

DRAFT

FOR DISCUSSION ONLY

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

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

DECEMBER, 1999

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

With Reporter's Notes

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**PROPOSED REVISIONS OF
UNIFORM COMMERCIAL CODE ARTICLE 2 – SALES**

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1 **PART 1**

2 **GENERAL PROVISIONS**

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

5 *[Reporter's Note – This section retains language from the July draft of 2-101 to conform to the*
6 *style of Article 3, Article 4, Article 4A, Article 5, and Article 8.]*

7 **SECTION 2-102. SCOPE.**

8 (a) This Article applies to transactions in goods.

9 ~~(b) If a transaction includes computer information and goods, this Article applies~~
10 ~~to the goods, but if a copy of a computer program is contained in and sold as part of other goods,~~
11 ~~this Article applies to the copy and the computer program unless:~~

12 ~~(1) the other goods are a computer or computer peripheral; or~~

13 ~~(2) giving the buyer access to or use of the program is ordinarily a material~~
14 ~~purpose of transactions in goods of the type sold.~~

15 ~~(c)~~ If there is a conflict between this Article and another Article of the [Uniform
16 Commercial Code] that Article governs.

17 ~~(d)~~ This Article does not apply to a foreign exchange transaction.

18 ~~*[Reporter's Note - Subsection (b) will need to be fleshed out with a comment along the following*~~
19 ~~*lines:*~~

20 ~~*"This revision does not govern computer information transactions. Judicial*~~
21 ~~*decisions that have applied existing Article 2 directly or by analogy to resolve an issue*~~
22 ~~*in such a transaction are not necessarily retroactively disapproved. If a state has*~~
23 ~~*enacted UCITA, it will govern such transactions after its effective date. If a state has not*~~
24 ~~*enacted UCITA, a court could apply a provision of the revision by analogy if that*~~
25 ~~*represents a sound policy choice, taking into account the expressed intentions of the*~~

~~parties to the transaction, the differences between a sale of goods and a license of computer information, and the policies reflected in UCITA.]~~

[Reporter's Note – We have not yet reached a consensus on scope as it relates to mixed transactions, and therefore this draft returns to the scope of original Article 2 (except for foreign exchange transactions). Because this is not a neutral position and calls into question past decisions, we will address the question further as the process continues. See also the definition of goods.]

*[Reporter's Note – Subsection (c**h**) is based on a provision in the July draft. It is a helpful clarification but should be accompanied by a comment making clear that it is a “one-way street” – that is, it does not permit a provision from Article 2 to be injected into another Article.]*

SECTION 2-103. DEFINITIONS.

(a) In this Article unless the context otherwise requires:

[Reporter's Note – The change restores language that is in current Article 2.]

(1) “Authenticate” means to execute or adopt a symbol, or encrypt or similarly process a record in whole or in part, with present intent to identify the authenticating person or to adopt or accept a record or term.:

~~(A) to sign; or~~

~~(B) to execute or adopt a symbol, or encrypt or similarly process a record in whole or in part, with present intent:~~

~~(i) identify the authenticating party; and~~

~~(ii) either:~~

~~(I) adopt or accept a record or term; or~~

~~(H) establish the authenticity of a record or term that contains the authentication or to which a record containing the authentication refers.~~

[Reporter's Note – This definition comes from Revised Article 9. This definition is based on

Revised Article 9 but differs in important respects. It does not use the word “sign” because the Article 1 definition of “signed” requires a “present intent to authenticate”, thus making the definition circular. The above definition also uses the disjunctive rather than the conjunctive between identification of the authenticating person and acceptance or adoption of a record or term. An “X” does not identify the authenticating person but when used to accept or adopt a record or term should qualify as an authentication.]

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

(3) “Buyer” means a person that buys or contracts to buy goods.

(4) “Cancellation” means an act by either party which puts an end to the contract for breach by the other.

(5) “Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a gross or carload) or any other unit treated in use or in the relevant market as a single whole.

~~Alternative A to subsection (a)(6)~~

~~(6) “Computer” means an electronic device that accepts information in digital or similar form and manipulates it for a certain result based on a sequence of instructions.~~

~~[Reporter’s Note—This definition comes from UCITA. There is some concern that it may be too broad.]~~

~~Alternative B to subsection (a)(6)~~

~~(6) “Computer” means an electronic device that can perform substantial computations, including numerous arithmetic operations or logic operations, without human intervention during the computation or operation.~~

1 ~~*[Reporter's Note – This definition comes from the July draft of Revised Article 2 and the July*~~
2 ~~*draft of UCITA.]*~~

3 *[Reporter's Note – This and other definitions that relate to computer information have been*
4 *deleted from this draft because they are not necessary for the proposed scope of the revision or*
5 *of the limited provisions in which they are used. For an explanation, see the first Reporter's*
6 *Note to 2-102.]*

7 ~~(7) “Computer information” means information in electronic form which is~~
8 ~~obtained from or through the use of a computer, or which is in a form capable of being processed~~
9 ~~by a computer. The term includes a copy of the information and any documentation or packaging~~
10 ~~associated with the copy.~~

11 ~~*[Reporter's Note – This definition comes from UCITA.]*~~

12 ~~(8) “Computer program” means computer information consisting of a set~~
13 ~~of statements or instructions to be used directly or indirectly in a computer to bring about a~~
14 ~~certain result.~~

15 ~~*[Reporter's Note – This term comes from UCITA but has been modified to make it clear that a*~~
16 ~~*computer program is a subset of computer information. In addition, the definition deletes*~~
17 ~~*UCITA's reference to separately identifiable informational content.]*~~

18 (96) “Conforming” goods or conduct means goods or conduct that are in
19 accordance with the obligations under the contract.

20 (107) “Conspicuous”, with reference to a term, means so written,
21 displayed, or presented that a reasonable person against which it is to operate ought to have
22 noticed it. A term in an electronic record intended to evoke a response by an electronic agent is
23 conspicuous if it is presented in a form that would enable a reasonably configured electronic agent
24 to take it into account or react without review of the record by an individual. Whether a term is

1 “conspicuous” or not is a decision for the court. Conspicuous terms include the following:

2 (A) with respect to a person:

3 (i) a heading in capitals equal to or greater in size than the
4 surrounding ~~lower case~~ text, or in contrasting type, font, or color to the surrounding text of the
5 same or lesser size;

6 (ii) language in the body of a record or display in larger type
7 than the surrounding text, or in contrasting type, font, or color to the surrounding text of the
8 same size, or set off from surrounding text of the same size by symbols or other marks that call
9 attention to the language; and

10 ~~{(iii) a term prominently referenced in an electronic record~~
11 ~~or display which is readily accessible and reviewable from the record or display; and}~~

12 (B) with respect to a person or an electronic agent, a term ~~for~~
13 ~~reference to a term}~~ that is so placed in a record or display that the person or electronic agent can
14 not proceed without taking action with respect to the particular term ~~for reference}~~.

15 ~~*[Reporter’s Note – This definition is adapted from current 1-201 and from UCITA. Paragraph*~~
16 ~~*(A)(3) is bracketed for discussion. It does not create a safe-harbor since a court must still*~~
17 ~~*determine whether a reference is “prominently” displayed, and thus it may do no more than*~~
18 ~~*reiterate the basic test for conspicuousness (“whether a reasonable person against which it is to*~~
19 ~~*operate ought to have noticed it”). For consistency, brackets are placed around related*~~
20 ~~*provisions in paragraph (B).]*~~

21 ~~*[Reporter’s Note – There should be a comment that makes plain that the subsections cannot be*~~
22 ~~*manipulated by unscrupulous sellers. For example, a contrasting color must create a true*~~
23 ~~*contrast, and a heading in capitals isn’t conspicuous if it is in minuscule type even if it is larger*~~
24 ~~*than the surrounding text. See Comment 10 to Section 1-201.]*~~

25 *[Reporter’s Note – This definition is adapted from current 1-201 and is closer to that definition*
26 *than the previous draft. The language dealing with incorporation by reference is deleted for two*
27 *reasons – 1) the word “prominently” added nothing in the text to the general test (i.e., that a*

1 reasonable person ought to have noticed) and thus had the potential to cause confusion, and 2)
2 nothing in the test required that the term referred to itself be conspicuous. This definition will
3 require a comment that makes plain that the subsections cannot be manipulated by unscrupulous
4 sellers. See Comment 10 to Section 1-201.]

5 (118) “Consumer” means an individual that buys or contracts to buy goods
6 that, at the time of contracting, are intended by the individual to be used primarily for personal,
7 family, or household purposes. ~~Personal, family, or household purposes do not include~~
8 ~~professional or commercial purposes, including agriculture, business management, and investment~~
9 ~~management, other than management of the individual’s personal or family investments.~~

10 [Reporter’ Note – The deletions bring the definition in line with the approach taken in Article 9.
11 The stricken language is based on UCITA. It has been deleted as unnecessary; the point can be
12 made in a comment.]

13 (129) “Consumer contract” means a contract between a merchant seller
14 and a consumer.

15 (1310) “Contract” ~~means~~ includes both a present sale of goods ~~or~~ and a
16 contract to sell goods at a future time.

17 [Reporter’s Note – The change is made to preclude a court from reading the definition in a
18 manner that is inconsistent with the Article 1 definition. A comment will make the point clear.]

19 (14) “Copy” ~~means the medium on which information is fixed on a~~
20 ~~temporary or permanent basis and from which it can be perceived, reproduced, used, or~~
21 ~~communicated, either directly or with the aid of a machine or device.~~

22 [Reporter’s Note – This definition comes from UCITA.]

23 (1511) “Delivery” means the voluntary transfer of physical possession or
24 control of goods.

25 (1612) “Electronic” means relating to technology having electrical, digital,

1 magnetic, wireless, optical, electromagnetic, or similar capabilities.

2 *[Reporter's Note – This definition is identical to UETA.]*

3 (1713) "Electronic agent" means ~~a computer program, or electronic or~~
4 ~~other automated means, used by a person to initiate an action, or to respond to electronic record~~
5 ~~or performances, on the person's behalf without review or action by an individual at the time of~~
6 ~~the action, response, or performance~~ a computer program or an electronic or other automated
7 means used independently to initiate an action or respond to electronic records or performances in
8 whole or in part, without review or action by an individual.

9 *[Reporter's Note – This definition is identical to ~~UCITA~~ UETA.]*

10 (1814) "Electronic record" means ~~a record that is stored, generated, or~~
11 ~~transmitted by electronic means for the purpose of communication to another person or electronic~~
12 ~~agent~~ a record created, generated, sent, communicated, received, or stored by electronic means.

13 *[Reporter's Note – This definition comes from UCITA, except that UCITA uses "electronic*
14 *message" and this draft uses "electronic record" This definition is identical to UETA.]*

15 (1915) "Financing agency" means a bank, finance company or other person
16 who in the ordinary course of business makes advances against goods or documents of title or
17 who by arrangement with either the seller or the buyer intervenes in ordinary course to make or
18 collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's
19 draft or making advances against it or by merely taking it for collection whether or not documents
20 of title accompany the draft. "Financing agency" includes also a bank or other person who
21 similarly intervenes between persons who are in the position of seller and buyer in respect to the
22 goods.

(2016) “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, and in which 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.

(2117) “Future goods” means goods that are not both existing and identified.

(2218) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(2319) “Goods” means all things (including specially manufactured goods) that are movable at the time of identification to the contract for sale. The term includes the unborn young of animals, growing crops, and other identified things to be severed from realty under Section 2-107. The term does not include money in which the price is to be paid, the subject matter of foreign exchange transactions, ~~computer information~~, documents, letters of credit, letter-of-credit rights, instruments, investment property, accounts, chattel paper, deposit accounts, or general intangibles.

[Reporter’s Note – The deletion of computer information from the definition relates to the

1 proposed scope of the revision. For an explanation, see the first Reporter's Note to 2-102.]

2 (24) ~~"Information" means data, text, images, sounds, mask works, or~~
3 ~~computer programs, including collections and compilations of them.~~

4 ~~[Reporter's Note – This definition comes from UCITA.]~~

5 (2520) "Information processing system" means an electronic system for
6 creating, generating, sending, receiving, storing, displaying, or processing information.

7 ~~[Reporter's Note – This definition comes from UCITA~~ This definition is identical to UETA.]

8 (2621) "Installment contract" means a contract which requires or
9 authorizes the delivery of goods in separate lots to be separately accepted, even though the
10 contract contains a term "each delivery is a separate contract" or its equivalent.

11 (2722) "Lot" means a parcel or a single article that is the subject matter of
12 a separate sale or delivery, whether or not it is sufficient to perform the contract.

13 (2823) "Merchant" means a person who deals in goods of the kind or
14 otherwise by its occupation holds itself out as having knowledge or skill peculiar to the practices
15 or goods involved in the transaction or to whom such knowledge or skill may be attributed by its
16 employment of an agent or broker or other intermediary who by its occupation holds itself out as
17 having such knowledge or skill.

18 (2924) "Present sale" means a sale that is accomplished by the making of
19 the contract.

20 (3025) "Receipt" means:

21 (A) with respect to goods, taking delivery; or

22 (B) with respect to a notice:

(i) coming to a person's attention; or

(ii) being delivered to and available at a location, or at an information processing system designated by agreement for that purpose in a form capable of being processed by or perceived from a system of that type by the recipient, or, in the absence of an agreed location or system:

(I) in the case of a notice that is not an electronic record, being delivered at the person's residence, or the person's place of business through which the contract was made, or at any other place held out by the person as a place for receipt of communications of the kind; or

(II) in the case of a notice that is an electronic record, ~~coming to existence in~~ being delivered to and available at a system or at an address in that system in a form capable of being processed by or perceived from a system of that type by a recipient, if the recipient uses, or otherwise ~~has designated or~~ holds out, that system or address for receipt of notices of the kind to be given and the sender does not know that the notice cannot be accessed from that place.

Whether the information processing system is designated by agreement or otherwise, an electronic record is not received if the sender or its information processing system inhibits the ability of the recipient to print or store the record.

[Reporter's Note – This definition is adapted from ~~UCITA~~ Section 15 of UETA. A comment will make clear that it must be read in a manner that is consistent with 1-201(27) on receipt by an organization.]

(3126) "Receive" means to take receipt.

(3227) "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.

[Reporter's Note – This definition is used in both UCITA, ~~and~~ UETA, and Revised Article 9.]

(3328) “Remedial promise” means a promise by the seller to repair or replace the goods or to refund all or part of the price upon the happening of a specified event.

The term does not include a seller's promise to make a refund under Section 2-207(c).

[Reporter's Note – The added language excludes refund obligations triggered when a buyer returns goods because of dissatisfaction with deferred terms sent by the seller. The reason for the change is that these promises should be personal to the buyer and ought not be extended under Section 2-318.]

(3429) “Sale” means the passing of title to goods from the seller to the buyer for a price.

(3530) “Seller” means a person that sells or contracts to sell goods.

(3631) “Send” means to transmit as agreed, or in the absence of agreement with any costs provided for and properly addressed or directed as reasonable under the circumstances ~~or as otherwise agreed~~, to deposit a record in the mail or with a commercially reasonable carrier, to deliver in a reasonable manner a record for transmission to or re-creation in another location or information processing system, or to take the steps necessary to initiate transmission to or re-creation of a record in another location or information processing system. In addition, with respect to an electronic record, the term includes to initiate operations that in the ordinary course will cause the record to ~~come into existence in~~ be delivered to and available at an information processing system or at an address within that system in a form capable of being processed by or perceived from a system of that type by the recipient, if the recipient uses; or otherwise ~~has designated or~~ holds out, that system or address as a place for the receipt of

communications of the kind sent. An electronic record is not sent if the sender or its information processing system inhibits the ability of the recipient to print or store the record. Receipt within the time in which it would have arrived if properly sent has the effect of a proper sending.

[Reporter's Note – This definition is a slightly modified version of ~~UCHA~~ UETA.]

(3732) “Termination” means that either party pursuant to a power created by agreement or law has put an end to the contract otherwise than for its breach.

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

(1) “Accounts” Section 9-102(a)(2).

(2) “Chattel paper” Section 9-102(a)(11).

(3) “Check” Section 3-104(e).

(4) “Deposit accounts” Section 9-102(a)(29).

(5) “Dishonor” Section 3-502.

(6) “Draft” Section 3-104(e).

(7) “General intangibles” Section 9-102(a)(42).

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

(9) “Instruments” Section 3-104(b).

(10) “Investment property” Section 9-102(a)(49).

(11) “Letter of credit” Section 5-102(a)(10).

(12) “Letter-of-credit rights” Section 9-102(a)(51).

(c) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

[Reporter's Note – All definitions used in more than one section should be set out in a single

1 *section. This is consistent with Article 2A, although it deviates from present Article 2, which has*
2 *definitions in multiple sections.]*

3 *Legislative Note: In a jurisdiction that has not adopted revised Article 9, the cross-references to*
4 *Article 9 will have to be changed.*

5 **SECTION 2-104. TRANSACTION SUBJECT TO OTHER LAW.**

6 (a) Except as otherwise provided in subsection (b), this Article does not impair or
7 repeal:

8 (1) [list any certificate of title statutes covering automobiles, trailers,
9 mobile homes, boats, farm tractors, or the like], except as to the rights of a buyer in ordinary
10 course of business under Section 2-403(b) which arise before a certificate of title covering the
11 goods is effective in the name of any other buyer;

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

13 (3) any other law of this State to which the transaction is subject, such as
14 laws dealing with:

15 (A) the sale or lease of agricultural products;

16 *[Reporter'S Note – Articles 2 and 2A conform on this point.]*

17 (B) the transfer of blood, blood products, human tissues, and parts;

18 (C) the consignment or transfer by artists of works of art or fine
19 prints;

20 (D) distribution agreements, franchises, and other relationships
21 through which goods are sold;

22 (E) tort liability for products that cause injury to person or
23 property;

1 (F) the making and disclaimer of warranties;
2 (G) the misbranding or adulteration of food products and drugs;
3 and
4 (H) dealers in particular products, such as automobiles, motorized
5 wheelchairs, agricultural equipment, and hearing aids.

6 (b) If another law of this State applies to a transaction subject to this Article and
7 requires that a term, waiver, notice, or disclaimer be in a writing, or requires that a writing, term,
8 waiver, notice, or disclaimer be signed, the requirement is ~~satisfied by a record or by an~~
9 ~~authentication~~ also satisfied by a record that is not a writing or by an authentication that is not a
10 signing [unless one of the parties to the transaction is a consumer and it is clear that the other law
11 intended the formalism of a writing or a signature to protect that party]], but if one of the parties
12 to the transaction is a consumer the requirement is not satisfied by a record or by an
13 authentication unless the consumer has separately authenticated a term in a record permitting the
14 requirement to be satisfied in that manner].

15 (c) Except for the rights of a buyer in the ordinary course of business under
16 subsection (a)(1), in the event of a conflict between this article and a law referred to in subsection
17 (a), that law governs.

18 (d) For purposes of this Article, ~~F~~failure to comply with laws of the kind referred
19 to in subsection (a) has only the effect specified in those laws.

20 *[Reporter's Note – This section deviates from existing numbering. In the present text, this is*
21 *covered in the scope section (2-102).]*

22 *[Reporter's Note – Subsection (b) presents three alternatives – either of the bracketed*
23 *alternatives can be selected, or neither, in which case the sentence would end after “signing” on*

line 9 (which was the position of the July draft). Without one of the three alternatives, subsection (a) will preserve writing and signature requirements in laws within its scope, including all consumer protection laws. The suggested alternatives differ from the approach taken in Section 8(b) of UETA.]

[Reporter's Note – The added language in subsection (d) is for clarification.]

SECTION 2-105. INTEREST AND PART INTEREST IN GOODS.

(a) Goods must be both existing and identified before any interest in them can pass.

(b) There may be a sale of a part interest in existing identified goods.

(c) A purported present sale of future goods or of any interest therein operates as a contract to sell.

(d) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof 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.

[Reporter's Note – The language is the same as existing Article 2. However, the section has been renamed and the text abridged because the definitions have been moved to 2-103.]

SECTION 2-106. EFFECT OF TERMINATION AND CANCELLATION.

On termination all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives. The effect of cancellation is the same as that of termination except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

[Reporter's Note – Termination and cancellation are now defined in section 2-103.]

1 *[Reporter's Note – The second sentence is from the existing Code, and therefore is being*
2 *preserved. However, a comment will be useful to give examples of other rights that may also*
3 *survive termination or cancellation.]*

4 **SECTION 2–107. GOODS TO BE SEVERED FROM REALTY: RECORDING.**

5 (a) A contract for the sale of minerals or the like (including oil and gas) or a
6 structure or its materials to be removed from realty is a contract for the sale of goods within this
7 Article if they are to be severed by the seller but until severance a purported present sale thereof
8 which is not effective as a transfer of an interest in land is effective only as a contract to sell.

9 (b) A contract for the sale apart from the land of growing crops or other things
10 attached to realty and capable of severance without material harm thereto but not described in
11 subsection (a) or of timber to be cut is a contract for the sale of goods within this Article whether
12 the subject matter is to be severed by the buyer or by the seller even though it forms part of the
13 realty at the time of contracting, and the parties can by identification effect a present sale before
14 severance.

15 (c) The provisions of this section are subject to any third party rights provided by
16 the law relating to realty records, and the contract for sale may be executed and recorded as a
17 document transferring an interest in land and shall then constitute notice to third parties of the
18 buyer's rights under the contract for sale.

19 *[Reporter's Note – There is no from change from current law.]*

20 **PART 2**

21 **FORM, FORMATION, TERMS, AND READJUSTMENT**

1 **OF CONTRACT; ELECTRONIC CONTRACTING**

2 *[Reporter's Note – The heading has been amended to add a reference to electronic contracting.]*

3 **SECTION 2-201. FORMAL REQUIREMENTS.**

4 (a) A contract for the sale of goods for the price of \$5,000 or more is not
5 enforceable by way of action or defense unless there is some record sufficient to indicate that a
6 contract has been made between the parties and authenticated by the party against which
7 enforcement is sought or by its authorized agent or broker. A record is not insufficient because it
8 omits or incorrectly states a term agreed upon but the contract is not enforceable under this
9 paragraph beyond the quantity of goods shown in such record.

10 (b) Between merchants if within a reasonable time a record in confirmation of the
11 contract and sufficient against the sender is received and the party receiving it has reason to know
12 its contents, it satisfies the requirements of subsection (1) against such party unless written notice
13 of objection to its contents is given in a record within 10 days after it is received.

14 (c) A contract which does not satisfy the requirements of subsection (1) but which
15 is valid in other respects is enforceable

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

21 (2) if the party against whom enforcement is sought admits in the party's
22 pleading, or in the party's testimony or otherwise under oath that a contract for sale was made,

1 but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

2 (3) with respect to goods for which payment has been made and accepted

3 or which have been received and accepted. (Sec. 2– 606).

4 (d) An enforceable contract under this section is not rendered unenforceable

5 merely because it is not capable of being performed within one year or any other applicable period

6 after its making.

7 *[Reporter’s Note – The following substantive changes have been made to existing 2-201(a):*

8 1. *The amount has been raised from \$500 to \$5,000.*

9 2. *The first clause (“Except as otherwise provided in this section”) has been eliminated.*
10 *This is intended to allow courts to bring in promissory estoppel and other common-law equitable*
11 *doctrines. The courts have been split on this issue.*

12 3. *“Writing” has been changed to “record”.]*

13 *[Reporter’s Note – Subsection (c) is retained from existing law. The only substantive change is*
14 *that admissions under oath (e.g., in depositions, in affidavits attached to motions) now satisfy*
15 *the statute under subsection (c)(2)(current 2-201 refers to admissions in “court”).]*

16 *[Reporter’s Note – Subsection (d) is new and is derived from the July draft.]*

17 **SECTION 2-202. PAROL OR EXTRINSIC EVIDENCE.**

18 (a) Terms with respect to which the confirmatory records of the parties agree or
19 which are otherwise set forth in a record intended by the parties as a final expression of their
20 agreement with respect to such terms as are included therein may not be contradicted by evidence
21 of any prior agreement or of a contemporaneous oral agreement but may be supplemented

22 (1) by evidence of course of performance, course of dealing or usage of
23 trade; and

24 (2) by evidence of consistent additional terms unless the court finds the
25 record to have been intended also as a complete and exclusive statement of the terms of the

1 agreement.

2 (b) Terms in a record may be explained by evidence of course of performance,
3 course of dealing, or usage of trade without a preliminary determination by the court that the
4 language used is ambiguous.

5 *[Reporter's Note - Subsection (a) is consistent with current law except that any reference to*
6 *interpretation issues has been eliminated. Interpretation is dealt with in subsection (b).]*

7 *[Reporter's Note - The present law provides for the admission of "evidence" of additional*
8 *terms, and course of performance, course of dealing, or usage of trade . This text provides for*
9 *"evidence" of additional terms as well as "evidence" of course of performance, course of*
10 *dealing, or usage of trade. This change reflects the acknowledgment that course of*
11 *performance, course of dealing, or usage of trade are not absolutes, but are just categories of*
12 *evidence.]*

13 *[Reporter's Note – Subsection (b), which is not in the present law and which is derived from the*
14 *July draft as amended at the annual meeting, brings up into the statutory text what has always*
15 *existed in the comments. See comment 1(c) to 2-202, which rejects "The requirement that a*
16 *condition precedent to the admissibility of the type of evidence specified in paragraph (a)[now*
17 *(b)] is an original determination by the court that the language used is ambiguous." It is clear*
18 *that this is what subsection (a) has always been intended to mean, and this is a clear statement*
19 *that we reject those cases that hold to the contrary.]*

20 **SECTION 2–203. SEALS INOPERATIVE.**

21
22 The affixing of a seal to a record evidencing a contract for sale or an offer to buy
23 or sell goods does not constitute the record a sealed instrument and the law with respect to sealed
24 instruments does not apply to such a contract or offer.

25 *[Reporter's Notes – There is no substantive change to the law; however, "writing" has been*
26 *changed to "record."]*

27 **SECTION 2-204. FORMATION IN GENERAL.**

28 (a) A contract for sale of goods may be made in any manner sufficient to show
29 agreement, including offer and acceptance, conduct by both parties which recognizes the

1 existence of such contract, or the interaction of electronic agents.

2 (b) An agreement sufficient to constitute a contract for sale may be found even
3 though the moment of its making is undetermined.

4 (c) Even though one or more terms are left open a contract does not fail for
5 indefiniteness if the parties have intended to make a contract and there is a reasonably certain
6 basis for giving an appropriate remedy.

7 ~~[(d) Subject to Section 2-204A, if a party uses language that indicates, or if~~
8 ~~circumstances give notice that a party has, an intention to defer contract formation pending~~
9 ~~agreement by the other party to terms proposed prevents contract formation until the other party~~
10 ~~agrees to the terms or conduct by both parties recognizes the existence of a contract.]~~

11 (ed) Except as otherwise provided in Sections 2-211 through 2-214~~3~~, the
12 following rules apply:

13 (1) ~~A contract may be formed by the interaction of electronic agents. If the~~
14 ~~interaction resulting from the electronic agents' engaging in operations shows an agreement~~
15 ~~sufficient to constitute a contract under this section, a contract is formed~~ A contract may be
16 formed by the interaction of electronic agents of the parties, even if no individual was aware of or
17 reviewed the electronic agents' actions or the resulting terms and agreements.

18 (2) A contract may be formed by the interaction of an electronic agent and an
19 individual acting on the individual's own behalf or for another person. A contract is formed if the
20 individual takes actions that the individual is free to refuse to take or makes a statement that the
21 individual has reason to know will:

22 (A) cause the electronic agent to complete the transaction or performance;

1 or

2 (B) indicate acceptance of an offer, regardless of other expressions or
3 actions by the individual to which the electronic agent cannot react.

4 (3) In an interaction between individuals, if an offer evokes an electronic record in
5 response, a contract is formed, if at all:

6 (A) if the electronic ~~message~~ record operates as an acceptance under
7 Section 2-206, when the message is received; or

8 (B) if the offer is accepted under Section 2-206 by an electronic
9 performance, when the electronic performance is received.

10 *[Reporter's Notes – There is no change from existing law in subsections (a)-(c).]*

11 ~~*[Reporter's Note – This draft contains two alternatives dealing with the Gateway problem =*~~
12 ~~*subsection (d) to this section and Section 2-207(d). A third alternative, and the one agreed to at*~~
13 ~~*the drafting committee meeting last year in Baltimore, is to not address the question and leave*~~
14 ~~*the issue for development in the courts. Subsection (d) to this section is predicated on the*~~
15 ~~*concept of deferred contract formation and depends for its development on the comment in the*~~
16 ~~*next Reporter's Note; Section 2-207(d) assumes that a contract is formed and focuses on its*~~
17 ~~*terms and the buyer's right of return.]*~~

18 ~~*[Reporter's Note – Subsection (d) states the general proposition that the time of contracting can*~~
19 ~~*be postponed even though the language or conduct of the parties would ordinarily indicate that*~~
20 ~~*a contract exists. It deals, inter alia, with what is sometimes referred to as a "rolling" contract.*~~
21 ~~*In a typical case, the buyer will call the seller's toll-free telephone number and order goods,*~~
22 ~~*giving the seller a credit card number to pay for all or part of the price. See, e.g., Hill v.*~~
23 ~~*Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997). The seller will then ship the goods with its*~~
24 ~~*standard terms, and the issue is whether the buyer's retention of the goods will constitute*~~
25 ~~*acceptance of the seller's terms. If i) the buyer knows, perhaps because of the telephone*~~
26 ~~*conversation or from material in an ad or catalog, or from the circumstances surrounding the*~~
27 ~~*transaction has notice, perhaps having dealt with the seller before or having dealt with another*~~
28 ~~*seller in a similar transaction, of the seller's intention to defer contract formation, ii) the*~~
29 ~~*standard terms are packaged in such a way that they would come to the attention of a reasonable*~~
30 ~~*buyer, and iii) the terms expressly permit the buyer to avoid contract formation by returning the*~~
31 ~~*goods without use (except as may be necessary to have an opportunity to review the terms and as*~~
32 ~~*stated below), then the terms should be effective if the buyer chooses to retain the goods (subject,*~~

1 ~~of course, to policing doctrines like unconscionability applicable to all terms in a contract for~~
2 ~~sale). Since the transaction has many of the features of a sale on approval, the buyer should be~~
3 ~~permitted to make use of the goods consistent with that concept for the purpose of trial before~~
4 ~~making a final decision whether to return them. Of course, they must still be in like-new~~
5 ~~condition upon their return. Under no circumstances should a seller's standard terms in a~~
6 ~~rolling contract be permitted to vary terms, like price, that were expressly agreed to by the~~
7 ~~parties. A seller should not be able to revoke its offer after initiating the process. The~~
8 ~~imposition of a fee, such as a restocking fee, upon return of the goods is inconsistent with the~~
9 ~~seller's claim that contract formation is being deferred.~~

10 ~~—— If the buyer does not know or have notice of the seller's intention to delay contract~~
11 ~~formation, a contract may be formed when the seller takes the buyer's credit card number. The~~
12 ~~terms of the contract are those expressly agreed to by the parties and terms derived from any~~
13 ~~relevant course of dealing or usage of trade, supplemented by the gap-filling provisions of this~~
14 ~~Article. A record containing standard terms that accompanies the goods should be treated for~~
15 ~~the most part like a confirmation under Section 2-207(c); that is, the terms are proposals to~~
16 ~~modify the contract and are not effective unless expressly agreed to by the buyer. However, the~~
17 ~~buyer should be deemed to have agreed to any terms that are more favorable to the buyer than~~
18 ~~those contained in the contract.]~~

19 *[Reporter's Note – Subsection (e~~d~~) is new and is designed to reflect rules of electronic*
20 *commerce. It is derived from both UETA and UCITA. Paragraphs (1) and (2) are identical to*
21 *Sections 14(a) and (b) of UETA. The underlined language in (d)(2) is from UETA and clarifies*
22 *that a contract can be formed between an electronic agent and a person that is not an individual.*
23 *Since UETA does not contain substantive contract rules it has no counterpart to Paragraph (3).]*

24 *[Reporter's Note – Subsection (e)(1) This section will require a comment that formation under*
25 *that subsection is subject to equitable defenses, such as fraud, (electronic) mistake, etc. The*
26 *comment will point out that the law with regard to electronic mistake is not well developed and*
27 *that courts should not automatically apply standards developed in other contexts.]*

28 **SECTION 2-204A. EXPRESS CONDITION IN RECORD; EXPRESS**

29 **AGREEMENT**

30 (a) Subject to subsection (d), ~~An~~ offer in a record that contains conspicuous
31 language that expressly conditions intent to make a contract upon the offeree's assent to its terms
32 prevents formation of a contract unless the offeree accepts the offer without proposing additional
33 or different terms or conduct ~~of the~~ by both parties recognizes the existence of a contract. If the
34 offeree accepts the offer without proposing additional or different terms, the terms of the contract

are as stated in Section 2-207(a). If conduct ~~of the~~ by both parties recognizes the existence of a contract, its terms are as stated in Section 2-207(b).

(b) ~~If a~~ Subject to subsection (d), A record sent by an offeree that would otherwise be a definite and seasonable expression of acceptance but that contains conspicuous language that expressly conditions intent to make a contract upon the offeror's assent to its terms ~~is operates as a counteroffer and sent by an offeree~~; no contract is formed unless the offeror expressly accepts the ~~record~~ counteroffer without proposing additional or different terms or conduct ~~of the~~ by both parties recognizes the existence of a contract. If the offeror expressly accepts the ~~record~~ counteroffer without proposing additional or different terms, the terms of the contract are as stated in Section 2-207(a). If conduct ~~of the~~ by both parties recognizes the existence of a contract, its terms are as stated in Section 2-207(b).

(c) Subject to subsection (d), ~~If~~ a record contains language that is not conspicuous and that expressly conditions intent to make a contract upon the other party's assent to its terms, the language is not effective unless the other party knows of it. If the other party knows of the language, it has the effect stated in subsections (a) and (b).

(d) Whether language that expressly conditions a party's intent to make a contract upon the other party's assent to its terms has the effect stated in subsections (a) through (c) must be determined in the context of its commercial setting.

~~(de)~~ For purposes of this Section and Section 2-207, a party does not expressly accept or expressly agree to a record or term by the mere retention or use of goods or by the mere retention of payment.

[Reporter's Note – This section, which is new, deals with what are commonly called “my way or

1 the highway” clauses. Subsection (a) deals with a conspicuous clause in a record that is an
2 offer. Subject to the rule stated in subsection (d), the clause prevents contract formation unless
3 the other party accepts without proposing additional or different terms or conduct of the by both
4 parties recognizes the existence of a contract. Acceptance can be inferred from conduct of the
5 offeree unless “the language or circumstances unambiguously indicate” a different, exclusive
6 method of acceptance (Section 2-206(a); cf. subsection (d)). If the offeree accepts, the terms of
7 the resulting contract are as stated in Section 2-207(a)(terms in the offer plus other terms
8 supplied or incorporated by other provisions of the Code).

9 If the offeree does not accept, no contract is formed; but if subsequent conduct of the by
10 both parties may recognizes the existence of a contract. The its terms of the contract will be
11 governed by Section 2-207(b). The comments will emphasize that what is intended here is not
12 the situation where one party makes an offer and the other accepts by conduct – what is intended
13 is a contract which exists because conduct by both parties recognizes its existence (for examples,
14 see the Reporter’s Notes to Section 2-207). Although it is true that one could perhaps find an
15 offer and an acceptance in the parties’ conduct, such an inquiry is unnecessary under Article 2
16 since Section 2-204(a) provides that a contract may be formed either by an offer and acceptance
17 or by conduct, and Section 2-204(b) provides that a contract may be formed even though the
18 moment of its making is undetermined.

19 Subsection (b) deals with the effect of a conspicuous “my way or the highway” clause in
20 a response to an offer that would otherwise be a definite and seasonable expression of
21 acceptance (Section 2-206(c)). Subject to the rule stated in subsection (d), the response does
22 not operate as an acceptance; rather it operates as a counteroffer, albeit one that can be
23 accepted only by express assent. If the original offeror expressly and unconditionally accepts,
24 the terms of the resulting contract are as stated in Section 2-207(a)(terms in the response plus
25 other terms supplied or incorporated by other provisions of the Code). If the original offeror
26 does not expressly and unconditionally accept, no contract is formed; but if subsequent conduct
27 of the by both parties recognizes the existence of a contract its terms will be governed by Section
28 2-207(b).

29 Subsection (c) states the rule for cases where a record contains a “my way or the
30 highway” clause that is not conspicuous. Such a clause should only be effective if the other
31 party knows of it. Subsection (c) is also subject to the rule stated in subsection (d).

32 Subsection (d) is designed to prevent a party from using an express condition to surprise
33 the other party and thereby achieve an unfair result. Its approach is based on estoppel. For
34 example, suppose a seller and buyer enter into a series of contracts, and in each instance the
35 seller responds to the buyer's offer with a record that contains its standard terms. Each record
36 sent by the seller contains a conspicuous (or known) clause that expressly conditions the seller's
37 intent to be bound upon the buyer's assent to its terms. In each instance, however, the seller
38 ships the goods without first obtaining the buyer's express assent. The buyer might be unfairly
39 prejudiced if the seller suddenly refused to ship an order of goods by relying on the clause in its
40 record to assert that no contract was formed. In this situation, a court might be justified in
41 ignoring the clause and treating the seller's record as a definite and seasonable expression of
42 acceptance that operates as an acceptance under Section 2-206(c). In another context the
43 seller's conduct would constitute a course of dealing, but that concept is used elsewhere in the

1 Code only as a basis for finding a supplementary term or explaining an existing term. Thus,
2 subsection (d) refers to commercial setting rather than course of conduct.

3 This section is not applicable if a record does not contain an express condition that is
4 effective because it is conspicuous or because the party against whom it is to operate knows of it.
5 For example, nothing in the section addresses the situation where an offeror orders goods (either
6 orally or in a record without an effective express condition) and the offeree ships them. The
7 contract is formed by offer and acceptance and not by conduct of both parties, and under normal
8 formation principles the contract is on the offeror's terms.]

9 **SECTION 2-205. FIRM OFFERS.**

10 An offer by a merchant to buy or sell goods in an authenticated record which by its
11 terms gives assurance that it will be held open is not revocable, for lack of consideration, during
12 the time stated or if no time is stated for a reasonable time, but in no event may such period of
13 irrevocability exceed three months; but any such term of assurance in a form record supplied by
14 the offeree must be separately authenticated by the offeror

15 *[Reporter's Note – There is no change in substance, but this section is revised to change “signed*
16 *writing” to “authenticated record” and “form” has been changed to “form record” to*
17 *acknowledge nonpaper transactions,.]*

18 **SECTION 2-206. OFFER AND ACCEPTANCE.**

19 (a) Unless otherwise unambiguously indicated by the language or circumstances
20 (1) An offer to make a contract shall be construed as inviting acceptance
21 in any manner and by any medium reasonable under the circumstances.

22 (2) An order or other offer to buy goods for prompt or current shipment
23 shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or
24 current shipment of conforming or nonconforming goods , but such a shipment of nonconforming
25 goods does not constitute an acceptance if the seller seasonably notifies the buyer that the
26 shipment is offered only as an accommodation to the buyer.

(b) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

(c) A definite and seasonable expression of acceptance in a record operates as an acceptance even if it contains terms ~~that~~ additional to or different from the offer.

[Reporter's Note – There is no change in substance in subsections (a) and (b).]

[Reporter's Note – Subsection (c) has been moved from former 2-207(1). Because the concept of the definite and seasonable expression of acceptance is meaningful only in the context of the battle of the forms, the subsection is limited to expressions in a record. The changes from "add" to "additional" and from "differ" to "different" parallel the drafting used elsewhere.

SECTION 2-207. TERMS OF CONTRACT; EFFECT OF CONFIRMATION.

(a) If a contract is formed by offer, including counteroffer, and acceptance and the acceptance does not contain terms additional to or different from the offer, the terms of the contract are:

(1) terms in the offer; and

(2) terms supplied or incorporated under any provision of [The Uniform Commercial Code].

~~(b) If conduct of the parties by both parties recognizes the existence of a contract but the records of the parties do not establish a contract, or if a contract is formed by an offer and a definite and seasonable expression of acceptance in a record but the record that contains terms additional to or different from the offer, the terms of the contract, subject to Section 2-202, are:~~

~~(1) terms in the records of the parties to the extent that they the terms show agreement of the parties;~~

~~(2) terms not in a record to which the parties have agreed;~~
~~(3) 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 [The Uniform~~
~~Commercial Code].~~

~~(c) If a party confirms a contract by a record received by the other party which~~
~~contains terms that add to or differ from those in the contract being confirmed, the contract~~
~~includes:~~

~~(1) terms in a confirming record that add to or differ from the confirmed~~
~~contract to which the other party expressly agrees;~~

~~(2) terms in a confirming record that add to or differ from the confirmed~~
~~contract to the extent that they show agreement with terms in a confirming record received~~
~~from the other party.~~

(b) If (i) conduct by both parties recognizes the existence of a contract but their
records do not establish a contract, (ii) a contract is formed by an offer and a definite and
seasonable expression of acceptance in a record that contains terms additional to or different from
the offer, or (iii) a party confirms a contract by a record received by the other party which
contains terms additional to or different from those in the contract being confirmed, the terms of
the contract, subject to Section 2-202, are:

(1) terms not in a record to which the parties have agreed;
(2) terms in a record supplied by a party to which the other party has
expressly agreed;

1 (3) terms in the records of the parties to the extent that they the terms
2 show agreement of the parties; and

3 (4) terms supplied or incorporated under any provision of [The Uniform
4 Commercial Code].

5 ~~[(d) If the parties enter into a contract and terms that are not otherwise part of the~~
6 ~~contract under subsection (a) are delivered to the buyer at or before the time the goods are~~
7 ~~received by the buyer, the terms become part of the contract only if (i) the seller gives the buyer a~~
8 ~~right to return the goods for a full refund within thirty days after receipt of the goods, (ii) prior to~~
9 ~~receipt of the goods the buyer agrees to be bound by such terms, or (iii) the terms do not~~
10 ~~materially alter the contract to the detriment of the buyer or of a person similarly situated.]~~

11 (c) If the parties enter into a contract and terms that are not otherwise part of the
12 contract are delivered to the buyer at the time the buyer receives the goods, the following rules
13 apply:

14 (1) In a contract other than a consumer contract, terms that do not
15 contradict terms in the agreement are effective if:

16 (i) prior to receipt of the goods the buyer agrees to be bound by the
17 terms; or

18 (ii) at the time the contract is formed the buyer has notice that the
19 seller intends to deliver the terms after formation and either (A) the seller gives the buyer a right
20 to avoid the contract by returning the goods for a full refund within thirty days after the buyer
21 receives the goods and the buyer fails to exercise the right of return in a timely manner, or (B) the
22 terms, taken as a whole, do not alter the contract to the detriment of the buyer.

1 (2) In a consumer contract, terms that do not contradict terms in the
2 agreement are effective if:

3 (i) prior to receipt of the goods the buyer agrees to be bound by the
4 terms and either (A) the seller gives the buyer a right to avoid the contract by returning the goods
5 for a full refund within thirty days after the buyer receives the goods and the buyer fails to
6 exercise the right of return in a timely manner, or (B) the terms, taken as a whole, do not alter the
7 contract to the detriment of the buyer; or

8 (ii) at the time the contract is formed the buyer has notice that the
9 seller intends to deliver the terms after formation and either (A) the seller gives the buyer a right
10 to avoid the contract by returning the goods for a full refund within thirty days after the buyer
11 receives the goods and the buyer fails to exercise the right of return in a timely manner, or (B) the
12 terms, taken as a whole, do not alter the contract to the detriment of the buyer.

13 The provisions of this paragraph may not be excluded or modified by agreement.

14 (3) Terms that are delivered after the contract is formed and that are not
15 effective under paragraphs (1) or (2) of this subsection are treated as a confirmation under
16 subsection (b).

17 (d) A contract formed by the interaction of an individual and an electronic agent
18 (Section 2-204(e)(2)) does not include terms provided by the individual if the individual had
19 reason to know that the agent could not react to the terms as provided.

20 *[Reporter's Note – The approach to the battle of the forms taken here is consistent with the*
21 *approach taken in the July draft, but a number of changes have been made for the sake of*
22 *clarity. In addition, the section now deals with the terms of all contracts, not just those where*
23 *there has been a “battle-of-the-forms.”*

24 *Subsection (a) is new and deals with the terms of contracts where there are no battle-of-*

1 the-forms issues. It states the traditional rule that the contract formed by an offer and a mirror-
2 image acceptance consists of the terms of the offer plus other terms supplied or incorporated
3 under the provisions of the U.C.C. Those other terms may be based on an implied-in-fact source
4 (usage of trade, course of dealing, or course of performance) or an implied-in-law source (the
5 Code's "gap-fillers"). Note that the introductory phrase to subsections (a) and (b) states that
6 the terms of the contract "are" those that are listed -- that is, the listing in those subsections is
7 intended to be complete. By contrast, the introductory phrase to subsection (c) states that the
8 terms "include" those that are listed. A comment will make clear that the confirmed contract,
9 including gap-fillers, remains in effect in a case governed by subsection (c) except to the extent
10 that it is modified as described in that subsection. A comment will also stress that terms derived
11 from an implied-in-fact source may also be part of the contract under each subsection.]

12 [Reporter's Note – The comments should indicate that "offer" in subsection (a) includes a
13 "counteroffer" that is created by a record that would be a definite expression of acceptance but
14 for the inclusion of a "my way or the highway" clause (see Section 2-204A(b), (c) and
15 accompanying Reporter's Note).]

16 [Reporter's Note – Subsection (b) is limited in scope and deals with only three situations. The
17 first situation involves a case where a contract is formed by conduct by both parties that
18 recognizes that a contract exists. The situations in which a contract will be based purely on
19 conduct by both parties are quite limited, and the following scenarios are the classic examples:
20 1) an offer contains an effective express condition to formation (Section 2-204A(a)), the offeree
21 responds with a record that is a definite and seasonable expression of acceptance but contains
22 additional or different terms, then the goods are shipped by the seller and accepted by the buyer;
23 2) an offer is made and the offeree responds with what would otherwise be a definite and
24 seasonable expression of acceptance but for the fact that it contains an effective express
25 condition (Section 2-204A(b)), the offeror does not expressly assent to the offeree's record but
26 the goods are shipped by the seller anyway and accepted by the buyer. In these situations,
27 neither party's record controls; but if each party has sent a record there will likely be areas of
28 overlap. Terms in the records that are identical become part of the contract automatically. If
29 terms are similar but not identical, the proper inquiry is whether the similarity shows agreement
30 of the parties. For example, if the seller's form provides for 15-days credit and the buyer's form
31 provides for 30-days credit, a court might reasonably conclude that the parties have agreed that
32 the sale is on credit and apply the lesser time period (15 days). However, if the seller's form
33 provides for arbitration in San Francisco and the buyer's form provides for arbitration in New
34 York, a court might reasonably conclude that the records do not reflect an agreement to
35 arbitrate. Extrinsic evidence might help a court reach its conclusion in these cases.

36 The second situation to which subsection (b) applies involves the relatively rare case
37 where an offer that does not contain an effective express condition is accepted by a definite and
38 seasonable expression of acceptance that also does not contain an express condition but
39 contains additional or different terms. As with the contract based on conduct by both parties,
40 the terms are determined by a "knock-out" rule.

41 The third situation to which subsection (b) applies arises when a contract is formed by

1 any method and one or both parties sends a confirmatory record that contains additional or
2 different terms. In these cases, the terms in one party's confirmation are effective to modify the
3 existing contract only if the other party expressly agrees to them or the other party also sends a
4 confirmatory record and the terms in the records show agreement of the parties.

5 [Reporter's Note – The following examples flesh out the draft's approach to the battle of the
6 forms. Some of the examples overlap with the preceding Reporter's Note, and some should
7 probably be placed after Section 2-204A.

8 Example 1: Offeror uses a record that contains an effective express condition; offeree
9 accepts orally, or by a record that does not contain any additional or different terms, or
10 by conduct (retention or use of the goods, retention of payment). Offeror's terms control.
11 The result would be the same if the offer did not contain the condition.

12 Example 2: Offeror uses a record that contains an effective express condition; offeree
13 responds with a record that is a definite expression of acceptance containing terms that
14 add to or differ from the offer. No contract is formed.

15 Example 3: Offeror uses a record that contains an effective express condition; offeree
16 responds with a record that contains terms that add to or differ from the offer and that
17 also contains an effective express condition. Without the condition the response would
18 be a definite and seasonable expression of acceptance. No contract is formed.

19 Example 4: Offeror makes offer by use of a record or otherwise; offeree responds with ~~a~~
20 ~~record~~ what would otherwise be a definite and seasonable expression of acceptance but
21 for the fact that it ~~that~~ contains terms that add to or differ from the offer. The offeree's
22 response ~~and that~~ also contains an effective express condition. No contract is formed.

23 Example 5: In Examples 2, 3 and 4, if either party expressly agrees to the other party's
24 ~~record terms~~ a contract is formed on those terms. Subsection (a) or (b) will state the
25 terms of the contract, depending upon whose record is being assented to.

26 Example 6: In Examples 2, 3 and 4, if subsequent conduct ~~of the~~ by both parties
27 recognizes that a contract exists, its terms are as stated in subsection (b).

28 Example 7: Buyer and Seller agree to a contract over the telephone. Without more the
29 terms of the contract are as stated in subsection (a). After their conversation ends, Seller
30 sends Buyer its standard confirmation form. The terms in the form are ineffective to
31 modify the contract unless (i) Buyer expressly agrees to them, or (ii) Buyer also sends a
32 confirmation and the confirmatory records of the parties are sufficiently identical to
33 show agreement as to a term or terms. Note that if Buyer was on notice at the time of
34 formation that Seller intended to contract on the basis of deferred terms, the case would
35 be resolved under subsection (c)(see next Reporter's Note).]

1 [Reporter's Note – Subsection (c) is an attempt to resolve what is sometimes referred to as a
2 “layered” or “rolling” contract. In a typical case, the buyer will call the seller's toll-free
3 telephone number and order goods, giving the seller a credit card number to pay for all or part
4 of the price. The seller will then ship the goods with its standard terms, and the issue is whether
5 the buyer's retention of the goods constitutes acceptance of the seller's standard terms.
6 Subsection (c) assumes that a portion of a contract has been formed during the telephone
7 conversation and states the conditions under which the buyer's conduct will constitute assent to
8 the seller's standard terms submitted later.

9 In no event may a deferred term contradict a term in the agreement. In this context, it is
10 important to bear in mind the distinction between “agreement” (Section 1-201(3)) and
11 “contract” (Section 1-201(11)). “Agreement” includes terms derived from an implied-in-fact
12 source but does not include implied-in-law (“gap-filling”) terms that have become part of the
13 contract by operation of law. Thus, a deferred term that contradicts an express or implied-in-
14 fact term does not become effective under this subsection while a deferred term that contradicts
15 a gap-filling term may become effective if the seller otherwise complies with this subsection.

16 In a nonconsumer contract, deferred terms that do not contradict the agreement are
17 effective if the buyer agrees prior to receipt of the goods to be bound by terms that are as yet
18 unseen. Agreement, of course, may be inferred from the surrounding circumstances. If the
19 buyer does not agree to be bound, the terms cannot become effective under this subsection unless
20 the buyer was on notice that deferred terms would be forthcoming. If the buyer was on notice,
21 the terms can become effective in two ways: 1) if the seller gives the buyer a thirty-day right of
22 return, and 2) if the terms, taken as a whole, do not alter the contract to the detriment of the
23 buyer.

24 Determining whether the deferred terms alter the contract to the detriment of the buyer
25 requires a comparison between the package of rights and duties that the buyer would have if the
26 deferred terms were effective and the package of rights and duties that the buyer has under the
27 contract that exists at the time the deferred terms are delivered. In making this comparison the
28 deferred terms must be considered as a package, meaning that no single deferred term should be
29 considered in isolation in order to determine its impact on the existing contract. The contract
30 that exists before the deferred terms are delivered may include such gap-fillers as an implied
31 warranty that the goods are of merchantable quality at the time of sale and a full panoply of
32 remedies. The contract that would exist if the deferred terms are effective may include such
33 terms as an express warranty that the goods will meet a specified level of quality for a period of
34 time, a disclaimer or modification of implied warranties, and an exclusive remedy. If the
35 package of deferred terms does not alter the existing contract to the detriment of the buyer, the
36 seller need not provide the buyer a right of return. A comment will be drafted with illustrations
37 of deferred-term packages that do not alter the contract to the detriment of the buyer.

38 In a consumer contract deferred terms cannot become effective unless the buyer agreed
39 to be bound or was on notice, but a consumer contract differs from a nonconsumer contract in
40 that the seller must give the buyer a right of return even if there is agreement unless the terms,
41 taken as a package, do not alter the contract to the detriment of the buyer. Further, the seller in
42 a consumer contract may not by agreement exclude or modify the provisions of paragraph (2).

43 In both consumer and nonconsumer contracts, the deferred terms are treated as a

1 confirmation under subsection (b) if the buyer neither agrees nor is on notice with regard to
2 them. The approach taken here creates a clear line between battle-of-the-forms cases and
3 layered-contract cases.

4 If a buyer exercises the right of return the contract is avoided. A buyer that fails to
5 exercise the right of return in a timely manner is deemed to have accepted the deferred terms.
6 Whether the buyer has accepted the goods, however, must still be resolved under Section 2-606.
7 Further, the mere fact that the buyer notifies the seller that the goods will not be retained in a
8 case governed by this subsection does not establish that the buyer did so because of
9 dissatisfaction with the terms. Nothing in this section suggests that the buyer cannot exercise the
10 normal right to reject a nonconforming tender and enforce the remedies appropriate to that
11 circumstance.]

12 [Reporter's Note – Subsection (d) was formerly located at Section 2-214(b). It has been
13 modified for clarity.]

14 **SECTION 2–208. COURSE OF PERFORMANCE OR PRACTICAL**
15 **CONSTRUCTION.**

16 (a) Where the contract for sale involves repeated occasions for performance by
17 either party with knowledge of the nature of the performance and opportunity for objection to it
18 by the other, any course of performance accepted or acquiesced in without objection shall be
19 relevant to determine the meaning of the agreement.

20 (b) The express terms of the agreement and any such course of performance, as
21 well as any course of dealing and usage of trade, shall be construed whenever reasonable as
22 consistent with each other; but when such construction is unreasonable, express terms shall
23 control course of performance and course of performance shall control both course of dealing and
24 usage of trade (Section 1–205).

25 (c) Subject to the provisions of the next section on modification and waiver, such
26 course of performance shall be relevant to show a waiver or modification of any term inconsistent
27 with such course of performance.

1 *[Reporter’s Note – There is no change from existing law.]*

2 *[Reporter Note – A legislative note might be placed here to suggest that this section should be*
3 *deleted upon adoption of revised Article 1, which will cover this area.]*

4 **SECTION 2–209. MODIFICATION, RESCISSION AND WAIVER.**

5 (a) An agreement modifying a contract within this Article needs no consideration
6 to be binding.

7 (b) An agreement in an authenticated record which excludes modification or
8 rescission except by an authenticated record cannot be otherwise modified or rescinded, but
9 except as between merchants such a requirement on a form record supplied by a merchant must
10 be separately authenticated by the other party.

11 (c) The requirements of the statute of frauds section of this Article (Section
12 2–201) must be satisfied if the contract as modified is within its provisions.

13 (d) Although an attempt at modification or rescission does not satisfy the
14 requirements of subsection (b) or (c) it can operate as a waiver.

15 (e) A party who has made a waiver affecting an executory portion of the contract
16 may retract the waiver by reasonable notification received by the other party that strict
17 performance will be required of any term waived, unless the retraction would be unjust in view of
18 a material change of position in reliance on the waiver.

19 *[Reporter’s Note – There is no substantive change. The only textual change in this section is in*
20 *subsection (b). This change reflects the acknowledgment of electronic transactions by replacing*
21 *“signed writings” with “authenticated records.”]*

22 **SECTION 2–210. ASSIGNMENT OF RIGHTS; DELEGATION OF**
23 **PERFORMANCE**

1 (a) If the seller or buyer assigns its rights under a contract of sale, the following rules
2 apply:

3 (1) Subject to paragraph (32) of this subsection and except as otherwise provided
4 in Section 9-406, all rights of either seller or buyer may be assigned unless the assignment would
5 materially change the duty of the other party, increase materially the burden or risk imposed on
6 that party by the contract, or impair materially that party's chance of obtaining return
7 performance. A right to damages for breach of the whole contract or a right arising out of the
8 assignor's due performance of its entire obligation can be assigned despite an agreement
9 otherwise.

10 ~~(2) The other party may treat an assignment of rights that is a breach as creating~~
11 ~~reasonable grounds for insecurity and may without prejudice to the party's rights against the~~
12 ~~assignee demand adequate assurance of due performance from the assignor (Section 2-609).~~

13 (32) The creation, attachment, perfection, or enforcement of a security interest in
14 the seller's interest under a contract is not an assignment that materially changes the duty of or
15 materially increases the burden or risk imposed on the buyer or materially impairs the buyer's
16 chance of obtaining return performance within the purview of paragraph (1) of this subsection
17 unless, and then only to the extent that, enforcement of the security interest results in a delegation
18 of a material performance of the seller. Even in that event, the creation, attachment, perfection,
19 and enforcement of the security interest remain effective. However, the seller is liable to the
20 buyer for damages caused by the delegation, and a court having jurisdiction may grant other
21 appropriate relief, including cancellation of the contract or an injunction against enforcement of
22 the security interest or consummation of the enforcement.

1 (b) If the seller or buyer delegates performance of its duties under a contract of sale, the
2 following rules apply:

3 (1) A party may perform its duties through a delegate unless otherwise
4 agreed or unless the other party has a substantial interest in having its original promisor perform
5 or control the acts required by the contract. No delegation of performance relieves the party
6 delegating of any duty to perform or any liability for breach.

7 (2) Acceptance of a delegation of duties by the assignee constitutes a
8 promise by it to perform those duties. This promise is enforceable by either the assignor or the
9 other party to the original contract.

10 (3) The other party may treat any delegation of duties as creating
11 reasonable grounds for insecurity and may without prejudice to its rights against the assignor
12 demand assurances from the assignee (Section 2-609).

13 (4) A contractual term prohibiting the delegation of duties otherwise
14 delegable under paragraph (1) of this subsection is enforceable, and an attempted delegation is not
15 effective.

16 (c) An assignment of “the contract” or of “all my rights under the contract” or an
17 assignment in similar general terms is an assignment of rights and unless the language or the
18 circumstances (as in an assignment for security) indicate the contrary, it is also a delegation of
19 performance of the duties of the assignor.

20 (d) Unless the circumstances indicate the contrary a prohibition of assignment of
21 “the contract” is to be construed as barring only the delegation to the assignee of the assignor’s
22 performance.

1 *[Reporter's Note – This section is an amalgamation of current law, conforming amendments in*
2 *Revised Article 9, and the July draft. That is, it follows the July draft's general approach of*
3 *breaking assignment and delegation apart; incorporates the changes dictated by revised Article*
4 *9; and uses language from existing Article 2 whenever possible.]*

5 *[Reporter's Note – A comment will describe the relationship between this provision and Section*
6 *9-406. That provision, which trumps this provision under Section 2-102(~~tc~~), broadly invalidates*
7 *anti-assignment terms in agreements between account debtors and assignors, and also*
8 *invalidates terms that render assignments a breach. In a transaction that is not within the scope*
9 *of Section 9-406, this provision governs the effect of an anti-assignment term. It does not*
10 *address terms that render assignments a breach, and these terms are enforceable under this*
11 *Article.]*

12 *[Reporter's Note – The words “of sale” following “contract” have been deleted throughout*
13 *Section 2-210 because the term “contract” is the appropriate defined term under this draft.]*

14 *[Reporter's Note – Subsection (a)(2) has been deleted in this draft. Under subsection (b)(3) any*
15 *delegation of duties creates reasonable grounds for insecurity, but this approach is not*
16 *appropriate in the context of a pure assignment of rights. A comment will indicate that there*
17 *may be circumstances where an assignment that is a breach of the terms of the agreement*
18 *creates reasonable grounds for insecurity and that nothing in this section precludes the*
19 *application of Section 2-609 in that case.]*

20 **SECTION 2-211. LEGAL RECOGNITION OF ELECTRONIC RECORDS AND**
21 **AUTHENTICATIONS.**

22 (a) A record or authentication may not be denied legal effect or enforceability
23 solely because it is in electronic form.

24 (b) A contract may not be denied legal effect or enforceability solely because an
25 electronic record was used in its formation.

26 (~~bc~~) This Article does not require a record or authentication to be created,
27 generated, sent, communicated, received, stored, or otherwise processed by electronic means or
28 in electronic form.

29 (~~ed~~) In any transaction, a person may establish requirements regarding the type of

1 record or authentication acceptable to it.

2 ~~(de) A person that uses an electronic agent that it has selected for making an~~
3 ~~authentication, performance or agreement is bound by the operations of the electronic agent, even~~
4 ~~if no individual was aware of or reviewed the agent's operations or the results of the operations.~~

5 *[Reporter's Note – This section comes from UETA and UCITA:*

6 *1. Subsection (a) is from UETA sec. 7(a).*

7 *2. Subsection (b) is from UETA sec. 7(b).*

8 *23. subsection (bc) is from UETA sec.5(a) with a slight language change (UETA uses*
9 *“signature” and this subsection uses “authentication”).*

10 *34. subsection (cd) is based on UCITA sec. 107(c) and represents an important policy*
11 *choice. Were the draft to follow UETA, it would adopt § 5(b)(and perhaps § 5(c)), which*
12 *preclude the use of electronic means to conduct a transaction unless the parties opt for an*
13 *electronic environment. Subsection (d) makes electronic contracting the default rule – that is,*
14 *the parties need not mutually agree to conduct transactions by electronic means for one of them*
15 *to use an electronic agent or electronic record.*

16 *4. Subsection (d) is based on UCITA sec. 107(d).]*

17 **SECTION 2-212. ATTRIBUTION.**

18 An electronic record or electronic authentication is attributed to a person if the
19 record was created by or the authentication was the act of the person or the person's electronic
20 agent or the person is otherwise bound by the act under the law.

21 *[Reporter's Note – This section is based on the concept of attribution found in Section 9 of*
22 *UETA. However, its language is slightly changed for clarity.]*

23 **SECTION 2-213 . CONTRACT FORMATION; ELECTRONIC RECORD.**

24 (a) Except as otherwise provided in subsection (b), an electronic record is
25 effective when received even if no individual is aware of its receipt.

26 (b) Receipt of an electronic acknowledgment of an electronic record establishes
27 that the record was received but, in itself, does not establish that the content sent corresponds to
28 the content received.

1 *[Reporter's Note – These provisions are adapted from Sections 15(e) and (f) of UETA.]*

2 **~~SECTION 2-214. CONTRACT FORMATION; TERMS; ELECTRONIC AGENT.~~**

3 ~~(a) An individual that uses an electronic agent for authentication, agreement, or~~
4 ~~performance is bound by the operations of the electronic agent even if the individual using the~~
5 ~~electronic agent was unaware of or did not review the agent's actions or the results of the~~
6 ~~operations.~~

7 ~~(b) The terms of a contract formed under Section 2-204 do not include terms~~
8 ~~provided by the individual not using an electronic agent if the individual had reason to know that~~
9 ~~the electronic agent could not react to the terms as provided.~~

10 *[Reporter's Note – Subsection (a) has been deleted in its entirety. Subsection (b) has been*
11 *modified for clarity and has been moved to Section 2-207(d).]*

12 **PART 3**

13 **GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT**

14 **SECTION 2–301. GENERAL OBLIGATIONS OF PARTIES.**

15 The obligation of the seller is to transfer and deliver and that of the buyer is to
16 accept and pay in accordance with the contract.

17 *[Reporter's Note – There is no change from existing law.]*

18 **SECTION 2–302. UNCONSCIONABLE CONTRACT OR TERM.**

19 (a) If the court as a matter of law finds the contract or any term of the contract to
20 have been unconscionable at the time it was made the court may refuse to enforce the contract,

1 or it may enforce the remainder of the contract without the unconscionable term, or it may so
2 limit the application of any unconscionable term as to avoid any unconscionable result.

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

6 *[Reporter's Note – With the exception of changing the word “clause” to “term” the text of this*
7 *section is consistent with current Article 2. However, it might be supplemented with a new*
8 *comment along the following lines:*

9 *1. This section is intended to make it possible for the courts to police explicitly against the*
10 *contracts or terms which they find to be unconscionable instead of by adverse construction of*
11 *language, by manipulation of the rules of offer and acceptance or by determinations that the term*
12 *is contrary to public policy or to the dominant purpose of the contract. The section is intended to*
13 *allow a court to pass directly on the unconscionability of the contract or a particular term of the*
14 *contract and to make a conclusion of law as to its unconscionability. The basic test is whether, in*
15 *the light of the general commercial background and the commercial needs of the particular trade*
16 *or case, the term or contract involved is so one-sided as to be unconscionable under the*
17 *circumstances existing at the time of the making of the contract. However, ~~for example,~~ a court*
18 *ought not, on the basis of substantive unconscionability alone, refuse to enforce a term disclaiming*
19 *an implied warranty that is ~~procedurally effective (Section 2-316) or a procedurally effective term~~*
20 *limiting the buyer's remedies complies with the requirements of Section 2-316 or a term that*
21 *provides for a remedy that is expressly agreed to be exclusive under Section 2-719 (as long as that*
22 *term provides a minimum adequate remedy) (Section 2-719). See, e.g., Hornberger v. General*
23 *Motors Corp., 929 F. Supp. 884 (E.D. Pa. 1996)(limitation of remedy to repair not unconscionable*
24 *where consumer lessee, who incurred repair costs after expiration of express warranty, based claim*
25 *on breach of implied warranty of merchantability); Moore v. Coachmen Industries, 499 S.E.2d 772*
26 *(N.C. 1998)(conspicuous term limiting warranty coverage on recreational vehicle to one year or*
27 *15,000 miles not unconscionable).*

28 *Generally a finding of unconscionability requires that a court find both “procedural” and*
29 *“substantive” unconscionability. Accordingly, courts also should seldom invalidate a contract, or*
30 *a term of a contract, that is not substantively unconscionable and that merely allocates risk, even*
31 *disproportionally, or that otherwise significantly cuts against the complaining party, on the basis*
32 *of the other party's conduct standing alone. In those cases that call out for relief often the conduct*
33 *will constitute an invalidating cause, such as fraud or duress. However, consistent with the*
34 *provisions of Section 2A-108(2) and the Uniform Consumer Credit Code (Section 5.108), in an*
35 *appropriate case a court may invoke procedural unconscionability to invalidate a term or contract.*
36 *For example, a court might invalidate a contract because of high pressure sales tactics used in a*

1 consumer buyer's home even though the conduct does not constitute fraud or duress. The principle
2 is one of the prevention of oppression and unfair surprise. Cf. *Campbell Soup Co. v. Wentz*, 172
3 F.2d 80 (3d Cir. 1948). The doctrine is not intended to allow disturbance of allocation of risks
4 because of superior bargaining power.

5 *The operation of this section is illustrated by the results in cases such as the following:*

6 *Kansas City Wholesale Grocery Co. v. Weber Packing Corporation*, 93 Utah 414,
7 73 P.2d 1272 (1937) (where a term limiting time for complaints was held
8 inapplicable to latent defects in a shipment of catsup which could be discovered only
9 by microscopic analysis); *Brower v. Gateway 2000, Inc.* 676 N.Y.S.2d 569 (N.Y.A.D.
10 1998) (term requiring arbitration in Chicago pursuant to rules requiring \$4,000
11 advance fee, of which \$2,000 was nonrefundable even if claimant prevailed,
12 substantively unconscionable as applied to consumer, even if consumer was aware
13 of the term); *New Prague Flouring Mill Co. v. G. A. Spears*, 194 Iowa 417, 189 N.W.
14 815 (1922) (holding that a clause permitting the seller, upon the buyer's failure to
15 supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely
16 postponed 30 days at a time by the inaction, does not indefinitely postpone the date
17 of measuring damages for the buyer's breach, to the seller's advantage); *Green v.*
18 *Arcos, Ltd.* (1931 CA) 47 T.L.R. 336 (blanket clause prohibiting rejection of
19 shipments by the buyer restricted to apply to shipments where discrepancies
20 represented merely mercantile variations); *Austin Co. v. J. H. Tillman Co.*, 104 Or.
21 541, 209 P. 131 (1922) (clause limiting the buyer's remedy to return held to be
22 applicable only if the seller had delivered a machine needed for a construction job
23 which reasonably met the contract description).

24 *These cases are but a small number of the cases decided prior to the Code and after its*
25 *enactment; they nonetheless indicate how various courts have applied the concept of*
26 *unconscionability in various contexts. A researcher desiring a more elaborate study of the meaning*
27 *of the doctrine as derived from the numerous decisions should consult the many sources available.*

28 2. *Under this section the court, in its discretion, may refuse to enforce the contract as*
29 *a whole if it is permeated by the unconscionability, or it may strike any single term or group of terms*
30 *which are so tainted or which are contrary to the essential purpose of the agreement or to material*
31 *terms to which the parties have expressly agreed, or it may simply limit unconscionable results.*

32 3. *The present section is addressed to the court, and the decision is to be made by it.*
33 *The evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the*
34 *agreement which results from the court's action on these matters is to be submitted to the general*
35 *trier of the facts.]*

36 **SECTION 2-303. ALLOCATION OR DIVISION OF RISKS.**

1 Where this Article allocates a risk or a burden as between the parties "unless otherwise
2 agreed", the agreement may not only shift the allocation but may also divide the risk or burden.

3 *[Reporter's Note – There is no change from current law.]*

4 **SECTION 2–304. PRICE PAYABLE IN MONEY, GOODS, REALTY, OR**
5 **OTHERWISE.**

6 (a) The price can be made payable in money or otherwise. If it is payable in whole or
7 in part in goods each party is a seller of the goods which that party is to transfer.

8 (b) Even though all or part of the price is payable in an interest in realty the transfer
9 of the goods and the seller's obligations with reference to them are subject to this Article, but not the
10 transfer of the interest in realty or the transferor's obligations in connection therewith.

11 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

12 **SECTION 2–305. OPEN PRICE TERM.**

13 (a) The parties if they so intend can conclude a contract for sale even though the price
14 is not settled. In such a case the price is a reasonable price at the time for delivery if

15 (1) nothing is said as to price; or

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

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

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

21 (c) ~~When a price left to be fixed otherwise than by agreement of the parties is not~~
22 ~~fixed in good faith under subsection (b), or fails to be fixed through fault of one party, the other may~~

1 ~~at its option treat the contract as canceled or itself fix a reasonable price.~~ When a price left to be
2 fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other
3 may at its option treat the contract as canceled or itself fix a reasonable price.

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

8 *[Reporter's Note – ~~The only substantive change is that subsection (c) adds the circumstance where~~*
9 *~~the price is not fixed pursuant to subsection (b).~~ The change in subsection (c) restores the language*
10 *of original Article 2.]*

11 **SECTION 2–306. OUTPUT, REQUIREMENTS AND EXCLUSIVE DEALINGS.**

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

16 (b) A lawful agreement by either the seller or the buyer for exclusive dealing in the
17 kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best
18 efforts to supply the goods and by the buyer to use best efforts to promote their sale.

19 *[Reporter's Note – There is no change from existing law.]*

20 **SECTION 2–307. DELIVERY IN SINGLE LOT OR SEVERAL LOTS.**

21 Unless otherwise agreed all goods called for by a contract for sale must be tendered
22 in a single delivery and payment is due only on such tender but where the circumstances give either
23 party the right to make or demand delivery in lots the price if it can be apportioned may be demanded

1 for each lot.

2 *[Reporter's Note – There is no change from existing law.]*

3 **SECTION 2–308. ABSENCE OF SPECIFIED PLACE FOR DELIVERY.**

4 Unless otherwise agreed

5 (1) the place for delivery of goods is the seller's place of business or if the seller
6 has none, its residence; but

7 (2) in a contract for sale of identified goods which to the knowledge of the
8 parties at the time of contracting are in some other place, that place is the place for their delivery;
9 and

10 (3) documents of title may be delivered through customary banking channels.

11 *[Reporter's Note – There is no change from existing law.]*

12 **SECTION 2–309. ABSENCE OF SPECIFIC TIME PROVISIONS; NOTICE OF**
13 **TERMINATION.**

14 (a) The time for shipment or delivery or any other action under a contract if not
15 provided in this Article or agreed upon shall be a reasonable time.

16 (b) Where the contract provides for successive performances but is indefinite in
17 duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time
18 by either party.

19 (c) Termination of a contract by one party except on the happening of an agreed event
20 requires that reasonable notification be received by the other party and an agreement dispensing with
21 notification is invalid if its operation would be unconscionable. However, a term specifying standards
22 for the nature and timing of notice is enforceable if the standards are not manifestly unreasonable.

1 *[Reporter's Note – ~~There is no change from existing law.~~ The added sentence in subsection (c)*
2 *comes from the July draft, and it provides greater party autonomy.]*

3 **SECTION 2–310. OPEN TIME FOR PAYMENT OR RUNNING OF CREDIT;**
4 **AUTHORITY TO SHIP UNDER RESERVATION.**

5 Unless otherwise agreed

6 (1) payment is due at the time and place at which the buyer is to receive the
7 goods even though the place of shipment is the place of delivery; and

8 (2) if the seller is required or authorized to send the goods it may ship them
9 under reservation, and may tender the documents of title, but the buyer may inspect the goods after
10 their arrival before payment is due unless such inspection is inconsistent with the terms of the contract
11 (Section 2–513); and

12 (3) if tender of delivery is agreed to be made by way of documents of title
13 otherwise than by subsection (2) then payment is due at the time and place at which the buyer is to
14 receive the documents regardless of where the goods are to be received; and

15 (4) where the seller is required or authorized to ship the goods on credit the
16 credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will
17 correspondingly delay the starting of the credit period.

18 *[Reporter's Note – Subsection (2) has been changed from original Article 2 so that it applies when*
19 *the seller is “required or authorized to send the goods.” The “required or” language was added*
20 *to make this section consistent with other usages throughout Article 2, as well as being consistent*
21 *with the common understanding of business practice.]*

22 *[Reporter's Note – Although no substantive change is intended, subsection (3) picks up clarifying*
23 *language from section 2-611(c) of the July draft.]*

24 **SECTION 2–311. OPTIONS AND COOPERATION RESPECTING**

1 **PERFORMANCE.**

2 (a) An agreement for sale which is otherwise sufficiently definite (subsection (c) of
3 Section 2–204) to be a contract is not made invalid by the fact that it leaves particulars of
4 performance to be specified by one of the parties. Any such specification must be made in good faith
5 and within limits set by commercial reasonableness.

6 (b) Unless otherwise agreed specifications relating to assortment of the goods are at
7 the buyer's option and specifications or arrangements relating to shipment are at the seller's option.

8 (c) Where such specification would materially affect the other party's performance but
9 is not seasonably made or where one party's cooperation is necessary to the agreed performance of
10 the other but is not seasonably forthcoming, the other party in addition to all other remedies

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

12 (2) may also either proceed to perform in any reasonable manner or after the
13 time for a material part of its own performance treat the failure to specify or to cooperate as a breach
14 by failure to deliver or accept the goods.

15 *[Reporter's Note – In subsection (b), the cross-reference in existing Article 2 to various subsections*
16 *of 2-319 has been deleted as those provisions no longer exist. The introductory phrase “Unless*
17 *otherwise agreed” is sufficient.]*

18 **SECTION 2–312. WARRANTY OF TITLE AND AGAINST INFRINGEMENT;**
19 **BUYER'S OBLIGATION AGAINST INFRINGEMENT.**

20 (a) Subject to subsection (c) there is in a contract for sale a warranty by the seller that:

21 (1) the title conveyed shall be good and its transfer rightful and shall not,
22 because of any colorable claim to or interest in the goods, unreasonably expose the buyer to litigation;
23 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) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which 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 buyer reason to know that the person selling does not claim title in itself, that it is purporting to sell only such right or title as the party or a third person may have, or that it is selling subject to any claims of infringement or the like.

[Reporter's Note – Subsection (a) brings up from the comments the doctrine of marketable title (“shall not, because of any colorable claim to or interest in the goods, unreasonably expose the buyer to litigation”). Although the concept was in the July draft, the exact language is new to this draft.]

[Reporter's Note – The order of subsections (b) and (c) has been reversed for logical clarity.]

SECTION 2–313. EXPRESS WARRANTIES BY AFFIRMATION, PROMISE, DESCRIPTION, SAMPLE, MODEL; REMEDIAL PROMISE.

(a) In this section, “immediate buyer” means a buyer that ~~has~~ enters into a contract with the seller.

(b) Express warranties by the seller to the immediate buyer are created as follows:

(1) Any affirmation of fact or promise made by the seller which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(c) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that the seller have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

(d) Any remedial promise made by the seller creates an obligation that the promise will be performed upon the happening of the specified event.

[Reporter's Note – This section now deals with remedial promises, but the positioning of that concept within the section makes it clear (as will a comment) that there is no basis of the bargain test for these promises and that the term is used in conjunction with Section 2-725(b)(3) to clarify the appropriate limitations period. In addition, the comments will explain the difference between a promise as in “affirmation of fact or promise” (representation as to future quality of the goods) and a remedial promise (commitment regarding seller's future obligations).]

[Reporters's Note – The term “immediate buyer” is used to differentiate the party to whom an express warranty runs under this section from the party to whom an express warranty obligation runs under sections 2-313A and 2-313B. We may eventually need to move “immediate buyer” to section 2-103, along with “remote purchaser” from sections 2-313A and 2-313B.]

[Reporter's Note – A comment should indicate that a representation in advertising may constitute an express warranty if it meets the tests set forth in this section. This is consistent with judicial decisions and is necessitated by the fact that we have a separate section (2-313B) dealing with advertisements to remote purchasers.]

SECTION 2-313A. ~~EXPRESS WARRANTY~~ OBLIGATION TO REMOTE PURCHASER CREATED BY RECORD PACKAGED WITH OR ACCOMPANYING GOODS.

1 (a) In this section:

2 (1) “Goods” means new goods and goods sold or leased as new goods in a
3 transaction of purchase that occurs in the normal chain of distribution.

4 (2) “Immediate buyer” means a buyer that ~~has~~ enters into a contract with the
5 seller.

6 (3) “Remote purchaser” means a person that buys or leases goods from an
7 immediate buyer or other person in the normal chain of distribution.

8 (b) If a seller makes an affirmation of fact or promise that relates to the goods, or
9 provides a description that relates to the goods, or makes a remedial promise, in a record packaged
10 with or accompanying the goods, and the seller reasonably expects the record to be, and the record
11 is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that the
12 goods will conform to the affirmation of fact, promise or description or that the seller will perform
13 the remedial promise unless a reasonable person in the position of the remote purchaser would not
14 believe that the affirmation of fact, promise or description created an obligation.

15 (c) It is not necessary to the creation of an ~~express warranty~~ obligation under this
16 section that the seller use formal words such as "warrant" or "guarantee" or that the seller have a
17 specific intention to undertake an obligation, but an affirmation merely of the value of the goods or
18 a statement purporting to be merely the seller's opinion or commendation of the goods does not
19 create an obligation.

20 (d) The following rules apply to the remedies for breach of an ~~express warranty~~
21 obligation created under this section:

22 (1) Damages may be proved in any manner that is reasonable. Unless special

1 circumstances show proximate damages of a different amount, the measure of damages if the goods
2 do not conform to an affirmation of fact, promise or description is the value of the goods if they had
3 been as represented less the value of the goods as delivered, and the measure of damages for breach
4 of a remedial promise is the value of the promised remedial performance less the value of any
5 remedial performance completed.

6 (2) The seller may modify or limit the remedies available to the remote
7 purchaser if the modification or limitation is furnished to the remote purchaser no later than the time
8 of purchase or if the modification or limitation is contained in the record that contains the affirmation
9 of fact, promise or description.

10 (3) Subject to a modification or limitation of remedy, a seller in breach is liable
11 for incidental or consequential damages under Section 2-715 but the seller is not liable for lost profits.

12 (e) An ~~express warranty~~ obligation that is not a remedial promise is breached if the
13 goods did not conform to the affirmation of fact, promise or description creating the obligation when
14 the goods left the seller's control.

15 *[Reporter's Note – This section contains a modified version of the “card-in-the-box” warranty*
16 *provisions from section 2-408 of the July draft. It does not contain the advertising provisions from*
17 *that section, and they are set forth in Section 2-313B. Some of the definitions have been slightly*
18 *altered from the revision draft. Note that the extension-of-warranty rules have been removed to*
19 *section 2-318.]*

20 *[Reporter's Note – ~~The comments will make it clear that even though the obligations in this section~~*
21 *~~and in Section 2-313B are referred to as “express warranty” obligations, they~~ All references to*
22 *“express warranty” have been deleted to make it clear that obligations under this section are not*
23 *subject to a basis-of-the-bargain test. The same approach is taken in related sections (2-313B, 2-*
24 *318 and 2-725). A comment will be added making the same point.]*

25 *[Reporter's Note – Subsection (e) is included draft because it is important for us to pinpoint the time*
26 *of breach for express warranty obligations. The accrual rule is stated in 2-725(c)(2) as the time the*
27 *remote purchaser receives the goods, but the point in time at which the goods must conform is a*

1 *different matter.]*

2 *[Reporter's Note – Although this section is limited to obligations created by a record, a comment*
3 *should indicate that the logic of the section may extend to samples and models.]*

4 **SECTION 2-313B. ~~EXPRESS WARRANTY~~ OBLIGATION TO REMOTE**
5 **PURCHASER CREATED BY COMMUNICATION TO PUBLIC.**

6 (a) In this section:

7 (1) “Goods” means new goods and goods sold or leased as new goods in a
8 transaction of purchase that occurs in the normal chain of distribution.

9 (2) “Immediate buyer” means a buyer that ~~has~~ enters into a contract with the
10 seller.

11 (3) “Remote purchaser” means a person that buys or leases goods from an
12 immediate buyer or other person in the normal chain of distribution.

13 (b) If a seller makes an affirmation of fact or promise that relates to the goods, or
14 provides a description that relates to the goods, or makes a remedial promise, in a medium for
15 communication to the public, such as advertising, and the remote purchaser enters into a transaction
16 of purchase with knowledge of and with the expectation that the goods will conform to the
17 affirmation of fact, promise, or description, or that the seller will perform the remedial promise, the
18 seller has an obligation to the remote purchaser that the goods will conform to the affirmation of fact,
19 promise or description or that the seller will perform the remedial promise unless a reasonable person
20 in the position of the remote purchaser would not believe that the affirmation of fact, promise or
21 description created an obligation.

22 (c) It is not necessary to the creation of an ~~express warranty~~ obligation under this

1 section that the seller use formal words such as "warrant" or "guarantee" or that the seller have a
2 specific intention to undertake an obligation, but an affirmation merely of the value of the goods or
3 a statement purporting to be merely the seller's opinion or commendation of the goods does not
4 create an obligation.

5 (d) The following rules apply to the remedies for breach of an ~~express warranty~~
6 obligation created under this section:

7 (1) Damages may be proved in any manner that is reasonable. Unless special
8 circumstances show proximate damages of a different amount, the measure of damages if the goods
9 do not conform to an affirmation of fact, promise or description is the value of the goods if they had
10 been as represented less the value of the goods as delivered, and the measure of damages for breach
11 of a remedial promise is the value of the promised remedial performance less the value of any
12 remedial performance completed.

13 (2) The seller may modify or limit the remedies available to the remote
14 purchaser if the modification or limitation is furnished to the remote purchaser no later than the time
15 of purchase. The modification or limitation may be furnished as part of the communication that
16 ~~creates the obligation~~ contains the affirmation of fact, promise or description.

17 (3) Subject to a modification or limitation of remedy, a seller in breach is liable
18 for incidental or consequential damages under Section 2-715 but the seller is not liable for lost profits.

19 (e) An ~~express warranty~~ obligation that is not a remedial promise is breached if the
20 goods did not conform to the affirmation of fact, promise or description creating the obligation when
21 the goods left the seller's control.

22 *[Reporter's Note – This section contains the media-created express warranty obligations to remote*

1 *parties. I have drafted it to parallel section 2-313A as closely as possible. Even though the*
2 *provisions are consistent with those set forth in section 2-313A, they are placed in a separate section*
3 *to stress the differences.]*

4 **SECTION 2–314. IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF**
5 **TRADE.**

6 (a) Unless excluded or modified (Section 2–316), a warranty that the goods shall be
7 merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of
8 that kind. Under this section the serving for value of food or drink to be consumed either on the
9 premises or elsewhere is a sale.

10 (b) Goods to be merchantable must be at least such as

11 (1) pass without objection in the trade under the contract description; and

12 (2) in the case of fungible goods, are of fair average quality within the
13 description; and

14 (3) are fit for the ordinary purposes for which goods of that description are
15 used; and

16 (4) run, within the variations permitted by the agreement, of even kind, quality
17 and quantity within each unit and among all units involved; and

18 (5) are adequately contained, packaged, and labeled as the agreement may
19 require; and

20 (6) conform to the promises or affirmations of fact made on the container or
21 label if any.

22 (c) Unless excluded or modified (Section 2–316) other implied warranties may arise

1 from course of dealing or usage of trade.

2 *[Reporter's Note – The only change from original Article 2 is the use of “goods of that description”*
3 *rather than “such goods” in subsection (b)(3). The substituted language comes from the July draft.]*

4 **SECTION 2–315. IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE.**

5 Where the seller at the time of contracting has reason to know any particular purpose
6 for which the goods are required and that the buyer is relying on the seller's skill or judgment to select
7 or furnish suitable goods, there is unless excluded or modified under the next section an implied
8 warranty that the goods shall be fit for such purpose.

9 *[Reporter's Note – There is no change from current law.]*

10 **SECTION 2–316. DISCLAIMER OR MODIFICATION OF WARRANTIES.**

11 (a) Words or conduct relevant to the creation of an express warranty and words or
12 conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with
13 each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2–202)
14 negation or limitation is inoperative to the extent that such construction is unreasonable.

15 (b) Notwithstanding subsection (c), unless the circumstances indicate otherwise, all
16 implied warranties are disclaimed by expressions such as “as is” or “with all faults” or similar
17 language or conduct which in common understanding make it clear to the buyer that the seller
18 assumes no responsibility for the quality or fitness of the goods. In a consumer contract evidenced
19 by a record, the requirements of this subsection must be satisfied by conspicuous language in the
20 record.

21 (c) Subject to subsection (b), to disclaim or modify an implied warranty of
22 merchantability or fitness, or any part of either implied warranty, the following rules apply:

1 (1) In a contract other than a consumer contract, the language is sufficient if:

2 (A) in the case of an implied warranty of merchantability, it mentions
3 merchantability; and

4 (B) in the case of an implied warranty of fitness, the language states,
5 for example, “There are no warranties that extend beyond the description on the face hereof.”

6 (2) In a consumer contract, the language must be in a record and be
7 conspicuous and:

8 (A) in the case of an implied warranty of merchantability, state “The
9 seller makes no representations about and is not responsible for the quality of the goods, except as
10 otherwise provided in this contract”; and

11 (B) in the case of an implied warranty of fitness, state “The seller makes
12 no representations that the goods will be fit for any particular purpose for which you may be buying
13 these goods, except as otherwise provided in the contract.”

14 (3) Language that is sufficient to disclaim or modify an implied warranty under
15 paragraph (2) is also sufficient to disclaim or modify an implied warranty under paragraph (1).

16 (d) An implied warranty may also be disclaimed or modified by course of
17 performance, course of dealing, or usage of trade.

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

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

2-718 and 2-719).

[Reporter's Note – This provision is essentially the same as the July draft (as modified by the errata sheet distributed in Denver).]

**SECTION 2–317. CUMULATION AND CONFLICT OF WARRANTIES EXPRESS
OR IMPLIED.**

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. 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 displaces inconsistent general language of description.

(3) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

[Reporter's Note – There is no change from existing law.]

**SECTION 2–318. THIRD PARTY BENEFICIARIES OF WARRANTIES EXPRESS
OR IMPLIED, WARRANTY OBLIGATIONS, AND REMEDIAL PROMISES.**

(a) In this section:

(1) “Immediate buyer” means a buyer that ~~has~~ enters into a contract with the seller.

(2) “Remote purchaser” means a person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution.

1 **Alternative A to Subsection (b)**

2 (b) A seller's warranty whether express or implied to an immediate buyer, a seller's
3 remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section
4 2-313A or Section 2-313B ~~to a remote purchaser~~ extends to any natural person who is in the family
5 or household of the immediate buyer or the remote purchaser or who is a guest in the home of either
6 person if it is reasonable to expect that such person may use, consume or be affected by the goods
7 and who is injured in person by breach of the warranty, remedial promise or obligation. A seller may
8 not exclude or limit the operation of this section.

9 **Alternative B to Subsection (b)**

10 (b) A seller's warranty whether express or implied to an immediate buyer, a seller's
11 remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section
12 2-313A or Section 2-313B ~~to a remote purchaser~~ extends to any natural person who may reasonably
13 be expected to use, consume or be affected by the goods and who is injured in person by breach of
14 the warranty, remedial promise or obligation. A seller may not exclude or limit the operation of this
15 section.

16 **Alternative C to Subsection (b)**

17 (b) A seller's warranty whether express or implied to an immediate buyer, a seller's
18 remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under Section
19 2-313A or Section 2-313B ~~to a remote purchaser~~ extends to any person who may reasonably be
20 expected to use, consume or be affected by the goods and who is injured by breach of the warranty,
21 remedial promise or obligation. A seller may not exclude or limit the operation of this section with
22 respect to injury to the person of an individual to whom the warranty, remedial promise or obligation

extends.

[Reporter's Note – This section retains the existing Code's approach to issues of (at least) horizontal privity but adapts them in light of new sections 2-313A and 2-313B.]

SECTION 2–319. SHIPMENT TERMS; SOURCE OF MEANING.

The effect of a party's use of shipment terms such as “FOB”; or “CIF” must be interpreted in light of any applicable usage of trade or course of performance or course of dealing between the parties.

[Reporter's Note – This is a slightly modified version of Section 2-309 from the July draft. This is a necessary change, as the existing definitions of shipping terms are woefully outdated and do not reflect modern practice.]

SECTIONS 2–320 THROUGH 2-324.

Reserved.

SECTION 2–325. FAILURE TO PAY BY AGREED LETTER OF CREDIT.

If the parties agree that the primary method of payment will be by letter of credit, the following rules apply:

(1) 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 undertake to pay against presentation of documents evidencing delivery.

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

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

[Reporter's Note – This is section 2-308 from the July draft. This revision conforms to revised Article 5.]

1 **SECTION 2–326. SALE ON APPROVAL AND SALE OR RETURN;**
2 **CONSIGNMENT SALES AND RIGHTS OF CREDITORS.**

3 (a) Unless otherwise agreed, if delivered goods may be returned by the buyer even
4 though they conform to the contract, the transaction is

5 (1) a "sale on approval" if the goods are delivered primarily for use, and

6 (2) a "sale or return" if the goods are delivered primarily for resale.

7 (b) Goods held on approval are not subject to the claims of the buyer's creditors until
8 acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

9 (c) Any "or return" term of a contract for sale is to be treated as a separate contract
10 for sale within the statute of frauds section of this Article (Section 2–201) and as contradicting the
11 sale aspect of the contract within the provisions of this Article on parol or extrinsic evidence (Section
12 2–202).

13 *[Reporter's Note – This is section 2-326 as amended by revised Article 9.]*

14 **SECTION 2–327. SPECIAL INCIDENTS OF SALE ON APPROVAL AND SALE OR**
15 **RETURN.**

16 (a) Under a sale on approval unless otherwise agreed

17 (1) although the goods are identified to the contract the risk of loss and the
18 title do not pass to the buyer until acceptance; and

19 (2) use of the goods consistent with the purpose of trial is not acceptance but
20 failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods
21 conform to the contract acceptance of any part is acceptance of the whole; and

(3) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

(b) Under a sale or return unless otherwise agreed

(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.

[Reporter's Note – There is no change in current law.]

SECTION 2–328. 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 other customary manner. Where a bid is made during the process of completing the sale but before a previous bid is accepted, the auctioneer has discretion to reopen the bidding or to declare the goods sold under the previous bid.

(c) A sale by auction is subject to the seller's right 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 right to withdraw the goods is not reserved. In an auction in which the right to withdraw the goods is reserved, the auctioneer may withdraw the goods at any time until completion of the sale is announced by the auctioneer. In an auction in which the right to withdraw the goods is not reserved, after the auctioneer calls for bids on an article or lot, the article or lot cannot 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

1 previous bid.

2 (d) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes
3 or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the
4 buyer may at its option avoid the sale or take the goods at the price of the last good faith bid prior
5 to the completion of the sale. This subsection shall not apply to any bid at an auction required by law.

6 *[Reporter's Note – This section is an amalgamation of original Article 2 and the July draft.*
7 *Stylistically, original Article 2 is followed whenever possible. Retained from the revision draft are*
8 *“process of completing the sale” rather than “hammer falling” (subsection (b)), “right to withdraw*
9 *the goods” rather than “with reserve” (subsection (c)), and “sale required by law” rather than*
10 *“forced sale” (subsection (d)).]*

11 **PART 4**

12 **TITLE, CREDITORS AND GOOD FAITH PURCHASERS**

13 **SECTION 2–401. PASSING OF TITLE; RESERVATION FOR SECURITY;** 14 **LIMITED APPLICATION OF THIS SECTION.**

15 Each provision of this Article with regard to the rights, obligations and remedies of
16 the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods
17 except where the provision refers to such title. Insofar as situations are not covered by the other
18 provisions of this Article and matters concerning title become material the following rules apply:

19 (1) Title to goods cannot pass under a contract for sale prior to their
20 identification to the contract (Section 2–501), and unless otherwise explicitly agreed the buyer
21 acquires by their identification a special property as limited by this Act. Any retention or

1 reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited
2 in effect to a reservation of a security interest. Subject to these provisions and to the provisions
3 of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the
4 buyer in any manner and on any conditions explicitly agreed on by the parties.

5 (2) Unless otherwise explicitly agreed title passes to the buyer at the time
6 and place at which the seller completes performance with reference to the delivery of the goods,
7 despite any reservation of a security interest and even though a document of title is to be delivered
8 at a different time or place; and in particular and despite any reservation of a security interest by
9 the bill of lading

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

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

15 (3) Unless otherwise explicitly agreed where delivery is to be made without
16 moving the goods,

17 (A) if the seller is to deliver a document of title, title passes at the
18 time when and the place where the seller delivers such documents; or

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

21 (4) A rejection or other refusal by the buyer to receive or retain the goods,
22 whether or not justified, or a justified revocation of acceptance revests title to the goods in the

1 seller. Such reversioning occurs by operation of law and is not a "sale".

2 *[Reporter's Note – In subsection (2), "physical delivery" has been changed to "delivery"*
3 *because we define "delivery" in section 2-103(15) as "the voluntary transfer of physical*
4 *possession or control of goods".]*

5 **SECTION 2-402. RIGHTS OF SELLER'S CREDITORS AGAINST SOLD**
6 **GOODS.**

7 (a) Except as provided in subsections (b) and (c), rights of unsecured creditors of
8 the seller with respect to goods which have been identified to a contract for sale are subject to the
9 buyer's rights to recover the goods under this Article (Sections 2-502 and 2-716).

10 (b) A creditor of the seller may treat a sale or an identification of goods to a
11 contract for sale as void if as against the creditor a retention of possession by the seller is
12 fraudulent under any rule of law of the state where the goods are situated, except that retention of
13 possession in good faith and current course of trade by a merchant-seller for a commercially
14 reasonable time after a sale or identification is not fraudulent.

15 (c) Except as provided in Section 2-403(b), ~~Nothing~~ in this Article shall be
16 deemed to impair the rights of creditors of the seller

17 (1) under the provisions of the Article on Secured Transactions (Article 9);
18 or

19 (2) where identification to the contract or delivery is made not in current
20 course of trade but in satisfaction of or as security for a pre-existing claim for money, security or
21 the like and is made under circumstances which under any rule of law of the state where the goods
22 are situated would apart from this Article constitute the transaction a fraudulent transfer or
23 voidable preference.

1 *[Reporter's Note – This section remains unchanged except for gender neutral language. The*
2 *added language in subsection (c) is necessary because the revision of Section 2-403(b) has the*
3 *effect of impairing the rights of a secured party.]]*

4 **SECTION 2-403. POWER TO TRANSFER; GOOD FAITH PURCHASE OF**
5 **GOODS; "ENTRUSTING".**

6 (a) A purchaser of goods acquires all title which the purchaser's transferor had or
7 had power to transfer except that a purchaser of a limited interest acquires rights only to the
8 extent of the interest purchased. A person with voidable title has power to transfer a good title to
9 a good faith purchaser for value. When goods have been delivered under a transaction of
10 purchase the purchaser has such power even though

11 (1) the transferor was deceived as to the identity of the purchaser, or

12 (2) the delivery was in exchange for a check which is later dishonored, or

13 (3) it was agreed that the transaction was to be a "cash sale", or

14 (4) the delivery was procured through criminal fraud.

15 (b) Any entrusting of goods to a merchant who deals in goods of that kind gives
16 the merchant power to transfer all of the entruster's rights to the goods and to transfer the goods
17 free of any interest of the entruster to a buyer in ordinary course of business.

18 (c) "Entrusting" includes any delivery and any acquiescence in retention of
19 possession regardless of any condition expressed between the parties to the delivery or
20 acquiescence and regardless of whether the procurement of the entrusting or the possessor's
21 disposition of the goods have been such as to be punishable under the criminal law.

22 (d) The rights of other purchasers of goods and of lien creditors are governed by
23 the Articles on Secured Transactions (Article 9), [Bulk Sales (Article 6): if the state retains the

remnants of Article 6] and Documents of Title (Article 7).

[Reporter's Note – References to "larceny", a somewhat dated term, have been replaced in subsections (a) and (c) by more general language referring to "criminal fraud" (subsection (a)) and conduct "punishable under the criminal law" (subsection (c)).]

[Reporter's Note – Subsection (b) has been modified to conform with Revised Article 9's treatment of "remote entrusting" (Revised 9-315(a)).]

PART 5

PERFORMANCE

SECTION 2–501. INSURABLE INTEREST IN GOODS; MANNER OF IDENTIFICATION OF GOODS.

(a) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and the buyer has an option to return or reject them. Such identification can 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 it is for the sale of goods already existing and identified;

(2) if the contract is for the sale of future goods other than those described in paragraph (3), when 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 or the

1 young are conceived if the contract is for the sale of unborn young to be born within twelve
2 months after contracting or for the sale of crops to be harvested within twelve months or the next
3 normal harvest season after contracting whichever is longer.

4 (b) The seller retains an insurable interest in goods so long as title to or any
5 security interest in the goods remains in the seller and where the identification is by the seller
6 alone the seller may until default or insolvency or notification to the buyer that the identification is
7 final substitute other goods for those identified.

8 (c) Nothing in this section impairs any insurable interest recognized under any
9 other statute or rule of law.

10 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

11 **SECTION 2-502. BUYER'S RIGHT TO GOODS ON SELLER'S REPUDIATION,**
12 **FAILURE TO DELIVER OR INSOLVENCY.**

13 (a) Subject to subsections (b) and (c) and even though the goods have not been
14 shipped a buyer who has paid a part or all of the price of goods in which the buyer has a special
15 property under the provisions of the immediately preceding section may on making and keeping
16 good a tender of any unpaid portion of their price recover them from the seller if

17 (1) in the case of goods bought for personal, family, or household
18 purposes, the seller repudiates or fails to deliver as required by the contract; or

19 (2) in all cases, the seller becomes insolvent within ten days after receipt of
20 the first installment on their price.

21 (b) The buyer's right to recover the goods under subsection (a)~~(1)~~ vests upon
22 acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(c) If the identification creating the special property has been made by the buyer, the buyer acquires the right to recover the goods only if they conform to the contract for sale.

[Reporter's Note – This section is derived from a conforming amendment to Article 2 that was promulgated as part of the Article 9 revision process.]

[Reporter's Note – Because Section 2-402 is limited to the rights of unsecured creditors, a comment along the following lines may be helpful in each of the referenced sections: “This rule assumes application of a ‘first in time’ priority rule. In other words, if the buyer’s rights vest under this rule before a creditor acquires an in rem right to the goods, including an Article 9 security interest and a lien created by levy, the buyer should prevail.”]

[Reporter's Note – The revision of the cross-reference in subsection (b) corrects a mistake that was never intended. There needs to be a clear vesting rule for all cases within subsection (a).]

SECTION 2-503. MANNER OF SELLER'S TENDER OF DELIVERY.

(a) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable the buyer to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

(1) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(2) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(b) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.

(c) Where the seller is required to deliver at a particular destination tender requires that the seller comply with subsection (a) and also in any appropriate case tender documents as described in subsections (d) and (e) of this section.

(d) Where goods are in the possession of a bailee and are to be delivered without being moved

(1) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee to the buyer of the buyer's right to possession of the goods; but

(2) tender to the buyer of a nonnegotiable document of title or of a record directing the bailee to deliver is sufficient tender unless the buyer seasonably objects, and except as otherwise provided in Article 9 receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(e) Where the contract requires the seller to deliver documents

(1) the seller must tender all such documents in correct form; and

(2) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes nonacceptance or rejection.

[Reporter's Note – Consistent with the July draft, subsection (d)(1) clarifies that the bailee's acknowledgment must be made to the buyer. See Jason's Foods, Inc. v. Peter Eckrick & Sons, Inc., 774 F.2d 214 (7th Cir. 1985). See similar amendment to Section 2-509(b)(3)(B).]

[Reporter's Note – Subsection (d)(2) has the following changes from current law: "of a written direction to the bailee" is changed to "a record directing the bailee"; and, the phrase "except as otherwise provided in Article 9" has been added to bring this subsection in line with the recent revisions to Article 9 (Revised 9-313).]

[Reporter's Note – The present version of what is now designated as subsection (e)(2) has the language "except as provided in this Article with respect to bills of lading in a set (subsection

1 (2) of Section 2–323". This has been deleted because we have not retained section 2-323.
2 However, we intend to draft a comment that refers to bills in a set and indicates that if they are
3 used they must be in "correct form" (emphasizing the language of subsection (e)(1)).]

4 **SECTION 2-504. SHIPMENT BY SELLER.**

5 Where the seller is required or authorized to send the goods to the buyer and the
6 contract does not require the seller to deliver them at a particular destination, then unless
7 otherwise agreed the seller must

8 (1) put ~~the~~ conforming goods in the possession of such a carrier and make such a
9 contract for their transportation as may be reasonable having regard to the nature of the goods
10 and other circumstances of the case; and

11 (2) obtain and promptly deliver or tender in due form any document necessary to
12 enable the buyer to obtain possession of the goods or otherwise required by the agreement or by
13 usage of trade; and

14 (3) promptly notify the buyer of the shipment.
15 Failure to notify the buyer under paragraph (3) or to make a proper contract under paragraph (1)
16 is a ground for rejection only if material delay or loss ensues.

17 [Reporter's Note – This section remains unchanged except for gender neutral language. The
18 addition of the word "conforming" in paragraph (1) clarifies the relationship between the
19 perfect tender rule in the context of a seller's obligations with respect to a shipment contract.]

20 **SECTION 2-505. SELLER'S SHIPMENT UNDER RESERVATION.**

21 (a) Where the seller has identified goods to the contract by or before shipment:

22 (1) the seller's procurement of a negotiable bill of lading to the seller's
23 own order or otherwise reserves in the seller a security interest in the goods. The seller's
24 procurement of the bill to the order of a financing agency or of the buyer indicates in addition only

1 the seller's expectation of transferring that interest to the person named.

2 (2) a nonnegotiable bill of lading to the seller or the seller's nominee
3 reserves possession of the goods as security but except in a case of conditional delivery
4 (subsection (b) of Section 2–507) a nonnegotiable bill of lading naming the buyer as consignee
5 reserves no security interest even though the seller retains possession of the bill of lading.

6 (b) When shipment by the seller with reservation of a security interest is in
7 violation of the contract for sale it constitutes an improper contract for transportation within the
8 preceding section but impairs neither the rights given to the buyer by shipment and identification
9 of the goods to the contract nor the seller's powers as a holder of a negotiable document.

10 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

11 **SECTION 2–506. RIGHTS OF FINANCING AGENCY.**

12 (a) Except as otherwise provided in Article 5, ~~A~~ a financing agency by paying or
13 purchasing for value a draft which relates to a shipment of goods acquires to the extent of the
14 payment or purchase and in addition to its own rights under the draft and any document of title
15 securing it any rights of the shipper in the goods including the right to stop delivery and the
16 shipper's right to have the draft honored by the buyer.

17 (b) Except as otherwise provided in Article 5, the right to reimbursement of a
18 financing agency which has in good faith honored or purchased the draft under commitment to or
19 authority from the buyer is not impaired by subsequent discovery of defects with reference to any
20 relevant document which was apparently regular on its face.

21 *[Reporter's Note - This section remains unchanged except that it now explicitly provides that*
22 *Article 5 governs in the event of a conflict. The cross-reference to Article 5 is needed in both*
23 *subsections.*

1 **SECTION 2-507. EFFECT OF SELLER'S TENDER; DELIVERY ON**
2 **CONDITION.**

3 (a) Tender of delivery is a condition to the buyer's duty to accept the goods and,
4 unless otherwise agreed, to the buyer's duty to pay for them. Tender entitles the seller to
5 acceptance of the goods and to payment according to the contract.

6 (b) Where payment is due and demanded on the delivery to the buyer of goods or
7 documents of title, the seller may reclaim the goods delivered upon a demand made within a
8 reasonable time after the seller discovers or should have discovered that payment was not made.

9 (c) The seller's right to reclaim under subsection (b) is subject to the rights of a
10 buyer in ordinary course or other good faith purchaser.

11 *[Reporter's Note – Subsection (a) remains unchanged except for gender neutral language. A*
12 *comment such as the following should be added to this section: "If the seller has agreed to*
13 *assemble or install the tendered goods, completion of that performance is also a condition to the*
14 *buyer's duty to accept and pay for the goods." This comes from the black letter text of the July*
15 *draft.]*

16 *[Reporter's Note – Subsection (b) has been changed to state more directly the seller's right of*
17 *reclamation from a nonpaying buyer in a cash-sale transaction. The current provision says this*
18 *very indirectly: "the buyer's right as against the seller to retain or dispose of them is conditional*
19 *upon the buyer making the payment due." The revision makes subsection 2-507(b) parallel to*
20 *subsection 2-702(b), as it was always intended to be. Because the buyer is actually in breach in*
21 *the cash sale situation, as opposed to the insolvency situation, there is no reason to put the seller*
22 *to an election of remedies here.]*

23 *[Reporter's Note – A comment should clarify that "due and demanded" in subsection (b), which*
24 *is from the current law, refers to the situation where the seller takes a check for payment.]*

25 **SECTION 2-508. CURE BY SELLER OF IMPROPER TENDER OR DELIVERY;**
26 **REPLACEMENT.**

27 (a) Where the buyer rejects goods or a tender of delivery under Section 2-601 or

1 Section 2-612 or {except in a consumer contract} justifiably revokes acceptance under Section
2 2-608(a)(2) and the agreed time for performance has not expired, ~~the~~ a seller that performs in
3 good faith, upon seasonable notice to the buyer and at the seller's own expense, may cure the
4 breach of contract by making a conforming tender of delivery within the agreed time. The seller
5 shall compensate the buyer for all of the buyer's reasonable expenses caused by the seller's breach
6 and subsequent cure.

7 (b) Where the buyer rejects goods or a tender of delivery under Section 2-601 or
8 Section 2-612 or {except in a consumer contract} justifiably revokes acceptance under Section
9 2-608(a)(2) and the agreed time for performance has expired, ~~the~~ a seller that performs in good
10 faith, upon seasonable notice to the buyer and at the seller's own expense, may cure the breach of
11 contract, if the cure is appropriate and timely under the circumstances, by making a tender of
12 conforming goods. The seller shall compensate the buyer for all of the buyer's reasonable
13 expenses caused by the seller's breach and subsequent cure.

14 *[Reporter's Note – Current 2-508(2) provides that the seller may cure after the time of*
15 *performance has run if “the seller had reasonable grounds to believe” the goods or tender*
16 *would be acceptable. This standard has created problems because it focuses on the seller's*
17 *reasonable beliefs to the exclusion of the buyer's rights, expectations and inconveniences.*
18 *Courts have, of course, filled this gap, but this is an area where it is appropriate for us to*
19 *clarify. Thus, the proposed new standard is: “if the cure is appropriate and timely under the*
20 *circumstances”. This language comes from the July draft. In addition, this draft states*
21 *explicitly what current law only implies: that subsection(b) deals with cure after the time of*
22 *performance has expired.*

23 *The requirement that a seller be in good faith to be entitled to cure has been added to*
24 *exclude from the protection of this section a seller that in bad faith tenders nonconforming*
25 *goods to preserve a contract.*

26 *[Reporter's Note – A comment should be added indicating what should be obvious – that the*
27 *rejection must be rightful or the revocation justifiable for this section to be triggered. In the*
28 *case of a wrongful but effective rejection there is no breach by the seller to be cured. This point*
29 *is reinforced by the language in the last sentence of each subsection (“seller's breach and*

1 *subsequent cure”.]*

2 *[Reporter’s Note – Consistent with the July draft, this draft accepts as a default rule a seller’s*
3 *right to cure following a revocation of acceptance under section 2-608(a)(2). The bracketed*
4 *language permits us to discuss whether the default rule should be otherwise in consumer*
5 *contracts.]*

6 *[Reporter’s Note – This draft clarifies that even though the breach has been cured the buyer is*
7 *entitled to compensation for the reasonable expenses caused by the seller’s breach and*
8 *subsequent cure. A comment should clarify that such expenses might go beyond incidental*
9 *damages.]*

10 ~~*[Reporter’s Note – The consumer exception for the seller’s right to cure after justifiable*~~
11 ~~*revocation has been bracketed for further discussion.]*~~

12 **SECTION 2-509. RISK OF LOSS IN THE ABSENCE OF BREACH.**

13 (a) This section is subject to the contrary agreement of the parties and to Section
14 2-327 and Section 2-510.

15 (b) Risk of loss passes to the buyer regardless of the conformity of the goods to
16 the contract as follows:

17 (1) Except as otherwise provided in this subsection, the risk of loss passes
18 to a buyer upon receipt of the goods. ~~If a buyer does not intend to take possession, the risk of~~
19 ~~loss passes when the buyer receives control of the goods~~ delivery.

20 (2) If the contract requires or authorizes the seller to ship goods by carrier,
21 the following rules apply:

22 (A) If the contract does not require delivery at a particular
23 destination, the risk of loss passes to the buyer when the goods are delivered to the carrier and the
24 seller complies with ~~subsection (b) of Section 2-503 and~~ Section 2-504, even if the shipment is
25 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 the goods are tendered in the manner required by subsection (c) of Section 2-503.

(3) If the 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 subsection (d)(2) of Section 2-503.

[Reporter's Note – A change has been made in subsection (b)(1) because “delivery” is defined in this draft to mean either physical receipt or control of the goods.]

[Reporter's Note – There is nothing substantive in 2-503(b) and therefore the citation to that subsection in (b)(2)(A) may cause confusion.]

[Reporter's Note – This is taken ~~directly~~ from the July draft with only the most minor, nonsubstantive changes. However, I have taken the last subsection of the July draft and have carved it out into a separate section (what was one section in the July draft has now been retained as two sections as in the current law).

As for the reasons for the changes from current law, I have reproduced here the rationale given in that draft:

“This section is derived from former Sections 2-509 and 2-510 but has made several substantive changes in the rules regarding passage from the seller to the buyer of the risk of loss for the goods. 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)[now the new Section 2-510]. Thus the conformity or nonconformity of the

1 *goods to the contract is not relevant to the passage of the risk of loss for the goods except*
2 *as provided in subsection (c) [Section 2-510]. Whether one or both parties have insured*
3 *against the loss is not relevant to determine who has the risk of loss for the goods.*

4 *The effect of the seller having the risk of loss for the goods is that if the goods are lost or*
5 *damaged, the seller must still deliver goods conforming to the contract or answer in*
6 *damages for breach of contract. Similarly, if the buyer has the risk of loss for the goods,*
7 *the buyer must perform its obligations under the contract or answer in damages for*
8 *breach of contract. Of course, the obligations of either the buyer or the seller may be*
9 *excused in an appropriate case under [Sections 2-613 through 2-616] on excuse.*

10 *Subsection (a) continues the rule that the risk of loss rules in this section are subject to*
11 *the rules on risk of loss found in [Section 2-327] for sale on approval or sale and*
12 *return.”]*

13 **SECTION 2-510. EFFECT OF BREACH ON RISK OF LOSS.**

14 A breach of contract by either party affects risk of loss only in the following cases:

15 (1) If the buyer rightfully rejects or justifiably revokes acceptance of the
16 goods, the seller in a consumer contract has the risk of loss from the time the rejection or
17 revocation is effective; otherwise, unless the seller has cured, the seller has the risk of loss after a
18 commercially reasonable time after the rejection or revocation is effective.

19 (2) If the seller has tendered nonconforming goods so that the buyer
20 would have the right to reject or revoke acceptance of the goods, the goods are damaged or lost
21 before the buyer effectively rejects or revokes acceptance, and the risk of loss would have
22 otherwise passed to the buyer under Section 2-509, the seller has the risk of loss to the extent the
23 nonconformity of the goods caused the damage or loss.

24 (3) If conforming goods are identified to the contract when the buyer
25 breaches and the risk of loss has not otherwise passed to the buyer, the buyer has the risk of loss
26 for those goods for a commercially reasonable time after the breach.

1 *[Reporter's Note – The changes to subsection (a) reflect a concern that the seller's insurance*
2 *may not cover the goods after delivery and that in a nonconsumer contract it is reasonable to*
3 *expect the buyer to carry adequate insurance.]*

4 *[Reporter's Note – The explanation for the other changes in this section are noted in the*
5 *Reporter's Note to section 2-509.]*

6 **SECTION 2-511. TENDER OF PAYMENT BY BUYER; PAYMENT BY CHECK.**

7 (a) Unless otherwise agreed tender of payment is a condition to the seller's duty to
8 tender and complete any delivery.

9 (b) Tender of payment is sufficient when made by any means or in any manner
10 current in the ordinary course of business unless the seller demands payment in legal tender and
11 gives any extension of time reasonably necessary to procure it.

12 (c) Subject to the provisions of this Act on the effect of an instrument on an
13 obligation (Section 3-310), payment by check is conditional and is defeated as between the
14 parties by dishonor of the check on due presentment.

15 *[Reporter's Note – This section remains unchanged.]*

16 **SECTION 2-512. PAYMENT BY BUYER BEFORE INSPECTION.**

17 (a) Where the contract requires payment before inspection nonconformity of the
18 goods does not excuse the buyer from so making payment unless

19 (1) the nonconformity appears without inspection; or
20 (2) despite tender of the required documents the circumstances would
21 justify injunction against honor under this Act (Section 5-109(b)).

22 (b) Payment pursuant to subsection (a) does not constitute an acceptance of goods
23 or impair the buyer's right to inspect or any of the buyer's remedies.

1 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

2 **SECTION 2-513. BUYER'S RIGHT TO INSPECTION OF GOODS.**

3 (a) Unless otherwise agreed and subject to subsection (c), where goods are
4 tendered or delivered or identified to the contract for sale, the buyer has a right before payment or
5 acceptance to inspect them at any reasonable place and time and in any reasonable manner. When
6 the seller is required or authorized to send the goods to the buyer, the inspection may be after
7 their arrival.

8 (b) Expenses of inspection must be borne by the buyer but may be recovered from
9 the seller if the goods do not conform and are rejected.

10 (c) Unless otherwise agreed the buyer is not entitled to inspect the goods before
11 payment of the price when the contract provides

12 (1) for delivery on terms that under applicable course of performance,
13 course of dealing, or usage of trade are interpreted to preclude inspection before payment; or

14 (2) for payment against documents of title, except where such payment is
15 due only after the goods are to become available for inspection.

16 (d) A place, method or standard of inspection fixed by the parties is presumed to
17 be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the
18 place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection
19 shall be as provided in this section unless the place, method or standard fixed was clearly intended
20 as an indispensable condition failure of which avoids the contract.

21 *[Reporter's Note – Subsection (d) now provides that, in addition to the place and method of*
22 *inspection, the parties may provide for the standard of inspection. This addition reflects the*
23 *large number of cases where there is a dispute about the standard of inspection anticipated by*

1 *the parties. The second sentence of subsection (d) is unchanged from current law. The*
2 *comments will note that the word “compliance” in that sentence means compliance with an*
3 *agreed mode of inspection.]*

4 *[Reporter’s Note – Subsection (c)(1) has been redrafted to acknowledge that we have removed*
5 *the sections on shipping terms (section 2-319 to 2-322) and are leaving the meaning of shipping*
6 *terms to the custom and usage employed by the parties.]*

7 **SECTION 2-514. WHEN DOCUMENTS DELIVERABLE ON ACCEPTANCE;**
8 **WHEN ON PAYMENT.**

9 Unless otherwise agreed and except as provided by Article 5, documents against
10 which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable
11 more than three days after presentment; otherwise, only on payment.

12 *[Reporter’s Note – I have added the phrase “and except as provide by Article 5”. This section is*
13 *designed to track section 4-503, which notes that Article 4 in this respect is also subject to a*
14 *contrary rule under Article 5. The specific question is what constitutes a time draft as opposed*
15 *to a sight draft. Under Article 5, because an issuer may have up to seven days to determine*
16 *compliance of documents (section 5-108), the delay beyond three days may not necessarily*
17 *indicate that the draft should be treated as a time draft.]*

18 **SECTION 2-515. PRESERVING EVIDENCE OF GOODS IN DISPUTE.**

19 In furtherance of the adjustment of any claim or dispute

20 (1) either party on reasonable notification to the other and for the purpose
21 of ascertaining the facts and preserving evidence has the right to inspect, test and sample the
22 goods including such of them as may be in the possession or control of the other; and

23 (2) the parties may agree to a third party inspection or survey to determine
24 the conformity or condition of the goods and may agree that the findings shall be binding upon
25 them in any subsequent litigation or adjustment.

26 *[Reporter’s Note – This section remains unchanged.]*

1 **PART 6**

2 **BREACH, REPUDIATION AND EXCUSE**

3 **SECTION 2–601. BUYER'S RIGHTS ON IMPROPER DELIVERY.**

4 Subject to the provisions of this Article on breach in installment contracts (Section
5 2–612) and shipment contracts (Section 2-504) and unless otherwise agreed under the sections on
6 contractual limitations of remedy (Sections 2–718 and 2–719), if the goods or the tender of
7 delivery fail in any respect to conform to the contract, the buyer may

8 (1) reject the whole; or

9 (2) accept the whole; or

10 (3) accept any commercial unit or units and reject the rest.

11 *[Reporter's Note – The only change is the addition of a cross-reference to Section 2-504 on*
12 *breach in shipment contracts. This makes no substantive change, but flags in this section that*
13 *there is a limitation on the perfect tender rule in section 2-504.]*

14 **SECTION 2–602. MANNER AND EFFECT OF REJECTION.**

15 (a) Rejection of goods must be within a reasonable time after their delivery or
16 tender. It is ineffective unless the buyer seasonably notifies the seller.

17 (b) Subject to subsection (d) of Section 2-608 and to Sections 2–603 and 2–604,

18 (1) after rejection any exercise of ownership by the buyer with respect to
19 any commercial unit is wrongful as against the seller; and

20 (2) if the buyer has before rejection taken physical possession of goods in
21 which the buyer does not have a security interest under the provisions of this Article (subsection
22 (c) of Section 2–711), the buyer is under a duty after rejection to hold them with reasonable care

1 at the seller's disposition for a time sufficient to permit the seller to remove them; but

2 (3) the buyer has no further obligations with regard to goods rightfully
3 rejected.

4 (c) The seller's rights with respect to goods wrongfully rejected are governed by
5 the provisions of this Article on seller's remedies in general (Section 2–703).

6 *[Reporter's Note – The title has been changed to eliminate the word “Rightful” before*
7 *“rejection” since the section deals with both effective and rightful rejections.]*

8 *[Reporter's Note – The only change in the text is a cross-reference to 2-608(d), which contains*
9 *the rule governing reasonable post-rejection and post-revocation use.]*

10 **SECTION 2–603. MERCHANT BUYER'S DUTIES AS TO REJECTED GOODS.**

11 (a) Subject to any security interest in the buyer (subsection (c) of Section 2–711),
12 when the seller has no agent or place of business at the market of rejection a merchant buyer is
13 under a duty after rejection of goods in its possession or control to follow any reasonable
14 instructions received from the seller with respect to the goods and in the absence of such
15 instructions to make reasonable efforts to sell them for the seller's account if they are perishable or
16 threaten to decline in value speedily. In the case of a rightful rejection instructions are not
17 reasonable if on demand indemnity for expenses is not forthcoming.

18 (b) When the buyer sells goods under subsection (a) following a rightful rejection,
19 the buyer is entitled to reimbursement from the seller or out of the proceeds for reasonable
20 expenses of caring for and selling them, and if the expenses include no selling commission then to
21 such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten
22 per cent on the gross proceeds.

23 (c) In complying with this section the buyer is held only to good faith and good

1 faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for
2 damages.

3 *[Reporter's Note – "Rightful" has been eliminated from the title (see Reporter's Note to 2-*
4 *602).]*

5 *[Reporter's Note – The only changes in the text are to clarify that the buyer is not entitled to*
6 *indemnity for expenses (subsection (a)) or to a commission (subsection (b)) following a wrongful*
7 *rejection.]*

8 *[Reporter's Note – Rather than incorporate references to revocation of acceptance in this*
9 *section, this draft continues the practice of tying the revoking buyer's rights into those of the*
10 *rejecting buyer. Notice that Section 2-608(c) contains an expanded cross-reference that includes*
11 *Sections 2-603 and 2-604. This approach has the added advantage of reducing the need to make*
12 *tenuous distinctions between justified revocations of acceptance and wrongful revocations (a*
13 *concept that exists only in atom smashers, where it can be observed for nanoseconds before*
14 *disappearing).]*

15 **SECTION 2-604. BUYER'S OPTIONS AS TO SALVAGE OF RIGHTFULLY**
16 **REJECTED GOODS.**

17 Subject to the provisions of this Article on the duties of a merchant buyer (Section
18 2-603), the buyer may store the rejected goods for the seller's account or reship them to the seller
19 or resell them for the seller's account with reimbursement as provided in the preceding section.
20 Such action is not acceptance or conversion.

21 *[Reporter's Note – The format (but not the effect) of the introductory clause has been changed.*
22 *The change emphasizes the fact that Section 2-604 is available to all buyers, including*
23 *nonmerchants. (The current language is "Subject to the provisions of the immediately preceding*
24 *section on perishables.")]*

25 **SECTION 2-605. WAIVER OF BUYER'S OBJECTIONS BY FAILURE TO**
26 **PARTICULARIZE.**

27 (a) The buyer's failure to state in connection with rejection a particular defect
28 which is ascertainable by reasonable inspection or in connection with revocation of acceptance a

known defect precludes the buyer from relying on the unstated defect to justify rejection or revocation of acceptance

(1) where the seller had a right to cure the defect (Section 2-508) and could have cured it if stated seasonably; or

(2) between merchants when the seller has after rejection or revocation of acceptance made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(b) A buyer's payment against documents tendered to the buyer made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

[Reporter's Note – Subsection (a) has been revised so that a failure to particularize waives only the right to rely on the unstated defect to justify the remedies of rejection and revocation of acceptance, not other remedies. This is consistent with revised section 2-607.]

[Reporter's Note – The addition of a reference to revocation in subsection (a) is necessitated by the expansion of the right to cure (section 2-508) to cover revocation in nonconsumer contracts.]

[Reporter's Note – Subsection (a)(1) has been revised to make it clear that the seller must have had both the right and the ability to cure (current law refers only to ability).]

[Reporter's Note – Subsection (b) has been revised to make clear that the buyer who makes payment upon presentation of the documents to the buyer may waive defects, but a person who is not the buyer (e.g., a letter-of-credit issuer) does not waive the buyer's right to assert defects in the documents as against the seller.]

SECTION 2–606. WHAT CONSTITUTES ACCEPTANCE OF GOODS.

(a) Acceptance of goods occurs when the buyer

(1) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or will be taken or retained in spite of their nonconformity; or

(2) fails to make an effective rejection (subsection (a) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(3) except as otherwise provided in Section 2-608(d), does any act inconsistent with the seller's ownership; but if such act is ratified by the seller it is an acceptance.

(b) Acceptance of a part of any commercial unit is acceptance of that entire unit.

[Reporter's Note – The only substantive change is a cross-reference to new Section 2-608(d), which deals with reasonable use following rejection or revocation of acceptance. The last clause of subsection (a)(3) has been revised to eliminate the word “wrongful”. That word is fully handled by the combination of 2-602(b)(1) and 2-608(d).]

**SECTION 2-607. EFFECT OF ACCEPTANCE; NOTICE OF BREACH;
BURDEN OF ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE OF
CLAIM OR LITIGATION TO PERSON ANSWERABLE OVER.**

(a) The buyer must pay at the contract rate for any goods accepted.

(b) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for nonconformity.

(c) Where a tender has been accepted

(1) the buyer must within a reasonable time after the buyer discovers or should have discovered any breach notify the seller; however, failure to give timely notice bars the buyer from a remedy only to the extent that the seller is prejudiced by the failure.

1 (2) if the claim is one for infringement or the like (subsection (c) of Section
2 2–312) and the buyer is sued as a result of such a breach it must so notify the seller within a
3 reasonable time after the buyer receives notice of the litigation or be barred from any remedy over
4 for liability established by the litigation.

5 (d) The burden is on the buyer to establish any breach with respect to the goods
6 accepted.

7 (e) Where the buyer is sued for indemnity, breach of a warranty or other obligation
8 for which another party is answerable over

9 (1) the buyer may give the other party notice of the litigation in a record.
10 If the notice states that the other party may come in and defend and that if the other party does
11 not do so it will be bound in any action against it by the buyer by any determination of fact
12 common to the two litigations, then unless the other party after seasonable receipt of the notice
13 does come in and defend it is so bound.

14 (2) if the claim is one for infringement or the like (subsection (c) of Section
15 2–312) the original seller may demand in a record that its buyer turn over to it control of the
16 litigation including settlement or else be barred from any remedy over and if it also agrees to bear
17 all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of
18 the demand does turn over control the buyer is so barred.

19 (f) The provisions of subsections (c), (d) and (e) apply to any obligation of a buyer
20 to hold the seller harmless against infringement or the like (subsection (c) of Section 2–312).

21 *[Reporter’s Note – There is a change in subsection (c)(1), where the effect of a failure to give*
22 *timely notice is reduced to a prejudice rule instead of an absolute bar to any recovery as under*
23 *the current provision.]*

1 *[Reporter's Note – Consistent with the July draft, the vouching-in procedure in subsection (e)*
2 *has been expanded to include indemnity actions and persons other than the seller who are*
3 *answerable over.]*

4 **SECTION 2–608. REVOCATION OF ACCEPTANCE IN WHOLE OR IN PART;**
5 **USE OF GOODS FOLLOWING RIGHTFUL REJECTION OR JUSTIFIABLE**
6 **REVOCATION OF ACCEPTANCE.**

7 (a) The buyer may revoke acceptance of a lot or commercial unit whose
8 nonconformity substantially impairs its value to the buyer if the buyer has accepted it

9 (1) on the reasonable assumption that its nonconformity would be cured
10 and it has not been seasonably cured; or

11 (2) without discovery of such nonconformity if the buyer's acceptance was
12 reasonably induced either by the difficulty of discovery before acceptance or by the seller's
13 assurances.

14 (b) Revocation of acceptance must occur within a reasonable time after the buyer
15 discovers or should have discovered the ground for it and before any substantial change in
16 condition of the goods which is not caused by their own defects. It is not effective until the buyer
17 notifies the seller of it.

18 (c) A buyer who so revokes has the same rights and duties with regard to the
19 goods involved as if the buyer had rejected them (subsection (b) of Section 2-602 and Sections 2-
20 603 and 2-604).

21 (d) If a buyer uses the goods after a rightful rejection or justifiable revocation of
22 acceptance, the following rules apply:

23 (1) Any use by the buyer that is unreasonable under the circumstances is

wrongful as against the seller and is an acceptance only if ratified by the seller (subsection (a)(3) of Section 2-606).

(2) Any use of the goods that is reasonable under the circumstances is not wrongful as against the seller and is not an acceptance, but in an appropriate case the buyer shall be obligated to the seller for the value of the use to the buyer.

[Reporter's Note – Subsection (c) contains an expanded cross-reference to provisions which, by their terms, deal with rejection.]

[Reporter's Note – Subsection (d), which is new, permits a buyer who rightfully rejects or justifiably revokes acceptance to make reasonable use of the goods and only be liable, where appropriate, for the value of the use. The language has been streamlined somewhat from the July draft. The Comments will need to flesh out the concept and give examples of circumstances where the buyer would not be obligated to pay for the use of the goods (e.g., where the use is solely for the purpose of protecting the buyer's security interest). The Comments will also clarify that the value that is being measured is the value to the buyer of nonconforming goods.]

SECTION 2-609. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.

(a) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in a record demand adequate assurance of due performance and until the party receives such assurance may if commercially reasonable suspend any performance for which it has not already received the agreed return.

(b) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(c) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

1 (d) After receipt of a justified demand failure to provide within a reasonable time
2 not exceeding thirty days such assurance of due performance as is adequate under the
3 circumstances of the particular case is a repudiation of the contract.

4 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

5 **SECTION 2–610. ANTICIPATORY REPUDIATION.**

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

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

11 (2) resort to any remedy for breach (Section 2–703 or Section 2–711),
12 even though the aggrieved party has notified the repudiating party that it would await the latter's
13 performance and has urged retraction; and

14 (3) in either case suspend performance or proceed in accordance with the
15 provisions of this Article on the seller's right to identify goods to the contract notwithstanding
16 breach or to salvage unfinished goods (Section 2–704).

17 (b) Repudiation includes language that a reasonable party would interpret to mean
18 that the other party will not or cannot make a performance still due under the contract or
19 voluntary, affirmative conduct that would appear to a reasonable party to make a future
20 performance by the other party impossible.

21 *[Reporter's Note – The only change of substance is the addition of subsection (b) from the July*
22 *draft.]*

1 **SECTION 2–611. RETRACTION OF ANTICIPATORY REPUDIATION.**

2 (a) Until the repudiating party's next performance is due that party can retract its
3 repudiation unless the aggrieved party has since the repudiation canceled or materially changed
4 position or otherwise indicated that the repudiation is final.

5 (b) Retraction may be by any method which clearly indicates to the aggrieved party
6 that the repudiating party intends to perform, but must include any assurance justifiably demanded
7 under the provisions of this Article (Section 2–609).

8 (c) Retraction reinstates the repudiating party's rights under the contract with due
9 excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

10 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

11 **SECTION 2–612. BREACH OF INSTALLMENT CONTRACT.**

12 (a) In an installment contract, the buyer may reject any installment which is
13 nonconforming if the nonconformity substantially impairs the value of that installment to the buyer
14 or if the nonconformity is a defect in the required documents; but if the nonconformity does not
15 fall within subsection (b) and the seller has a right to cure the defect (Section 2-508) and gives
16 adequate assurance of cure the buyer must accept that installment.

17 (b) Whenever nonconformity or default with respect to one or more installments
18 substantially impairs the value of the whole contract [to the buyer] there is a breach of the whole.
19 But the aggrieved party reinstates the contract if it accepts a nonconforming installment without
20 seasonably notifying of cancellation or if it brings an action with respect only to past installments
21 or demands performance as to future installments.

22 *[Reporter's Note – The title has been changed because the definition of installment contract now*

1 appears in 2-103. Concomitantly, current subsection (1), where installment contracts are
2 defined, has been deleted.]

3 [Reporter's Note – The bracketed words “to the buyer” in subsections (a) and (b) are added to
4 equate the standard for rejecting an installment with the standard for revocation of acceptance.
5 This language appears in the July draft.]

6 [Reporter's Note – Subsection (a) has been revised to clarify the relationship between this
7 section and the section on cure (section 2-508).]

8 [Reporter's Note – A comment will indicate that a buyer can reject a defective installment that is
9 not substantially nonconforming if there is a breach of the whole and the buyer also cancels the
10 contract.]

11 **SECTION 2–613. CASUALTY TO IDENTIFIED GOODS.**

12 Where the contract requires for its performance goods identified when the contract
13 is made and the goods suffer casualty without fault of either party before the risk of loss passes to
14 the buyer then

15 (1) if the loss is total the contract is terminated; and

16 (2) if the loss is partial or the goods have so deteriorated as no longer to
17 conform to the contract the buyer may nevertheless demand inspection and at its option either
18 treat the contract as terminated or accept the goods with due allowance from the contract price
19 for the deterioration or the deficiency in quantity but without further right against the seller.

20 [Reporter's Note – I have deleted the underlined part of the following text: “ before the risk of
21 loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2–324)”
22 because we have deleted section 2-324. A comment will be needed to make the same point.]

23 [Reporter's Note – Paragraphs (1) and (2) have been revised to use “terminated” rather than
24 the current law's “avoided”. This preserves pre-termination breaches, which I believe to be the
25 appropriate rule in this context.]

26 **SECTION 2–614. SUBSTITUTED PERFORMANCE.**

27 (a) Where without fault of either party the agreed berthing, loading, or unloading

1 facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery
2 otherwise becomes commercially impracticable but a commercially reasonable substitute is
3 available, such substitute performance must be tendered and accepted.

4 (b) If the agreed means or manner of payment fails because of domestic or foreign
5 governmental regulation, the seller may withhold or stop delivery unless the buyer provides a
6 means or manner of payment which is commercially a substantial equivalent. If delivery has
7 already been taken, payment by the means or in the manner provided by the regulation discharges
8 the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

9 *[Reporter's Note – There is no change from the current law.]*

10 **SECTION 2–615. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.**

11 Except so far as a seller may have assumed a greater obligation and subject to the
12 preceding section on substituted performance:

13 (1) Delay in performance or nonperformance in whole or in part by a seller
14 who complies with paragraphs (2) and (3) is not a breach of the seller's duty under a contract for
15 sale if performance as agreed has been made impracticable by the occurrence of a contingency the
16 nonoccurrence of which was a basic assumption on which the contract was made or by
17 compliance in good faith with any applicable foreign or domestic governmental regulation or
18 order whether or not it later proves to be invalid.

19 (2) Where the causes mentioned in paragraph (1) affect only a part of the
20 seller's capacity to perform, the seller must allocate production and deliveries among the seller's
21 customers but may at the seller's option include regular customers not then under contract as well
22 as the seller's own requirements for further manufacture. The seller may so allocate in any

1 manner which is fair and reasonable.

2 (3) The seller must notify the buyer seasonably that there will be delay or
3 nonperformance and, when allocation is required under paragraph (2), of the estimated quota thus
4 made available for the buyer.

5 *[Reporter's Note –subsection (1) is changed to cover delays “in performance or*
6 *nonperformance” rather than “in delivery or nondelivery.” This change reflects an*
7 *understanding of the broader range of obligations a seller may have other than the delivery of*
8 *the goods.]*

9 **SECTION 2–616. PROCEDURE ON NOTICE CLAIMING EXCUSE.**

10 (a) Where the buyer receives notification of a material or indefinite delay or an
11 allocation justified under Section 2-615 the buyer may by notification in a record to the seller as
12 to any delivery concerned, and where the prospective deficiency substantially impairs the value of
13 the whole contract under the provisions of this Article relating to breach of installment contracts
14 (Section 2–612), then also as to the whole,

15 (1) terminate and thereby discharge any unexecuted portion of the contract;
16 or

17 (2) modify the contract by agreeing to take its available quota in
18 substitution under Section 2-615.

19 (b) If after receipt of such notification from the seller the buyer fails so to modify
20 the contract within a reasonable time not exceeding thirty days the contract is terminated with
21 respect to any performance affected.

22 (c) The provisions of this section may not be negated by agreement except in so far
23 as the seller has assumed a greater obligation under the preceding section.

1 *[Reporter's Note – Consistent with section 2-613 (see Reporter's Note to that section),*
2 *subsection (b) is amended to refer to “termination” and “performance” rather than*
3 *“avoidance” and “delivery”.]*

4 **PART 7**

5 **REMEDIES**

6 **SECTION 2–701. REMEDIES FOR BREACH OF COLLATERAL CONTRACTS** 7 **NOT IMPAIRED.**

8 Remedies for breach of any obligation or promise collateral or ancillary to a
9 contract for sale are not impaired by the provisions of this Article.

10 *[Reporter's Note – This section remains unchanged.]*

11 **SECTION 2-702. SELLER'S REMEDIES ON DISCOVERY OF BUYER'S** 12 **INSOLVENCY.**

13 (a) Where the seller discovers the buyer to be insolvent the seller may refuse
14 delivery except for cash including payment for all goods theretofore delivered under the contract,
15 and stop delivery under this Article (Section 2–705).

16 (b) Where the seller discovers that the buyer has received goods on credit while
17 insolvent the seller may reclaim the goods upon demand made within a reasonable time after the
18 buyer's receipt of the goods. Except as provided in this subsection the seller may not base a right
19 to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent
20 to pay.

21 (c) The seller's right to reclaim under subsection (b) is subject to the rights of a

1 buyer in ordinary course or other good faith purchaser. Successful reclamation of goods under
2 this Section excludes all other remedies with respect to them.

3 *[Reporter's Note – Subsection (b) is changed from the current provision. Under the current law,*
4 *the seller must make the reclamation claim within 10 days of the buyer's receipt of the goods*
5 *(subject to an active misrepresentation of solvency, in which case the 10 day limitation does not*
6 *apply). A comment should remind sellers of the risk of delay in asserting their reclamation*
7 *claims in bankruptcy.]*

8 **SECTION 2-703. SELLER'S REMEDIES IN GENERAL.**

9 (a) A breach of contract by the buyer includes the buyer's wrongful rejection or
10 wrongful attempt to revoke acceptance of goods, wrongful failure to perform a contractual
11 obligation, failure to make a payment when due, or repudiation.

12 (b) If the buyer is in breach of contract the seller ~~or in breach of the whole contract~~
13 ~~under subsection (c) of Section 2-612~~, may:

- 14 (1) withhold delivery of the goods under subsection (a) of Section 2-702;
- 15 (2) stop delivery of the goods under Section 2-705;
- 16 (3) proceed with respect to good unidentified to the contract or unfinished
17 under Section 2-704;
- 18 (4) reclaim the goods under subsection (b) of Section 2-702;
- 19 (5) cancel (Section 2-106);
- 20 (6) resell and recover damages under Section 2-706;
- 21 (7) recover damages for nonacceptance or repudiation under subsection (a)
22 of Section 2-708;
- 23 (8) recover lost profits under subsection (b) of Section 2-708;
- 24 (9) recover the price under Section 2-709;

(10) obtain specific performance under Section 2-716;
(11) recover liquidated damages under Section 2-718;
(12) recover incidental and consequential damages under Section 2-710; or
(13) in a case not within any of the preceding paragraphs, recover damages
in any manner that is reasonable under the circumstances.

(c) If a buyer becomes insolvent but is not in breach of contract under subsection
(a), the seller may:

- (1) withhold delivery under subsection (a) of Section 2-702;
- (2) stop delivery of the goods under Section 2-705; or
- (3) reclaim the goods under subsection (b) of Section 2-702.

[(d) Unless the contract provides for liquidated damages enforceable under
Section 2-718 or a limited remedy under Section 2-719 an aggrieved party may not recover that
part of a loss resulting from a breach of contract that could have been avoided by reasonable
measures under the circumstances.]

*[Reporter's Note – This section is a substantial revision of current 2-703 and gives a laundry list
of the seller's remedies for breach. In addition, the section now states the seller's remedies upon
the buyer's insolvency. It also defines the buyer's statutory breaches (as opposed to
contractually defined breaches) with more specificity, although it is drafted to be inclusive
rather than exclusive.]*

*[Reporter's Note – The reference to breach of the whole has been deleted from subsection (b) as
unnecessary and potentially confusing. It suggests that there must be breach of the whole before
any of the listed remedies may be employed. There is a parallel change in 2-711.]*

*[Reporter's Note – A comment should indicate that subsection (b)(13), which is open-ended, is
designed to deal with remedies for contractually defined breaches.]*

[Reporter's Note – Subsection (d) is bracketed for discussion both here and in Section 2-711.]

1 **SECTION 2-704. SELLER'S RIGHT TO IDENTIFY GOODS TO THE**
2 **CONTRACT NOTWITHSTANDING BREACH OR TO SALVAGE UNFINISHED**
3 **GOODS.**

4 (a) An aggrieved seller under the preceding section may

5 (1) identify to the contract conforming goods not already identified if at the
6 time the seller learned of the breach they are in the seller's possession or control;

7 (2) treat as the subject of resale goods which have demonstrably been
8 intended for the particular contract even though those goods are unfinished.

9 (b) Where the goods are unfinished an aggrieved seller may in the exercise of
10 reasonable commercial judgment for the purposes of avoiding loss and of effective realization
11 either complete the manufacture and wholly identify the goods to the contract or cease
12 manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

13 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

14 **SECTION 2-705. SELLER'S STOPPAGE OF DELIVERY IN TRANSIT OR**
15 **OTHERWISE.**

16 (a) The seller may stop delivery of goods in the possession of a carrier or other
17 bailee when the seller discovers the buyer to be insolvent (Section 2-702) or when the buyer
18 repudiates or fails to make a payment due before delivery or if for any other reason the seller has a
19 right to withhold or reclaim the goods.

20 (b) As against such buyer the seller may stop delivery until

21 (1) receipt of the goods by the buyer; or

22 (2) acknowledgment to the buyer by any bailee of the goods except a

1 carrier that the bailee holds the goods for the buyer; or

2 (3) such acknowledgment to the buyer by a carrier by reshipment or as
3 warehouseman; or

4 (4) negotiation to the buyer of any negotiable document of title covering
5 the goods.

6 (c)(1) To stop delivery the seller must so notify as to enable the bailee by
7 reasonable diligence to prevent delivery of the goods.

8 (2) After such notification the bailee must hold and deliver the goods
9 according to the directions of the seller but the seller is liable to the bailee for any ensuing charges
10 or damages. A carrier or other bailee need not stop delivery if the seller does not provide
11 indemnity for charges or damages upon demand of the carrier or bailee.

12 (3) If a negotiable document of title has been issued for goods the bailee is
13 not obliged to obey a notification to stop until surrender of the document.

14 (4) A carrier who has issued a nonnegotiable bill of lading is not obliged to
15 obey a notification to stop received from a person other than the consignor.

16 *[Reporter's Note – Subsection (a) eliminates the restriction on the right of stoppage in transit to*
17 *“carload, truckload, planeload or larger shipments” when the buyer fails to pay or repudiates*
18 *the agreement, but protects the bailee by allowing a demand for indemnity. This change comes*
19 *from the July draft, and it is based on the assumption that the present limitation is incompatible*
20 *with current shipping capabilities.]*

21 **SECTION 2-706. SELLER'S RESALE INCLUDING CONTRACT FOR RESALE.**

22 (a) ~~Under the conditions stated in Section 2-703 on seller's remedies~~ In an
23 appropriate case involving breach by the buyer (Section 2-703(a)), the seller may resell the goods
24 concerned or the undelivered balance thereof. Where the resale is made in good faith and in a

1 commercially reasonable manner the seller may recover the difference between the contract price
2 and the resale price together with any incidental and consequential damages allowed under the
3 provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's
4 breach.

5 (b) Except as otherwise agreed a resale may be at public or private sale including
6 sale by way of one or more contracts to sell or of identification to an existing contract of the
7 seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every
8 aspect of the sale including the method, manner, time, place and terms must be commercially
9 reasonable. The resale must be reasonably identified as referring to the broken contract, but it is
10 not necessary that the goods be in existence or that any or all of them have been identified to the
11 contract before the breach.

12 (c) Where the resale is at private sale the seller must give reasonable notification of
13 an intention to resell.

14 (d) Where the resale is at public sale

15 (1) only identified goods can be sold except where there is a recognized
16 market for a public sale of futures in goods of the kind; and

17 (2) it must be made at a usual place or market for public sale if one is
18 reasonably available and except in the case of goods which are perishable or threaten to decline in
19 value speedily the seller must give the buyer reasonable notice of the time and place of the resale;
20 and

21 (3) if the goods are not to be within the view of those attending the sale the
22 notification of sale must state the place where the goods are located and provide for their

1 reasonable inspection by prospective bidders; and

2 (4) the seller may buy.

3 (e) A purchaser who buys in good faith at a resale takes the goods free of any
4 rights of the original buyer even though the seller fails to comply with one or more of the
5 requirements of this section.

6 (f) The seller is not accountable to the buyer for any profit made on any resale. A
7 person in the position of a seller (Section 2–707) or a buyer who has rightfully rejected or
8 justifiably revoked acceptance must account for any excess over the amount of any security
9 interest, as hereinafter defined (subsection (3) of Section 2–711).

10 [(g) A seller who does not resell in the manner required under this section is not
11 barred from any other remedy.]

12 [Reporter’s Note – The change in subsection (a) is necessary because the revision of 2-703
13 makes the introductory phrase from original Article 2 technically inaccurate. A comment will
14 indicate that the situations giving rise to a right of resale under this Section are those in which a
15 seller reclaims goods under Section 2-507 or a buyer repudiates or makes a wrongful but
16 effective rejection. In addition, there should be a right of resale if the buyer unjustifiably
17 attempts to revoke acceptance and the seller takes back the goods. However, the seller in this
18 case may choose to ignore the buyer’s attempt to revoke acceptance, in which case the
19 appropriate remedy is an action for the price.]

20 [Reporter’s Note – Consistent with the expansion in 2-710 to allow consequential damages for
21 sellers, subsection (a) now provides for the seller’s consequential damages in appropriate
22 situations.]

23 [Reporter’s Note – Current law measures damages by the difference between the resale price
24 and the contract price. Subsection (a) of this draft reverses the terms (“difference between the
25 contract price and the resale price”) because the contract price must be the larger number in
26 order for there to be direct damages. The same change has been made in section 2-708(a).
27 Compare sections 2-712 and 2-713 on buyer’s remedies, where the contract price is listed after
28 the cover or market price.]

29 [Reporters Note – I have bracketed subsection (g) for discussion. This subsection is new and it

comes from the July draft. The obvious reason for this provision is that the same provision is currently in the concomitant provision for buyers. (See section 2-712.) This provision is not innocuous, however, and it is intended to overrule some very specific cases and to address a very specific situation – when the seller would receive a higher measure of damages under section 2-708 than the seller would receive under section 2-706. This problem arises when the seller resells the goods, but by a commercially unreasonable does not meet the requirements of section 2-706, and therefore is “relegated” to collecting a higher amount of damages under the default measure of section 2-708. Many courts have taken the position that when there is a commercially unreasonable resale, the seller cannot receive more under section 2-708 than the seller would have received under section 2-706. This provision would overrule those cases.

Note also that this provision eliminates any argument a buyer would have that the seller had an obligation to mitigate damages by reselling (although, unlike the problem discussed above, I have never seen this mitigation argument made in any cases).

A comment will clarify that subsection (g) applies when the seller’s resale is inconsistent with the requirements of Section 2-706 and also applies when the seller chooses not to resell.]

SECTION 2-707. "PERSON IN THE POSITION OF A SELLER".

(a) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of the principal or anyone who 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.

[Reporter’s Note – This section has been changed to allow the "person in the position of a seller" to have the full range of remedies that the seller would have. The current provision is more limited, and it provides that: “A person in the position of a seller may as provided in this Article withhold or stop delivery (Section 2–705) and resell (Section 2–706) and recover incidental damages (Section 2–710).” I can think of no reason for the present limitation, nor have I been able to find any commentary that would justify the limitation (although there is plenty of commentary that expresses the same puzzlement with the limitation.)]

SECTION 2-708. SELLER'S DAMAGES FOR NONACCEPTANCE OR REPUDIATION.

(a) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2–723)

1 (1) the measure of damages for nonacceptance by the buyer is the
2 difference between the contract price and the market price at the time and place for tender
3 together with any incidental or consequential damages provided in this Article (Section 2–710),
4 but less expenses saved in consequence of the buyer's breach; and

5 (2) the measure of damages for repudiation by the buyer is the difference
6 between the contract price and the market price at the place for tender and at the expiration of a
7 commercially reasonable time after the seller learned of the repudiation, but no later than the time
8 stated in paragraph (1), together with any incidental or consequential damages provided in this
9 Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

10 (b) If the measure of damages provided in subsection (a) or in Section 2-706 is
11 inadequate to put the seller in as good a position as performance would have done then the
12 measure of damages is the profit (including reasonable overhead) which the seller would have
13 made from full performance by the buyer, together with any incidental and consequential damages
14 provided in this Article (Section 2–710).

15 [Reporter's Note – Consistent with the approach taken in the comments to Section 2-706, a
16 comment will indicate that “nonacceptance” by the buyer refers to cases in which a seller
17 reclaims the goods under Section 2-507 or the buyer repudiates or makes a wrongful but
18 effective rejection. It also includes a case in which the buyer unjustifiably attempts to revoke
19 acceptance and the seller takes back the goods.]

20 [Reporter's Note – Subsection (a) has been divided into two paragraphs rather than the one
21 paragraph in existing law. The second paragraph, which is new, clarifies the proper
22 measurement of damages in cases of anticipatory repudiation. The measurement is consistent
23 with the better reasoned cases. The same approach has been taken in 2-713 on buyer's market-
24 based damage claims.]

25 [Reporter's Note – The current provision sets the measure of damages as the difference between
26 the market price and the unpaid contract price. I have deleted the word unpaid as being
27 superfluous and misleading. It is a word that is never mentioned in the cases or commentary,

1 *because it is generally recognized as meaningless. It is also unnecessary, because if the buyer*
2 *has already paid a portion of the price, the buyer is entitled to that back as restitution under*
3 *section 2-718. Thus the word, in the current provision, sits there waiting to cause mischief. I*
4 *have also reversed the order of the terms “market price” and “contract price” – see the second*
5 *Reporter’s Note to section 2-706.]*

6 *[Reporter’s Note – Consistent with the revision of section 2-710, this section now provides for*
7 *consequential as well as incidental damages in both subsections (a) and (b).]*

8 *[Reporter’s Note – Subsection (b) now has the following underlined language added: “provided*
9 *in subsection (a) or section 2-706 is inadequate...” Courts generally have correctly assumed*
10 *that 2-708(b) was an alternative to section 2-706 as well as 2-708(a), but the courts still have*
11 *been forced to ask and analyze the question. See e.g., R.E. Davis Chemical Corp. v. Disonics,*
12 *Inc., 826 F.2d 678 (7th Cir. 1987). This change makes this result explicit.]*

13 *[Reporter’s Note – In subsection (b) the language “due credit for payments or proceeds of*
14 *resale” from the current provision has been deleted. As has been noted repeatedly, (see e.g. ,*
15 *Harris, A Radical Restatement of the Law of Seller’s Damages: Sales Act and Commercial Code*
16 *Results Compared, 18 Stanford. L. Rev. 66; White & Summers , Uniform Commercial Code pp.*
17 *275-66, 4th Ed.)) the language makes no sense whatsoever (at least in the context of the lost-*
18 *volume seller) and it has been universally ignored in order to make this provision work as it was*
19 *intended.]*

20 *[Reporter’s Note – The existing version of subsection (b) contains the phrase “due allowance for*
21 *costs reasonably incurred”. This draft deletes that language because it can cause mischief in*
22 *certain contexts. The proper application of the concept will be worked out in the comments.]*

23 **SECTION 2-709. ACTION FOR THE PRICE.**

24 (a) When the buyer fails to pay the price as it becomes due the seller may recover,
25 together with any incidental or consequential damages under the next section, the price

26 (1) of goods accepted

27 (2) of conforming goods lost or damaged within a commercially reasonable
28 time after risk of their loss has passed to the buyer; but, if the seller has retained or regained
29 control of the goods, the seller may recover the price only if the loss or damage has occurred
30 within a commercially reasonable time after the risk of loss has passed to the buyer; and

1 (3) of goods identified to the contract if the seller is unable after reasonable
2 effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort
3 will be unavailing.

4 (b) A seller who sues for the price must hold for the buyer any goods which have
5 been identified to the contract and are still in the seller's control except that if resale becomes
6 possible the seller may resell them at any time prior to the collection of the judgment. The net
7 proceeds of any such resale must be credited to the buyer and payment of the judgment entitles
8 the buyer to any goods not resold.

9 (c) After the buyer has wrongfully rejected or revoked acceptance of the goods or
10 has failed to make a payment due or has repudiated, a seller who is held not entitled to the price
11 under this section shall nevertheless be awarded damages for nonacceptance under the preceding
12 section.

13 *[Reporter's Note – Consistent with the revision of section 2-710, this section now provides for*
14 *consequential as well as incidental damages.]*

15 *[Reporter's Note – Subsection (a) has been changed from two to three paragraphs. This*
16 *structural change is made for the purpose of making the section more readable. Within*
17 *subsection (a)(2) the risk of loss rule has been clarified to conform with section 2-510.*

18 **SECTION 2-710. SELLER'S INCIDENTAL AND CONSEQUENTIAL**
19 **DAMAGES.**

20 (a) Incidental damages to an aggrieved seller include any commercially reasonable
21 charges, expenses or commissions incurred in stopping delivery, in the transportation, care and
22 custody of goods after the buyer's breach, in connection with return or resale of the goods or
23 otherwise resulting from the breach.

(b) Consequential damages resulting from the buyer's breach include any loss resulting from general or particular requirements and needs of which the buyer at the time of contracting had reason to know and which could not reasonably be prevented by resale or otherwise.

(c) Unless otherwise agreed, in a consumer contract a seller may not recover consequential damages from a consumer.

[Reporter's Note- this section has been amended to provide for seller's consequential as well as incidental damages. The title of the section has also been changed to reflect this. In addition, a comment will make it clear (with examples) that it is very difficult to have seller's consequential damages. Subsection (c) reflects the view that recovery of a seller's consequential damages ought not be the default rule in consumer contracts.]

SECTION 2-711. BUYER'S REMEDIES IN GENERAL; BUYER'S SECURITY INTEREST.

(a) A breach of contract by the seller includes the seller's wrongful failure to deliver or to perform a contractual obligation, making of a nonconforming tender of delivery or performance, or repudiation.

(b) If the seller is in breach of contract under subsection (a) ~~or in breach of the whole contract under subsection (c) of Section 2-612~~, the buyer may:

(1) in the case of rightful cancellation, rightful rejection or justifiable revocation of acceptance recover so much of the price as has been paid;

(2) deduct damages from any part of the price still due under Section 2-717);

(3) cancel (Section 2-106);

1 (4) cover and have damages under the Section 2-712 as to all goods
2 affected whether or not they have been identified to the contract;
3 (5) recover damages for nondelivery or repudiation under Section 2-713;
4 (6) recover damages for breach with regard to accepted goods or breach
5 with regard to a remedial promise under Section 2-714;
6 (7) recover identified goods under Section 2-502;
7 (8) obtain specific performance or obtain the goods by replevin or the like
8 under Section 2-716;
9 (9) recover liquidated damages under Section 2-718;
10 (10) recover incidental and consequential damages under Section 2-715; or
11 (11) in a case not within any of the preceding paragraphs, recover damages
12 in any manner that is reasonable under the circumstances.

13 (c) On rightful rejection or justifiable revocation of acceptance a buyer has a
14 security interest in goods in the buyer's possession or control for any payments made on their
15 price and any expenses reasonably incurred in their inspection, receipt, transportation, care and
16 custody and may hold such goods and resell them in like manner as an aggrieved seller (Section
17 2-706).

18 [(d) Unless the contract provides for liquidated damages enforceable under
19 Section 2-718 or a limited remedy under Section 2-719 an aggrieved party may not recover that
20 part of a loss resulting from a breach of contract that could have been avoided by reasonable
21 measures under the circumstances.]

22 *[Reporter's Note –This section is a substantial revision of current 2-711. The rationale for*

1 *many of the changes is discussed in the Reporter's Notes to section 2-703. The deletion in*
2 *subsection (b) is explained in the second Reporter's Note to 2-703.]*

3 **SECTION 2-712. COVER; BUYER'S PROCUREMENT OF SUBSTITUTE**
4 **GOODS.**

5 (a) If the seller wrongfully fails to deliver or repudiates or the buyer rightfully
6 rejects or justifiably revokes acceptance, the buyer may cover by making in good faith and
7 without unreasonable delay any reasonable purchase of or contract to purchase goods in
8 substitution for those due from the seller.

9 (b) The buyer may recover from the seller as damages the difference between the
10 cost of cover and the contract price together with any incidental or consequential damages as
11 hereinafter defined (Section 2-715) but less expenses saved in consequence of the seller's breach.

12 (c) Failure of the buyer to effect cover within this section does not bar the buyer
13 from any other remedy.

14 *[Reporter's Note – The changes from current law in subsection (a) make the application of the*
15 *section more precise. Cover is not available if the buyer accepts the goods and does not*
16 *rightfully revoke that acceptance.]*

17 **SECTION 2-713. BUYER'S DAMAGES FOR NONDELIVERY OR**
18 **REPUDIATION.**

19 (a) Subject to the provisions of this Article with respect to proof of market price
20 (Section 2-723), if the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects
21 or justifiably revokes acceptance the following rules apply:

22 (1) the measure of damages in the case of wrongful failure to deliver by the seller
23 or rightful rejection or justifiable revocation of acceptance by the buyer is the difference between

1 the market price at the [time when the buyer learned of the breach][time for tender under the
2 agreement] and the contract price together with any incidental and consequential damages
3 provided in this Article (Section 2–715), but less expenses saved in consequence of the seller's
4 breach; and

5 (2) the measure of damages for repudiation by the seller is the difference
6 between the market price at the expiration of a commercially reasonable time after the buyer
7 learned of the repudiation, but no later than the time stated in paragraph (1), and the contract
8 price together with any incidental or consequential damages provided in this Article (Section 2-
9 710), but less expenses saved in consequence of the seller's breach.

10 (b) Market price is to be determined as of the place for tender or, in cases of
11 rejection after arrival or revocation of acceptance, as of the place of arrival.

12 *[Reporter's Note – This section now provides a rule for anticipatory repudiation cases. This is*
13 *consistent with the new rule in section for 2-708(1) and resolves a problem that is in the current*
14 *Code.]*

15 *[Reporter's Note – The changes in subsection (a) make application of the section more precise.*
16 *See Reporter's Note to Section 2-712.]*

17 *[Reporter's Note – I have bracketed the time of the measurement for the normal case for the*
18 *buyer's damages for repudiation or rejection. The current provision sets it at the time the buyer*
19 *learns of the breach, and this is reflected in the first bracketed language. The second bracketed*
20 *language sets the time at the time of performance under the agreement.*

21 *This second approach is consistent with the seller's remedy under section 2-708(1),*
22 *consistent with the Uniform Sales Act from which it is derived, and also consistent with any*
23 *notion of what the damage measurement would be at the time of formation. These two*
24 *measurements reflect two different theories of contract damages. Measurement at the time the*
25 *buyer learned of the breach assumes a theory that damages are best measured by what the*
26 *parties actually do after a breach. This theory supports sections 2-706 and 2-712, as well as the*
27 *current version of 2-713 (the comments to section 2-713 make it clear that the section is*
28 *specifically intended to reflect party response to the breach as opposed to the bargain ex ante).*
29 *The second theory of contract damages presupposes that a party is entitled to that which would*
30 *in fact actually result from the agreement (i.e., a baseline of what actual performance would*

1 have yielded, irrespective of what the parties in fact do after a breach.) This theory supports the
2 measurement of damages in 2-708(1) and is what the common law and the Uniform Sales Act
3 would have yielded for the buyer prior to section 2-713.

4 The July draft adopted the latter theory, and therefore made the assumption that the
5 bargain ex ante is the correct measurement : “at the time for tender of delivery or when the
6 buyer learned that the tender of delivery did not occur, whichever is later.” I have chosen not to
7 adopt this language because, although it begins with the assumption that the measurement is the
8 bargain ex ante, (which I believe is the correct view) it then adds the further stipulation that the
9 time may be delayed until the buyer’s knowledge of the breach. This sneaks the theory of actual
10 party response in the back door results in a measurement of damages grounded in no consistent
11 theory.

12 It is clear that current Article 2 assumes one theory for buyers and another one for
13 sellers. There has never been an explanation for this, and my choice would be to have a
14 consistent theory. I would adopt the latter bracketed language because it is more consistent with
15 traditional contract theory that one takes the risk at the time of contracting as to what the actual
16 outcome will be. This is consistent with the recommendations of the original Study Committee
17 as well as the A.B.A. Task Force. The recommendation of those reports noted the difficulty with
18 the current standard, as it is hard to prove or disprove when a buyer was aware of the breach.]

19 **SECTION 2-714. BUYER'S DAMAGES FOR BREACH IN REGARD TO**
20 **ACCEPTED GOODS AND REMEDIAL PROMISES.**

21 (a) Where the buyer has accepted goods and given notification (subsection (c) of
22 Section 2–607) the buyer may recover as damages for any nonconformity of tender the loss
23 resulting in the ordinary course of events from the seller's breach as determined in any manner
24 which is reasonable.

25 (b) The measure of damages for breach of a warranty is the difference at the time
26 and place of acceptance between the value of the goods accepted and the value they would have
27 had if they had been as warranted, unless special circumstances show proximate damages of a
28 different amount.

29 (c) The measure of damages for breach of a remedial promise value is the
30 difference between the value of the promised remedial performance less the value of any remedial

performance made.

(d) In a proper case any incidental and consequential damages under the next section may also be recovered.

[Reporter's Note – Prior drafts have added the underlined clause to subsection (a): “A buyer that has accepted goods and not justifiably revoked acceptance”. I have not added it, as it appears to be superfluous. However, we can point this out in a comment with a cross reference to 2-608(c).]

[Reporter's Note – Subsection (c) is new. This section is necessary because the provisions on express warranties and express warranty obligations (sections 2-313, 2-313A, and 2-313(B)) explicitly refer to remedial promises.]

SECTION 2–715. BUYER’S INCIDENTAL AND CONSEQUENTIAL DAMAGES.

(a) Incidental damages resulting from the seller’s breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(b) Consequential damages resulting from the seller’s breach include

(1) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(2) injury to person or property proximately resulting from any breach of warranty.

[Reporter's Note – There is no change from current law.]

[Reporter's Note – It will be useful to put in a comment as a reminder that a buyer who has justifiably revoked acceptance has the same rights as a rejecting buyer. See Section 2-608(c).]

SECTION 2–716. RIGHT TO SPECIFIC PERFORMANCE OR REPLEVIN OR

1 **THE LIKE.**

2 (a) Specific performance may be decreed where the goods are unique or in other
3 proper circumstances. In a contract other than a consumer contract, the court may enter a decree
4 for specific performance if the parties have agreed to that remedy. However, even if the parties
5 agree to specific performance, the court may not enter a decree for specific performance if the
6 breaching party's sole remaining contractual obligation is the payment of money.

7 (b) The decree for specific performance may include such terms and conditions as
8 to payment of the price, damages, or other relief as the court may deem just.

9 (c) The buyer has a right of replevin or the like for goods identified to the contract
10 if after reasonable effort the buyer is unable to effect cover for such goods or the circumstances
11 reasonably indicate that such effort will be unavailing or if the goods have been shipped under
12 reservation and satisfaction of the security interest in them has been made or tendered.

13 (d) The buyer's right under subsection (c) vests upon acquisition of a special
14 property, even if the seller had not then repudiated or failed to deliver.

15 *[Reporter's Note – Consistent with the content of the section, the section heading has eliminated*
16 *the reference to "Buyer" and has been expanded to refer to ". . . replevin or the like." The*
17 *assumption is that either the seller or the buyer can demand specific performance in appropriate*
18 *circumstances (see the next Reporter's Note).]*

19 *[Reporter's Note – A comment should indicate that in subsection (a) the phrase "other proper*
20 *circumstances" is not limited to the goods. The obligation of the parties may be more than the*
21 *tendering of the goods or the payment of money – there may be unusual terms that neither party*
22 *can replicate in the marketplace.]*

23 *[Reporter's Note – Subsection (a) adds the following sentence to current law: "In a contract*
24 *other than a consumer contract, the court may enter a decree for specific performance if the*
25 *parties have agreed to that remedy." This recognizes that under the general principle of freedom*
26 *of contract, as well as the development of commercial practices consistent with this principle,*
27 *parties should be able to arrange for specific performance if they so agree.]*

1 *[Reporter's Note – The last sentence of subsection (a) is new. Because we have extended the*
2 *right of specific performance to seller's as well as buyers, we have opened up the possibility of*
3 *sellers using this provision to force the payment of money judgments. The specific performance*
4 *provision should not be read as creating a new right to enforce money judgments.]*

5 *[Reporter's Note – Subsection (c) has been changed from the current provision. After the word*
6 *"replevin" is added the clause "or the like" to reflect that under the governing state law, the*
7 *right of replevin may be called "detinue", "sequestration," "claim and delivery", or*
8 *something else. A comment will make this point clear.]*

9 *[Reporter's Note – Subsection (d) is new, and it corresponds with Section 2-502(b), which in*
10 *turn is derived from the conforming amendments to Article 9. This is a necessary clarification in*
11 *the Articles 2 and 9 interrelationship.]*

12 *[Reporter's Note – Because Section 2-402 is limited to the rights of unsecured creditors, a*
13 *comment along the following lines may be helpful in each of the referenced sections: "This rule*
14 *assumes application of a 'first in time' priority rule. In other words, if the buyer's rights vest*
15 *under this rule before a creditor acquires an in rem right to the goods, including an Article 9*
16 *security interest and a lien created by levy, the buyer should prevail."]*

17 **SECTION 2–717. DEDUCTION OF DAMAGES FROM THE PRICE.**

18 The buyer on notifying the seller of an intention to do so may deduct all or any
19 part of the damages resulting from any breach of the contract from any part of the price still due
20 under the same contract.

21 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

22 **SECTION 2–718. LIQUIDATION OR LIMITATION OF DAMAGES;** 23 **DEPOSITS.**

24 (a) Damages for breach by either party may be liquidated in the agreement but only
25 at an amount which is reasonable in the light of the anticipated or actual harm caused by the
26 breach and, in a consumer contract, the difficulties of proof of loss and the inconvenience or
27 nonfeasibility of otherwise obtaining an adequate remedy. Section 2-719 determines the

1 enforceability of a term that limits but does not liquidate damages.

2 (b) Where the seller justifiably withholds delivery of goods or stops performance
3 because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum
4 of the buyer's payments exceeds the amount to which the seller is entitled by virtue of terms
5 liquidating the seller's damages in accordance with subsection (a).

6 (c) The buyer's right to restitution under subsection (b) is subject to offset to the
7 extent that the seller establishes

8 (1) a right to recover damages under the provisions of this Article other
9 than subsection (a), and

10 (2) the amount or value of any benefits received by the buyer directly or
11 indirectly by reason of the contract.

12 (d) Where a seller has received payment in goods their reasonable value or the
13 proceeds of their resale shall be treated as payments for the purposes of subsection (b); but if the
14 seller has notice of the buyer's breach before reselling goods received in part performance, the
15 resale is subject to the conditions laid down in this Article on resale by an aggrieved seller
16 (Section 2-706).

17 *[Reporter's Note – Subsection (a) simplifies the test for enforcing a liquidated damages clause in*
18 *a commercial contract (but retains the original test in a consumer contract).]*

19 *[Reporter's Note – The draft deletes the last sentence in current 2-718(1)(unreasonable*
20 *liquidated-damages clause void as a penalty). Removing the sentence assures that it cannot be*
21 *read by a court as imposing an additional condition. The sentence merely reiterates what is in*
22 *the first sentence and may cause more harm than good.]*

23 *[Reporter's Note – The last sentence in subsection (a) comes from the July draft and is a useful*
24 *signpost.]*

1 *[Reporter's Note – The following underlined language is added to subsection (b): “ Where the*
2 *seller justifiably withholds delivery of goods or stops performance because of the buyer's*
3 *breach”. This comes from the July draft and is useful in that it points out that the seller's*
4 *obligations may well be greater than mere delivery of the goods.]*

5 *[Reporter's Note – Subsection (b) also drops the statutory liquidated damages clause that*
6 *operates in the absence of an express liquidated damages provision. In the current law, this*
7 *provides that “in the absence of such terms, twenty per cent of the value of the total performance*
8 *for which the buyer is obligated under the contract or \$500, whichever is smaller.”]*

9 **SECTION 2–719. CONTRACTUAL MODIFICATION OR LIMITATION OF**
10 **REMEDY.**

11 (a) Subject to the provisions of subsections (b), (c) and (d) of this section and of
12 the preceding section on liquidation and limitation of damages,

13 (1) the agreement may provide for remedies in addition to or in substitution
14 for those provided in this Article and may limit or alter the measure of damages recoverable under
15 this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price
16 or to repair and replacement of nonconforming goods or parts; and

17 (2) resort to a remedy as provided is optional unless the remedy is
18 expressly agreed to be exclusive, in which case it is the sole remedy.

19 (b) Where circumstances cause an exclusive or limited remedy to fail of its
20 essential purpose in a contract other than a consumer contract, remedy may be had as provided in
21 this Act. However, an agreement expressly providing that consequential damages are excluded is
22 enforceable to the extent permitted under subsection (d).

23 (c) Where circumstances cause an exclusive or limited remedy to fail of its
24 essential purpose in a consumer contract, remedy may be had as provided in this Act including the
25 right to recover consequential damages notwithstanding any term purporting to exclude or limit

1 such damages.

2 (d) Subject to subsection (c), consequential damages may be limited or excluded
3 unless the limitation or exclusion is unconscionable. Limitation of consequential damages for
4 injury to the person in the case of consumer goods is prima facie unconscionable but limitation of
5 damages where the loss is commercial is not.

6 *[Reporter's Note – Subsections (b) and (c) clarify the relationship between a limited remedies*
7 *clause and a clause limiting or excluding consequential damages. The current law does not*
8 *expressly state whether the right to pursue all available remedies upon the failure of the*
9 *essential purpose includes the right of consequential damage. The courts have had a difficult*
10 *time with this question, and the decisions have been inconsistent. The formulation in this draft is*
11 *based on the July draft and in my opinion reflects as sound a resolution of this problem as we*
12 *are likely to come up with.]*

13 **SECTION 2–720. EFFECT OF "CANCELLATION" OR "RESCISSION" ON**
14 **CLAIMS FOR ANTECEDENT BREACH.**

15 Unless the contrary intention clearly appears, expressions of "cancellation" or
16 "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any
17 claim in damages for an antecedent breach.

18 *[Reporter's Note – There is no change in this section.]*

19 **SECTION 2–721. REMEDIES FOR FRAUD.**

20 Remedies for material misrepresentation or fraud include all remedies available
21 under this Article for nonfraudulent breach. Neither rescission or a claim for rescission of the
22 contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a
23 claim for damages or other remedy.

24 *[Reporter's Note – There is no change in this section.]*

25 **SECTION 2–722. WHO CAN SUE THIRD PARTIES FOR INJURY TO GOODS.**

1 Where a third party so deals with goods which have been identified to a contract
2 for sale as to cause actionable injury to a party to that contract

3 (1) a right of action against the third party is in either party to the contract
4 for sale who has title to or a security interest or a special property or an insurable interest in the
5 goods; and if the goods have been destroyed or converted a right of action is also in the party
6 who either bore the risk of loss under the contract for sale or has since the injury assumed that
7 risk as against the other;

8 (2) if at the time of the injury the party plaintiff did not bear the risk of loss
9 as against the other party to the contract for sale and there is no arrangement between them for
10 disposition of the recovery, the party plaintiff's suit or settlement is, subject to its own interest, as
11 a fiduciary for the other party to the contract;

12 (3) either party may with the consent of the other sue for the benefit of
13 whom it may concern.

14 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

15 **SECTION 2–723. PROOF OF MARKET PRICE: TIME AND PLACE.**

16 (a) If evidence of a price prevailing at a time or place described in this Article is
17 not readily available the price prevailing within any reasonable time before or after the time
18 described or at any other place that in commercial judgment or under usage of trade would serve
19 as a reasonable substitute for the one described may be used, making any proper allowance for the
20 cost of transporting the goods to or from such other place.

21 (b) Evidence of a relevant price prevailing at a time or place other than the one
22 described in this Article offered by one party is not admissible unless and until that party has given

1 the other party such notice as the court finds sufficient to prevent unfair surprise.

2 *[Reporter's Note – Current subsection (1), which deals with the measurement of market price*
3 *when there has been an anticipatory repudiation, has been deleted as unnecessary, as this has*
4 *now been incorporated into sections 2-708(1) and 2-713.]*

5 **SECTION 2–724. ADMISSIBILITY OF MARKET QUOTATIONS.**

6 Whenever the prevailing price or value of any goods regularly bought and sold in
7 any established commodity market is in issue, reports in official publications or trade journals or in
8 newspapers, periodicals or other means of communication in general circulation published as the
9 reports of such market shall be admissible in evidence. The circumstances of the preparation of
10 such a report may be shown to affect its weight but not its admissibility.

11 *[Reporter's Note – The only change from current Article 2 is the addition of the language “or*
12 *other means of communication in . . .” This addition is made to reflect nonpaper media and*
13 *other forms of communication in common usage.]*

14 **SECTION 2–725. STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE.**

15 (a) An action for breach of any contract for sale must be commenced within the
16 later of four years after the cause of action has accrued under subsection (b) or (c) or one year
17 after the breach was or should have been discovered, but no longer than five years after the cause
18 of action accrued. Except in a consumer contract, By the original agreement the parties may
19 reduce the period of limitation to not less than one year but may not extend it; ~~however, in a~~
20 ~~consumer contract, the period of limitation may not be reduced.~~

21 (b) Except as otherwise provided in subsection (c), the follow rules apply:

22 (1) Except as otherwise provided in this subsection, a cause of action for
23 breach of a contract accrues when the breach occurs, even if the aggrieved party did not have
24 knowledge of the breach.

1 (2) For breach of a contract by repudiation, a cause of action accrues at
2 the earlier of when the aggrieved party elects to treat the repudiation as a breach or when a
3 commercially reasonable time for awaiting performance has expired.

4 (3) For breach of a remedial promise, a cause of action accrues when the
5 remedial promise is not performed when due.

6 (4) In an action by a buyer against a person that is answerable over to the
7 buyer for a claim asserted against the buyer, the buyer's cause of action against the person
8 answerable over accrues at the time the claim was originally asserted against the buyer.

9 (c) If a breach of a warranty arising under Section 2-312, 2-313, 2-314, or 2-315,
10 or a breach of an obligation arising under Section 2-313A or 2-313B, is claimed the definitions in
11 Sections 2-313, 2-313A and 2-313B and the following rules apply:

12 (1) Except as otherwise provided in paragraph (4), a cause of action for
13 breach of warranty arising under Section 2-313, 2-314 or 2-315 accrues when the seller has
14 tendered delivery to the immediate buyer and has completed performance of any agreed
15 installation or assembly of the goods.

16 (2) Except as otherwise provided in paragraph (4), a cause of action for
17 breach of an obligation arising under Section 2-313A or 2-313B accrues when the remote
18 purchaser receives the goods.

19 (3) A cause of action for breach of warranty arising under Section 2-312
20 accrues when the aggrieved party discovers or should have discovered the breach. However, an
21 action for breach of the warranty of noninfringement may not be commenced more than [six]
22 years after tender of delivery of the goods to the aggrieved party.

1 (4) Where a warranty or obligation arising under Section 2-313, 2-313A or
2 2-313B explicitly extends to future performance of the goods and discovery of the breach must
3 await the time for performance the cause of action accrues when the immediate buyer or the
4 remote purchaser discovers or should have discovered the breach.

5 (d) Where an action commenced within the time limited by subsection (b) or (c) is
6 so terminated as to leave available a remedy by another action for the same breach such other
7 action may be commenced after the expiration of the time limited and within six months after the
8 termination of the first action unless the termination resulted from voluntary discontinuance or
9 from dismissal for failure or neglect to prosecute.

10 (e) This section does not alter the law on tolling of the statute of limitations nor
11 does it apply to causes of action which have accrued before this Act becomes effective.

12 *[Reporter's Note – Consistent with the July draft, subsection (a) changes the flat four-year rule*
13 *of current law and provides for a limited one-year discovery rule with a five-year cap.]*

14 *[Reporter's Note – Subsection (a) differs from current law in that it does not permit reduction of*
15 *the limitations period in consumer contracts.]*

16 *[Reporter's Note – This section contains a new provision governing a breach of the warranty of*
17 *noninfringement under section 2-312. This period is stated in brackets as six years. The July*
18 *draft used eight years. It is difficult to assess what time period is most appropriate here, and*
19 *this provision is extremely important to some commercial concerns. We should discuss.]*

20 *[Reporter's Note – There are new rules governing remedial promises, express warranty*
21 *obligations under new sections 2-313A and 2-313B, and repudiations.]*