, the party seeking enforcement:

(1) has the rights and remedies in this article and, except as limited by this part, in the agreement;

(2) may reduce its claim to judgment or otherwise enforce the contract by any available administrative or judicial procedure, or the like, including arbitration or other dispute resolution procedure if agreed to by the parties; and

(3) may enforce the rights granted by and remedies available under other law.

SOURCE: Leases, Section 2A-501.

Comment

1. This section has no counterpart in current article 2 and is based on section 2A-501. This section provides a summary of the aggrieved party's general remedial rights upon a breach of contract. Whether a party is in breach of contract depends upon the principles in Part 7. The rights and remedies under this article are cumulative and this article rejects any doctrine of election of remedies as a fundamental principle. Whether the pursuit of one remedy bars another

1 depends entirely on the facts of the individual case and is governed by the general principles
2 stated in Subpart A.

3 2. Both this article and the parties' agreement should be consulted to determine what
4 remedies are available to an aggrieved party in the event of breach. An agreement may provide
5 for a dispute resolution process. In addition, an aggrieved party may use administrative or
6 judicial process to enforce rights. Finally, this article does not preempt other rights and remedies
7 available under law outside this article. Section 1-103.

8 **SECTION 2-803. REMEDIES IN GENERAL.**

9 (a) In accordance with Section 1-106, the remedies provided in this article must be
10 liberally administered with the purpose of placing the aggrieved party in as good a position as if
11 the other party had fully performed.

12 (b) Unless the contract provides for liquidated damages under Section 2-809 or a limited
13 remedy enforceable under Section 2-810, an aggrieved party may not recover that part of a loss
14 resulting from a breach of contract that could have been avoided by reasonable measures under
15 the circumstances. The burden of establishing a failure to take reasonable measures under the
16 circumstances is on the party in breach.

17 (c) The rights granted by and remedies available under this article are cumulative, but a
18 party may not recover more than once for the same injury.

19 (d) This article does not impair a remedy for breach of any obligation or promise
20 collateral or ancillary to a contract for sale.

21 **SOURCE: Sales, Section 2-701; Article 1, Section 1-106; Restatement (Second) of**
22 **Contracts, Section 350.**

23 **Comment**

24 1. The bulk of this section has no counterpart in former Article 2.

25 2. Subsection (a) is derived from the statement of remedial policy in section 1-106. This

1 remedial policy is designed to allow an aggrieved party to recover the value of its expectation
2 interest or the benefit of the bargain. See Restatement (Second) of Contracts section 344. The
3 specific remedies in Subparts B and C are designed to compensate the aggrieved party based
4 upon its expectation interest.

5 3. Subsection (b) contains a statement of the mitigation principle derived from the
6 Restatement (Second) of Contracts, Section 350. An aggrieved buyer who has not accepted the
7 goods has two alternative measures of damages, the cover price minus the contract price (section
8 2-825) or the market price minus the contract price (section 2-826). The aggrieved buyer is not
9 required to cover although the statement of the mitigation principle in subsection (b) may
10 preclude the recovery of loss that could have been prevented if the aggrieved buyer could have
11 reasonably avoided that loss by making a cover transaction. If the buyer covers under section 2-
12 825 by reasonably and in good faith making a purchase in substitution for the goods from the
13 seller without undue delay, the buyer has appropriately mitigated under the principle of this
14 section. An aggrieved seller has three alternative damage measurements, the contract price
15 minus the resale price (section 2-819), the contract price minus the market price (section 2-
16 821(a)) or lost profit and reliance expenditures (section 2-821(b)). The seller is not required to
17 resell goods. Again, the mitigation principle of subsection (b) may prevent the seller from
18 recovering the part of the loss that could have been prevented if the seller could have reasonably
19 sold the goods. If the seller does resell and complies with the requirements of section 2-819, the
20 seller has appropriately mitigated the loss.

21 4. Subsection (c) declares that the rights and remedies are cumulative. This statement
22 accords with the former Article 2's rejection of a policy of an election of remedies subject to a
23 preclusion of double recovery for the same harm. See comment to section 2-802. As stated in the
24 comment to section 2-802, whether the exercise of one remedy may preclude use of another
25 remedy depends upon whether the use of both remedies violates the principles stated in Subpart
26 A, including the principles of this section. Any choice among remedial options must be made in
27 good faith.

28 Under former Article 2, if the buyer had covered by buying goods in substitution of the
29 ones due the seller in good faith, reasonably and without unreasonable delay, the buyer must use
30 the cover section to measure its damages and may not use the section on market price to measure
31 damages. See *Commonwealth Edison C. v. Allied Chemical Nuclear Products Inc.*, 684 F. Supp.
32 1434, 1435 (N. D. Ill. 1984) (“Official comment 5 to §2-713 indicates that when a party covers,
33 his damages are measured by §2-712, not §2-713. ”); *Dickson v. Dehli Seed Co.*, 760 S.W. 2d
34 382, 389 (Ct. App. Ark. 1988) (“Because appellee chose to purchase substitute goods its remedy
35 was limited to that of §2-712 unless the purchase did not constitute ‘cover.’ ”); *Neibert v.*
36 *Schwenn Agri-Production Corp.*, 579 N.E.2d 389, 393 (Ill. Ct. App. 1991) (Section 2-713 “only
37 applies when and to the extent the buyer has not covered. ”); *James J. White & Robert S.*
38 *Summers*, UNIFORM COMMERCIAL CODE §6.4, subsection c (4th ed. 1995) (advocating that a
39 cover that qualifies under §2-712 should preclude the buyer from recovering a greater amount by
40 using the market price formula of §2-713). Similarly, if the seller resold the goods in compliance
41 with the section on recovering damages based upon the resale, some courts have precluded the

1 seller from obtaining damages based upon the market price measurement. See Sharp Electronics
2 Corp. v. Lodgistix, Inc., 802 F. Supp. 370, 380-81 (D. Kan. 1992) (In that case, seller could not
3 use market price damages when it had resold the goods); White & Summers, UNIFORM
4 COMMERCIAL CODE, §7-7 (4th ed. 1995) (advocating that a resale complying with the
5 requirements of section 2-706 should preclude seller from recovering a larger amount by using
6 the market price formula of section 2-708(1)). This section does not change the results of these
7 cases under former Article 2.

8 5. Subsection (d) is the same as former section 2-701.

9 **SECTION 2-804. MEASUREMENT OF DAMAGES IN GENERAL.** If there is a
10 breach of contract the aggrieved party may recover compensation for the loss resulting in the
11 ordinary course from the breach as determined under Sections 2-815 through 2-829 or as
12 determined in any reasonable manner, together with incidental damages and consequential
13 damages, less expenses and costs avoided as a result of the breach.

14 **SOURCE: Sales, Section 2-714(a).**

15 **Comment**

16 1. Section 2-804 is new and provides a general statement of a measurement rule that can
17 be used if the specific measurement rules are not sufficient to compensate the aggrieved party's
18 expectancy interest under the principle of section 2-803(a). Although compensation of the
19 expectancy interest of the aggrieved party is the general rule, a party may also use this
20 measurement to compensate the aggrieved party's reliance or restitution interests. See
21 Restatement (Second) of Contracts, section 349 and section 371. For example, assume a buyer is
22 unable to recover any damages based upon either the cover or market price measurements
23 because the price for the good has not changed but the buyer has incurred damages in preparing
24 to perform its part of the contract. Those reliance based expenses may not fall into the category
25 of incidental or consequential damages but could be recovered under this section. Of course,
26 recovery under this section is subject to the general principles stated in section 2-803. Even if
27 an aggrieved party cannot establish any general or direct damages, an aggrieved party may
28 recover incidental and consequential damages resulting from the breach.

29 2. An aggrieved party should not be able to use section 2-804 to recover damages based
30 upon its reliance or restitutionary interests when those interests are greater than its expectancy
31 interest. To illustrate, assume seller and buyer enter into an installment contract for 10 deliveries
32 at \$20,000 per delivery. Seller's cost of performing is actually \$25,000 per delivery. The market
33 price at time of delivery is \$20,000 and Seller could resell undelivered goods for at most
34 \$20,000. Seller made a bad deal by underestimating the cost of Seller's performance. Thus on

1 each delivery that Buyer accepts, Seller is losing \$5,000. Buyer breaches. Seller's general
2 damage recovery under either the market price or resale formula is \$0. Under a restitution
3 theory, Seller could argue that it should get the value of the benefit it conferred on Buyer by its
4 part performance. If the value of the benefit conferred on Buyer is measured by the market value
5 of the goods, the restitution recovery is identical to the expectancy recovery. If the value of the
6 benefit conferred on Buyer is measured by the contract price Buyer agreed to pay, than as to any
7 installments accepted, the Buyer is already liable for the price under section 2-822, and Seller
8 gets no benefit from asserting restitution. If the value of the benefit conferred on Buyer is
9 measured by the cost of performance, then Seller will get the \$25,000 per delivery as to the
10 goods accepted by Buyer. See *Boomer v. Muir*, 24 P.2d 570 (Cal. App. 1933) (a construction
11 contract situation where the value of the benefit conferred on the buyer was measured by the cost
12 of performance of the builder); *U.S. v. Western States Mechanical Contractors*, 834 F.2d, 1533
13 (10th Cir. 1987) (subcontractor's contract price was \$295,706, the reasonable value of work
14 under the subcontract as determined at trial was \$475,000, subcontractor wrongly fired so general
15 contractor in breach, 40% of the work was done by subcontractor prior to firing, subcontractor
16 received 40% of \$475,000 as restitution for the value of the work performed). See also
17 Restatement (Second) of Contracts section 371. Recovery based upon the reliance or restitution
18 interest that exceeds the expectancy interest of the aggrieved party should not be allowed when
19 the aggrieved party enters into a losing contract. See Restatement (Second) of Contracts section
20 349 comment a. If the party completely performs the contract and they are owed only money, the
21 Restatement (Second) of Contracts section 373(2) provides that restitution is not allowed, thus
22 the seller would be limited to the price.

23 **SECTION 2-805. INCIDENTAL DAMAGES.** Incidental damages resulting from
24 breach of contract include compensation for any commercially reasonable charges, expenses, or
25 commissions incurred with respect to:

26 (1) inspection, receipt, transportation, care, and custody of identified goods which are the
27 subject of the breached contract;

28 (2) stopping delivery or shipment;

29 (3) effecting cover, return, or resale of the goods;

30 (4) reasonable efforts otherwise to minimize or avoid the consequences of breach; and

31 (5) otherwise dealing with the goods or effectuating other remedies after the breach.

32 **SOURCE: Sales, Sections 2-715(1), 2-710.**

33 **Comment**

1 1. Section 2-805 combines former section 2-710 and former section 2-715(1) into one
2 section without limiting the recovery of incidental damages under subsection (1) for an aggrieved
3 buyer to goods rightfully rejected. This limitation under former law had been criticized as more
4 restrictive than the common law rule and as encouraging rejection in the marginal case. See also
5 section 2-609(b).

6 2. An aggrieved party should be able to recover damages based on this section for
7 expenses that are incurred in dealing with the goods after a breach, in mitigation of the
8 consequence of the breach, or in exercising other remedies for the breach. The incurring of
9 charges or other expenses must be commercially reasonable to be recovered. Compensating an
10 aggrieved party for its incidental damages is part of placing the aggrieved party in the position it
11 would have been in if the contract had been fully performed. Section 2-803(a).

12 **SECTION 2-806. CONSEQUENTIAL DAMAGES.**

13 Consequential damages resulting from a breach of contract include compensation for:

14 (1) any loss, including loss to property other than the goods sold, resulting from
15 the aggrieved party's general or particular requirements and needs of which the party in breach at
16 the time of contracting had reason to know and which could not reasonably be prevented; and

17 (2) injury to person proximately resulting from any breach of warranty.

18 **SOURCE: Sales, Section 2-715(2).**

19 **Comment**

20 1. Section 2-806 is derived from the provision governing buyer's consequential damages
21 in former section 2-715(2) with the following changes. First, the section has been rephrased to
22 govern both the seller and buyer as the aggrieved party. This change rejects the position under
23 former Article 2 that a seller should not be entitled to consequential damages for a buyer's breach
24 of contract. Second, damage to property other than the goods sold is governed by the
25 foreseeability test and mitigation principle in subsection (a)(1) and not the proximate cause test
26 of subsection (a)(2). The proximate cause test turns on whether it was reasonable for the person
27 to use the goods without an inspection that would have revealed the defect on which the breach
28 of warranty is based. If it was unreasonable to use the goods without such an inspection or the
29 defect was in fact discovered prior to use, the personal injury is not a proximate result of the
30 breach of warranty. Whether a person is entitled to enforce a breach of warranty which has
31 resulted in personal injury depends upon other provisions of this article. See Part 4 of this
32 article.

33 2. Compensating an aggrieved party for consequential loss is part of placing the

1 aggrieved party in the position it would have occupied but for the breach of contract. Section 2-
2 803(a). Assuming the contract does not contain an enforceable exclusion of consequential
3 damages (section 2-810), the aggrieved party must satisfy four conditions to recover:

4 (a) The loss must result from (be caused by) the breach. This cause-in-fact requirement is
5 common to all breach of contract claims, but may be more difficult to establish when the loss is
6 remote from the breach.

7 (b) The loss must result from general or particular requirements of the aggrieved party of
8 which the breaching party had reason to know at the time of contracting. This statement of the
9 foreseeability test rejects the tacit agreement test for recover of consequential damages.

10 (c) An otherwise foreseeable loss is not recoverable if, after the breach, it could have been
11 prevented by either the aggrieved or the breaching party. This limitation is a specific application
12 of the mitigation principle of section 2-803(b). Normally, the breaching party must establish that
13 the aggrieved party failed to mitigate. See section 2-803(b). In cases where both parties could
14 have avoided the loss by the same or similar acts and it is "equally reasonable" to expect the
15 breaching party to minimize damages, the breaching party is in no position to contend that the
16 aggrieved party failed to mitigate. See, e.g., *Nezperce Storage Co. v. Zenner*, 670 P.2d 871 (Id.
17 1983). Decisions about actions taken to mitigate harm must be made in good faith.

18 (d) The plaintiff must prove the loss with reasonable certainty. This limitation controls
19 loss in complex cases of remote or speculative damage, (e.g., loss of good will, new businesses).
20 This does not require the aggrieved party to demonstrate mathematical precision in the proof of
21 loss. Loss may be determined in any manner which is reasonable under the circumstances.

22 3. Some courts have used the Restatement (Second) of Contracts section 351(3) to limit
23 consequential damages if under the circumstances "justice so requires in order to avoid
24 disproportionate compensation. See *Perini Corp. v. Great Bay Hotel & Casino, Inc.*, 610 A.2d
25 364, 381-83 (N. J. 1992) (disproportion between loss suffered by aggrieved party and price
26 charged by breaching party); *International Ore & Fertilizer Corp. v. SGS Control Services, Inc.*,
27 743 F. Supp. 250 (S.D.N.Y. 1990) (same). That principle may be appropriate to apply in some
28 cases under this article.

29 **SECTION 2-807. SPECIFIC PERFORMANCE.**

30 (a) A court may enter a decree for specific performance if the goods or the agreed
31 performance of the party in breach of contract are unique or in other proper circumstances. [In a
32 contract other than a consumer contract,] a court may enter a decree for specific performance if
33 the parties have expressly agreed to that remedy. Even if the parties expressly agree to specific
34 performance, a court shall not enter a decree for specific performance where the breaching
35 party's sole remaining contractual obligation is the payment of money.

(b) The decree for specific performance may include terms and conditions as to payment of the price, damages, or other relief the court considers just.

SOURCE: Section 2A-521; Sales, Section 2-716(1) & (2).

Comment

1. Section 2-807 is derived from former section 2-716(1) & (2) but is no longer limited to a buyer's remedy. Either party may obtain a decree for specific performance in an appropriate case. Subsection (a) recognizes that unique goods or unique performance as well as other circumstances that are not based upon uniqueness may be the basis for a specific performance decree. Uniqueness should be determined in light of the total circumstances of the contract and is not limited to goods identified when the contract is formed. Evidence of other circumstances in which it might be appropriate to order specific performance include when a buyer is unable to cover or when a seller has no other outlet for the goods.

2. This section recognizes that the parties may agree to specific performance. This agreement to specific performance is symbolized by the "take and pay" contracts in the oil and gas industry. The parties' agreement to specific performance could be enforced even if legal remedies are entirely adequate. **[The drafting committee should decide whether to limit the effect of agreements to specific performance to non consumer cases. This enforceability of an agreement to specific performance has been limited to commercial cases to avoid having a consumer buyer to be forced to take and pay for goods that the consumer may not want.]** The second sentence of subsection (a) prevents the aggrieved party from getting specific performance if the party in breach is only obligated to pay money. Thus in the case of accepted goods, the buyer who is obligated to pay the price, section 2-707, should not have that obligation enforced by an action for specific performance. The seller's right to be paid in that case should be enforced through an action for the price. Section 2-822.

3. Nothing in this section constrains the court's exercise of its equitable discretion in deciding whether to enter a decree for specific performance or in determining the conditions or terms of such a decree. This section assumes that the decree for specific performance will condition the decree on full performance by the party who seeks the other party's specific performance of its obligation. Thus, a seller seeking to enforce a "take and pay" term should be required to tender goods that conform to the contract requirements.

SECTION 2-808. CANCELLATION; EFFECT.

(a) An aggrieved party may cancel a contract if there is a breach under Section 2-701, or in the case of an installment contract, a breach of the whole contract under Section 2-710(c),

1 unless there is a waiver of the breach under Section 2-702 or a right to cure the breach under
2 Section 2-709.

3 (b) Cancellation is not effective until the canceling party notifies the party in breach of
4 the cancellation.

5 (c) Except as otherwise provided in subsection (d), upon cancellation of the contract all
6 obligations that are still executory on both sides are discharged.

7 (d) The obligations surviving cancellation of a contract include:

8 (1) a right based on a previous breach or performance of a contract;

9 [(2) any term limiting disclosure of information;]

10 [(3) an obligation to return or dispose of goods;]

11 (4) any term specifying a choice of law or forum;

12 (5) any term creating an obligation to arbitrate or otherwise resolve disputes
13 through alternative dispute resolution procedures;

14 [(6) a term limiting the time for commencing an action or for providing notice;]

15 (7) a remedy for breach of the whole contract or any unperformed balance; and

16 (8) other rights, remedies, or limitations if in the circumstances such survival is
17 necessary to achieve the purposes of the parties.

18 (e) Unless a contrary intention clearly appears, language of cancellation, rescission, or
19 avoidance of the contract or similar language shall not be construed as a renunciation or
20 discharge of any claim in damages for an antecedent breach of contract.

21 **SOURCE: Sales, Sections 2-106(3) & (4), 2-720.**

22 **Comment**

1 1. Section 2-808 is an articulation of the cancellation remedy and consequences of
2 cancellation derived from former section 2-106(3) & (4). Both a buyer and a seller have a right to
3 cancel as a remedy for breach as under former Article 2. This section provides greater definition
4 to the exercise of cancellation as a remedy for breach of contract. Cancellation is defined in 2-
5 102 as a party ending a contract because of the other party's breach. Cancellation of a contract as
6 a remedy for breach generally affects only future performance of the contract and is not a
7 rescission of the contract. Performances accepted prior to cancellation need not be returned to
8 the other party.

9 2. Subsection (a) makes clear that the right to cancel depends upon a breach of contract.
10 The index of seller's remedies (Section 2-815) and the index of buyer's remedies (Section 2-823)
11 both list cancellation as a remedy for breach of contract. A party may not cancel the contract if
12 they have waived the breach under section 2-702(a). A buyer may not cancel the contract if the
13 seller has a right to cure under section 2-709. A seller's right to cure depends in part upon
14 sending timely notice of the intent to cure to the buyer. If the buyer does not receive notice of the
15 seller's intent to offer a cure that satisfies section 2-709 within the seasonable time for notice, the
16 buyer may cancel the contract.

17 3. Subsection (b) is new and resolves a controversy under current law about whether an
18 aggrieved party needs to notify the other party of the cancellation. See the definition of notify in
19 section 1-201(26).

20 4. Subsection (c) continues the rule from former section 2-106(4) that upon cancellation,
21 all obligations that are executory on both sides are discharged. If the parties have already
22 rendered their performance so that obligations are not executory on both sides, then cancellation
23 is a meaningless remedy. Assume non-installment contract that the seller has delivered non-
24 conforming goods and the buyer has accepted those goods. The buyer cancels due to the non-
25 conformity of the goods. The buyer is still liable for the price under section 2-707(a) and has a
26 counterclaim for damages under section 2-827 unless buyer can revoke acceptance under section
27 2-708. The buyer's cancellation does not affect the buyer's obligation to pay for the goods nor
28 give the buyer the ability to return the goods to the seller outside of the revocation right. If the
29 seller has delivered a nonconforming installment of goods and the nonconforming installment
30 results in a breach of the whole contract, the buyer may cancel the contract. Section 2-710.
31 When the buyer cancels, the buyer need not return the accepted non-conforming installments to
32 the seller, but has the right to obtain damages due to the non-conformity of those past
33 installments. The cancellation means that the seller need not deliver any of the remaining
34 installments but the seller is liable for breach of the whole contract.

35 5. Subsection (d) provides a nonexclusive list of other rights that survive cancellation.
36 Under former law, the rights that survived cancellation of the contract were rights based on a
37 prior breach or performance and rights for remedy of breach of the whole contract or an
38 unperformed balance. Subsection (d) continues those rules. In addition, courts have found that
39 other rights that survive cancellation are rights based upon a term in the agreement concerning

1 dispute resolution processes, a term concerning choice of law or choice of forum, and terms that
2 provide rights the parties specify should survive a cancellation. Those rights are reflected in the
3 list of rights in subsection (d). Of course, the parties are free to specify any rights created in the
4 contract survive cancellation of the contract. In addition, the court may find that a right must
5 survive cancellation even if the parties did not explicitly specify in order to achieve the purposes
6 of the parties. **The bracketed subsections are recommended to be deleted due to uncertainty**
7 **regarding survival of those rights as representing the “default” intention of the parties. If**
8 **the drafting committee agrees, the sections will be renumbered accordingly.**

9 6. Subsection (e) is the same as former section 2-720. A party’s use of the term
10 cancellation or rescission should not result in an impairment or waiver of a right to a remedy for
11 breach of a contract unless there is a clear statement that the canceling party intends to so waive
12 those rights.

13 **SECTION 2-809. LIQUIDATION OF DAMAGES; DEPOSITS.**

14 (a) Damages for breach of contract by either party may be liquidated in the agreement but
15 only at an amount that is reasonable in the light of the difficulties of proof of loss in the event of
16 breach and either the actual loss or the then anticipated loss caused by the breach. If a term
17 liquidating damages is unenforceable under this subsection, the aggrieved party may pursue the
18 remedies provided in this article.

19 (b) If a seller justifiably withholds delivery of goods or stops performance because of the
20 buyer's breach of contract or insolvency, the buyer is entitled to restitution of any amount by
21 which the sum of payments exceeds the amount to which the seller is entitled under a term
22 liquidating damages in accordance with subsection (a).

23 (c) The buyer's right to restitution under subsection (b) is subject to offset [set off] to the
24 extent that the seller establishes a right to recover damages under the provisions of this article
25 other than subsection (a) and the amount or value of any benefits received by the buyer directly
26 or indirectly by reason of the contract.

27 (d) If a seller has received payment in goods, their reasonable value or the proceeds of

1 their resale are payments for the purposes of subsection (b). However, if the seller has notice of
2 the buyer's breach before reselling goods received in part performance, the resale is subject to the
3 requirements of section 2-819.

4 **SOURCE: Sales, Section 2-718.**

5 **Comments**

6 1. Section 2-809 continues the rules from former section 2-718 with several substantive
7 changes. First, in subsection (a) the tests of inconvenience or non-feasibility of obtaining an
8 adequate remedy have been eliminated. The enforceability of a liquidated damages clause is
9 determined by looking at the anticipated difficulties of proving loss and either the anticipated
10 loss or the actual loss. This continues the policy from former law that evaluates a liquidated
11 damages term in light of the circumstances of the case. A valid liquidated damages clause may
12 liquidate the amount of all damages, including consequential and incidental damages. If the
13 parties have not attempted to liquidate damages in light of these factors in this section, a term
14 limiting the amount of the damages would be tested under the section on limited remedies.
15 Section 2-810. Second, the provision from former law stating that an unreasonably large
16 liquidated damages clause is void as a penalty has been eliminated as unnecessary. If the
17 liquidated damages term is reasonable in light of the test of subsection (a), the term should be
18 enforceable and the penalty language of the former law is unnecessary. Similarly, if a liquidated
19 damages clause is unreasonably small under the test of subsection (a), it would be unenforceable.
20 Third, the last sentence of subsection (a) is new and states what was implicit in the former rule,
21 that if a liquidated damages clause is unenforceable, the remedies of the Article become available
22 to the aggrieved party.

23 2. Subsection (b) continues the rules from former section 2-718(2) allowing for
24 restitution of the payments the buyer has already made but expands the situations in which
25 restitution might be available to any situation where the seller stops performance on account of
26 the buyer's breach or insolvency. See sections 2-816(a) and 2-818. Only the buyer's payments
27 that are more than the amount of an enforceable liquidated damages term need be returned to the
28 buyer. The statutory liquidated damages provision found in prior law has been deleted as an
29 unwarranted penalty. If the buyer has made payment by virtue of a trade in or other goods
30 deposited with the seller, subsection (d) provides that the reasonable value of such goods or their
31 resale price should be used to determine what the buyer has paid, not the value the seller allowed
32 the buyer in the trade in. To assure that the seller obtains a reasonable price for the goods so
33 deposited, the seller must comply with the resale provisions of section 2-819 if the seller knows
34 of the buyer's breach before it has resold the goods deposited with the seller.

35 3. Subsection (c) continues the rule from former law without change. If there is no
36 enforceable liquidated damages clause, the buyer is entitled to restitution under subsection (b)

1 subject to a set off of the seller for any damages it is otherwise entitled to under this Article.

2 **SECTION 2-810. CONTRACTUAL MODIFICATION OF REMEDY.**

3 (a) Subject to Section 2-809 and subsections (b) and (c), the following rules apply:

4 (1) An agreement may add to or substitute for the remedies available under this
5 article and may limit or alter the measure of damages recoverable for breach of contract such as
6 by limiting the buyer's remedies to return of the goods and repayment by the seller of the price or
7 to repair and replacement of nonconforming goods or parts by the seller.

8 (2) Resort to an agreed remedy under paragraph (1) is optional. However, if the
9 parties expressly agree that the agreed remedy is exclusive, it is the sole remedy;

10 (3) An agreed remedy under this section creates a remedial promise.

11 (b) If circumstances cause an exclusive or limited remedy to fail of its essential purpose,
12 the following rules apply:

13 (1) In a contract other than a consumer contract, the aggrieved party may pursue
14 all remedies available under this article. However, an agreement expressly providing that
15 consequential damages, including those resulting from the failure to provide the limited remedy,
16 are excluded is enforceable to the extent permitted under subsection (c).

17 (2) In a consumer contract, an aggrieved party may reject the goods or revoke
18 acceptance and, [to the extent of the failure], may pursue all remedies available under this article
19 including the right to recover consequential damages, despite any term purporting to exclude or
20 limit such remedies.

21 (c) Subject to subsection (b), consequential damages may be limited or excluded by
22 agreement unless the operation of the limitation or exclusion is unconscionable. Limitation of

consequential damages for injury to the person in the case of a consumer contract is presumed to be unconscionable.

SOURCE: Sales, Section 2-719.

Comment

1. Section 2-810 continues the rules from former section 2-719. Subsection (a) allows parties to shape their remedies to their particular requirements and reasonable agreements limiting or modifying those remedies are given effect. However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions in an unconscionable manner so as to deny a party an adequate minimum remedy is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Subsection (a)(1) presumes that remedy terms in an agreement are intended to be cumulative and if the parties intend the remedy term to be an exclusive, that intention must be clearly expressed.

2. Subsection (b) is based upon the principle that a fair and reasonable term in a contract may because of circumstances fail in its purpose or operate under the circumstances to deprive a party of the substantial value of its bargain. If that happens, the aggrieved party should be able to resort to remedies under this Article. Subsection (b) addresses the troublesome issue of what to do with a consequential damage excluder in the event the exclusive agreed remedy fails to achieve its purpose. This issue is frequently litigated. In these cases, the seller, either directly or through a dealer, obtains an agreement with the buyer that may: (1) Make a limited express warranty, (2) Exclude or limit implied warranties, (3) Promise, on breach of express warranty, to repair, replace parts or otherwise cure the breach for a stated period of time, and (4) Exclude liability for consequential damages. These clauses, typically, are well drafted and are stated to be "exclusive." The test adopted in subsection (b) provides clear results in both commercial cases and consumer cases without resorting to complicated factual analysis that has been used by some courts to determine the enforceability of the consequential damage excluder in these types of cases. Thus in a commercial contract, the parties may expressly provide that the consequential damage excluder will be enforced even if the exclusive or limited remedy has failed in its essential purpose. In that case, the consequential damages are excluded by the agreement as long as the excluder is enforceable under subsection (c). In a consumer contract, the consequential damage excluder is unenforceable no matter what a term of the contract may provide in the event the exclusive or limited remedy fails in its essential purpose. This dichotomy between the commercial and consumer contracts in regard to the enforcement of the consequential damage excluder in this circumstance follows the majority of the cases approach to this problem.

1 3. Subsection (c) recognizes the validity of clauses limiting or excluding consequential
2 damages but makes it clear that they may not operate in an unconscionable manner. This
3 principle is made subject to subsection (b) in recognition that a consequential damage excluder
4 that is conscionable under subsection (c) may be unenforceable under the rule of subsection (b).
5 In a consumer contract (defined in 2-102), a seller may not exclude consequential damages for
6 personal injury as such an exclusion is presumed to be unconscionable. This continues the policy
7 of former law that a seller who sells goods to a consumer should be liable for that personal injury
8 harm under this article if the seller has given a warranty which has been breached proximately
9 resulting in personal injury. Section 2-806(2). A seller may, however, choose to disclaim a
10 warranty for the quality of the goods without violating this section. Section 2-406.

11 **SECTION 2-811. REMEDIES FOR MISREPRESENTATION OR FRAUD.**

12 Remedies for material misrepresentation or fraud include all remedies available under this article
13 for non-fraudulent breach of contract. Rescission or a claim for rescission of a contract for sale or
14 rejection or return of the goods do not bar and are not inconsistent with a claim for damages or
15 other remedy.

16 **SOURCE: Sales, Section 2-721.**

17 **Comment**

18 This section is the same as former section 2-721. This section continues the policy that
19 the remedies for material misrepresentation or fraud should be construed in light of the policy of
20 this Article that remedies are designed to place the aggrieved party in the position that it would
21 have been in if the contract had been performed. Similarly, a party claiming to rescind the
22 contract and seeking to return the goods to the seller should also be able to enforce its remedies
23 under this article in light of that same principle. Section 2-803.

24 **SECTION 2-812. PROOF OF MARKET PRICE.**

25 (a) If evidence of a price prevailing at a time or place described in this article is not
26 readily available, the following rules apply:

27 (1) The price prevailing within any reasonable time before or after the time
28 described may be used.

29 (2) The price prevailing at any other place that in commercial judgment or usage

of trade is a reasonable substitute for the one described may be used, making proper allowance for any cost of transporting the goods to or from the other place.

(3) Evidence of a relevant price prevailing at a time or place other than one described in this Article offered by one party is not admissible unless the party has given the other party notice that the court finds sufficient to prevent unfair surprise.

(b) If the prevailing price or value of any goods regularly bought and sold in any established commodity market is in dispute, reports in official publications or trade journals or in newspapers, periodicals, or other means of communication in general circulation and published as the reports of that market are admissible in evidence. The circumstances of the preparation of such a report may affect the weight of the evidence but not its admissibility.

SOURCE: Sales, Sections 2-723, 2-724.

Comments

1. Section 2-812 restates the rules from former section 2-721(2) & (3) and former section 2-724.

2. Subsection (a) provides guidance on where and when to measure market price. The court may allow a party to submit other times and places to measure market price if that is reasonable in the circumstances of the case subject to protection of the other party from unfair surprise.

3. Subsection (b) allows reports of market prices to be admissible while providing flexibility for a determination of the weight of the evidence offered. An “established market” under this section requires a market where transactions in the commodity are frequent and open enough to make a market established by usage in which one price can be expected to affect another and in which an informed report of the range and trend of prices can be assumed to be reasonably accurate. This section is not meant to prevent admission of other types of relevant evidence on market price under any other rule of evidence.

SECTION 2-813. LIABILITY OF THIRD PERSONS FOR INJURY TO GOODS.

If a third person deals with goods identified to a contract for sale and causes actionable injury to

1 the goods, the parties to the contract have the following rights and remedies:

2 (1) A party with title to, or a security interest, special property interest, or insurable
3 interest in, the goods has a right of action against the third person.

4 (2) If the goods have been destroyed or converted, the party that had the risk of loss under
5 the contract for sale, or since the injury has assumed that risk as against the other party, also has a
6 right of action against the third person.

7 (3) If at the time of the injury the plaintiff does not have the risk of loss as against the
8 other party to the contract for sale and there is no arrangement between them for disposition of
9 the recovery, the plaintiff's right of action or settlement is, subject to the plaintiff's interest, as a
10 fiduciary for the other party to the contract.

11 (4) Either party, with the consent of the other, may maintain an action for the benefit of a
12 concerned party.

13 **SOURCE: Sales, Section 2-722.**

14 **Comment**

15 Section 2-813 continues the rules of former section 2-722 with no substantive change.
16 This provision is a procedural rule that details who has standing to pursue an action for damages
17 for harm to the goods. The injury to the goods is usually actionable under law other than Article
18 2. This section concerns who has a right of action for injury to the goods after identification of
19 the goods to the contract, section 2-502, as before that time, the seller will have the right of
20 action for such injury. During the period after identification of the goods to the contract and
21 before the buyer has finally accepted the goods, both parties may have a right of action against
22 third persons for harm to the goods. A seller may have a right of action even after the buyer's
23 acceptance due to the seller retaining an interest in the goods. See section 2-501.

24 **SECTION 2-814. STATUTE OF LIMITATIONS.**

25 (a) An action for breach of a contract or other obligation under this article must be
26 commenced within the later of four years after the right of action has accrued under subsection

1 (b) or (c) or one year after the breach was or should have been discovered, but no longer than five
2 years after the right of action accrued. Except in a consumer contract, the original agreement may
3 reduce the period of limitation to not less than one year.

4 (b) Except as provided in subsection (c), the follow rules apply:

5 (1) Except as otherwise provided in this subsection, for breach of contract, a right
6 of action accrues when the breach occurs, even if the aggrieved party did not have knowledge of
7 the breach.

8 (2) For breach of a contract by repudiation under section 2-712, a right of action
9 accrues at the earlier of when the aggrieved party elects to treat the repudiation as a breach of
10 contract or when a commercially reasonable time for awaiting performance has expired.

11 (3) For breach of a remedial promise, a right of action accrues when the remedial
12 promise is not performed when due.

13 (4) In an action by a buyer against a person who is answerable over to the buyer
14 for a claim asserted against the buyer, the buyer's right of action against the person answerable
15 over accrues at the time the claim was originally asserted against the buyer.

16 (c) If a breach of warranty is claimed, the definitions in section 2-401 and the following
17 rules apply:

18 (1) Except as provided in subsection (c)(4), for breach of a warranty that arises
19 under sections 2-403, 2-404, 2-405 or 2-409, a right of action accrues when a seller has
20 completed tender of delivery of nonconforming goods to the immediate buyer.

21 (2) Except as provided in subsection (c)(4), for a breach of an express warranty
22 obligation arising under section 2-408, a right of action accrues when the goods are received by

1 the remote buyer. [Under section 2-408, the express warranty obligation is breached if the goods
2 did not conform to the representation creating the express warranty obligation when the goods
3 left the seller's control.]

4 (3) For a breach of the warranty arising under section 2-402, a right of action
5 accrues when the aggrieved party discovers or should have discovered the breach.

6 (4) If the seller has made an express representation about the performance or
7 quality of the goods which extends to the performance or quality of the goods after delivery and
8 that representation creates a warranty under section 2-403 or a warranty obligation under section
9 2-408, a right of action accrues when the buyer discovers or should have discovered that the
10 goods failed to conform to that representation.

11 (d) If an action for breach of contract or other obligation commenced within the
12 applicable time limitation is terminated but a remedy by another action for the same breach is
13 available, the other action may be commenced after the expiration of the time limitation and
14 within six months after the termination of the first action unless the termination resulted from
15 voluntary discontinuance or from dismissal for failure to prosecute.

16 (e) This section does not alter the law on tolling of a statute of limitations and does not
17 apply to a right of action that accrued before the effective date of this article.

18 **SOURCE: Sales, Section 2-725.**

19 **Comments**

20 1. Section 2-814 continues the rules from former section 2-725 with several changes.

21 2. Subsection (a) continues the 4 year limitation period but provides for a possible one
22 year extension to accommodate a discovery of the breach late in the four year period after
23 accrual. The four year period under this article is shorter than many other statute of limitations
24 for breach of contract and provides a period which is appropriate given the nature of the contracts

1 under this article and modern business practices. This four year period governs all obligations
2 under this article even if not technically part of a contract for sale of the goods, such as the
3 obligations created under section 2-408. As under prior law, the period of limitations can be
4 reduced to one year by an agreement in a commercial contract. That reduction of the period for
5 suit allows commercial parties to control the time for suit but is not appropriate in the context of
6 consumer contracts where such a reduction is less likely to be a product of an explicitly
7 bargained for exchange. The rule from former law that the parties could not extend the
8 limitations period has been eliminated as not effective to prevent the limitations period from
9 being waived or tolled by agreement.

10 3. Subsections (b) and (c) provide rules for accrual of various types of actions that this
11 Article allows. Certainty of commercial relationships is advanced when the rules for when a
12 cause of action can be brought are clearly set forth. Subsection (b) treats accrual rules for actions
13 other than for breach of a warranty claims while subsection (c) treats the accrual rules for the
14 various types of warranty claims that can be asserted pursuant to the provisions of Part 4 of this
15 Article.

16 Subsection (b)(1) states the general rule from prior law that a right of action for breach of
17 contract accrues when the breach occurs without regard to the aggrieved party's knowledge of the
18 breach. This general rule is then subject to the three more explicit rules in subsection (b) and the
19 rules for breach of warranty stated in subsection (c).

20 Subsection (b)(2) provides an explicit rule about repudiation cases. In a repudiation, the
21 aggrieved party may await performance for a commercially reasonable time or resort to any
22 remedy for breach. Section 2-712. The accrual rule for breach of contract in a repudiation case
23 is keyed to the earlier of those two time periods.

24 Subsection (b)(3) addresses the accrual of a cause of action for breach of a remedial
25 promise. Section 2-102. If a seller has promised to take remedial action with respect to the
26 goods, the cause of action accrues whenever the promised action is not taken. This addresses the
27 problem in the cases where the courts have mistakenly held that a cause of action for failure to
28 follow through on a promised remedy accrues when the warranty concerning the quality of goods
29 is breached. The warranty and the remedial promise represent two separate obligations, each with
30 their own accrual rule for breach of that obligation. Subsection (b)(4) addresses the problem that
31 has arisen in the cases when an intermediary party is sued for a breach of obligation for which its
32 seller or another person is answerable over, but the limitations period in the upstream lawsuit has
33 already expired. This subsection allows a party four years, or if reduced in the agreement, not less
34 than one year, from when the claim is asserted against the buyer for the buyer to sue the person
35 who is answerable over to the buyer.

36 4. Subsection (c) addresses the accrual rules for breach of warranty or warranty
37 obligations that arise based upon the provisions of Part 4 of this article. The accrual rules should
38 be read in light of the definitions of terms in Part 4. Subsection (c)(1) continues the general rule
39 that an action for breach of warranty accrues in the case of an express or implied warranty upon

1 completion of tender of delivery of nonconforming goods to the immediate buyer. A completion
2 of the tender of delivery follows the rule of section 2-602, that a tender of delivery is not
3 completed until the seller has performed any agreed installation or assembly. This accrual rule
4 governs even when that warranty is extended to persons other than the immediate buyer under
5 section 2-409. A cause of action of a person to whom a warranty is extended under section 2-409
6 is governed by the same time limit as the immediate buyer.

7 Subsection (c)(2) addresses the accrual of the cause of action for breach of a warranty to a
8 remote buyer that is governed by section 2-408. In that case, the cause of action accrues when the
9 remote buyer receives the goods. That time period governs even if that warranty is extended to
10 other persons under section 2-408. This accrual rule balances the rights of the remote buyer to be
11 able to have a cause of action based upon the warranty obligation the seller has created with the
12 rights of the seller to have some limit on the length of the seller's liability. Both of these accrual
13 rules are subject to an exception for express representations about the performance or quality of
14 the goods after delivery in subsection (c)(4). If the seller makes an express representation such as
15 "these goods will be defect free for five years," the seller is warranting that for five years the
16 goods will not have defects. If anytime within that five years, the goods have or develop a
17 defect, the cause of action accrues when the buyer discovers or should have discovered the
18 defect.

19 Subsection (c)(3) allows a cause of action to accrue upon discovery of the breach of
20 warranty of title or against infringement when the aggrieved party discovers or should have
21 discovered the breach. In a typical case, the aggrieved party will not discover the breach of
22 warranty until it is sued by a party asserting title to the goods or an infringement which could be
23 many years after the buyer acquired the goods. This accrual rule allows the aggrieved party
24 appropriate leeway to then bring a claim against the person who made the warranty of title or the
25 warranty against infringement.

26 5. Subsection (d) continues the rule from former Article 2 to allow a short period for
27 bringing an action where suits begun within the statute of limitations are terminated and the
28 aggrieved party still has a remedy for breach.

29 6. Subsection (e) does not prescribe any rules for tolling the running of the statute of
30 limitations. If the seller has a right to cure a nonconforming tender of delivery under section 2-
31 709, the time in which the seller is effecting a cure may be an appropriate time period for tolling
32 the running of the statute of limitations in order to not prejudice the buyer's rights.

33 **[B. SELLER'S REMEDIES]**

34 **SECTION 2-815. SELLER'S REMEDIES IN GENERAL.** If a buyer breaches the
35 contract under Sections 2-701 or 2-710(c) or becomes insolvent, the seller may:

36 (1) withhold delivery of the goods under Sections 2-816(a) or 2-818(a);

- (2) stop delivery of the goods under Section 2-818(b);
- (3) proceed with respect to goods still unidentified to the contract or unfinished under Section 2-817;
- (4) reclaim the goods under Section 2-816(b);
- (5) obtain specific performance under Section 2-807 or recover the price under Section 2-822;
- (6) resell the goods and recover damages under Section 2-819;
- (7) recover damages for repudiation or nonacceptance under Section 2-821;
- (8) recover incidental and consequential damages under Sections 2-805 and 2-806;
- (9) cancel the contract under Section 2-808;
- (10) recover liquidated damages under Section 2-809;
- (11) enforce limited remedies under Section 2-810; or
- (12) recover damages under Section 2-804.

SOURCE: Sales, Section 2-703.

Comment

Section 2-815 is derived from former section 2-703 and indexes the remedies the seller may pursue subject to the principles stated in Subpart A of this Part 8 and subject to the requirements of the individual sections in Subpart B. The seller's ability to exercise its remedies depends upon whether the buyer has breached the contract. In an installment contract, the breach must be of the whole contract in order for the seller to exercise its remedies. The remedies available to the seller upon the buyer's insolvency are listed in this section and are fairly limited to withholding delivery, stopping delivery and reclamation in a credit sale. Not all of the remedies listed are available to the seller in every case but depend upon application of the principles of full compensation to the aggrieved party developed in Subpart A, notably section 2-803. Whether the buyer has breached the contract is determined under section 2-701 and section 2-710(c).

SECTION 2-816. SELLER'S RIGHT TO WITHHOLD DELIVERY OF GOODS

1 **OR TO RECLAIM GOODS AFTER DELIVERY TO BUYER.**

2 (a) If a buyer is in breach of contract under Section 2-701 [in a contract other than an
3 installment contract], the seller may withhold delivery of the goods directly affected. If the
4 breach is of the whole contract [in an installment contract], Section 2-710(c), the seller may
5 withhold delivery of any undelivered balance.

6 (b) Under this article, a seller may reclaim goods delivered to a buyer under a contract for
7 sale only in the following circumstances:

8 (1) A seller that discovers that the buyer has received goods on credit while
9 insolvent may reclaim the goods upon a demand made within a reasonable time after the buyer's
10 receipt of the goods.

11 (2) If payment is due and demanded on delivery to the buyer, the seller may
12 reclaim the goods delivered upon a demand made within a reasonable time after the seller
13 discovers or should have discovered that payment was not made.

14 (c) Reclamation under subsection (b) is subject to the rights under this article of a buyer
15 in ordinary course of business or other good-faith purchaser for value that vest before the seller
16 takes possession under a timely demand for reclamation. Successful reclamation of the goods
17 under subsection (b)(1) precludes all other remedies with respect to them.

18 **SOURCE: Sales, Sections 2-507(2), 2-702, 2-703(a).**

19 **Comment**

20 1. This section is derived from former sections 2-507(2), 2-702 and 2-703(a) with several
21 substantive changes.

22 2. Subsection (a) is a statement of the principle in former section 2-703(a). Section 2-
23 701 provides different means by which a buyer may breach a contract. In a non-installment
24 contract, the seller need not continue on with delivery of the goods if the buyer has breached.

1 Section 2-701. In an installment contract, however, the breach must be of a magnitude to be a
2 breach of the whole contract under section 2-710(c) before the seller can withhold its future
3 performance. The buyer's creditors can assert no greater rights to the goods than the buyer could
4 assert and thus the buyer's creditors are subject to the seller's right to withhold the goods under
5 this section. Section 2-504(a).

6 3. Subsection (b) provides for the seller's ability to reclaim goods that have been
7 delivered to a buyer. This right to reclamation exists in a credit sale if the delivery is made when
8 the buyer is insolvent. The basis of this right is the assumption that a buyer who receives goods
9 on credit is making a tacit representation of solvency and receipt when insolvent is fraudulent
10 against the seller. This section has been changed from prior law to eliminate artificial barriers to
11 the seller's right to reclaim in a credit sale. In a cash sale, the buyer may tender a payment that
12 later fails, such as a bounced check. In that case, subsection (b)(2) governs the seller's right to
13 reclaim. This rule codifies the result in PEB Commentary 1. A seller should note, however, that
14 if the buyer enters bankruptcy, compliance with this section and with 11 U.S.C. § 546(c) is
15 necessary in order to have the reclamation claim recognized in bankruptcy. If the seller does not
16 have the right to reclaim under this section, the seller's rights to recover the goods from the buyer
17 depend upon the seller's compliance with Article 9 in obtaining a security interest in the goods.

18 4. Subsection (c) addresses the priority of the seller's right to reclaim under subsection
19 (b) against other person's claims to the goods. In order for the seller's reclamation right to
20 triumph over the rights of a buyer in the ordinary course of business or a good faith purchaser for
21 value, the seller must actually take possession of the goods back from the buyer pursuant to a
22 demand for reclamation that is timely under subsection (b) before the rights of the other persons
23 vest. Vesting means when a person has fulfilled all necessary conditions to becoming a buyer in
24 the ordinary course, section 1-201(9), or becoming a good faith purchaser for value, section 1-
25 201(32). For example, assume a buyer's secured party's security interest attaches to the goods
26 pursuant to an after acquired property clause under Article 9. That attachment of the security
27 interest would be the vesting of the secured party's rights in the goods. Unless the secured party
28 has not acted in good faith, the secured party's right as a good faith purchaser for value will
29 triumph over the seller who seeks to reclaim as the attachment of the security interest will be
30 prior in time to the seller's repossession of the goods under the timely reclamation demand.

31 **The second sentence of subsection (c) precludes the exercise of other remedies if the**
32 **seller successfully reclaims the goods in a credit sale where the right to reclaim is**
33 **predicated on the buyer's insolvency. The preclusive effect of the credit sale reclamation**
34 **upon insolvency is based upon the concept that a buyer who receives goods on credit while**
35 **insolvent has engaged in fraud. The seller who elects to reclaim is electing a rescission**
36 **remedy for fraud which the older cases held was inconsistent with the right to get damages**
37 **for breach of contract. Query whether this distinction should be maintained given the**
38 **Code's general disdain for election of remedies doctrine and the fact that in many instances**
39 **a buyer will both be insolvent (giving rise to the right to reclaim) and may have breached**
40 **the contract as well. This election of remedies idea has not been applied in the cash seller**
41 **reclamation situation, see *Burk v. Emmick*, 637 F.2d 1172 (8th Cir. 1980). If the buyer is**

1 insolvent and has otherwise breached the contract, should reclamation preclude other
2 remedies for breach? If the fear is the reclamation creates a secret lien on behalf of the
3 seller, it is unclear how precluding the seller from obtaining breach of contract damages if
4 the seller reclaims makes the lien any less secret.

5 5. The right to reclaim extends only to the goods involved and does not extend to any
6 proceeds of the goods.

7 **SECTION 2-817. SELLER'S RIGHT TO IDENTIFY GOODS TO CONTRACT**
8 **DESPITE BREACH OR TO SALVAGE UNFINISHED GOODS.**

9 (a) If the buyer has breached the contract, an aggrieved seller may:

10 (1) identify to the contract conforming goods not already identified if they are in
11 the seller's possession or control at the time the seller learned of the breach of contract; and

12 (2) resell goods that are shown to have been intended for the particular contract,
13 even if those goods are unfinished.

14 (b) If goods are unfinished at the time of breach of contract, an aggrieved seller, in the
15 exercise of reasonable commercial judgment for the purposes of minimizing loss and of
16 effective realization, may complete the manufacture and wholly identify the goods to the
17 contract, cease manufacture and resell for scrap or salvage value, or proceed in any other
18 reasonable manner.

19 **SOURCE: Sales, Section 2-704.**

20 **Comment**

21 1. Section 2-817 follows former section 2-704 without substantive change.

22 2. Subsection (a) allows a seller to identify goods to the contract that have not already
23 been identified in order to allow the seller to resell the goods under section 2-819 or to obtain the
24 price in the appropriate case when resale is not practicable under section 2-822. Subsection (b)
25 allows the seller to take action as to unfinished goods in order to minimize loss. The burden is on
26 the buyer to demonstrate that any action taken to finish the goods is commercially unreasonable.
27

1 3. The seller's exercise of these options is of course subject to the principles stated in
2 Subpart A, including the mitigation obligation stated in section 2-803, and the obligation of good
3 faith. The reasonableness of the seller's actions under this section should be judged in light of
4 the circumstances available to the seller at the time the seller acted and not evaluated with
5 hindsight.

6 **SECTION 2-818. SELLER'S REFUSAL TO DELIVER BECAUSE OF BUYER'S**
7 **INSOLVENCY; STOPPAGE IN TRANSIT OR OTHERWISE.**

8 (a) A seller that discovers that the buyer is insolvent may refuse to make delivery except
9 for cash, including payment for all goods previously delivered under the contract.

10 (b) Subject to subsection (d), a seller may stop delivery of goods in the possession of a
11 carrier or other bailee if the buyer is insolvent or repudiates or fails to make a payment due
12 before delivery or if, for any other reason, the seller has a right to withhold or reclaim the goods.

13 (c) As against a buyer under subsection (b), the seller may stop delivery until:

14 (1) receipt of the goods by the buyer;

15 (2) acknowledgment to the buyer by any bailee of the goods, other than a carrier,
16 that the bailee holds the goods for the buyer;

17 (3) acknowledgment to the buyer by a carrier by reshipment or as warehouseman
18 that the carrier holds the goods for the buyer; or

19 (4) negotiation to the buyer of any negotiable document of title covering the
20 goods.

21 (d) If notice to stop delivery has been given, the following rules apply:

22 (1) The notice must afford the carrier or bailee a reasonable opportunity to prevent
23 delivery of the goods.

24 (2) After notification, the carrier or bailee shall hold and deliver the goods

1 according to the directions of the seller. The seller is liable to the bailee or carrier for any
2 resulting charges or damages. A carrier or bailee need not stop delivery if the seller does not
3 provide indemnity for charges or damages upon the carrier's or bailee's demand.

4 (3) If a negotiable document of title has been issued for goods, the carrier or bailee
5 need not obey a notification to stop until surrender of the document.

6 (4) A carrier or bailee that has issued a nonnegotiable document of title need not
7 obey a notification to stop received from a person other than the person named in the document
8 as the person from which the goods have been received for shipment or storage.

9 **SOURCE: Sales, Sections 2-702(1) & 2-705.**

10 **Comment**

11 1. Section 2-818 restates the rules from former sections 2-702(1) and 2-705.

12 2. Subsection (a) allows a seller to withhold delivery except for cash for that delivery
13 and all previous deliveries upon discovering the buyer's insolvency.

14 3. Subsection (b) allows a seller to stop delivery when the buyer is insolvent, the buyer
15 has breached the contract, or the seller otherwise has a right to stop performance such as in the
16 case of insecurity, see section 2-711. Where a stoppage occurs for insecurity under section 2-
17 711, if the assurances are forthcoming, delivery must be resumed. If the seller has no right to
18 stop delivery, the seller's actions may be a breach of contract if it results in an interference with
19 the buyer's right to a tender of delivery of the goods. Section 2-701, section 2-602. A bailee or a
20 carrier who obeys an unjustified stop order may have liability to the buyer under Article 7 for
21 which the bailee or carrier may demand indemnity against the seller under subsection (d)(2).
22 After an effective stoppage of delivery, the seller's rights in the goods are the same as if the seller
23 had never made a delivery.

24 The right to stop delivery is no longer limited to when the buyer has a right to stop an
25 entire "carload, truckload, planeload or larger shipments of express or freight. This language is
26 out of date in light of changing shipping methods and practices which now allows individual
27 tracking of goods in shipment. The carrier or bailee is protected from harm by the on demand
28 indemnity provision added to subsection (d)(2). The right to stop delivery under subsection (b) is
29 subject to the rules under subsection (d).

30 The buyer's receipt of goods under subsection (b)(1) includes receipt by a subpurchaser

1 when the seller makes shipment directly to the subpurchaser.

2 4. Subsection (c) restates the rules from former section 2-705(2) on when the seller has
3 the right to stop the goods as against a buyer in terms of when it is too late for the seller to
4 effectively exercise its rights under subsection (b). Under subsection (c)(3), as under former law,
5 a diversion of shipment which is merely an incident to the original contract of transportation or a
6 change in name of the person named in the document is not a reshipment. Acknowledgment by
7 a carrier as warehouseman requires a contract different from the original shipment where the
8 carrier does not merely extend the transit but undertakes to store the goods.

9 5. Subsection (d) is concerned with the rights of the carrier or bailee to whom the seller
10 is communicating its right to stop delivery as against the buyer and seeks to provide reasonable
11 rules for the protection of the carrier or bailee.

12 6. As with the right to withhold delivery under section 2-816(a), the buyer's creditors are
13 subject to the seller's rights under this section to withhold or stop delivery. Section 2-504(a).

14 **SECTION 2-819. SELLER'S RESALE.**

15 (a) If a buyer has breached a contract, the seller may resell the goods concerned that are in
16 the seller's possession or control. If the resale is made in good faith, within a commercially
17 reasonable time, and in a commercially reasonable manner, the seller may recover the contract
18 price less the resale price together with any consequential and incidental damages, less expenses
19 avoided as a result of the breach.

20 (b) A resale:

21 (1) may be at a public auction or private sale including a private auction, a sale by
22 one or more contracts to sell, or by identification to an existing contract of the seller;

23 (2) may be as a unit or in parcels and at any time and place and on any terms, but
24 every aspect of the sale, including the method, manner, time, place, and terms, must be
25 commercially reasonable; and

26 (3) must be reasonably identified as referring to the breached contract, but the
27 goods need not be in existence or have been identified to the contract before the breach.

1 (c) If the resale is at a public auction, the following rules apply:

2 (1) Only identified goods may be sold unless there is a recognized market for the
3 public sale of futures in goods of the kind.

4 (2) The resale must be made at a usual place or market for public sale if one is
5 reasonably available. Except in the case of goods that are perishable or which threaten to decline
6 in value speedily, the seller shall give the buyer reasonable notice of the time and place of the
7 resale.

8 (3) If the goods are not to be within the view of persons attending the sale, the
9 notification of sale must state the place where the goods are located and provide for their
10 reasonable inspection by prospective bidders.

11 (4) The seller may buy the goods.

12 (d) A good-faith purchaser at a resale takes the goods free of any rights of the original
13 buyer, even if the seller fails to comply with this section.

14 (e) The seller is not accountable to the buyer for any profit made on a resale. However, a
15 person in the position of a seller or a buyer which has rightfully rejected or justifiably revoked
16 acceptance shall account for any excess over the amount of the claim secured by the security
17 interest provided in Section 2-829(b).

18 [(f) A seller that fails to resell in the manner required under this section is not barred from
19 any other available remedy.]

20 **SOURCE: Sales, Section 2-706.**

21 **Comments**

22 1. Section 2-819 is based on former section 2-706.

1 2. Subsection (a) allows the seller to resell the goods after a buyer's breach of contract if
2 the seller has possession or control of the goods. See section 2-701 on buyer's breach of contract.
3 The seller may have possession or control of the goods at the time of the breach or may have
4 regained possession of the goods under section 2-716(b)(2). If the seller has regained possession
5 of the goods under Article 9 after delivery to the buyer, Article 9 controls the seller's rights of
6 resale. If the seller resells the goods in compliance with this section, the seller may then use the
7 resell price in determining its damages for breach of contract. In addition, a seller may recover
8 both incidental and consequential damages under sections 2-805 and 2-806 assuming the seller's
9 damages have not been liquidated under section 2-809 or limited under section 2-810. A seller
10 who has resold the goods pursuant to the requirements of this section has mitigated its harm in
11 compliance with the principle of section 2-803(b).

12 3. Subsection (b) prescribes the requirements for a resale under this section. A seller
13 may sell at a public auction or a private sale as long as the choice is commercially reasonable. A
14 public auction is one in which members of the public are admitted. All auctions are not public
15 auctions. A private sale may be by auction or by solicitation directly or through a broker. Sales
16 by public auction have further requirements stated in subsection (c) which requirements follow
17 former law. The requirement of notice in a private sale as under former law is deleted.

18 The seller's resale must be in good faith, made at a commercially reasonable time and
19 made in a commercially reasonable manner. Commercially reasonable practices are allowed in
20 order to realize as high a price as possible under the circumstances. What is a reasonable time
21 depends upon the nature of the goods, the conditions of the market and other circumstances of
22 the case. If the seller receives a demand from the buyer for inspection of the goods, section 2-
23 718, the time may be appropriately lengthened. The seller need not resale at the place for
24 delivery of the goods if that place is not commercially reasonable. The seller may resell on
25 different terms and conditions other than the breached contract if such action is commercially
26 reasonable.

27 The seller may identify goods to the contract after the breach, section 2-817, but must
28 identify the goods being sold as pertaining to the breached contract.

29 4. Subsection (c) states requirements for resale by public auction which operate in
30 addition to the requirements of subsection (b) which pertain to all resales under this section.
31 Subsection (c)(1) allows goods not identified to the contract to be sold only if there is a
32 recognized market for public sales of futures in that type of good. Subsection (c)(2) is designed
33 to allow for competitive bidding by being held at a usual market for those type of goods. Whether
34 such a market is reasonably available depends upon whether it is a market where prospective
35 bidders may reasonably be expected to attend. If such a market is not reasonably available, a
36 duly advertised public auction may be held at another place where prospective bidders may
37 reasonably be expected to attend even if it is not a "usual" place. A buyer is entitled to notice of
38 a public sale, except in the cases noted, in order to give the buyer an opportunity to bid or secure
39 the attendance of other bidders. Subsection (c)(3) is designed to permit intelligent bidding.
40 Subsection (c)(4) allows the seller to buy the goods which may work to the benefit of the buyer

by allowing a higher price to be obtained than would otherwise.

5. Subsection (d) allows a purchaser to take the goods free of the rights of the buyer even if the seller has not complied with this section. The policy of resolving any doubts in favor of the resale purchaser operates to the benefit of the buyer by increasing the price the purchaser should be willing to pay.

6. Subsection (e) recognizes that when the seller is entitled to resell under this article, the goods are the sellers and the purpose of resale under this section is to set the seller's damages as against the buyer. A person in the position of the seller or a buyer asserting a security interest in the goods under section 2-829(b) has only a limited right in the goods and so must account to the seller for any excess over the limited amount necessary to satisfy those rights.

7. Subsection (f) is presented for discussion for the drafting committee. It parallels the provision in the cover sections of both current article 2, 2-712, and the revision, 2-825. Please read the note to 2-803 on mitigation in order to decide the policy on when the aggrieved party might be prevented from recovering part of the loss when the party does not resell or cover but such an action might have mitigated the recovery that is based upon market price. The mitigation rule of 2-803 might lead to some portion of the market price based damages being nonrecoverable. This situation is likely to occur in the case of a wildly fluctuating market.

SECTION 2-820. PERSON IN POSITION OF SELLER.

(a) In this section, a person in the position of a seller includes, as against a principal, an agent that has paid or become responsible for the price of goods on behalf of the principal or any person that otherwise holds a security interest or other right in goods similar to that of a seller.

(b) A person in the position of a seller has the same remedies as a seller under this article.

SOURCE: Sales, Section 2-707.

Comment

Section 2-820 restates the rules from former section 2-707 with one substantive change. A person in the position of the seller gets all of the seller's remedies. Former section 2-707 appeared to limit the remedies to withholding or stopping delivery, reselling and incidental damages for no apparent reason.

SECTION 2-821. SELLER'S DAMAGES FOR BREACH BASED ON MARKET PRICE, LOST PROFIT, OR RELIANCE.

1 (a) If a buyer breaches a contract, the seller may recover damages based upon market
2 price, together with any incidental and consequential damages, less expenses avoided as a result
3 of the breach, as follows:

4 (1) Except as provided in subsection (2), the measure of damages is the contract
5 price less the market price of comparable goods at the time and place for tender of delivery.

6 (2) In the case of a repudiation governed by Section 2-712, the measure of
7 damages is the contract price less the market price of comparable goods at the place for tender of
8 delivery and at the time when a commercially reasonable period after the seller learned of the
9 repudiation has expired, but no later than the time stated in subsection (a)(1). The commercially
10 reasonable period includes the commercially reasonable time for awaiting performance under
11 Section 2-712 and any further commercially reasonable time that would have been needed for the
12 seller to obtain substitute performance.

13 (b) If the measure of damages under Section 2-819 or Section 2-821(a) are inadequate
14 under Section 2-803(a), a seller may recover damages measured by other than the market price or
15 the resale price, together with incidental and consequential damages, including:

16 (1) lost profits, including reasonable overhead, resulting from the breach of
17 contract determined in any reasonable manner; and

18 (2) reasonable expenditures made in preparing for or performing the contract.

19 **SOURCE: Sales, Section 2-708; Section 2-723(1).**

20 **Comment**

21 1. Section 2-821 is based upon former section 2-708 and former section 2-723(1).

22
23 2. Subsection (a) provides for the seller to recover damages based upon the market price
24 when the buyer has breached the contract. Section 2-701 and section 2-710(c). This recovery

1 should be given in light of the general principles of section 2-803. Subsection (a)(1) follows
2 former law in using the time and place for tender as the appropriate time and place for measuring
3 market price in the case of the buyer's breach other than by repudiation. The provisions of this
4 Article on proving the market price are relevant to determining the market price in order to
5 measure the seller's damages. Section 2-812. The time and place of tender of delivery is
6 determined under section 2-602.

7
8 Subsection (a)(2) addresses the question troublesome under former law on the time when
9 the market price should be measured in the case of an anticipatory repudiation by the buyer. This
10 section provides that the market price should be measured in a repudiation case at the end of the
11 time for awaiting performance under section 2-712 and any further time that the seller would
12 have needed to obtain substitute performance. This time is designed to approximate the market
13 price at the time the seller would have resold the goods, even though the seller has not done so
14 under section 2-819, and is designed to attempt to put the seller in the position the seller would
15 have been in if the buyer had performed, section 2-803, by approximating the harm the seller has
16 suffered without allowing the seller an unreasonable time to speculate on the market at the
17 buyer's expense. This rule on measuring the time for measuring market price in a repudiation
18 case is a particular application of the mitigation principle incorporated in section 2-803. This
19 time for measuring market price in the repudiation case cannot extend beyond the time for tender
20 of delivery. The price term in a long term contract may or may not have an escalation clause.
21 The time for determining the contract price in a long term contract should not necessarily be tied
22 to the time for measuring the market price in the repudiation situation. What is the appropriate
23 contract price should be determined in light of the general principle of full compensation for the
24 aggrieved party under section 2-803(a).

25 3. Subsection (b) is a revision of the rule from former section 2-708(2) that had been
26 interpreted by the courts to allow sellers to recover lost profits and reliance expenditures. The
27 former subsection (2) was used in the cases of uncompleted goods, jobbers or middlemen, or lost
28 volume sellers. This remedy is an alternative to the remedy under sections 2-819 or 2-821(a) and
29 is available when the damages based upon resale of the goods or market price of the goods does
30 not achieve the goal of full compensation for harm caused by the buyer's breach. Section 2-803.
31 No effort has been made to state how lost profits should be calculated given the variety of
32 situations in which this measurement may be appropriate and the variety of ways in which courts
33 have measured lost profits. If a seller can recoup its reliance expenditures by salvage, resale or
34 other reasonable measures, the mitigation principle in section 2-803 would operate to prevent the
35 seller from recovering those expenditures from the buyer.

36
37 4. In addition to recovery under this section, the seller may recover incidental and
38 consequential damages, Sections 2-805 and 2-806, assuming that there is no agreement limiting
39 the seller's ability to recover those damages. Section 2-809 and section 2-810.

40 41 **SECTION 2-822. ACTION FOR PRICE.**

42 (a) If a buyer fails to pay the price as it becomes due, the seller may recover, together

1 with any incidental and consequential damages, the price of:

2 (1) goods accepted;

3 (2) conforming goods lost or damaged after risk of their loss has passed to the
4 buyer, but, if the seller has retained or regained control of the goods, the loss or damage must
5 occur within a commercially reasonable time after the risk of loss has passed to the buyer; and

6 (3) [conforming] goods identified to the contract, if the seller is unable after a
7 reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that
8 this effort would be unavailing.

9 (b) A seller that remains in control of the goods and sues for the price shall hold for the
10 buyer any goods identified to the contract. If the seller is entitled to the price and resale becomes
11 possible, the seller may resell the goods under Section 2-819 at any time before the collection of
12 the judgment. The net proceeds of the resale must be credited to the buyer. Payment of the
13 judgment entitles the buyer to any goods not resold.

14 (c) If a buyer has breached the contract, a seller that has sued for but is held not entitled
15 to the price under this section may still be awarded damages under Section 2-821.

16 **SOURCE: Sales, Section 2-709.**

17 **Comment**

18 1. Section 2-822 continues the rules from former section 2-709.

19
20 2. Subsection (a) allows the seller to recover the price in the same three situations as
21 under former law. As under former law, this section is exhaustive in its enumeration of cases
22 where an action for the price is allowed. Goods accepted under subsection (a)(1) include only
23 goods as to which there has been no justified revocation of acceptance under section 2-708.
24 Subsection (a)(2) allows the seller to recover the price if the goods were conforming and if the
25 buyer has the risk of loss at the time the goods were lost or damaged. Section 2-612. In the
26 circumstance where the buyer has wrongfully forced conforming goods back on the seller so that
27 the seller is in possession or control of the goods, the seller may still obtain the price for the

1 goods if the loss or damage to the goods takes place within a commercially reasonable time after
2 the risk of loss has passed to the buyer. If the loss or destruction of the goods takes place after
3 that commercially reasonable time, the seller may have an action against the buyer for breach of
4 its obligations under the contract under other sections of this article but can no longer recover the
5 price. Subsection (a)(3) allows a seller to obtain the price of identified [conforming] goods if the
6 seller cannot resell the goods. The goods may be identified to the contract after the breach.
7 Section 2-817.

8
9 3. Subsection (b) requires that the seller who sues for the price shall hold goods for the
10 buyer if the seller has control of the goods. If a resale becomes possible, the seller may resale the
11 goods under section 2-819 and credit the proceeds against any judgment for the price.

12
13 4. Subsection (c) allows a seller to recover damages for the buyer's breach in the same
14 lawsuit in the event the seller is not entitled to the price under this section.

15
16 5. In addition to recovery under this section, the seller may recover incidental and
17 consequential damages, Sections 2-805 and 2-806, assuming that there is no agreement limiting
18 the seller's ability to recover those damages. Section 2-809 and section 2-810.

19 20 [C. BUYER'S REMEDIES]

21 **SECTION 2-823. BUYER'S REMEDIES IN GENERAL.** If a seller is in breach of the
22 contract under section 2-701, or in breach of the whole contract under Section 2-710(c), the
23 aggrieved buyer may:

24 (1) recover the price paid under Section 2-829(a) or deduct damages from price unpaid
25 under Section 2-828;

26 (2) cancel the contract under Section 2-808;

27 (3) cover and obtain damages under Section 2-825;

28 (4) recover damages based on market price under Section 2-826;

29 (5) recover damages for breach with regard to accepted goods under Section 2-827.

30 (6) recover identified goods under Section 2-824;

31 (7) obtain specific performance under Section 2-807;

32 (8) enforce a security interest under Section 2-829(b);

(9) recover incidental and consequential damages under Sections 2-805 and 2-806;

(10) recover liquidated damages under Section 2-809;

(11) enforce limited remedies under Section 2-810; or

(12) recover damages under Section 2-804.

SOURCE: Sales, Section 2-711.

Comment

Section 2-823 is based on former section 2-711. Consistent with the revisions to the seller's index section, this section indexes the aggrieved buyer's remedies. The buyer's ability to exercise its remedies depends upon whether the seller has breached the contract. In an installment contract, the breach must be of the whole contract in order for the buyer to exercise its remedies. A seller's cure of its breach under section 2-709 may preclude the buyer's ability to resort to any remedy. Whether a buyer is in fact entitled to any particular remedy depends upon the requirements of the each particular section and the principles of Subpart A, including section 2-803.

SECTION 2-824. BUYER'S RIGHT TO GOODS.

(a) A buyer that pays all or a part of the price of goods identified to the contract, whether or not they have been shipped, and makes and keeps good a tender of full performance, has a right to recover them in a civil action from the seller if the seller repudiates or fails to deliver as required by the contract.

(b) A buyer may recover from the seller by [insert appropriate civil action], goods identified to a contract if, after reasonable efforts, the buyer is unable to effect cover for the goods or the circumstances reasonably indicate that an effort to obtain cover would be unavailing and the buyer tenders full performance of its obligation under the contract or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

(c) The buyer's right vests under subsection (a) or (b) upon identification of the goods to

1 the contract for sale even if the seller has not then repudiated the contract or failed to deliver as
2 required by the contract.

3 **SOURCE: Sales, Sections 2-502 & 2-716(3).**

4 *Legislative Note: States should insert the appropriate name for their civil action for replevin,*
5 *claim and delivery, detinue, sequestration or the like in subsection (b)*

6 **Comment**

7 1. Section 2-824 is derived from former sections 2-502 and 2-716(3).
8

9 2. Subsection (a) expands the ability of a prepaying buyer to recover the goods from the
10 seller. Thus the right is no longer limited to cases of seller's insolvency and the goods need only
11 be identified and need not be conforming. There is significant doubt whether a right to the goods
12 that is triggered by insolvency is enforceable in a seller's bankruptcy. *See* 11 U.S.C. § 545; *In re*
13 *G. Paoletti, Inc.*, 205 B.R. 251, 262-64 (Bankr. N.D. Cal. 1997). The buyer's right under this
14 section to recover the goods by making and keeping a tender of full performance allows the buyer
15 a mechanism for obtaining the goods from the seller even if the buyer could obtain substitute
16 goods elsewhere. This protects the prepaying buyer's deposit for the goods. A financing buyer
17 should comply with the requirements of Article 9 for taking a security interest in the goods. This
18 section does not create a right to buyer's self help to the goods but rather a right to bring an
19 action to obtain the goods from the seller

20 3. Subsection (b) continues the rule allowing for replevin or similar legal remedy when
21 the buyer is unable to obtain cover for identified goods. Similar to subsection (a), this right is
22 available even when the buyer has not pay any of the price for the goods. The buyer's right to
23 obtain the goods under this section depends upon the buyer tendering its full performance under
24 the contract or if the seller has shipped under reservation, the buyer must tender payment of the
25 security interest created. Section 2-604. Because a shipment under reservation may be a breach
26 of the contract for sale, the buyer need not tender full performance of its obligations, but need
27 only satisfy the security interest created by such shipment.
28

29 4. Subsection (c) is a new section designed to bolster the priority rule in section 2-505(a)
30 to allow the buyer who has the right to obtain the goods to also prevail against creditors of the
31 seller in certain situations as defined in section 2-505. Subsections (a) and (b) govern the rights
32 of the buyer as against the seller. Subsection (c) and section 2-505 operate to govern the rights of
33 the buyer as against the seller's creditors. See comment to section 2-505.

34 **SECTION 2-825. COVER; BUYER'S PURCHASE OF SUBSTITUTE GOODS.**

35 (a) If a seller breaches a contract, the buyer may cover by making in good faith and

1 without unreasonable delay any reasonable purchase of, contract to purchase, or arrangement to
2 procure comparable goods to substitute for those due from the seller.

3 (b) A buyer that covers in the manner required by subsection (a) may recover damages
4 measured by the cost of covering less the contract price, together with any incidental or
5 consequential damages, less expenses avoided as a result of the seller's breach.

6 (c) A buyer that fails to cover in a manner required under subsection (a) is not barred
7 from any other available remedy.

8 **SOURCE: Sales, Section 2-712.**

9 **Comment**

10 1. Section 2-825 continues the rules from former section 2-712 that allow a buyer to
11 obtain the needed goods and use that cover price to obtain damages for breach from the seller.
12 The cover based damage remedy is the equivalent of the seller's right to resell the goods under
13 section 2-819 and obtain damages based upon the resale price.

14 2. Subsection (a) defines cover which could consist of a series of contracts or a single
15 contract for sale. Goods purchased for cover need not be identical to those goods that are the
16 subject of the breached contract but could be commercially reasonable as substitutes under the
17 circumstances of the case. Contracts made as a cover transaction need not be on the same credit
18 or delivery terms but must be reasonable under the circumstances. The reasonableness of a cover
19 transaction and the good faith of the buyer in making a cover transaction must be determined
20 based upon circumstances present when the buyer acts and should not be judged in hindsight. A
21 cover may be a reasonable cover even if it later proves that the cover transaction was not the
22 cheapest or most effective cover. The reasonable time in which to make a cover transaction must
23 take into account the time the buyer needs to look around and decide as to how to best cover.
24 Both merchants and non-merchant buyers may pursue cover under this section as long as the
25 buyer acts in good faith and the cover transaction is reasonable. The standards of reasonableness
26 and good faith will vary, however, depending upon whether the buyer is a merchant.

27 3. Subsection (b) allows a buyer who has appropriately covered to measure its damages
28 by the difference between the cover price and the contract price. In addition, the buyer is entitled
29 to incidental and consequential damages, sections 2-805 and 2-806, assuming that there is no
30 agreement limiting the buyer's ability to recover those damages. Section 2-809 and section 2-
31 810.

32 4. Subsection (c) continues the policy from former law that a buyer who does not cover

1 as provided in subsection (a) may still pursue other remedies under this Article. This subsection
2 must be read in conjunction with the mitigation principle expressed in section 2-803.

3
4 **SECTION 2-826. BUYER'S DAMAGES FOR BREACH BASED ON MARKET**
5 **PRICE.**

6 (a) If a seller breaches a contract, the buyer may recover damages based upon market
7 price, together with any incidental and consequential damages, less expenses avoided as a result
8 of the breach, as follows:

9 (1) Except as provided in subsection (2), the measure of damages is the market
10 price for comparable goods at the time for tender of delivery or when the buyer learned that the
11 tender of delivery did not occur, whichever is later, less the contract price.

12 (2) In the case of a repudiation governed by Section 2-712, the measure of
13 damages is the market price of comparable goods at the time when a commercially reasonable
14 period after the buyer learned of the repudiation has expired, but no later than the time stated in
15 subsection (a)(1), less the contract price. The commercially reasonable time includes the
16 commercially reasonable time for awaiting performance under Section 2-712 and any further
17 commercially reasonable time that would have been needed for the buyer to obtain substitute
18 performance.

19 (b) Market price is determined at the place for tender of delivery. However, in cases of
20 rejection after arrival or revocation of acceptance, market price is determined at the place of
21 arrival.

22 **SOURCE: Sales, Section 2-713 and Section 2-723(1).**

23 **Comment**

24 1. Section 2-826 is based upon former sections 2-713 and 2-723(1) and is comparable to

1 the seller's remedy based upon market price contained in section 2-821(a).

2 2. Subsection (a) allows a buyer to recover damages based upon the market price when
3 the seller has breached the contract. Section 2-701 and section 2-710(c). Subsection (a)(1)
4 provides that the time for measuring market price is when the tender of delivery should have
5 occurred or at the time the buyer should have learned that the tender did not occur. Subsection (b)
6 follows former law on the place for measuring market price which is based upon measuring
7 market price in the market the buyer would have obtained cover. Thus, the place of tender of
8 delivery is determined under section 2-602. If the goods are rightfully rejected, section 2-703, or
9 an acceptance is justifiably revoked, section 2-708, the place for measuring the market price is
10 where the goods are. The market price is of comparable goods to the ones involved in the
11 breached contract. The provisions of this Article on proving the market price are relevant to
12 determining the market price in order to measure the buyer's damages. Section 2-812.

13 3. Subsection (a)(2) determines the time for measuring the market price when the seller
14 has repudiated the contract in the same manner as provided in section 2-821(a)(2). This time is
15 designed to approximate the time in which the buyer would have engaged in a cover transaction,
16 even if the buyer has not done so pursuant to section 2-825, and is designed to put the buyer in
17 the position the buyer would have been in if the seller had performed the contract, section 2-803,
18 by approximating the harm the buyer has suffered without allowing the buyer an unreasonable
19 time to speculate on the market at the seller's expense. This rule is a particular application of the
20 mitigation principle from section 2-803. The time for measuring market price cannot extend
21 beyond the time for tender of delivery. The price term in a long term contract may or may not
22 have an escalation clause. The time for determining the contract price in a long term contract
23 should not necessarily be tied to the time for measuring the market price in the repudiation
24 situation. What is the appropriate contract price should be determined in light of the general
25 principle of full compensation for the aggrieved party under section 2-803(a).

26 4. The buyer is entitled to incidental and consequential damages, sections 2-805 and 2-
27 806, assuming that there is no agreement limiting the buyer's ability to recover those damages.
28 Section 2-809 and section 2-810.

29 **SECTION 2-827. BUYER'S DAMAGES FOR BREACH REGARDING** 30 **ACCEPTED GOODS.**

31 (a) A buyer that has accepted goods and not justifiably revoked acceptance and that has
32 given notice pursuant to Section 2-707(c)(1) may recover as damages for any nonconforming
33 tender the loss resulting in the ordinary course of events from the seller's breach as determined in
34 any reasonable manner.

(b) A measure of damages for breach of a warranty of quality is the value of the goods as warranted less the value of the goods accepted at the time and place of acceptance, unless special circumstances show proximate damages of a different amount.

(c) A measure of damages for breach of a remedial promise is the value of the promised performance less the value of any performance made.

(d) A buyer may recover incidental and consequential damages.

SOURCE: Sales, Section 2-714.

Comment

1. Section 2-827 continues the rules from former section 2-714 for recovery of damages in the case of accepted goods where there is a nonconformity with the contract requirements. The measurement of damages under this section should be determined in light of the remedial principles in section 2-803.

2. Subsection (a) requires an acceptance that has not been justifiably revoked, section 2-708, and a notice of breach under section 2-707(c)(1) in order to recover damages under this section. Damages may be measured in any reasonable manner for losses which result from the breach of contract. Losses recoverable under this section may be based upon a seller's delay in performance, the seller's breach of warranty of title or against infringement under section 2-402, or the seller's failure to perform another obligation under the contract.

3. Subsection (b) states a rule for measuring damages for breach of a warranty of quality governed by Part 4 of this Article. The value of the goods as warranted is based upon the market value of the goods if the goods had conformed to the warranty of quality made. The contract price may be evidence of that value but is not conclusive. The value of the goods accepted is keyed to the market value at the time and place the buyer accepted the goods, section 2-706, not the time or place for tender of delivery. In some cases, the difference between those two values may be demonstrated by the cost of repair if the repair would result in goods that conform to the contract.

4. The buyer is entitled to incidental and consequential damages, sections 2-805 and 2-806, assuming that there is no agreement limiting the buyer's ability to recover those damages. Section 2-809 and section 2-810.

SECTION 2-828. DEDUCTION OF DAMAGES FROM PRICE. A buyer, on so

1 notifying a seller of an intent to do so, may deduct all or any part of the damages resulting from
2 any breach of contract from any part of the contract price still due under the same contract.

3 **Source: Sales, Section 2-717.**

4 **Comment**

5 Section 2-828 makes no substantive changes to former section 2-717. This section
6 permits the buyer to deduct its damages as determined under the provisions of this article from
7 the price if some or all of the price is still due under the same contract. A buyer's notification
8 need only be any language which reasonably indicates the buyer's reason for not paying.

9 **SECTION 2-829. RECOVERY OF PRICE; BUYER'S SECURITY INTEREST.**

10 (a) If the seller has breached the contract, the buyer may recover any payments made on
11 the price of goods that are not accepted.

12 (b) On rightful rejection or justifiable revocation of acceptance, a buyer has a security
13 interest in goods in the buyer's possession or control for any payments made on their price and
14 any expenses reasonably incurred in their inspection, receipt, transportation, care, and custody.
15 The buyer may hold the goods and resell them in the manner provided for an aggrieved seller
16 under Section 2-819, except that the buyer shall give the seller reasonable notice of the intended
17 resale and must account to the seller for any excess of the proceeds of resale over the amount of
18 the security interest created in this subsection.

19 **Source: Sales, Section 2-711, Section 2-706(6).**

20 **Comment**

21 1. Section 2-829 is the derived from former section 2-711.

22 2. Subsection (a) allows the buyer to get the price back for any goods the buyer has not
23 accepted if the seller has breached the contract. Section 2-701 and section 2-710. A buyer who
24 has rightfully rejected the goods or justifiably revoked acceptance of the goods is not liable for
25 the price of the goods and is entitled to a refund to the extent the buyer has paid any of the price

1 to the seller. A buyer's ability to get the price refunded if the rejection is wrongful is determined
2 under section 2-809.

3 3. Subsection (b) continues the right of the buyer to retain goods in the case of a rightful
4 rejection or justifiable revocation in order to enforce a security interest to recover the price paid
5 or the types of incidental expenses listed. The buyer's resale should comply with section 2-819
6 and the buyer should give notice to the seller, even if the resale is a private resale. The buyer
7 also must account for any proceeds that exceed the amount of the security interest the buyer is
8 entitled to assert under this section. This is a security interest arising under Article 2 and is also
9 governed by Revised Article 9, section 9-110. The assertion of a security interest under this
10 section does not preclude the buyer from pursuing other remedies such as market price based
11 damages, section 2-826, or cover based damages, section 2-825, but the buyer may not use a
12 security interest under this section to collect those other damages. A buyer asserting rights under
13 this section has not accepted the goods nor converted the goods and has not violated the buyer's
14 obligations under sections 2-704 or 2-705.