

DRAFT

FOR DISCUSSION ONLY

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

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MARCH 1, 1999

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

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**DRAFTING COMMITTEE TO REVISE UNIFORM COMMERCIAL CODE
ARTICLE 2 - SALES**

LAWRENCE J. BUGGE, 313 Walnut Grove Drive, Madison, WI 53717-1228, *Chair*
JOHN FOX ARNOLD, 714 Locust Street, St. Louis, MO 63101
BORIS AUERBACH, 332 Ardon Lane, Wyoming, OH 45215
GERALD L. BEPKO, Indiana University, 355 N. Lansing Street, Indianapolis, IN 46202
AMELIA H. BOSS, Temple University, School of Law, 1719 N. Broad Street, Philadelphia, PA 19122, *The American Law Institute Representative*
BRUCE A. COGGESHALL, One Monument Square, Portland, ME 04101
CHRISTOPHER D. DINGELL, P.O. Box 30036, Room 910, Farnum Building, Lansing, MI 48909
HENRY DEEB GABRIEL, JR., Loyola University, School of Law, 526 Pine Street, New Orleans, LA 70118
BION M. GREGORY, Office of Legislative Counsel, State Capitol, Suite 3021, Sacramento, CA 95814-4996
WILLIAM H. HENNING, University of Missouri-Columbia, School of Law, 313 Hulston Hall, Columbia, MO 65211
PETER F. LANGROCK, P.O. Drawer 351, Middlebury, VT 05753
CURTIS R. REITZ, University of Pennsylvania, School of Law, 3400 Chestnut Street, Philadelphia, PA 19104
BYRON D. SHER, State Capitol, Suite 2054, Sacramento, CA 95814
JOHN A. SPANOGLA, George Washington University, National Law Center, 2000 H Street, N.W., Washington, DC 20052, *The American Law Institute Representative*
RICHARD E. SPEIDEL, Northwestern University, School of Law, 357 E. Chicago Avenue, Chicago, IL 60611, *Reporter*
LINDA J. RUSCH, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104, *Associate Reporter*

EX OFFICIO

GENE N. LEBRUN, P.O. Box 8250, 9th Floor, 909 St. Joseph Street, Rapid City, SD 57709, *President*
BARRY H. EVENCHICK, One Gateway Center, 8th Floor, Newark, NJ, 07102, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

DAVID JOEL FRISCH, 1101 W. University Avenue, Champaign, IL 61821, *Advisor*
KARL B. GRUBE, Pinellas County Court, Room 305, 150 5th Street, N., St. Petersburg, FL 33701, *Judicial Administration Division, National Conference of Special Court Judges Section Advisor*
THOMAS J. MCCARTHY, DuPont Legal, Barley Mill Plaza 17-2286, Wilmington, DE 19805, *Business Law Section Advisor*

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

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NATIONAL CONFERENCE OF COMMISSIONERS
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Chicago, Illinois 60611
312/915-0195

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1 **REVISED ARTICLE 2-SALES**

2 _____
3 **NATIONAL CONFERENCE OF COMMISSIONERS**
4 **ON UNIFORM STATE LAWS**
5 _____

6 **March 1, 1999 Draft**

7 **[Styled by the Committee on Style, January 14-17, 1999]**
8 _____

9 **PART 1**

10 **GENERAL PROVISIONS**

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

13 **Comments**

14 1. **Source**, Section 2-101. Former 2-101 has been revised to conform to the style of
15 Article 3, Article 4, Article 4A, Article 5 and Article 8.

16 **SECTION 2-102. DEFINITIONS.**

17 (a) In this article:

18 ~~(1) "Attribution procedure" means... [2B-102(a)(3) (Dec. 1998)]~~

19 (1) "Authenticate" means to sign, or to execute or adopt a symbol, or encrypt a
20 record in whole or in part, with present intent to (i) identify the authenticating party, (ii) adopt or

1 accept a record or term, or (iii) establish the authenticity of a record or term that contains the
2 authentication or to which a record containing the authentication refers. [Source: 9-102(a)(7)]

3 ~~(3) "Automated transaction" means... [2B-102(a)(5) (Dec. 1998)]~~

4 (2) "Between merchants" means between parties in a transaction with respect to
5 which both parties are merchants.

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

7 (4) "Cancellation" means an act by either party which ends a contract because of
8 breach by the other party. "Cancel" has a corresponding meaning.

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

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

16 ~~(7) "Computer" means [2B-102(a)(7) (Dec. 1998)]~~

17 ~~(10) "Computer program" means [2B-102(a)(10) (Dec. 1998)]~~

18 (7) "Conspicuous", with reference to a term, means so written, displayed, or
19 presented that a reasonable person against which it is to operate would have noticed it or, in the
20 case of an electronic message intended to evoke a response without the need for review by an
21 individual, in a form that would enable a reasonably configured electronic agent to take it into
22 account or react to it without review of the message by an individual. In a written record:

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

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

5 _____ (iii) any term or clause in a telegram or other similar communication is
6 conspicuous. In an electronic record or display, a term is conspicuous if it is so positioned that a
7 party cannot proceed without taking some additional action with respect to the term or any
8 prominent reference thereto.]

9 (8) "Consumer" means an individual who buys or contracts to buy goods that, at
10 the time of contracting, are intended by the individual to be used primarily for personal, family,
11 or household purposes.

12
13 (9) "Consumer contract" means a contract for sale between a [merchant] seller
14 regularly engaged in the business of selling and a consumer.

15 (10) "Contract" means a "contract for sale.

16 (11) "Contract for sale" means a present sale of goods or a contract to sell existing
17 or future goods at a future time.

18 (12) "Delivery" means the voluntary transfer of physical possession or control of
19 goods.

20 ~~(16) "Electronic" means of or relating to electrical, digital, magnetic, wireless,~~
21 ~~optical, or electromagnetic technology or any other technology that entails similar capabilities.~~
22 ~~"Electronically" has a corresponding meaning. [2B-102(a)(21) (Dec. 1998)]~~

23 ~~_____ (17) "Electronic agent" means a computer program or other automated means~~

1 used by a person independently to initiate or respond without review by an individual to
2 electronic messages or performances on behalf of that person. [2B-102(a)(21) (Dec. 1998)]

3 (18) "Electronic message" means an electronic record or display that is stored,
4 generated, or transmitted by electronic means for purposes of communication to another person
5 or electronic agent. [2B-102(a)(22) (Dec. 1998)]

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

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

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

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

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

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

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

14 ~~(18) "Information processing system" means an electronic system or facility for~~
15 ~~generating, sending, receiving, storing, displaying, or processing electronic information. [2B-~~
16 ~~102(a)(26) (Dec. 1998).~~

17 ~~(18) "Letter of credit" means an irrevocable letter of credit as defined in Section~~
18 ~~5-102(a)(10), issued by a financing agency of good repute and, if the shipment is overseas, of~~
19 ~~good international repute.~~

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

22 (19) "Merchant" means a person that deals in goods of the kind involved in the

1 transaction, a person that by occupation purports to have knowledge or skill peculiar to the
2 practices or goods involved in the transaction, or a person to which knowledge or skill may be
3 attributed by the person's employment of an agent or broker or other intermediary that purports to
4 have the knowledge or skill.

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

6 (21) "Receive" means with respect to goods, to take delivery and in the case of an
7 electronic notification, to come into existence in an information processing system in a form
8 capable of being processed by or perceived from a system of that type, if the recipient uses, or
9 otherwise has designated or otherwise holds out that system as a place for the receipt of such
10 notices. "Receipt" has a corresponding meaning.

11 (22) "Record" means information that is inscribed on a tangible medium or that is
12 stored in an electronic or other medium and is retrievable in perceivable form.

13 (23) "Remedial promise" means a promise by a seller to take remedial action,
14 including to repair or replace the goods or to refund the price, if the goods do not conform to the
15 contract, or a representation, or upon the happening of a specified future event,

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

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

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

1 (27) "Termination means the ending of a contract or a part thereof by an act by a
2 party under a power created by agreement or law, or by operation of the terms of the agreement,
3 for a reason other than for breach by the other party. Terminate has a corresponding meaning.

4 (b) Other definitions which contain substantive elements and apply to two or more
5 sections or parts of this Article and the section in which they appear are:

6 "Acceptance of goods. Section 2-706.

7 ~~"Assignment. Section 2-503(a).~~

8 ~~"Attribution. Sections 2-210(a), 2-211(a).~~

9 "Breach of contract. Sections 2-701.

10 "Consequential damages. Section 2-806.

11 "Cover. Section 2-825.

12 ~~"Delegation. Section 2-503(b).~~

13 ~~"Entrusting. Section 2-504(c).~~

14 "Incidental damages. Section 2-805.

15 "Identification. Section 2-502.

16 "Immediate buyer. Section 2-401.

17 "Installment contract. Section 2-710.

18 "Insurable interest. Section 2-502.

19 "Person in position of seller. Section 2-604.

20 "Remote purchaser. Section 2-401.

21 "Repudiation. Section 2-712.

22 ~~"Sale on approval. Section 2-506(a).~~

1 other articles of this Act.

2 Words and phrases which are defined and appear in only one section of this Article and
3 are not defined in other articles of this Act include: “Assignment. Section 2-503; “Delegation.
4 Section 2-503; “Entrusting. Section 2-504; “Sale on approval. Section 2-506; and “Sale or
5 return. Section 2-506.

6 2. **Authenticating a record.** The former defined word, “signed, 1-201(39) is now
7 incorporated into the new definition “authenticate. The former defined word, “writing, 1-
8 201(46), is now incorporated into the new definition “record. The new definitions, which are
9 used through this Act, blend the new electronic technology with the traditional. Thus, a person
10 who has signed a writing for purposes of the statute of frauds, 2-201(a), has authenticated a
11 record for purposes of this Act. [This definition conforms to Article 9 but not the latest definition
12 in Article 2B.]

13 3. **Electronic transactions.** In addition to “authenticate and “record, other new
14 definitions are relevant to the electronic contracting process. They are [which definitions], their
15 sources are [name sources] and they fit in [how]. [Under review.]

16 4. **Consumer contracts.** This Act contains ___ sections that deal with consumers or
17 consumer contracts. They are _____. The source of these definitions is _____.

18 The definition of “consumer contract is limited to a contract for sale between a
19 merchant seller and a “consumer. To be a consumer, an individual must buy goods that at the
20 time of contracting are intended by the individual to be used “primarily for personal, family, or
21 household purposes. Thus, a sale by a consumer to a consumer is not a “consumer contract
22 and a sale by a merchant to an individual who intends the goods to be used primarily in a home
23 business is not a sale to a consumer.

24 5. **“Foreign exchange transaction.”** This new definition is intended to exclude certain
25 currency exchange transactions from the scope of this Article. See 2-103(d).

26 6. **“Remedial promise.”** New. Article 2 applies to “remedial promises, 2-103(a), and
27 several sections deal with their enforcement upon breach by the seller.

28 7. **Definitions in former Article 2.** Several definitions from original Article 2 have
29 been preserved, some with slight modifications.

30 “Between merchants. Source: 2-104(3).

31 “Buyer. Source: 2-103(1)(a).

32 “Cancellation. Source: 2-106(4). When a party may cancel for breach and the effect of

1 cancellation are treated in 2-808.

2 “Commercial unit. Source: 2-105(6). The definition has been conformed to 2A-
3 103(1)(c).

4 “Conforming goods or conduct. Source: 2-106(2).

5 “Contract for sale. Source: 2-106(1). The definition has been clarified to cover a
6 contract to sell “future goods at a future time.

7 “Delivery. Source: New. The phrase “control of goods” includes cases where the goods
8 are controlled by a document of title or are in the possession of an agent.

9 “Financing agency. Source: 2-104(2).

10 “Future goods. Source: 2-105(2).

11 “Goods. Sources: 2-105(1), 9-102(a)(44). The definition has been clarified and
12 expanded to exclude various forms of collateral under Article 9.

13 “Letter of credit. Sources: 2-325(3), 5-102(a)(10).

14 “Lot. Source: 2-105(5).

15 “Merchant. Source: 2-104(1).

16 “Present sale. Source: 2-106(1).

17 “Receipt. Sources: 2-103(1)(c), 1-201(26). “Delivery” is defined in 2-102(a)(11). The
18 definition has been expanded to include receipt of electronic notification.

19 “Sale. Source: 2-106(1).

20 “Seller. Source: 2-103(1)(d).

21 “Termination. Source: 2-106(3).

22 **8. Definitions in former Article 1, now in Article 2.**

23 “Good faith. Source: 3-103(a)(4).

24 “Conspicuous. Source: [_____] [Under review.]

1 **Transition Notes**

2 1. Further efforts to conform this definition with 2B-102(a)(12) are required. See Revised
3 1-201(11).

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

8 **Questions to be resolved: (1) Should the definition be the same for Articles 2, 2A and**
9 **2B? (2) If so, what is the better definition? (3) Should a common definition for all be in**
10 **Article 1?**

11 **SECTION 2-103. SCOPE.**

12 (a) This article applies to transactions in goods, including remedial promises.

13 **Alternative A [Article 9]**

14 [(b) If a transaction involves both goods and software, this article applies to the goods and
15 not the software. However, if goods contain software embedded in the goods in such a manner
16 that the software is customarily considered to be part of the goods or that by becoming the owner
17 of the goods, the person acquires a right to use the software in connection with the goods, this
18 article applies to both the goods and the software.]

19 **Alternative B [derived from Article 2B]**

20 [(b) If a transaction involves a copy of computer information that is contained in and sold
21 as part of goods, the following rules apply:

22 (1) this article applies to the goods; and

23 (2) this article applies to a copy of the computer information unless [the copy of
24 the computer information is separately licensed and];

25 (A) the goods are a computer or a computer peripheral, or

1 (B) the predominate purpose of the transaction is to give the purchaser of
2 the goods access to or use of the computer information.]

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

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

8 **Comments**

9 1. **Source.** Subsection (a) follows the first clause of former 2-102 except that the phrase
10 “Unless the context otherwise requires” is deleted. Subsection (b), which is derived from 9-
11 102(a)(44), is new. Subsection (c) amplifies the second clause of former 2-102. Subsection (d) is
12 new.

13 2. **Transactions in goods.** The phrase “transactions in goods” in subsection (a) usually
14 means a contract for the sale of goods, particularly in sections where the word “contract” or the
15 phrase “contract for sale” are used. In sections where those words are not used, “transaction
16 does not include a lease of goods, see Article 2A, or a security interest in goods, see Article 9,
17 but could include a contract where both goods and services are provided, such as a contract to
18 deliver and install goods. When Article 2 applies to mixed goods and service transactions is left
19 for judicial inclusion or exclusion under the “predominant purpose” test, where factors such as
20 the language of the contract, the usual business of the seller or supplier, and the relative cost of
21 the goods and the services and whether they are segregated assist to determine whether a sale of
22 goods predominates. See, e.g., *Princess Cruises, Inc. v. General Electric Co.*, 143 F.3d 828 (4th
23 Cir. 1998), reviewing the cases and applying the test. If goods predominate, the transaction is
24 treated as a contract for sale and is within the scope of Article 2.

25 A “transaction in goods” could include a bailment or consignment of goods. These
26 transactions are not within the scope of Article 2. Article 2, however, may be extended by
27 analogy to transactions in goods not specifically covered.

28 3. **Remedial promises.** Article 2 does apply to remedial promises made by a seller in a
29 transaction in goods. 2-102(2). Thus, if a seller makes and breaches a remedial promise, Article
30 2 governs enforcement by the buyer. See 2-408(b)(2), 2-408(f), 2-409(a), 2-409(c), 2-409(d), 2-
31 810(a)(3), 2-814(b)(3), and 2-827(c).

1 **4. Transactions involving goods and [software].**

2 Alternative A to Subsection (b) follows 9-102(a)(44).

3 _____ Alternative B to Subsection (b) is derived from Article 2B.

4
5 Both definitions are under review.

6 The enactment of Article 2B should help to end recurring disputes over whether contracts
7 to develop or to license software should be treated as “transactions in goods” for purposes of
8 Article 2. See, e.g., *Micro Data Systems, Inc. v. Dharma Systems, Inc.*, 148 F.3d 649 (7th Cir.
9 1998). They are not.

10 _____ **5. Overlaps with other UCC articles.** Subsection (c) is new and replaces the language
11 in former 2-102 that Article 2 “does not apply to any transaction which although in the form of
12 an unconditional contract to sell or present sale is intended to operate only as a secured
13 transaction. This language, which applied to “either-or” transactions, did not deal with cases
14 where two or more articles applied to the same transaction.

15 There is no tension between articles if, for example, the transaction is a contract for sale
16 and no security interest is created in the goods or if the transaction is exclusively a security
17 agreement. Similarly, if the transaction is a “true lease” rather than a sale of goods or a secured
18 transaction, Article 2A alone applies.

19 In a contract for sale, the most likely overlap is with Article 9. The seller, the buyer, or
20 some third person may create a security interest in the goods sold or a security interest may arise
21 under Article 2. In these cases, Article 9 not Article 2 applies to the creation, perfection, priority
22 and enforcement of the security interest. For example, a security interest arising when the seller
23 ships under reservation, 2-604, is subject to Article 9, but 9-113 {9-110} expressly refers some
24 aspects of perfection and enforcement back to Article 2.

25 In cases where Article 2 gives the seller or buyer interests in the goods that are not
26 security interests, however, Article 2 rather than Article 9 governs the rights and remedies
27 between seller and buyer. These rights, however, may be subject to security interests in the same
28 goods perfected under Article 9 by third persons. For example, a reclaiming seller under 2-
29 816(b) is subject to the rights of a good faith purchaser for value, including a secured party,
30 whose rights vest before the seller takes possession. 2-816(c).

31 [If payment is by letter of credit, 2-308 and 2-605 deal with the duty of the buyer to
32 provide and the effect of furnishing or not of the letter of credit, but Article 5 defines the critical
33 terms and covers all aspects of the transaction until the letter of credit is paid or dishonored.]

34 **6. Foreign exchange transactions.** Subsection (d), which is new, excludes “foreign

1 exchange transactions from the scope of Article 2. Although a currency exchange is a sale of
2 goods, i.e., a swap, see 2-301(a), an exchange where delivery is “through funds transfer, book
3 entry accounting, or other form of payment order, or other agreed means to transfer a credit
4 balance is not governed by Article 2. Rather, Article 4A or other applicable federal law applies.
5 2-102(a)(21). On the other hand, if the parties agree to a forward transaction where, ultimately,
6 dollars are to be physically delivered in exchange for the delivery of Euros, the transaction is not
7 within the exclusion and Article 2 applies.

8 **7. International sales.** CISG applies to “contracts of sale of goods where the
9 jurisdictional requirements of the Convention are satisfied. Art. 1(1). Article 3 excludes
10 transactions where a party who orders goods to be manufacturer or produced supplies a
11 “substantial part of the materials necessary for such manufacture or production, Art. 3(1), or
12 where the “preponderant part of the obligation of the party furnishing goods “consists in the
13 supply of labour or other services. Art. 3(2).

14 CISG does not apply to sales of consumer goods, certain obligations to pay money,
15 “ships, vessels, hovercraft or aircraft, and electricity. Art. 2.

16 **Cross References:**

17 **Definitional Cross References:**

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

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

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

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

25 (3) any other law of this State to which the subject matter of this article is subject,
26 such as laws dealing with:

27 (A) the sale of agricultural products;

28 (B) the transfer of blood, blood products, human tissues, and organs;

1 (C) the consignment or transfer by artists of works of art or fine prints;
2 (D) distribution agreements, franchises, and other relationships through
3 which goods are sold;
4 (E) liability for products that cause injury to person or property;
5 (F) the making and disclaimer of warranties;
6 (G) the misbranding or adulteration of food products and drugs; and
7 (H) dealers in particular products, such as automobiles, motorized
8 wheelchairs, agricultural equipment, and hearing aids.

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

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

14 **Comments**

15 1. **Source:** Section 2-104, which is new, builds upon former 2-102 after the word “nor
16 and follows the form of 2A-104(1).

17 2. **Other law governing transactions in goods.**

18 In subsection (a), it is assumed that Article 2 is subject to any applicable federal law.

19 **Certificate of title laws.** Subsection (a)(1) permits the states to list any applicable
20 certificate of title statutes and provides that Article 2 is subject to their provisions on the transfer
21 and effect of title except for the rights of a buyer in the ordinary course to business.

22 **Illustration #1.** Suppose that a used car is stolen from Owner and Thief, by fraud, is
23 able to obtain a clean certificate of title from State A. Thief sells the car to B, a good
24 faith purchaser, and transfers the certificate of title. Under 2-504, B does not get good
25 title, regardless of the certificate, and O can replevy the car. The same result follows if

1 the applicable state certificate of title law makes the certificate prima facie evidence of
2 ownership. If, however, the applicable law makes issuance of the certificate conclusive
3 on title, 2-504 does not apply and B (probably) gets good title.

4 **Illustration #2.** Owner entrusts her car to Dealer, a merchant, for repairs. D sells the car
5 to B#1, a buyer in the ordinary course of business. D holds the car for further work and
6 promises to deliver it shortly with a certificate of title. Thereafter, D sells the car to B#2,
7 a buyer in the ordinary course of business, and delivers the car and a new certificate of
8 title in B#2's name. Since B#1's rights as a buyer in the ordinary course of business arose
9 first, B#1 gets title to the car regardless of the scope of the applicable certificate of title
10 statute.

11 3. **Effect of other state law.** Subsections (b) and (c) deal with the effect of a conflict or
12 failure to comply with any law listed in subsection (a).

13 Under subsection (b), in case of a conflict, that law governs to the extent of the conflict.
14 Thus, the applicable law might preempt all or part of Article 2 in a particular transaction.
15 [Illustrate.]

16 Assuming that there is a conflict, subsection (c) deals with the failure of parties to the
17 contract to comply with applicable law. The failure has the “effect specified” in the statute.
18 Thus, the failure to obtain a required license may make the contract illegal, and thus
19 unenforceable, while the non-negligent supply of unmerchantable blood under a “blood shield
20 statute may mean only that the supplier is insulated from injury to person or property.
21

22 **Consumer protection law.** Subsection (a)(2) states that Article 2 is subject to “any
23 applicable law that establishes a different rule for consumers. “Law in this subsection includes
24 (a) different levels of law, federal, state, and local, and (b) different sources of law, legislation,
25 regulation, administrative rule and judicial decision. It also includes law existing at the time of
26 enactment and changes thereafter. It does not deal with the effect of changes in consumer law
27 upon existing contracts. See 2-715, 2-716.

28 The relationship between Article 2 and federal and state consumer law will vary from
29 transaction to transaction and from state to state. For example, the Magnuson-Moss Warranty
30 Act, 15 U.S.C.A. §§ 2301 et. seq., may or may not apply to the consumer dispute in question and
31 the applicable state “Lemon Law” may provide more or less protection than Magnuson-Moss. To
32 the extent of application, they control. Otherwise, Article 2 applies. [Amplify]

33 **Other state law.** Subsection (a)(2) and subsection (a)(3) replace language in former 2-
34 102, which provided: “[N]or does this Article impair or repeal any statute regulating sales to
35 consumers, farmers or other specified classes of buyers.

36 Subsection (a)(3) provides an illustrative but not exhaustive list of other applicable state

1 law that may preempt all or part of Article 2. For example, franchise contracts may be regulated
2 by state franchise acts, the seller of unmerchantable blood or human tissue may be insulated from
3 warranty liability and disclaimers of the implied warranty of merchantability may be invalidated
4 by non-uniform amendments to Article 2. The existence, scope, and effect of these statutes must
5 be assessed from state to state.

6 **4. International sales.** When applicable to a contract for sale of goods, CISG, a treaty,
7 largely preempts Article 2 under Article VI of the Constitution.

8 In the absence of a choice of law clause contracting out, see Art. 6, CISG applies to
9 “contracts of sale of goods between parties whose places of business are in different states...when
10 the states are Contracting States. Art. 1(1)(a). See also, Art. 1(2), Art. 10, which elaborate the
11 place of business test. This would include contracts for sale between parties in the United States
12 and parties in Canada or Mexico, because all of these states are contracting states. If the parties
13 have places of business in different states but one state has not ratified the Convention, CISG
14 does not apply. The United States, exercising a reservation, did not include subsection (1)(b) of
15 Article 1 which purported to apply CISG even though one state was not a contracting state
16 “when the rules of private international law lead to the application the law of a Contracting
17 States.

18 Even if applicable, CISG may not cover every aspect of the contract for sale. For
19 example, CISG excludes sales of consumer goods, “ships, vessels, hovercraft or aircraft, and
20 electricity and sales by auction. Article 2 covers these sales. More importantly, Article 4
21 provides that CISG is “not concerned with: (a) the validity of the contract or of any of its
22 provisions or of any usage; (b) the effect which the contract may have on the property in the
23 goods sold. Article 2 refuses to enforce an unconscionable contract or clause. 2-105. Finally,
24 CISG does not apply “to the liability of the seller for death or personal injury caused by goods to
25 any person. Art. 6. Article 2 applies to “injury to person proximately resulting from any breach
26 of warranty. 2-806(2).

27 The parties to a transaction covered by CISG may contract out and choose applicable
28 United States law, such as Article 2. Even if these is no choice of law clause, Article 2 may
29 apply to parts of the transaction excluded by Articles 2, 4, and 5, if under applicable choice of
30 law principles state law in the United States is applicable.

31 **Cross References:**

32 **Definitional Cross References:**

33 **SECTION 2-105. UNCONSCIONABLE CONTRACT OR TERM.**

34 (a) If a court as a matter of law finds a contract or any term thereof to have been

1 unconscionable at the time it was made, the court may refuse to enforce the contract, enforce the
2 remainder of the contract without the unconscionable term, or so limit the application of an
3 unconscionable term as to avoid an unconscionable result.

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

7 **Comments**

8 1. **Source:** Former 2-302.

9 2. Subsection (a) gives a court power, after the hearing required in subsection (b), to find
10 as a matter of law that a contract or a term in the contract was “unconscionable at the time it was
11 made.

12 **Remedies for unconscionability.** The available judicial remedies under 2-105(a)
13 include refusing to enforce the contract, deleting the enforceable term and enforcing the rest, or
14 limiting an “unconscionable term as to avoid an “unconscionable result. A damage remedy is
15 not available unless the unconscionable conduct breaches some other obligation, such as the duty
16 of good faith or a duty imposed by other state law, such as a deceptive trade practices act.
17 Moreover, subsection (a) does not authorize a court to delete or limit a term that was
18 conscionable at the time of contracting because its enforcement may cause an unconscionable
19 result. See 2-311(a).

20 **The basic test.** The assumption is that the contract or term is not per se illegal or against
21 public policy. In such a case, there would be no need for 2-105(a). Subsection (a), however,
22 does not define unconscionability. The concept integrates elements beyond the traditional
23 defenses of fraud, mistake and duress into a broader test for enforceability. In the past 40 years,
24 the courts have embraced and worked with language in comment 1 to former 2-302, which
25 provided in part:

26 “The basic test is whether, in the light of the general commercial background and the
27 commercial needs of the particular trade or case, the clauses involved are so one-sided as
28 to be unconscionable under the circumstances existing at the time of the making of the
29 contract. . . .The principle is one of the prevention of oppression and unfair surprise...and
30 not of disturbance of allocation of risks because of superior bargaining power.

31 Most courts have recognized that there are two elements of unconscionability, procedural

1 and substantive. See *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y.A.D. 1998); *NEC*
2 *Technologies, Inc. v. Nelson*, 478 S.E.2d 769 (Ga. 1996).

3 Procedural unconscionability means the absence of meaningful choice, i.e., the presence
4 of unfair surprise or oppression. Assuming that the party seeking to avoid the contract has
5 objectively assented to a record, absence of meaningful choice may be found by examining some
6 or all of several factors: (1) Age, education, and intelligence; (2) Business acumen and
7 experience; (3) Relative bargaining power; (4) Who drafted the contract; (5) Whether the terms
8 were explained to the weaker party; (6) Whether alternations of a term were permitted; and (7)
9 Whether there were alternative sources of supply. See *Maxwell v. Fidelity Financial Services,*
10 *Inc.*, 907 P.2d 51 (Ariz. 1995). If one is unfairly surprised by a term, there is no need to examine
11 whether, if fully informed, the party would have been able to reject the offer and find an
12 alternative source of supply. If there is no unfair surprise, the term may still be oppressive if it is
13 offered on a take it or leave it basis and there is no alternative source of supply.

14 Substantive unconscionability means that the contract or term is not commercially
15 reasonable, i.e., that the clause and its operation bear no reasonable relationship to the risks and
16 needs of business. This is usually determined after the hearing required by 2-105(b).

17 Most courts have concluded that unconscionability requires a “certain quantum” of both
18 procedural and substantive unconscionability. See *NEC Technologies, supra*; *American*
19 *Software, Inc. v. ALI*, 54 Cal.Rptr. 477 (Cal.App. 1996). Thus, if there is unfair surprise but the
20 term is commercially reasonable, the term is conscionable. Conversely, if there is no unfair
21 surprise and the term is commercially unreasonable, the term, if not per se against public policy,
22 is conscionable.

23 **Hearing.** Subsection (b) provides that if a party claims unconscionability or it appears to
24 the court that the contract or a term is unconscionable, the parties must be afforded a hearing.
25 Thus, a court may raise the issue *sua sponte* but the failure to hold a hearing may be grounds for
26 reversal and justify a remand. The hearing, whether by testimony or on the record, is to aid the
27 court to determine as a matter of law whether the contract or term is unconscionable.

28 In the hearing, the parties “must be afforded a reasonable opportunity” to present
29 evidence as to the contract or term’s “commercial setting, purpose, and effect.”

30 **Agreed remedies.** [Will discuss application of former 2-719(3).]

31 **Consumer contracts.**

32 [A particularized application of this principle may be found in consumer contracts, which
33 often are characterized by the use of standard forms prepared by a merchant seller. Examples of
34 unconscionable consumer contract terms are obscure and deceptive terms which eliminated the
35 essential purpose of the contract, conflict with other material terms to which the parties have
36
37

1 expressly agreed, or impose grossly unreasonable risk or cost on the buyer under the
2 circumstances. However, this section does not render unenforceable an otherwise enforceable
3 term disclaiming or modifying an implied warranty or a warranty of title, and does not empower
4 a court to invalidate conscionable terms on the ground that they were not within the reasonable
5 expectations of the parties. **Comment under review.**]

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

11 [Illustrate.]

12 4. **International contracts.** In general, CISG does not apply to the “validity of the
13 contract or of any of its provisions or of any usage. Art. 4(a).

14 **Cross References:**

15 **Definitional Cross References:**

16
17 **SECTION 2-106. INTEREST AND PART INTEREST IN GOODS.**

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

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

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

22 (d) An undivided share in an identified bulk of fungible goods is sufficiently described to
23 be sold even if the quantity of the bulk is not determined. Any proportion of the bulk or quantity
24 agreed upon by number, weight, or other measure, may, to the extent of the seller's interest in the
25 bulk, be sold to the buyer. The buyer then becomes an owner in common.

26 **Comments**

27 1. **Sources:** Subsection (a) follows former 2-105(2), first sentence; Subsection (b)

1 follows former 2-105(3); Subsection (c) follows former 2-105(a)(2), the last sentence;
2 Subsection (d) follows former 2-105(4).

3 2. Section 2-106 collects several property rules in one place.

4 First, before a buyer can obtain title, 2-501, or a special property interest, 2-502, in goods,
5 the goods must be existing and identified. Subsection (a). When goods are identified is stated in
6 2-502. The word “existing, although not defined, covers tangible things that are recognizable
7 under the contract description even though they do not yet conform to the contract. Thus, planted
8 crops or components to be integrated into a final product can be existing goods.

9 Second, if goods exist and are identified, whether a single unit or a bulk of fungible
10 goods, the seller may sell a part interest in them to the buyer. Subsection (b). Thus, the seller
11 may sell a one-half interest in an existing piece of factory equipment or fungible corn in a silo.
12 Subsection (d) states that a seller can sell an undivided but unquantified share of a bulk of
13 fungible goods and when the buyer becomes an owner in common. Thus, a sale of 50% of the
14 seller’s one-half interest in the yellow corn in Silo #1 is sufficient to make the buyer an “owner in
15 common of that amount.

16 Third, goods that are neither existing nor identified are “future goods. 2-102(a)(22).
17 Under subsection (d), a purported sale of future goods is treated as a contract to sell goods, i.e., a
18 contract for the future sale of future goods. 2-102(a)(14).

19 3. **International sales.** CISG is not “concerned with. . .the effect which the contract
20 may have on the property in the goods sold. Art. 4(b).

21 **Cross References:**

22 **Definitional Cross References:**

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

24 **RECORDING.**

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

1 (b) Subject to subsection (a), a contract for the sale, apart from an interest in real
2 property, of growing crops, timber to be cut, or other things attached to real property and capable
3 of severance without material harm to the real property, is a contract for the sale of goods,
4 whether the thing is to be severed by the buyer or seller and even if it forms part of the real
5 property at the time of contracting. The parties may effect a present sale before severance by
6 identification of the goods.

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

11 **Comments**

12 1. **Source:** Former Section 2-107.

13 2. **Things that are part of real property.** Subsection (a) deals with things so integrated
14 with land that they are fairly classified as real property. They include, for example, oil and gas to
15 be extracted and a building to be removed from the land. Under a contract for sale, if a buyer is
16 permitted to enter the land and sever the things, the things are treated as real property and Article
17 2 does not apply. The permission to enter and sever, frequently granted by a lease, is treated as
18 the transfer of a limited interest in land and the transaction is subject to applicable statutes of
19 limitations for and recording requirements in real property law.

20 Article 2 does apply, however, if the things sold are to be severed by the seller. At
21 severance, the things are goods. Before severance by the seller, the contract is to sell future
22 goods. Thus, a long-term contract for the sale of natural gas to be produced (severed) by the
23 seller is governed by Article 2, but a sale cannot occur until the gas is produced and identified to
24 the contract. See *JN Exploration & Production v. Western Gas Resources, Inc.*, ___ F.3d ___, 36
25 UCC Rep. Serv.2d 649 (8th Cir. 1998).

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

1 **3. Things apart from real property.**

2 Subsection (b), which is subject to subsection (a), treats things attached to real property
3 and capable of severance without material harm to the real property as goods, regardless of who
4 is to sever them. The assumption is that the severance of growing crops or timber will not
5 materially harm the real property. As to other things not covered in subsection (a), the lack of
6 material harm test must be satisfied. For example, the removal of a rock wall or a portable
7 aluminum storage shed is within subsection (b) but probably does not result in material harm. In
8 these cases, the parties may conclude a present sale before severance by identifying the goods at
9 the time of contracting.

10 Revised Article 9 includes in the definition of goods: “(I) fixtures, (ii) standing timber
11 that is to be cut and removed under a conveyance or contract for sale, . . . (iv) crops grown,
12 growing or to be grown, even if the crops are produced on trees, vines, or bushes. . . . 9-
13 102(a)(44). Article 2 does not deal with fixtures.

14 **4. Permissive recording in real estate records.** Subsection (c) confirms that if the
15 parties have contracted to sell an interest in real property they are subject to the rights of third
16 parties under the laws relating to records of real property. If the contract is for the sale of goods
17 under either subsection (a) or (b), the parties may execute and record the contract as transferring
18 an interest in real property so as to give third persons notice of the buyer’s rights under the
19 contract.

20 **Cross References:**

21 **Definitional Cross References:**

22 **SECTION 2-108. EFFECT OF AGREEMENT.**

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

25 (b) The absence of a phrase such as "unless otherwise agreed" does not by itself preclude
26 the parties from varying a provision of this article by agreement.

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

29 **Comments**

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

8 (b) If within a reasonable time a record in confirmation of a contract and sufficient
9 against the sender under subsection (a) is received by a merchant party and the merchant has
10 reason to know of its contents, the confirmation satisfies the requirements of subsection (a)
11 against the merchant unless notice in a record objecting to the contents of the confirmation is sent
12 within 10 days after it is received.

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

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

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

22 (3) the party against whom which enforcement is sought admits in pleading or

1 testimony in court or otherwise under oath facts from which an agreement may be found.

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

5 (e) The affixing a seal to a record evidencing a contract for sale or to an offer to buy or
6 sell goods does not make the record a sealed instrument. The law with respect to sealed
7 instruments does not apply to the contract or offer.

8 **Comments**

9 1. **Source:** Derived from former Section 2-201.

10 2. **Scope.** Under subsection (a), the requirements of the statute of frauds apply to a
11 contract for the price of \$5,000 or more. An authenticated record is not required where the price
12 is less than \$5,000. The \$500 price in former 2-201(1) has been increased to reflect changes in
13 the cost of living over the last 50 years.

14 In litigation, a party may raise the defense by denying “facts from which an agreement
15 can be found. The defense will be rejected and the parties put to their proof of the bargain in
16 fact if there is a record authenticated by the defendant or the defendant’s agent which is
17 sufficient to indicate that a contract has been made between the parties. The record may omit or
18 incorrectly state terms agreed upon. The record may be sufficient if it omits a quantity term, but
19 if a quantity term is stated in the record the contract is not enforceable beyond the quantity stated.
20 See *Advent Systems Ltd. v. Unisys. Corp.*, 925 F.2d 670, 677 (3d Cir. 1991), citing with
21 approval, Bruckel, *The Weed and the Web: Section 2-201's Corruption of the U.C.C.'s*
22 *Substantive Provisions--The Quantity Problem*, 1983 U. Ill. L. Rev. 811 (1983). These
23 requirements guard against the risk that perjury has been or will be committed in the allegation
24 that a contract exists or as to its terms

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

31 2. **Confirmations.** Subsection (b) retains the principle that a record sufficient against the

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

8 To illustrate, suppose that buyer, a grain dealer, sends seller, a farmer, an authenticated
9 record that states: “This confirms our agreement to sell your output of corn for \$2.10 per bushel,
10 October delivery. Seller receives the record and ignores it. Assuming that the seller was a
11 merchant, since the authenticated record was sufficient against the buyer under subsection (a) and
12 was received and not objected to by the seller, the seller cannot raised the statute of frauds
13 defense under subsection (b). The parties, however, must still prove that a contract was formed
14 and its terms, except that the contract is not enforceable beyond the seller’s “output of corn. See
15 2-306(a).

16 **3. Statutory exceptions.** Subsection (c) states three statutory exceptions to cases where
17 the defense is otherwise available under subsections (a) or (b). These exceptions neutralize the
18 risk that there was perjury about the existence of the contract or its terms.

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

21 Second, subsection (c)(2) expands the “part performance exception in former 2-
22 201(3)(c). Conduct by both parties in performing agreement in whole or in part that recognizes
23 that a contract has been formed takes the case out of the statute. Consistent with subsection (a),
24 enforcement is not limited to the quantity involved in the part performance.

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

29 **4. Promissory estoppel.** The statement of three statutory exceptions to subsection (a)
30 does not preclude the possibility that a promisor will be estopped to raise the statute of frauds
31 defense in appropriate cases. See Revised 1-102(b). For example, suppose a farmer orally agrees
32 to delivery 5,000 bushels of corn after harvest to a dealer for \$5 per bushel. The dealer resells the
33 corn to a third party for \$6 per bushel but neglects to send the farmer a confirmation. Under
34 Section 139 of the Restatement (Second) of Contracts, the farmer may be estopped by the oral
35 promise to deliver that induces reliance by the dealer, especially where the reliance “corroborates
36 evidence of the making and terms of the promise, or the making and terms are otherwise
37 established by clear and convincing evidence. See Subsection §139 (2)(c).

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

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

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

13 **Cross References:**

14 **Definitional Cross References:**

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

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

21 (1) non-contradictory additional terms, unless the court finds that:

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

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

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

1 (b) Terms in a record may be explained by evidence of course of performance, course of
2 dealing, or usage of trade without a preliminary determination by the court that the language used
3 is ambiguous. [Terms in a record may also be explained by evidence of the surrounding
4 circumstances and other sources as determined by a court. **Under review.**]

5 **Comments**

6 1. **Source:** Former 2-202.

7 2. **Intention of the parties.** Subsection (a) codifies the so-called parol evidence rule, the
8 operation of which depends upon the intention of both parties, either inferred or expressed in a
9 merger clause, that terms in “confirmatory records or “a record are the “final expression of
10 their agreement with respect to the included terms. Without this mutual intention to integrate
11 the record, the so-called parol evidence rule does not apply to exclude other terms allegedly
12 agreed to prior to or contemporaneously with the writing. These alleged terms are provable as
13 part of the agreement by relevant evidence from any credible source.

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

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

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

1 **4. Partial integration.** In the absence of a merger clause, the intention to integrate a
2 record with regard to some of all of the terms must be inferred from the circumstances. The
3 inference will be strongest where the parties have assented to a record that appears to be
4 complete on its face. Nevertheless, the court should conduct a hearing to confirm that inference
5 and to determine what other terms, if any, should be included in the agreement. For example, if a
6 term does not contradict but is additional to a partially integrated record, the court might
7 conclude that the term, if agreed to, would certainly have been included in the record. If so,
8 evidence of the term is not admissible.

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

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

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

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

25 5. Subsection (b) states that terms in an record, whether integrated or not, may be
26 explained by evidence from course of performance, usage or trade, or course of dealing without a
27 preliminary determination by the court that the terms are ambiguous. Terms in a record may also
28 be explained by evidence from the “surrounding circumstances” and other sources as determined
29 by the court under applicable law. See Sections 212, 200-203 of the Restatement, Second, of
30 Contracts; Margaret N. Kniffen, *A New Trend in Contract Interpretation: The Search for Reality*
31 *as Opposed to Virtual Reality*, 74 Oregon L. Rev. 643 (1995).

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

1 204(2); subsection (c) follows former 2-204(3); subsection (d), which is derived from former 2-
2 207(1), last clause, is new.

3 **2. Contract formation.** Subsection (a) states the flexible principle that a contract may
4 be made “in any manner sufficient to show agreement. This includes but is not limited to offer
5 and acceptance and the conduct of both parties [or the operations of electronic agents] which
6 recognize the existence of a contract.

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

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

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

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

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

1 Nevertheless, if one or both parties expressly conditions their willingness to contract but
2 the seller ships and the buyer accepts the goods, there is a contract under this section. The so-
3 called “my way or the highway” conditions can be waived by conduct. In such a case, the terms
4 of the contract are determined under 2-207(b).

5 **5. International Sales.** Detailed contract formation principles are provided in Articles
6 14-24 of CISG. The definition, effect and revocability of an offer are covered in Articles 14-17
7 and the definition and effect of an acceptance are covered in Articles 18-23. Although Article
8 18(1) recognizes that an offer may be accepted by conduct, there is no explicit statement that a
9 contract may be formed by conduct of both parties. Article 23 provides that a “contract is
10 concluded at the moment when an acceptance of an offer becomes effective in accordance with
11 the provisions of this Convention.

12 **Cross References:**

13 **Definitional Cross References:**

14 **SECTION 2-2045. FIRM OFFERS.** An offer by a merchant to buy or sell goods made
15 in an authenticated record that by its terms gives assurance that the offer will be held open is not
16 revocable for lack of consideration during the time stated. If a time is not stated, the offer is
17 irrevocable for a reasonable time not exceeding 90 days. A term of assurance in a form record
18 supplied by the offeree to the offeror is ineffective unless the term is conspicuous.

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

20 **Comments**

21 1. **Source:** Former 2-205.

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

27 To reduce the risk of unfair surprise, if the offeree provides the merchant offeror with a
28 form record containing a term of assurance, the term must be conspicuous. There is no
29 requirement that the offeror separately sign the assurance.

1 Subsection (a) supplements rather than displaces other methods by which option contracts
2 are created, such as with consideration or by reliance. See Restatement, Second, Contracts
3 §87(2).
4

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

9 **Cross References:**

10 **Definitional Cross References:**

11 **SECTION 2-2056. OFFER AND ACCEPTANCE.**

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

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

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

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

25 **Comments**

1 1 **Source:** Follows former 2-206..

2 2. **Method and manner of acceptance.** Assuming that an offer has been made, 2-
3 206(a)(1) through the first sentence states the basic principle regarding the manner and medium
4 of acceptance: Unless unambiguously indicated by the “language or circumstances , the offer
5 invites acceptance in “any manner and by any medium reasonable under the circumstances.
6 Thus, if the seller offers to sell goods in a letter communicated to the buyer and does not define
7 or restrict the manner or medium of acceptance, the buyer can create a contract by making a
8 promissory acceptance in a letter mailed to the seller, or in any other medium reasonable in the
9 circumstances, such as by Fax or telegram or even by e-mail.

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

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

24 4. **Acceptance by promise or shipment.** Subsection (a)(2) follows 2-206(1)(b). To
25 illustrate, suppose the offeror offers to buy 1,000 units for prompt shipment. The offer is
26 construed to permit acceptance either by promptly shipping or by promising to promptly ship
27 1,000 units. Suppose, however, that the seller promptly ships 900 units. Under this subsection,
28 the shipment of non-conforming goods accepts the offer to buy and creates a contract to ship
29 1,000 units unless the seller states that the shipment is for accommodation to the buyer. Without
30 notice of an intended accommodation, the non-conforming shipment is normally to be
31 understood as intended to close the bargain, even though it proves to have been at the same time
32 a breach. The effect is to avoid price speculation by the seller during shipment by binding the
33 seller to a contract.

34 5. **Acceptance by conduct.** Subsection (b) follows former §2-206(2) except that the
35 offeror who is not promptly notified of acceptance by beginning performance may treat the
36 contract formed as discharged rather than the offer as having lapsed. This is consistent with the
37 Restatement, Second, of Contracts, which treats performance invited by the offeror as an
38 acceptance by promise, §62, but treats the failure of the offeree to notify the offeror of the

1 acceptance as a discharge of the offeror’s contractual duty. §54(2).

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

7
8 4. **International sales.** Article 18(1) recognizes that an offer may be accepted by a
9 “statement...or other conduct by the offeree indicating assent to the offer. Subsection (2) states
10 when an acceptance by a statement (promise) becomes effective and subsection (3) deals with
11 when the offeree may “indicate assent by performing an act. In the former case, an acceptance
12 by statement or promise is usually effective when received (there is no “mailbox rule), and in the
13 latter case the acceptance is effective when the act is performed if the offeror has indicated or the
14 parties have agreed that notice to the offeror is not required. Apparently, an acceptance by an act
15 is ineffective if notice to the offeror is not dispensed with.

16 **SECTION 2-206. UNENFORCEABLE TERMS IN CONSUMER CONTRACTS.**

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

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

26 (c) This section does not apply to a term disclaiming or modifying an implied warranty
27 that complies with Section 2-406.

28 **Comments**

1 1. **Source:** new.

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

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

9 Second, the term must be a “standard term” included in a record. Article 2 does not
10 define standard term or standard form. See 2B-102(46), defining “standard form. The
11 assumption is that the standard term is drafted in advance for inclusion in the record, that the
12 consumer was unable to influence the substance of the terms in advance, and that the term was
13 not individually negotiated with the consumer before assent. In short, it is the classic “boiler
14 plate” term offered on a “take it or leave it” basis.

15 Third, the inclusion of the term in the record was “materially inconsistent with reasonable
16 commercial standards of fair dealing in contracts of this type. Under this contextualized
17 standard, either the method by which the term was included or the content of the term may justify
18 non-enforcement. For example, a term of which a party had no real opportunity to review or
19 understand would be unenforceable if the process of inclusion was materially inconsistent with
20 reasonable commercial standards of fair dealing. Similarly, an included term that was beyond
21 what a reasonable seller in a competitive market would include in contracts of that type might be
22 denied enforcement.

23 Fourth, a standard term that conflicts with one or more non-standard terms may also be
24 unenforceable. For example, suppose the parties agree that the goods are to be delivered within
25 30 days of the contract and that the time is handwritten into a blank space for delivery. On the
26 back of the record is a standard term that permits the seller unilaterally to extend the time for
27 performance without notice to the buyer. Or suppose the agreed terms of the contract state that
28 the balance of the price is due on the day when the goods are to be delivered. A standard term,
29 however, gives the seller power to demand payment on that date even though the goods have not
30 been tendered. Both of these standard terms are unenforceable.

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

33 3. If a seller, in disclaiming or modifying an implied warranty, satisfies the requirements
34 of Section 2-406 for consumer contracts, Section 2-206 does not apply. A disclaimer that
35 complies with 2-406 and cannot be unenforceable under 2-206, however, may still be
36 unconscionable under the broader standard of 2-105(a).

1 **Cross References:**

2 **Definitional Cross References:**

3 **SECTION 2-207. EFFECT OF ADDITIONAL OR DIFFERENT TERMS IN**
4 **RECORD.**

5 _____ (a) This section is subject to Section 2-105 and 2-206.

6 (b) Unless otherwise provided in subsection (d), if a contract is formed by offer and
7 acceptance and the acceptance is by a record containing terms additional to or different from the
8 offer or ~~by conduct of the parties~~ that if the conduct of the parties recognizes the existence of a
9 contract but the records of the parties do not otherwise establish a contract for sale, the terms of
10 the contract include:

11 (1) terms in the records of the parties to the extent that they agree;

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

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

16 (4) terms supplied or incorporated under any provision of [the Uniform
17 Commercial Code].

18 (c) Unless otherwise provided in subsection (d), if a party confirms a contract by a
19 record received by the other party that contains terms that add to or differ from the previous
20 agreement, the terms of the contract include:

21 (1) terms in the confirmations of the parties, to the extent that they agree;

22 (2) terms to which the parties have previously agreed;

1 (3) standard terms in a confirming record that add to or differ from the previous
2 agreement to which the other party expressly agrees; and

3 (4) terms supplied or incorporated under any provision of this article.

4 [(d) If at the time of full or partial payment for goods by a buyer, a seller intends the
5 agreement to contain additional ~~or different~~ terms and after payment but not later than delivery of
6 the goods those terms are proposed to the buyer, the following rules apply:

7 (1) If it was reasonable under the circumstances for the seller to disclose or make
8 available [a source of] the terms to the buyer at or before the time of payment and it fails to do
9 so, the terms provided after payment ~~are proposals to modify the agreement and~~ do not become
10 part of the agreement [contract] unless the buyer expressly agrees to them;

11 (2) If it was not reasonable under the circumstances for the seller to disclose the
12 terms or make available a source of the terms to the buyer, the seller shall inform the buyer at or
13 before the time of payment that additional ~~or different~~ terms will be proposed.

14 (A) If the buyer is not informed by the seller, the subsequently proposed
15 terms do not become part of the agreement [contract] unless expressly agreed to by the buyer.

16 (B) If informed by the seller, the buyer may either accept the subsequently
17 proposed terms by agreement or reject them by promptly notifying the seller. If the terms are
18 rejected, the buyer, subject to paragraph (3), must return the goods within a reasonable time.

19 (3) Upon returning goods to the seller under subsection (2)(B), the buyer has:

20 (A) a right to a refund of the price;

21 (B) a right to reimbursement of any reasonable expenses incurred
22 related to the return and in compliance with any instructions of the seller for return or, in the

1 absence of instructions, return postage or similar reasonable expenses in returning the goods;

2 (c) the rights and duties of a buyer who has rightfully rejected
3 goods under Section 2-704 and 2-829(b);

4 (D) [Should paragraph (3) also state that (1) the goods, after the
5 terms are rejected, are not subject to claims of the buyer's creditors and that claims of the seller's
6 creditors are subject to the buyer's rights under this subsection and that (2) if the seller has not
7 paid and reimbursed the buyer within a stated period of time after the goods are returned that the
8 buyer may recover punitive damages and attorney fees?] [**Under review.**]

9 (e) In this section, a term is not expressly agreed to by the mere retention or use of goods.

10 **Comments**

11 1. **Sources:** Subsection (a) is derived from former 2-302(1); Subsection (b) is derived
12 from former 2-207(1); Subsection (c) is derived from former 2-207(1); Subsection (d) is new.

13 2. **Overview.** There are no contract formation rules in 2-207, which deals exclusively
14 with what the terms of the contract are. Assuming a contract is formed under other sections,
15 subsection (b) deals primarily with cases where the records of the party do not agree on the term
16 in dispute, subsection (c) deals with the effect of a confirmation of a contract that contains
17 additional terms, and subsection (d) deals primarily with cases where terms intended by a seller
18 to be part of the contract are first disclosed after payment for the goods has been made by the
19 buyer.

20 These cases usually do not involve contracts where all of the terms are included in one
21 record signed by both parties. Rather, they involve relatively unstructured transactions where it
22 is more difficult to determine when the contract was formed and whether certain terms proposed
23 either before or after formation are part of the contract. The problem is further complicated by
24 the likelihood that one or both parties will use standard forms or terms to which the other party
25 appears to have agreed by conduct or otherwise but which, in fact, have not been read or
26 understood. In most cases, Section 2-207 operates to exclude terms of this sort unless the party
27 has expressly agreed to them. See subsection (f), which states that a party who merely retains or
28 uses goods does not expressly agree to terms in records that accompany or precede delivery.
29 Even then, the included terms are still subject to Sections 2-105(a) and 2-206. See subsection
30 (a).

1 The line between 2-207 and the usual fact pattern for contract modification governed by
2 2-209(a) is often difficult to draw. A helpful distinction is the time frame within which the terms
3 are intended or proposed for inclusion in the contract. Under 2-209(1), a contract is formed,
4 performance usually begins and an event occurs that prompts one party to request a modification.
5 If the other party agrees and the agreement is in good faith the modification is enforceable.
6 Under 2-207, the time when the contract is formed may not be clear and the additional terms and
7 the additional terms are proposed in and around the formation process. There is a greater risk
8 that one party will be unfairly surprised when the other claims that standard terms are part of the
9 agreement or that one party will take unfair advantage of the process. Although terms included
10 after contract formation are, in general, modifications, the test for inclusion under 2-207 and 2-
11 209(a) differ.

12 **3. Battle of the records.** Subsection (b) deals with the common transaction where
13 commercial parties, dealing at a distance, exchange records in their effort to form a contract for
14 sale. Whether the contract is formed by offer and acceptance or conduct by both parties, the
15 principles of inclusion are the same.

16 First, the contract includes terms in the records of the parties to the extent that they agree.
17 Terms in the records of the parties that differ are not part of the contract under subsection (b)(1).
18 A term in one record but not in the other is presumptively excluded under subsection (b)(1), but
19 may be included under subsection (b)(2) or (b)(3).

20 Second, the contract includes non-form terms, whether or not in a record, to which the
21 parties have otherwise agreed. Many terms in a record are not form or standard terms.
22 Subsection (b)(2) includes them if agreed to and are not knocked out under subsection (b)(1).
23 Thus, if Buyer makes an offer in a record that contains both form and non-form terms and Seller
24 accepts the offer with additional or different terms, the contract includes the non-form terms
25 offered and any other terms in the records to the extent that they agree..

26 Third, form or standard terms in records excluded under subsection (b)(1) or (b)(2)
27 become part of the contract if they have been expressly agreed to. Thus, a term “knocked out” of
28 the agreement because the records do not agree can be included by express agreement. A party
29 does not “expressly agree” to a term simply by using goods shipped or tendered. Subsection (f).
30 Something more is required, such as initialing the term or evidence that the party was aware of
31 the term and had a realistic opportunity to object to it. In all probability, these issues will arise
32 most frequently where the parties exchange standard forms that are not read. See former 2-205
33 and 2-209(2) where the word “form” is used without definition and the comments to 2-207 where
34 both “forms” and “expressly agreed” are used. This tends to prevent unfair surprise and
35 opportunistic behavior through the use of standard forms, the problem to which former 2-207
36 was directed.

37 Fourth, gaps in agreements where a contract is formed are filled by “terms” supplied by or
38 incorporated from the UCC.

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

4 Example #1. After negotiations, B offered to buy goods from S. The offer was made on
5 a purchase order that on the front stated price, quantity, time of delivery and method of payment
6 and on the back stated several standard terms, including a term requiring arbitration under AAA
7 rules in St. Louis. S accepted the offer in an acknowledgment form, on the back of which was a
8 standard term requiring arbitration in Chicago under Endispute rules and a disclaimer of the
9 implied warranty of merchantability. Without more, a contract was formed. The terms include
10 the terms on the front of Buyer's purchase order to which Seller assented and arbitration to the
11 extent that the records agree. The terms include the implied warranty of merchantability under 2-
12 404 but not the Seller's form disclaimer of the implied warranty, even if the term otherwise
13 complied with 2-406.

14 Example #2. Either party in Example #1 could prevent contract formation by a
15 conspicuous term stating, in effect, "unless you agree to all of my terms there is no contract.
16 See 2-204(d). If, nevertheless, the seller shipped and the buyer accepted and used the goods, a
17 contract by conduct would be formed.

18 4. **Confirmations.** Subsection (c) follows language in former §2-207(1) and elaborates
19 on the effect of a confirmation of a contract by a record.

20 The record may confirm an oral agreement within and thus satisfy the statute of frauds. 2-
21 201(2).

22 If both parties have sent confirmations, terms in the contract include terms in the
23 confirming records to the extent that they agree.

24 If one party confirms and the confirming record contains terms that add to or differ from
25 the previous agreement, those terms are included if expressly agreed to but not otherwise.

26 5. **Terms first disclosed after payment. [This subsection and the comments are still**
27 **under review.]**

28 Subsection (d) deals with sales over the telephone, the internet or by other direct
29 marketing methods where all of terms of the deal are not disclosed by one party, usually the
30 seller, before payment for the goods is made. The parties are in privity of contract, compare 2-
31 408, the transaction differs from the exchange of records covered in subsection (b), and no
32 confirmation is involved. After payment the seller proposes terms that add to those already
33 agreed and, typically, gives the buyer a choice to accept the terms or to reject them and return the
34 goods. The courts have supported the seller in these transactions by interpreting former Article 2
35 to create a "rolling contract" where no contract is formed unless the buyer accepts the additional

1 terms and holding that the terms are accepted by using the goods without objection to the terms.
2 Put differently, despite payment for and shipment of the goods, conduct that usually creates a
3 contract, the courts have held that the additional terms are a final offer to sell which the buyer
4 must accept or reject and that acceptance of the terms can be inferred from conduct. These
5 decisions arguably misinterpret Article 2 and create the risk either that the buyer will be unfairly
6 surprised by the terms or put in a position where return of the goods that return of the goods is so
7 inconvenient and costly that no objection will be made to the terms.

8 **The operation of subsection (d) can be illustrated by several examples.**

9 **Example #1.** B, responding to S's advertisement, telephones S [or uses a computer] and
10 orders the goods. B is asked to pay at that time by credit card. If it is reasonable under the
11 circumstances, S should disclose to B all of the terms of the sale. B may then either reject the
12 terms (and the deal) or accept the terms and form a contract by making part or full payment. If it
13 is not reasonable to disclose [or the seller elects not to?] the terms before payment, S should
14 inform B before payment that additional terms will be proposed at or before delivery of the
15 goods. Whether or not a contract is formed at the time of payment, when the additional terms are
16 proposed by S the buyer may either accept them by agreement or reject the terms and return the
17 goods within a reasonable time. Subsection (d)(2)(B). If the terms are agreed to, the contract
18 includes those terms. If the terms are rejected, there is no contract and the goods must be
19 returned under subsection (d)(3). Even if B agrees to the terms, the right to inspect the goods and
20 all remedies for non-conformity of the goods remain intact.

21 **Example #2.** In Example #1, if S fails unreasonably to disclose additional terms before
22 payment or fails to inform B that additional terms will be proposed, the proposed terms do not
23 become part of the agreement unless B expressly agrees to them. Under subsection (f), the mere
24 retention or use of the goods is not an express agreement to the proposed terms. Thus, the cost to
25 the seller of failing to disclose when reasonable or failing to inform that additional terms will be
26 proposed is that B can ignore the terms and, by use of the goods, create a contract without those
27 terms. Cf. 2-209(a).

28 If it is unclear whether disclosure before payment is reasonable in a particular case, S, in
29 good faith, may decide to inform B that additional terms will be forthcoming. See Example #3.

30 **Example #3.** In Example #1, if it is not reasonable for S to disclose all of the terms
31 before payment but B is informed that additional terms will be proposed, subsection (d)(2)(B)
32 gives B a choice when the terms are proposed: To accept the terms by agreement or to reject the
33 terms and return the goods to S within a reasonable time.

34 If the goods are returned, subsection (d)(3) states that B has a right to a refund of any
35 price paid and to reimbursement for reasonable expenses incurred in the return. In addition, B
36 has the rights and duties of a buyer who has rightfully rejected goods under 2-704, including a
37 security interest in the goods under 2-829(b). [Is this enough? See query in subsection

1 (d)(3)(D).]

2 In sum, the seller who discloses all terms before payment or informs the buyer that
3 additional terms will be proposed gives the buyer an option to agree to the terms or not under the
4 usual standards for agreement. In short, the informed buyer could agree to proposed terms
5 simply by paying the price or using the goods. The seller who neither discloses nor warns,
6 however, does not get subsequently proposed terms into the agreement unless the buyer expressly
7 agrees to them. In these cases, the buyer can ignore the terms and use the goods without
8 incorporating them into the contract. Even if the seller informs the buyer that additional terms
9 will be proposed, the buyer has a choice to agree to the terms or reject them and return the goods.
10 If the goods are returned, the provision of subsection (d)(3) govern the return.

11
12 6. **CISG.** The principle underlying revised 2-207(a) is rejected in Article 19 of CISG. In
13 essence, a purported acceptance of an offer which contains additions, limitations or other
14 modifications is a rejection and a counteroffer unless the reply contains “additional or different
15 terms which do not materially alter the terms of the offer. Art. 19(2) Thus, the counteroffer is
16 the offeree’s “last shot” which can be accepted by “conduct...indicating assent” to the offer. Art.
17 18(1). CISG contains no protection against unfair surprise and provides no explicit method of
18 determining what are the terms of a contract formed by mutual conduct.

19 **SECTION 2-208. COURSE OF PERFORMANCE OR PRACTICAL**
20 **CONSTRUCTION.**

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

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

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

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

28 (b) A course of performance between the parties is relevant to ascertaining the meaning of
29 the parties’ agreement, ~~may give particular meaning to specific terms of the agreement,~~ and may
30 supplement [or qualify] the terms of the agreement.

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

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

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

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

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

10 **Comments**

11 [Revised Section 2-208 is derived from former 2-208 and follows Revised 1-304 in
12 revised Article 1. Ultimately, 2-208 will be deleted from Article 2 and appear only in Article 1.]

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

14 (a) Subject to Section 2-207, an agreement made in good faith modifying a contract under
15 this article needs no consideration to be binding.

16 (b) [Except in a consumer contract], an authenticated record containing a term that
17 prohibits modification or rescission except by an authenticated record may not be otherwise
18 modified or rescinded. If [such] a term is in a form record is supplied by a merchant to a
19 nonmerchant, it must be conspicuous. A party whose language or conduct is inconsistent with the
20 term is precluded from asserting the term if the assertion is unjust in view of a material change of
21 position in reliance on the language or conduct.

22 (c) Except as otherwise provided in subsection (b), a condition in a contract may be

1 waived by the party for whose benefit it was included. Language or conduct, including a course
2 of performance between the parties, is relevant to show a waiver. A waiver affecting an
3 executory portion of a contract may be retracted by reasonable notice received by the other party
4 that strict performance will be required of any term waived unless the retraction would be unjust
5 in view of a material change of position in reliance on the waiver.

6 **Comments**

7 1. **Source:** Follows former 2-209.

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

13 Subsection (a) is subject to 2-207. In the three situations covered there, Section 2-207
14 rather than 2-209(a) determines whether terms proposed in the process of contract formation
15 become part of the contract.

16 **Example #1.** S and B enter a five year contract for the supply of a stated quantity of
17 goods at a fixed price. There is no disagreement about what the terms of the contract are. After
18 three years of performance, S's cost of performance rises dramatically and S asks B if the
19 contract price could be adjusted upward. After due consideration, B agrees to the change and the
20 writing is modified. Whether the agreed modification is enforceable is determined under 2-
21 209(a).

22 **Example #2.** B orders goods from S over the internet. Before payment, S informs B that
23 additional terms will be proposed when the goods arrive. B pays and the goods are shipped. B
24 ignores the terms accompanying the goods and uses the goods without objection. Whether the
25 additional terms are part of the contract is determined by 2-207(d).

26 3. **Relationship to statute of frauds.** Subsection (3) of former 2-209, which stated that
27 the requirements of the statute of frauds must be satisfied if the contract as modified is within its
28 provisions, has been deleted. Thus, if the original agreement satisfies the statute of frauds, 2-
29 201, a modification is enforceable even though it is within the statute and does not comply with
30 subsection (a). In cases where neither the original agreement nor the modification were in excess
31 of \$5,000 but together they are, the phrase "contract for sale in 2-201(a) should be interpreted
32 to include a contract as modified and the statute of frauds will apply.

1 4. **“No oral modification” terms.** Subsection (b) follows former 2-209(2), with three
2 exceptions.

3 First, consumer contracts are excepted. Thus, a NOM term in a consumer contract is not
4 enforceable. [**This exception is under review.**]

5 Second, a NOM term in a form supplied by a merchant to a non-merchant must be
6 conspicuous. This follows the last clause of former 2-209(2), but changes the requirement of
7 “between merchant and substitutes “conspicuous for “separately signed. These changes both
8 protect the non-merchant from the fine print and facilitate electronic commerce, where it is more
9 difficult to satisfy a requirement of a “separate signature.

10 Third, the party for whose benefit the NOM term was included is precluded from
11 enforcing it if language or conduct inconsistent with the NOM clause have induced reasonable,
12 good faith reliance by the other party. See *Brookside Farms v. Mama Rizzo’s, Inc.*, 873 F. Supp.
13 1029 (S.D. Tex. 1995). For example, suppose that a buyer insisted on a NOM clause to control
14 the extra work of a seller of manufactured goods. Seller asks buyer for a written change order to
15 increase the quality of an important component. Buyer tells the seller “not to worry about the
16 writing and to “make the change and send me the bill. If the change was made, Buyer would
17 be foreclosed from defending that the oral agreement was unenforceable because of the NOM
18 clause.

19 4. **Waiver of other conditions.** The first sentence of subsection (c) draws upon former
20 §2-208(3) and 2-209(4) to state a general principle of “election waiver where conditions (other
21 than the NOM condition) are involved. Express conditions for the benefit of one party, such as
22 notice, may be waived by that party by failing to insist upon them after the condition fails. No
23 reliance by the other party is necessary.

24 The second sentence of subsection (c) follows former §2-209(5), except that the reliance
25 exception is revised to conform to subsection (b). In this so-called reliance waiver, the party for
26 whose benefit a condition is included states that he will not insist upon the occurrence of a
27 condition in the future. Here, however, the waiver may be retracted unless the retraction is unjust
28 in view of a material change in position in reliance on the waiver.
29

30 In a third type of waiver not covered by revised 2-209, the court may simply excuse the
31 condition when its nonoccurrence would cause "disproportionate forfeiture" and the occurrence
32 of the condition was not a "material part of the agreed exchange." Restatement, Second,
33 Contracts §229. See *Aetna Casualty and Surety Co. v. Murphy*, 538 A.2d 219 (Conn.
34 1988)(burden on party seeking excuse to prove that condition was not a material part of
35 exchange).

36 **Example #3.** Suppose that a contract for installment deliveries contains a NOM term.
37 The seller encounters production problems, misses a due date and requests an extension of

1 delivery time from the buyer.

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

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

13 **[B. Electronic Contracting]**

14 **[This subpart is under review.]**

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

18 **SECTION 2-211. ELECTRONIC MESSAGES: TIMING OF CONTRACT;**
19 **EFFECTIVENESS OF MESSAGE; ACKNOWLEDGING MESSAGES.**

20 **SECTION 2-218. OFFER AND ACCEPTANCE; ELECTRONIC AGENTS.**

21 **Comments to Part B**

22 [These sections are under review by the Drafting Committee.]

23 **PART 3**

24 **GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT**

25 **SECTION 2-301. HOW CONTRACT PRICE PAYABLE.**

26 (a) The contract price may be made payable in money or otherwise. If the price is payable

1 in whole or in part in goods, each transferor is a seller of the goods transferred.

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

5 **Comments**

6 1. **Source:** Former 2-304.

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

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

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

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

31 3. **International sales.** Article 53 of CISG states that the buyer "must pay the price for
32 the goods and take delivery of them as required by the contract and this Convention. Articles 54
33 through 59 then deal with the buyer's responsibility to comply with required formalities to enable

1 the price to be paid and provide default rules for open price contracts and where and when the
2 price is to be paid.

3 **Cross References:**

4 **Definitional Cross References:**

5
6 **SECTION 2-302. FULL OR PART PERFORMANCE.**

7 (a) Except as otherwise provided in subsection (b), if all of a seller's performance can be
8 rendered at one time, full performance must be tendered. The buyer's duty to accept and pay
9 arises only on tender of all of the goods or on the completion of full performance.

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

13 **Comments**

14 1. **Source:** Former 2-307. [**This section will be conformed to changes proposed in**
15 **Sections 2-606 and 2-607 dealing with the seller's performance obligations other than the**
16 **tender of goods.**]

17 2. Subsection (a) states that all of the seller's performance of the contract, which may
18 include tender of the goods and their assembly or installation, must be tendered at one time if it
19 can, unless the parties have agreed to an installment contract, see 2-710(a), or subsection (b)
20 applies. In this case, full performance is a condition to the buyer's duty to accept and pay for the
21 goods. If the seller's performance takes time to complete, the completed performance must be
22 tendered before the buyer has a duty to accept and pay. See 2-606(a).

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

30 If circumstances do not justify the exception, subsection (a) applies and payment is not

1 due until the seller has tendered all of the goods or completed full performance.

2 For example, suppose the seller is to deliver 10,000 tons of coal at \$25 per ton by
3 November 1. The goods are to be shipped to the buyer. Due to a temporary shortage of rail cars,
4 the seller was able to ship only 5,000 tons on October 24. The balance was shipped on October
5 27 and arrived by November 1. Under subsection (b), circumstances gave the seller the right to
6 make performance in parts and to demand payment for each part. The buyer cannot reject the
7 first shipment on the deficiency in quantity alone. See 2-710, installment contracts.

8 4. **International Sales.** The seller's obligations regarding delivery of the goods under
9 CISG are covered in Articles 30 through 33. Although not clearly stated, the assumption is that
10 all of the goods will be delivered at once unless installment deliveries have been agreed. See Art.
11 73.

12 **Cross References:** 2-606, 2-607, 2-710.

13 **Definitional Cross References:**

14 **SECTION 2-303. OPEN-PRICE TERM.**

15 (a) The parties, if they so intend, may form a contract for sale even if the price is not
16 agreed. In this case, the price is a reasonable price at the time for delivery if:

17 (1) nothing is said as to price;

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

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

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

22 (c) If a price left to be fixed otherwise than by agreement of the parties is not fixed in
23 good faith under subsection (b) or fails to be fixed through fault of one party, the other party at its
24 option may treat the contract as canceled or may fix a reasonable price.

25 (d) If the parties intend not to be bound unless the contract price is fixed or agreed and it
26 is not fixed or agreed, a contract is not formed. In that case, the buyer shall return any goods

1 already received or, if unable to do so, pay their reasonable value at the time of delivery, and the
2 seller shall return any portion of the contract price paid on account.

3 **Comments**

4 1. **Source:** 2-305.

5 2. **Open prices.** Subsection (a) deals with agreements where the parties intend to
6 contract even though the price is not agreed, or is left to be agreed in the future, or is left to be
7 fixed by external standards. These “open price agreements contrast with contracts where the
8 price is fixed, with or without various forms of escalation. Section 2-303 does not apply in these
9 cases.

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

14 The primary purpose of open price contracts is to share the risk of changing market
15 conditions. This is especially important in contracts with extended duration. For example, in a
16 fixed price installment contract for a five year duration market fluctuations could create
17 incentives for either party to breach. Thus, in rising markets the seller would prefer to sell to
18 other buyers at the market price and in falling markets the buyer would prefer to buy from other
19 sellers at the market price. The fixed price prevents this and allocates the risk.

20 To illustrate, suppose the parties enter into a ten year installment contract for the delivery
21 of 10,000 tons of steel. Under the contract, price is to be fixed by an external source every four
22 months based upon current market conditions. If that price is not fixed, the parties agree to agree
23 on the price. If the external source fails to fix the price, and the parties are unable to agree, the
24 court must first determine if the parties intended to contract despite the failure to agreement. If
25 so, the price is a “reasonable price at the time of delivery. If not, the parties are entitled to
26 restitution under subsection (e). See *Oglebay Norton Co. v. Armco, Inc.*, 556 N.E.2d 515 (Ohio
27 1990).

28 3. **Price to be fixed by one party.** Subsection (b) deals with agreements conferring on
29 either the seller or the buyer discretion to fix the price. A price fixed in good faith, i.e., with
30 honesty in fact and the observance of reasonable commercial standards of fair dealing, supplies
31 the price term for the contract. Subsection (a) does not apply in this situation. If, however, the
32 price is fixed in bad faith, that price does not bind the other party. Rather, the buyer may treat the
33 contract as canceled or may fix a reasonable price under subsection (c).

34 4. **Effect of failure to fix price.** If the price is not fixed through the fault of one party,

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

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

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

11 **Cross References:**

12 **Definitional Cross References:**

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

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

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

22 **Comments**

23 1. **Source:** Former 2-306.

24 2. **“Output” or “Requirements” as quantity terms.** Subsection (a) states the meaning
25 of "output" and "requirements" when used as quantity terms in a contract for sale. The parties
26 may agree upon a fixed quantity or no quantity or something in between. But unless the parties
27 agree to measure all or part of the quantity by "output" or "requirements," 2-304(a) does not

1 apply. See *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, 925 S.W. 2d 759 (Tex.
2 1996)(holding that contested quantity term was not a requirements or output contract).

3 “Output or “Requirements terms satisfy the statute of frauds, 2-201(a), see *Orchard*
4 *Group, Inc. v. Konica Medical Corp.*, 135 F.3d 421 (6th Cir. 1998), and do not cause a contract to
5 fail for indefiniteness, see 2-204(c), because quantity is determined by the actual output or
6 requirements that may occur in good faith. Because the seller’s or buyer’s discretion is limited
7 by the duty of good faith, subsection (a) does not require that there must also be an exclusive
8 dealing arrangement before an output or requirements term is enforceable. Although some states
9 require exclusive dealing, see *Essco Geometric v. Harvard Industries*, 46 F.3d 718 (8th Cir.
10 1995)(Missouri), this position is rejected. The term should be enforceable where the seller or
11 buyer agrees to supply or demand all or part of its output or requirements in good faith to or from
12 the other. See *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991); Restatement
13 (Second) Contracts §79(c)(where consideration requirement is met there is no additional
14 requirement of mutuality of obligation). For example, a term where the buyer agrees to buy 10%
15 of its actual requirements in good faith from the seller should be enforceable. On the other hand,
16 the buyer would not have the additional obligation to use "best efforts" unless there was an
17 exclusive dealing contract. 2-304(b). See *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119 (3d
18 Cir. 1992).

19 **3. Unreasonably disproportionate.** In cases where there are some actual output or
20 requirements in good faith, subsection (a) further controls the exercise of discretion by requiring
21 a reasonable proportion between agreed estimates or prior comparable output or requirements
22 and the goods actually supplied or ordered. Suppose, for example, that the buyer estimated its
23 requirements to be 50,000 units per year. Over a five year period, the buyer's orders averaged
24 between 45,000 to 55,000 per year. In the 6th year, buyer's actual requirements in good faith
25 were 100,000 per year. If 100,000 units were ordered, the question is whether the quantity is
26 "unreasonably disproportionate" to the stated estimate and this question is answered more by the
27 size of the variations and whether they were reasonably foreseeable at the time of the contract
28 than the motives of the buyer or seller. In short, a buyer can be in good faith and still order
29 requirements that are unreasonably disproportionate.. See *Orange & Rockland v. Amerada Hess*
30 *Corp.*, 397 N.Y.S.2d 814 (N.Y.A.D. 1977).

31 **4. Going out of business.** Subsection (a), as revised, clarifies that if there are no actual
32 output or requirements in good faith, the party has no duty to perform even though there are
33 estimates in the contract or there were prior output or requirements. The question is whether the
34 lack of output or requirements occurred in good faith, not whether the lack of actual output or
35 requirements was "unreasonably disproportionate." This follows the interpretation of prior
36 2-306(1) in *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333 (7th Cir. 1988), but
37 rejects the court's dictum that the unreasonably disproportionate limitation is not applicable to
38 any decrease in quantity or requirements. See also, *Brewster of Lynchburg, Inc. v. Dial Corp.*, 35
39 F.3d 355 (4th Cir. 1994); *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119 (3d Cir. 1992).

1 The question when a party with no actual output or requirements has acted in good faith,
2 i.e., has been dishonest in fact or failed to observe reasonable commercial standards of fair
3 dealing, 2-102(a)(23), is more difficult to answer. Some courts have distinguished decisions
4 made because the contract is simply unprofitable or too costly (bad faith) from those made
5 because an event external to the contract has adversely affected the viability of the entire
6 enterprise (good faith). *Feld v. Henry S. Levy & Sons, Inc.*, 335 N.E.2d 320 (N.Y. 1975). At
7 least one court has held, however, that bad faith is established if the party claiming no actual
8 requirements fails to offer a reason for that situation. See *Empire Gas Corp.*, supra; *Canusa*
9 *Corp. v. A & R Lobosco, Inc.*, 986 F. Supp. 723 (E.D.N.Y. 1997).

10 **5. Exclusive dealing.** Subsection (b) states the effect of an exclusive dealing agreement
11 which is otherwise valid under anti-trust or other laws: The parties must use best efforts to supply
12 the goods or to promote their sale. Although "best efforts" is not defined in the statute, the duty
13 of good faith and the standard of commercial reasonableness apply to judge the effort or lack of
14 effort by a party. See *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979). When
15 exclusive dealing is coupled with a requirements term, a buyer who has no requirements in good
16 faith may still have failed to use best efforts to promote the sale.

17 **6. International sales.** CISG does not deal specifically with requirements or output
18 contracts. The seller, however, is obligated to deliver the quantity of goods required by the
19 contract and that quantity could be the seller's output or the buyer's requirements. See Art. 30.

20 **Cross References:**

21 **Definitional Cross References:**

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

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

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

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

29 **Comments**

30 1. **Source:** Former Section 2-308.

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

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

9 3. **Documents of title.** Subsection (b) states only that a document of title may be
10 delivered through customary banking channels. If so delivered, customarily the bank will notify
11 the buyer when the document has arrived and the buyer bears the expense of picking up the
12 document from the bank and taking delivery of the goods from the carrier or warehouse. If the
13 contract requires payment against documents and a bank purchases or agrees to collect a sight
14 draft, the collection duties in Article 4, Part 5 will apply. If a letter of credit is involved, Article
15 5 deals with duties regarding the document of title. See 5-108.

16 4. **International sales.** Article 31 states the place where goods are to be delivered and
17 Article 34 deals with the delivery of documents.

18 **Cross References:**

19 **Definitional Cross References:**

20 **SECTION 2-306. TIME FOR PERFORMANCE NOT SPECIFIED.**

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

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

26 **Comments**

27 1. **Source:** Former Section 2-309(1) and (2).

28 2. Subsection (a), which substitutes "performance" for the phrase "shipment or
29 delivery," states that the time for performance if not otherwise specified is a reasonable time.

1 See 1-204(2). The time for performance may be otherwise specified in the agreement or another
2 section in this article. See 2-205.

3 3. Subsection (b) states that an agreement for successive performances where the
4 duration is indefinite is terminable at will by either party if the notice requirements of 2-311 are
5 satisfied. Subsection (b) does not apply where the goods are to be delivered in a single lot but
6 does apply to installment contracts. For example, a contract to deliver 1,000 units without stating
7 a time for delivery would be governed by subsection (a). On the other hand, a contract for the
8 buyer's monthly requirements without stating a duration would be governed by subsection (b).
9

10 4. **International sales.** The time for delivery of goods by the seller is stated in Article
11 33 and the time for payment of the price is stated in Article 58.

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

13 **PERFORMANCE.**

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

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

23 (c) A specification relating to an assortment of goods is at the buyer's option. Except as
24 otherwise provided in subsection (d), a specification or arrangement relating to shipment is at the
25 seller's option.

26 (d) If a specification by one party would materially affect the other party's performance

1 but is not seasonably made or if one party's cooperation is necessary to the agreed performance of
2 the other but is not seasonably forthcoming, the other party, in addition to all other remedies:

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

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

7 **Comments**

8 1. **Source:** Follows former Section 2-311.

9 2. **Particulars of performance open.** Subsection (a) follows former 2-311(1), but is
10 broadened to include a contract that leaves particulars of performance to be fixed by agreement.
11 Assuming that the parties intend to contract, this is consistent with the principle in 2-204(c) and
12 2-303. If the parties do not intend to form a contract until gaps are filled or particulars are
13 specified, the agreement is not enforceable. 2-204(c), 2-303(d).

14 The last sentence in subsection (a), which is still under review, makes clear that if the
15 parties intended to contract and agreement leaves particulars of performance to be fixed by
16 agreement, the parties shall, at a minimum, make a good faith effort to reach agreement. If they
17 fail to agree in good faith, the gap can be filled by the court if the parties still intended to
18 contract. This follows the approach of 2-303 where the parties intend to contract but leave the
19 price to be agreed.

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

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

27 5. **International sales.** There is no comparable provision in **CISG**.

28 **SECTION 2-308. FAILURE TO PAY BY AGREED LETTER OF CREDIT.** If the
29 parties agree that the primary method of payment will be by letter of credit, the following rules

1 apply:

2 (1) The buyer's obligation to pay is suspended by reasonable delivery to the seller of a
3 letter of credit issued or confirmed by a financing agency of good repute in which the issuer and
4 any confirmer undertake to pay against presentation of documents evidencing delivery.

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

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

9 **Comments**

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

13 2. Subsection (a) states the effect of the tender to the seller of a letter of credit agreed by
14 the parties to be the primary method of payment. As with the issue of an instrument, 3-310, the
15 buyer's duty to pay is suspended until the letter or credit is honored or dishonored. Note that the
16 financing agency, see 2-102(a)(16), which is typically a bank, must be in good repute and be
17 obligated to pay upon presentation of documents evidencing delivery. If the delivery is overseas,
18 the financing agency must be of good international repute. Once the obligation is suspended, all
19 other aspects of the transaction, until the letter of credit is honored or dishonored, are governed
20 by Article 5.

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

24 4. Subsection (c) states the seller's remedy if the letter of credit is repudiated or
25 wrongfully dishonored: Assuming that the goods conform to the contract, the seller may require
26 payment directly from the buyer. In short, the seller may recover the agreed price, see 2-822,
27 even if the goods are still in transit or have not been inspected by the buyer. See Section 2-605,
28 which states the rights of a financing agency that has honored a letter of credit or purchased a
29 draft presented with necessary documents. Note, however, that a buyer who wrongfully
30 repudiates a letter of credit may still have a right to inspect and reject non-conforming goods.
31 **[Under review for coordination with Article 5.]**
32

1 *and UCC Article 2--Conflicts and Confusions*, 31 *The International Lawyer* 111(1997).

2 4. **International sales.** Under CISG, delivery and shipment terms are determined by the
3 contract, which frequently incorporates the Incoterms by reference.

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

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

8 (b) The following survive termination of a contract:

9 (1) a right based on a previous breach or performance of the contract;

10 ~~(2) a term limiting the scope, manner, method, or location of the exercise of rights~~
11 ~~in the goods;~~

12 (2) an obligation of confidentiality, nondisclosure, or noncompetition;

13 ~~(4) an obligation to return or dispose of goods or return any unearned part of the~~
14 ~~price;~~

15 (3) a choice of law or forum;

16 (4) an obligation to arbitrate or otherwise resolve disputes through alternative
17 dispute-resolution procedures;

18 (5) a term limiting the time for bringing an action or for providing notice;

19 (6) an indemnity term;

20 (7) a limitation of remedy or modification or disclaimer of warranty; and

21 (8) other rights, remedies, or limitations if in the circumstances their survival is
22 necessary to achieve the purposes of the parties.

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

2 **Comments**

3 **1. Source:** 2B-626.

4 **2.** Section 2-310 is new and follows 2B-626 (December, 1998.) "Terminate means "to
5 end a contract or a part thereof by an act by a party under a power created by agreement or law ,
6 or by operation of the terms of the agreement for a reason other than for breach by the other
7 party. 2-102(a)(___). This section is still under review.

8 **SECTION 2-311. TERMINATION; NOTICE.**

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

12 (b) A term dispensing with notice is invalid if its operation is unconscionable. However,
13 a term specifying standards for the nature and timing of notice is enforceable if the standards are
14 not manifestly unreasonable.

15 **Comments**

16 **1. Source:** Former Section 2-309(3).

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

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

28 There are three exceptions to this important default rule.

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

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

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

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

19 Without more, the exercise of an agreed power to terminate is also subject to the duty of
20 good faith, 1-203, which cannot be disclaimed by agreement. 1-102(3). Many courts, however,
21 have found good faith where the terminating party follows the terms of an otherwise
22 conscionable termination clause. Under this approach, the motive of the terminating party is
23 irrelevant and the agreed termination is effective if a reasonable notice is given. This does not,
24 however, foreclose proof of other conduct that amounts to bad faith in performance or in
25 attempting to recapture opportunities that were foreclosed upon the making of the contract. See
26 *Sons of Thunder, Inc. v. Borden, Inc.*, 690 A.2d 575 (N.J. 1997), which made the distinction
27 between a good faith termination under the contract and bad faith in performance prior to the
28 termination.

29 4. **International sales.** There is no comparable provision in CISG.

30
31 **SECTION 2-312. SALE BY AUCTION.**

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

34 (b) A sale by auction is complete when the auctioneer so announces by the fall of the

1 hammer or in any other customary manner. If a bid is made during the process of completing the
2 sale but before a previous bid is accepted, the auctioneer may in its discretion reopen the bidding
3 or declare the goods sold under the previous bid.

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

13 (d) If an auctioneer knowingly receives a bid on a seller's behalf or the seller makes or
14 procures a bid, and notice has not been given that authority for such bidding is reserved, the
15 buyer at the buyer's option may avoid the sale or take the goods at the price of the last bid made
16 in good faith before the completion of the sale. This subsection does not apply to a bid at an
17 auction required by law.

18 **SOURCE: Sales, Section 2-328.**

19 **Comments**

20 1. **Source:** Former Section 2-328.

21 2. Section 2-311 makes three changes in former 2-328. First, subsection (b) clarifies that
22 the auctioneer's discretion to reopen the bidding applies regardless of the method of completing
23 the sale. Second, at the request of the auction industry, the concept of "power to withdraw the

1 goods is substituted for the phrase “with reserve” in subsection (c). The meaning of the latter
2 phrase is ambiguous. Finally, subsection (d) clarifies the meaning of a forced sale. There are
3 relatively few cases under former 2-328 and they reveal no significant problems of interpretation.
4 For a focused analysis, see Jorge Contreras, *The Art Auctioneer: Duties and Assumptions*, 13
5 *Hastings Comm./Ent. L. J.* 717 (1991); Patty Gerstenblith, *Picture Imperfect: Attempted*
6 *Regulation of the Art Market*, 29 *Wm. & Mary L. Rev.* 501 (1988).

7 2. Operation and effect.

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

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

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

22 If it is announced in “express terms” that the auction is not subject to the seller’s power to
23 withdraw the goods, a contract is not formed until some bid is made within a reasonable time and
24 not withdrawn by the bidder before the auctioneer announces the completion of the sale. Both
25 parties have some discretion (the auctioneer’s is more limited) after the bid is made. This
26 supports the conclusion that the contract is formed at the place where the auctioneer accepts the
27 bid, rather than at the point where the bid is made, whether made by mail or through EDI.

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

32 The assumption is that a seller, at a minimum, must give notice if it bids at an “unforced
33 auction and some auctioneer’s believe that the seller should not be able to bid at all at a sale
34 where the seller has no power to withdraw the goods. Suppose, during the course of an auction
35 where the seller reserves power to withdraw the goods, the auctioneer expressly announces that
36 the seller no longer reserves power to withdraw the goods. Original 2-328(3) did not recognize

1 this conversion possibility, which exists in practice. Such a conversion, in effect, announces a
2 “reserve bid” in that the goods will not be sold below the last bid before the conversion.
3 Presumably, a sale “without reserve” can also be converted to a sale “with reserve” during the
4 course of the auction. For a case holding that the goods were not in “explicit terms” put up
5 without reserve where the auctioneer stated that there was no minimum bid and the goods would
6 be sold to the highest bidder, see *Miami Aviation Serv. v. Greyhound Leasing & Finance Corp.*,
7 856 F.2d 166 (11th Cir. 1988).

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

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

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

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

28 **3. Auctions, warranties and disclaimers.**

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

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

35 Section 2-403 provides that express warranties may be made by a seller (auctioneer or

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

6 4. **International sales.** There is no comparable provision in CISG.

7 **PART 4**

8 **WARRANTIES**

9 **SECTION 2-401. DEFINITIONS.** In this part:

10 (1) "Damage" means all loss resulting from a breach under this Part of warranty,
11 including direct, incidental, and consequential damage.

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

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

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

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

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

22 **Comments**

23 **1. Source: New**

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

5 Nevertheless, at least two developments support a revision that is sensitive to the interests
6 of the buying public, who pay the price of the goods sold.

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

19 The second is the increasing use by sellers of advertising and other methods of electronic
20 communication to stimulate sales, whether made directly to buyers by telephone, television, or
21 the internet, or through retailers and dealers. Since former Article 2 was based upon different
22 assumptions about how contracts for sale were advertised, negotiated and concluded, and how
23 goods were distributed, the question is whether the older model is still viable. For example,
24 since many sales are now concluded after advertising to the public or through warranties passed
25 through a dealer by a manufacturer, Article 2 has been revised to codify the existing case law in
26 this area rather than leave it to the common law process. See Section 2-408.

27 2. **Definitions.** Section 2-401, which is new, provides common definitions for use in Part
28 4.

29 **Damage.** Unless otherwise provided in Part 4, damages for breach of warranty or other
30 obligations created in Part 4 include all loss resulting from the breach, including direct,
31 incidental, 2-805, and consequential damages, 2-806. Consequential damages include loss to
32 property other than the goods sold and “injury to person” proximately resulting from any breach
33 of warranty, 2-806(2), but under 2-408(f)(3), not consequential damages for lost profits. Direct
34 damages are losses that are neither incidental nor consequential.

35 **Goods.** “Goods” include a component incorporated “in substantially the same condition
36 into other goods. See 2-102(a)(___). Unless otherwise provided in Part 4, goods include both
37 new and used goods.

1 **Immediate buyer.** An immediate buyer is in a contractual relationship with the seller.
2 Thus, express warranties, 2-403, and implied warranties, 2-404, 2-405, are made by sellers to
3 immediate buyers but express warranties under 2-408 are made by sellers to “remote buyers.
4 Unless the phrase “remote buyer” is used, use of the word “buyer” in Part 4 also means
5 “immediate buyer.

6 **Remote buyer.** A “remote buyer” is a buyer from a person other than the seller against
7 which a claim under Part 4 is made. The phrase is used only in 2-408 and 2-409(d).

8 **Representation.** The word “representation” is used as a short hand for the elements of
9 an express warranty, a description of the goods, an affirmation of fact or promise about the
10 quality or performance of the goods to be delivered, or a sample or model of the goods. The word
11 is used extensively in Part 4.

12 A representation, if resulting in an express warranty or an obligation, creates a standard of
13 quality or performance to which the goods must conform at the time of tender of delivery. A
14 representation includes affirmations or promises that the goods will, after delivery, continue to
15 meet a stated standard of quality or performance for a specified length of time.

16 A representation should be distinguished from a “remedial promise,” defined as a
17 “promise by a seller to take remedial action, including to repair or replace the goods or to refund
18 the price, if the goods do not conform to the contract, or a representation, or upon the happening
19 of a specified future event” 2-102(a)(25). Remedial promises are frequently made in connection
20 with express and implied warranties and are part of the package that a manufacturer or dealer
21 might offer to an immediate buyer or pass through to a remote buyer. The phrase is treated in
22 Part 4 and other parts of Article 2, see 2-103(a), 2-804, 2-814, 2-827. See *Flagg Energy*
23 *Development Corp. v. General Motors Corp.*, 709 A.2d 1075, 1080 (Conn. 1980).

24 **Example.** S contracts with B to manufacture and deliver factory equipment. S promises
25 that (1) the equipment will produce 100 units per hour at delivery, (2) the equipment will produce
26 “not less than 90” units per hour for three years after delivery, and (3) as an exclusive remedy, S
27 will repair and replace defective parts and workmanship for a three year period after delivery.
28 The first two promises are representations within the definition and the third promise is a
29 “remedial” promise.

30 **Seller.** In Part 4, “seller” includes an auctioneer or liquidator that “fails to disclose that it
31 is acting on behalf of a principal. An auctioneer that discloses an agency status at the time of
32 the auction but does not disclose the name of the principal does not make a warranty under Part
33 4. See *Jones v. Ballard*, 573 So.2d 783 (Miss. 1990).

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

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

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

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

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

11 (c) A warranty under this section may be disclaimed or modified only by specific
12 language or by circumstances that give the immediate buyer reason to know that the person
13 selling ~~seller~~ does not claim title or purports to sell only such right or title as the seller or a third
14 party may have or sells subject to any claims of infringement or the like. [In an electronic
15 transaction that does not involve review of the record by an individual, language, to be sufficient,
16 must also be conspicuous and relate to the warranty of title or against infringement. **Under**
17 **review.**]

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

20 **Comments**

21 1. **Source:** Former Section 2-312.

22 2. **Scope of warranty.** Unlike other warranties in Part 4, the warranty made by a seller in

1 subsections (a) and (b) is fixed and does not depend upon whether the seller is a merchant. The
2 warranty, however, can be disclaimed or modified under subsection (c).

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

7 A warranty that the "title conveyed is good and its transfer rightful" covers cases where
8 the title is good but the transfer is not rightful. A good example of a wrongful transfer is where
9 a merchant bailee to whom goods are entrusted for repair sells them without authority to a buyer
10 in the ordinary course of business. See 2-504(c); *Sumner v. Fel-Air, Inc.*, 680 P.2d 1109
11 (Alaska 1984). Further protection is needed, however, where title is burdened by colorable
12 "clouds" that affect the value of the goods. See, e.g., *Frank Arnold KRS, Inc. v. L.S. Meier*
13 *Auction Co., Inc.*, 806 F.2d 462 (3d Cir. 1986)(two law suits contest title); *Jeanneret v. Vichey*,
14 693 F.2d 259 (2d Cir. 1982)(export restrictions in country from which painting was taken affect
15 value); *Colton v. Decker*, 540 N.W.2d 172 (S.D. 1995)(conflicting vehicle identification
16 numbers). As one court put it, there "need not be an actual encumbrance of the purchaser's title
17 or actual disturbance of possession to permit a purchaser to recover for a breach of warranty of
18 title when he demonstrates the existence of a cloud on his title, regardless of whether it
19 eventually develops that a third party's title is superior." The policy is that a purchaser "should
20 not be required to engage in a contest over the validity of his ownership." *Maroon Chevrolet,*
21 *Inc. v. Nordstrom*, 587 So.2d 514, 518 (Fla.App. 1991)(conflicting vehicle identification
22 numbers). Revised Article 2 follows this principle.

23 3. **Infringement.** Subsection (b) continues the warranty against infringement in former 2-
24 312(3). The warranty can be disclaimed or modified under subsection (c). See *Bonneau Co. v.*
25 *AG Industries, Inc.*, 116 F.3d 155 (5th Cir. 1997), which holds that if the buyer furnishes
26 specifications to a seller who follows them, there is no warranty against infringement under 2-
27 312(3). This limitation is retained here.

28 4. **Disclaimers.** Subsection (c) deals with the disclaimer or modification of the warranty
29 of title or against infringement. The first sentence, which follows former 2-312(2), states the
30 general standard that must be met to disclaim or modify against an immediate buyer. The
31 language need not be conspicuous or in a record. The warranty against “infringement” can also
32 be disclaimed under subsection (c). There are no safe harbors for disclaimers under this section.
33 See 2-406(c).

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

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

9 Without subsection (d), a cause of action for breach of warranty under subsection (a)
10 would accrue when the breach occurred even though the plaintiff did not have knowledge of the
11 breach. 2-814(b)(1). Under the Uniform Sales Act the statute ran from the time of delivery or
12 when quiet possession was disturbed. See *Menzel v. List*, 246 N.E.2d 742 (N.Y. 1969). Former
13 Article 2 did not impose a warranty of quiet possession. Thus, if the warranty was breached
14 upon tender of delivery but the owner did not replevy the goods until five years later, the statute
15 of limitations had run unless the seller made an express warranty explicitly extending to future
16 performance. Some courts have stretched to achieve this result. See *Balog v. Center Art*
17 *Gallery-Hawaii, Inc.*, 745 F. Supp. 1556 (D.Haw. 1990)(warranty that art work "genuine"
18 explicitly extended to future performance). Subsection (d) resolves this problem.

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

28 **SECTION 2-403. EXPRESS WARRANTY TO IMMEDIATE BUYER.**

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

34 _____ (b) It is not necessary to create an express warranty that the seller use formal words such

1 as “warranty or “guaranty or have a specific intention to make a warranty. However, a
2 representation merely of the value of the goods or an affirmation purporting to be merely the
3 seller’s opinion or commendation of the goods does not create an express warranty under
4 subsection (a).

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

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

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

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

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

16 **Comments**

17 1. **Source:** Former Section 2-313.

18 2. **Representations.** Under subsection (a), express warranty obligations are created
19 through representations, including advertising, made by sellers to immediate buyers that become
20 part of the basis of the bargain. The assumption is that the bargain between the parties is
21 otherwise enforceable as a contract and is subject to other requirements of this Article, such as
22 the statute of frauds, 2-201, and the parol evidence rule, 2-202, 2-406(a). For the extent to which
23 representations protect others besides the immediate buyer, see 2-408, 2-409.

24 The definition of representation in 2-401(5) includes a promise by the seller about the
25 quality or the performance of the goods. Thus, a seller may either affirm to the buyer that the

1 goods are X or may promise that the goods when delivered will be X, or may promise that the
2 goods will perform like X after delivery. All are terms in the contract, but are treated as
3 representations under Part 4.

4 **3. Puffing.** Subsection (b) follows 2-313(2) of current Article 2. Although preserving
5 the distinction between express warranty and puffing, subsection (b) does not provide a clear test
6 to distinguish the two. Presumably a buyer must first be reasonable under the circumstances in
7 believing that a representation rather than puffing was made, and then argue that the
8 representation became part of the basis of the bargain.. See 2-408(b) and (c). However, a
9 representation or affirmation that is “puffing is not a representation under subsection (a) that can
10 become part of the basis of the bargain.

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

25 **4. Basis of the bargain.** The “part of the basis of the bargain requirement stated in 2-
26 313(1)(a) is retained in subsection (a). Unlike current 2-313, however, subsection (c) states when
27 a representation becomes part of the basis of the bargain and this should help to resolve the
28 disagreement over what that phrase means. See e.g., Holdych & Mann, *The Basis of the Bargain*
29 *Requirement: A Market and Economic Based Analysis of Express Warranties*, 45 De Paul L.
30 Rev. 781 (1996). There is no intention to change the interpretation of former 2-313 and the
31 comments that an affirmation of fact becomes part of the basis of the bargain unless one of the
32 exceptions in subsection (c) is established. *Buettner v. R.W. Martin & Sons, Inc.*, 47 F.3d 116
33 (4th Cir. 1995) (Virginia law); *Tomie Farms, Inc. v. J.R. Simplot, Inc.*, 862 P.2d 299 (Idaho
34 1993); *Torres v. Northwest Engineering Co.*, 949 P.2d 1004 (Hawaii App. 1998); *Weng v.*
35 *Allison*, 678 N.E.2d 1254 (Ill.App. 1997); *Keith v. Buchanan*, 220 Cal. Rptr. 392 (Cal. App.
36 1985)..

37 Subsection (c) states that a representation, including representations by advertising,
38 becomes part of the basis of the bargain unless one or more of the three conditions are satisfied.
39

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

6 Subsection (c)(2) states another defense, that a “reasonable person in the position of the
7 immediate buyer would not believe that the representation was part of the agreement. Thus, the
8 buyer can know of and believe the representation but still be unreasonable in that belief. For
9 example, if the buyer brings its own expert to the bargaining table and relies upon her judgment
10 that the goods are of quality X, it is unlikely that the buyer was influenced by or relied upon the
11 seller’s affirmation that the quality was Y rather than X. Such an assertion or belief, under the
12 circumstances, would be unreasonable.

13 [Proposed Explanatory Comment

14 _____A reasonable person in the position of the immediate buyer would not believe that a
15 seller’s representation became part of the basis of the bargain if no such reasonable person
16 would have been influenced by or relied on the representation in entering the contract or
17 any modification thereof.]

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

22 _____5. Temporal issues. “Agreement is defined as the “bargain of the parties in fact. 1-
23 201(3). So “basis of the bargain is another way of saying “basis of the agreement. Since
24 agreements can be made both before and after a contract is formed, there is no artificial time at
25 which an express warranty must be made. Thus, a representation, including those made by
26 advertising, made before or after contract formation can become part of the basis of the bargain.
27 If a representation is made after the contract is formed, the requirements for a modification in 2-
28 209(a) must be satisfied. *See Downie v. Abex Corp.*, 741 F.2d 1235 (10th Cir. 1984).

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

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

1 warranty of merchantability.

2 Note that the implied warranty of merchantability may be disclaimed or modified to the
3 extent provided in 2-406, and may be subordinated by an express warranty, see 2-407(3).
4 Moreover, certain transactions, such as the furnishing of blood or body parts, may be regulated
5 by so-called state “blood shield” statutes. See 2-104(a)(3).

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

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

24 For the “power mower to be merchantable:

25 (a) It must pass without objection in the trade under the agreed description. Would sellers
26 and buyers in the trade and familiar with trade descriptions object to goods described as a power
27 mower that would not start on the first pull? See *Agoos Kid Co., Inc. v. Blumenthal Import*
28 *Corp.*, 184 N.E. 279 (Mass. 1933) (trade description under Uniform Sales Act).

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

32 (c) The goods must be fit for the “ordinary purposes for which goods of that description
33 are used. This is one of the most important and frequently invoked standards. Here, evidence of
34 ordinary purposes is required. What do goods described as a “power lawn mower” do and what
35 would a reasonable buyer expect it to do? A power mower that would not start in less than 20
36 pulls or would not cut an ordinary lawn or created a danger of injury to the operator might be

1 unmerchantable.

2 (d) If the agreement permits variations of kind or quality, the particular goods must be
3 within those variations. Thus, if a commercial buyer buys 20 power lawnmowers and the
4 agreement states that the seller can furnish three different makes and that all makes must start in
5 five pulls or less, a lawnmower of a different make or a lawnmower that won't start in less than
6 10 pulls is probably unmerchantable.

7 (e) The goods must be adequately contained, packaged or labeled as required by the
8 agreement or the circumstances.

9 (f) The goods must conform to any representation made on the container or label.

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

12 **4. Personal injuries**

13
14 Suppose that an unmerchantable lawn mower caused personal injuries to the buyer, who
15 was operating the goods. Without more, the immediate buyer can sue the seller for breach of the
16 implied warranty of merchantability and recover for injury to person or property "proximately
17 resulting from the breach. 2-806(2).

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

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

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

34 **When, however, a claim for injury to person or property is based on an implied**

1 relying on the seller’s skill or judgment to select or furnish suitable goods. Thus, if the buyer
2 furnishes detailed specifications for goods that satisfy particular purposes and asks the seller to
3 follow them, the buyer is not relying on the seller’s skill and judgment and the seller has reason
4 to know it.

5 The buyer’s particular and ordinary purpose usually are different. Goods that are
6 merchantable may not be fit for particular purposes. In some cases, a buyer may claim a breach of
7 the fitness warranty when the goods, in fact, are unmerchantable. In these cases, the elements
8 of both warranties must be properly plead and proved. See *Van Wyck v. Norden Laboratories,*
9 *Inc.*, 345 N.W.2d 81 (Iowa 1984).

10 Finally, the implied warranty of fitness may be disclaimed under 2-406.

11 **Example.** S manufactures and sells iron products. B, a state conservation agent, wants to
12 purchase iron collars to attach the steel blade of a hoe to a wooden handle. The purpose of the
13 hoe is to plant pine seedlings and the strength of the collar required depends upon the type of soil
14 involved. Most collars will work in sandy or clay soil but a stronger collar and blade is required
15 in rocky conditions. After some discussion, S agreed to supply B with 2,000 “hoe dad collars
16 for \$10 each. After delivery, B learned that the hoedads worked well in sandy and clay soil but
17 that 80% of the hoedads broke when used in rocky soil. On these facts, it is unlikely that S made
18 and breached a warranty: (1) There was no express warranty that the collars were fit for use in
19 rocky soil; (2) The collars were fit for the ordinary purposes for which the collars were used, i.e.,
20 sandy or clay soil; and (3) B did not reveal to S or rely upon S to furnish goods that met the
21 particular purpose required, i.e., effective use in rocky soil.

22 2. **CISG.** Article 35(2)(b) provides that unless the parties have otherwise agreed, goods
23 do not conform with the contract unless they are “fit for any particular purpose expressly or
24 impliedly made known to the seller at the time of the conclusion of the contract, except where the
25 circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the
26 seller’s skill and judgement.

27 **SECTION 2-406. DISCLAIMER OR MODIFICATION OF WARRANTY.**

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

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

3 (1) language or conduct that makes it clear to the buyer that there is no implied
4 warranty or that there is a modified implied warranty, but unless the circumstances indicate
5 otherwise, expressions like “as is or “with all faults or similar language or conduct are
6 effective to disclaim or modify an implied warranty if in common understanding the expressions
7 make it clear to the buyer that the seller assumes no responsibility or only a limited responsibility
8 for the quality or fitness of the goods;

9 (2) Course of performance, course of dealing, or usage of trade; or

10 (3) To satisfy the requirements of subsection (b)(1) in a consumer contract,
11 conspicuous language and expressions must be in a record.

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

14 **Alternative A**

15 (1) in the case of the implied warranty of merchantability, the language states
16 “The seller makes no representations about and is not responsible for the quality of the goods,
17 except as otherwise provided in this contract , or words of similar import. [Style]

18 **Alternative B**

19 (1) in the case of the implied warranty of merchantability, the language states that
20 “The seller makes no representations about and is not responsible for the quality of the goods,
21 except as otherwise provided in this contract , or words of similar import, [Style] but in a
22 consumer contract, language, expressions, or conduct, no matter how conspicuous or clear, are

1 not effective to disclaim or modify an implied warranty that new goods and goods sold as new
2 goods are fit for the ordinary purposes for which goods of that description are used.; or

3 **End of Alternatives**

4 (2) in the case of the implied warranty of fitness, the language states “The seller
5 makes no representations that the goods will be fit for any particular purpose for which you may
6 be buying purchasing [style] these goods, except as otherwise provided in this contract, or words
7 of similar import.

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

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

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

14 (e) If the buyer before entering into the contract has examined the goods or the sample or
15 model as fully as desired or has refused to examine the goods, there is no implied warranty with
16 regard to defects that a reasonable examination would ~~in the circumstances~~ have revealed to the
17 buyer. [Style concludes that subsection (f) makes no sense unless a reasonable examination is
18 required.]

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

21 **Comments**

1 1. **Source:** Derived from former Section 2-316.

2 2. **Express warranties.** Subsection (a) follows 2-316(1), with minor revisions for style
3 and clarity. A seller need not make an express warranty beyond some description of the
4 goods. But if the seller makes a representation to the immediate buyer that becomes part of the
5 basis of the bargain, the express warranty cannot be subsequently disclaimed. . The court is
6 directed to construe the express warranty and the disclaimer “where ever reasonable as consistent
7 with each other. To the extent this construction is unreasonable the disclaimer is “inoperative.

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

13 2. **Implied warranties: general principal.** Subsection (b), which is derived from 2-
14 316(3)(a), states the general standards that must be met to disclaim or modify implied warranties
15 in commercial and consumer contracts. The language or conduct must make it clear to the buyer
16 that there is no implied warranty or that the implied warranty is modified. This includes certain
17 expressions, such as “as is, where is which in common understanding make it clear to the buyer
18 that the seller assumes no or a limited responsibility for the quality or fitness of the goods.

19 Subsection (b) does not provide a safe harbor. In a consumer contract, however, language
20 of disclaimer or modification contained in a record must be conspicuous and satisfy the
21 requirements of subsection (b)(1).

22 Subsection (b)(3) follows 2-316(3)(c).

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

24 3. **Implied warranties: safe harbors.** Subsection (c), which is new, establishes a safe
25 harbor for both commercial and consumer contracts. To be sufficient, the language must be in a
26 record, be conspicuous, and satisfy the specified content requirements. Language that does not
27 meet the requirements of subsection (c), however, may still satisfy the more general standards of
28 subsection (b).

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

31 4. **Alternative for consumer contracts.** Alternative B to subsection (c)(1) gives an
32 option to the states to invalidate any attempt in a consumer contract to disclaim or modify an
33 implied warranty under 2-404(b) that the new goods or goods sold as new goods are fit for the
34 ordinary purposes for which goods of that description are used. This is consistent with Section

1 2308(a) of the Manguson-Moss Warranty Act (when the supplier makes a written warranty with
2 respect to a consumer product) and is the law in several states. If Alternative B is not enacted,
3 disclaimers of implied warranties in consumer contracts must satisfy either subsection (b) or (c).

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

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

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

12 8. **International sales.** There is no provision comparable to 2-406 in CISG. Under
13 Article 35, however, quality terms must be “required by the contract. Arguably, 2-406, which
14 regulates disclaimers to require adequate disclosure, involves the “validity of the contract, a
15 matter that is excluded from CISG. Art. 4(a).
16

17 **SECTION 2-407. CUMULATION AND CONFLICT OF WARRANTIES.**

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

21 (1) Exact or technical specifications ~~displace~~ prevail over an inconsistent sample
22 or model or general language of description.

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

25 (3) Except in a consumer contract, an express warranty prevails over an
26 inconsistent implied warranty other than an implied warranty of fitness for a particular purpose.

27 **Comments**

28 1. **Source:** Follows former Section 2-317.

1 . 2. In most cases, express and implied warranties in a contract will be construed as
2 consistent with each other. All will be part of the agreement. See *Fournier Furniture, Inc. v.*
3 *Waltz-Holst Blow Pipe Co.*, 980 F. Supp. 187 (W.D. Va. 1997). If an express and an implied
4 warranty of merchantability cover the same subject matter and the express warranty gives less
5 than the implied warranty, a rule of construction (to ascertain the intention of the parties) is that
6 an express warranty displaces an inconsistent implied warranty of merchantability. 2-407(3).
7 See *Commonwealth v. Johnson Insulation*, 682 N.E.2d 1323 (Mass. 1997) (commercial contract,
8 no displacement on facts).

9 This rule of construction does not apply in consumer contracts, however. As a practical
10 matter, the inconsistent express warranty acts as a disclaimer without the disclosure and other
11 requirements of 2-406(b) and (c). Thus, it should not so operate unless 2-406 is satisfied.

12 _____ **SECTION 2-408. EXPRESS WARRANTY OBLIGATION TO REMOTE BUYER**
13 **AND TRANSFEREE.**

14 _____ (a) In this section, the term “goods” means new goods and goods sold as new goods in a
15 sale to a remote buyer.

16 (b) If a seller makes a representation in a record packaged with or accompanying the
17 goods or a remedial promise and the seller reasonably expects the record to be furnished to a
18 remote buyer and the record is so furnished, the following rules apply:

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

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

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

25 (2) A seller’s obligation to a remote buyer created under subsection (b)(1) also
26 extends to:

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

3 (B) a transferee from the remote consumer buyer and any subsequent
4 transferee but, for purposes of this paragraph, the seller may limit its obligation to the remote
5 consumer buyer or may limit extension to a particular person or transferee or a class of ~~persons or~~
6 transferees, if the limitation is furnished to the remote consumer buyer at the time of the sale or
7 with the record that makes the representation, whichever is later.

8 (c) If a seller makes a representation in a medium for communication to the public,
9 including advertising, the seller has an obligation to a remote buyer that the goods will conform
10 to the representation or perform any accompanying remedial promise ~~or the seller will perform as~~
11 ~~promised~~ if:

12 (1) the remote buyer purchased the goods from a person in the normal chain of
13 distribution with knowledge of the representation and with the expectation that the goods will
14 conform to the representation;

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

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

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

21 (e) An express warranty obligation under this section is breached if the goods did not
22 conform to the representation creating the express warranty obligation when the goods left the

1 seller's control. A right of action for breach of an express warranty obligation under this section
2 accrues as provided under Section 2-814.

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

6 (1) A seller under this section may modify or limit the remedies available to
7 persons to which an obligation is created, provided that the modification or limitation is
8 furnished to the remote buyer ~~with the representation~~ no later than the time of sale or with the
9 record that makes the representation. ~~whichever is later.~~

10 (2) Damages may be proved in any manner that is reasonable. Unless special
11 circumstances show proximate damages of a different amount, the measure of damages if the
12 goods do not conform to a representation is the value of the goods as represented less the value
13 of the goods as delivered and the measure of damages for breach of a remedial promise is the
14 value of the promised performance less the value of any performance made.

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

18 **Comments**

19 1. **Source:** New.

20 2. **Overview.** Section 2-408 follows case law and practice in extending a seller's express
21 warranties regarding new goods to remote buyers and others in two situations, subsection (b),
22 dealing with "pass through" warranties, and subsection (c), dealing with advertising and other
23 communications to the public. The structure and test for establishing an obligation follows that
24 stated in 2-403(b). Subsection (e) states when a cause of action for breach accrues and

1 subsection (f) states what remedies are available to the remote buyer against the seller.
2 Although no direct contract exists between the parties, the obligations and remedies are stated
3 to the extent feasible as if there were a contract. Thus, if the remote buyer's immediate seller
4 does not make a warranty but the manufacturer of the product makes a representation on a record
5 included with the goods, the remote buyer may sue the manufacturer if the goods do not conform
6 to the representation or perform as promised.

7 2. **New goods.** Section 2-408 is limited to new goods or goods sold as new goods.
8 Subsection (a). As with any warranty, the express warranty under 2-408 is breached if the new
9 goods do not conform when they leave the seller's control. Despite this, the right of action for
10 purposes of the statute of limitations does not accrue until the non-conforming goods are
11 received by the remote buyer. 2-814(c)(2). Section 2-408 does not apply to resales by an
12 immediate or a remote buyer of used goods.

13
14 3. **Pass through warranties.** Subsection (b) deals with so-called "pass through
15 warranties made by manufacturers through dealers to remote buyers. It states when the
16 obligation is created, to whom the obligation extends, what the obligations is, and the defenses
17 to liability. The theory is that a remote buyer and others to whom the obligation is extended gets
18 the warranty package, no more and no less. Thus, the seller can define the scope of the express
19 warranty made, limit the remedies for breach and limit the persons other than the first user to
20 whom the warranty extends. Subsection (b)(2). Unless otherwise stated in the package, the
21 remote buyer or other protected persons may pursue remedies under subsection (f) directly
22 against the seller.

23 **Paradigm case.** In the paradigm case, a remote buyer (RB) buys goods from a dealer (D)
24 manufactured by a seller. (S) D may or may not make any warranties to RB who is, of course, the
25 immediate buyer from D. In the box or accompanying the goods is a representation and,
26 probably, a remedial promise made by S with the reasonable expectation that the record will be
27 furnished by D to RB. It is irrelevant whether RB knows of the representation at the time of the
28 sale.

29 In most cases, if the goods do not conform to the representation "in the box, S, the
30 manufacturer will acknowledge its liability and attempt to remedy the non-conformity, perhaps
31 through D who sold the good to RB. S, however, may have defenses to liability. For example, S
32 has no obligation to RB if a "reasonable person in the position of the remote buyer would not
33 believe that the representation created an obligation, subsection (b)(1)(A), or the representation
34 was "puffing, subsection (b)(1)(B).

35 If an obligation is created and breached or a remedial promise is breached, RB's remedies
36 and set forth in subsection (f).

37 **Scope of protection.** Subsection (b)(2) states the extent to which S's obligation on a
38 representation or remedial promise extends to persons other than RB, who must be a remote

1 consumer buyer. S, however, has power in the record containing the representation to limit the
2 scope of this extension provided that the limitation is furnished to the remote consumer buyer
3 “with the record that makes the representation or at the time of the sale, whichever is later.

4 **Example.** D sells a remote consumer buyer (RCB) a computer manufactured by S. S
5 makes representations and remedial promises “in the box. There are no limitations to a
6 particular person or class. The computer fails while being used by a member of RCB’s family,
7 who suffers damage. S’s obligation extends to that family member, whose remedies are stated in
8 subsection (f). The obligation also extends to transferees from the RCB and subsequent
9 transferees, but they must prove that the new goods failed to conform to the representations when
10 they left S’s control.

11 **4. Communications to the public, including advertising.** Manufacturers and other
12 sellers frequently advertise their products to the public. The representations in advertising and
13 other communications made to the public frequently become part of a remote buyer’s decision to
14 purchase the goods.

15 If the communication is to an immediate buyer, any representations must become part of
16 the basis of the bargain under 2-403. There is a direct contractual relationship here.

17 If the communication is made by a seller to a remote buyer who buys the goods from a
18 dealer, the seller may have an obligation to the remote buyer, but only the remote buyer, under 2-
19 408(b). There is no direct contractual relationship here.

20 This potential obligation is limited. Assuming that the seller made a representation to the
21 public, **no** obligation will arise in the following situations:

22 RB did not purchase the goods from a seller in the normal chain of distribution.

23 RB, at the time of purchase, had no knowledge of the representation or, if knowledge, had
24 no expectation that the goods would conform to the representation.

25 A reasonable person in the position of RB with knowledge would not expect the goods to
26 conform to the representation.

27 The representation was puffing.

28 **Example.** M, a computer manufacturer, advertised that its Model #255 had X megahertz
29 and Y hard drive capacity. RB read the advertisement and, expecting that Model #255 would
30 conform to representations in the Ad, purchased a Model #255 from D, a dealer. D made no
31 express warranties and disclaimed all implied warranties. Model #255 in fact did not have X
32 megahertz. If the representation was not “puffing and a reasonable person would expect the
33 goods to conform, S has made and breached an obligation to RB. RB’s remedies are stated in

1 subsection (f).

2 5. Subsection (e) states when an obligation created under 2-408 is breached. Assuming
3 that the goods do not conform to a representation at the time they left the seller's control, the
4 breach occurs when the goods leave the seller's control but the cause of action accrues when the
5 goods are received by the remote buyer.

6 6. **Remedies.** Subsection (f) states the statutory remedies that are available to a remote
7 buyer and other protected persons for breach of an obligation created under 2-408 or a remedial
8 promise.

9 Subsection (f)(1) provides that a seller may modify or limit remedies available for breach
10 of the obligation under either subsection (b) or (c) but requires that the limitation must be
11 furnished with the representation "no later than at the time of sale. Thus, a limitation of
12 remedies for breach of a "pass through" representation that is contained in a record delivered by
13 the dealer to a remote buyer at the time of sale would be effective, provided that 2-810 was
14 satisfied.

15 Subsection (f)(2) states the general measure of direct damages for breach. See Sections
16 2-804 and 2-827, from which these principles are derived. See also, 2-803.

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

24 7. **Manufacturer's implied warranty.**

25 The representations in 2-408, which include descriptions of the goods, may include
26 elements of quality normally associated with the implied warranty of merchantability. 2-404.
27 But goods that conform to the description or pass without objection under the description may
28 not be fit for the ordinary purposes for which goods of that description are used. Section 2-408
29 does not cover claims of that sort. Moreover, the courts have been unwilling to impose liability
30 on the manufacturer in these cases without privity of contract. See, e.g. Beard Plumbing &
31 Heating, Inc. v. Thompson Plastics, Inc., 152 F.3d 286 (4th Cir. 1998)(UCC 2-318 does not
32 support recovery of consequential economic loss without privity of contract).

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

34 (a) In a consumer contract, a seller's express or implied warranty or a remedial promise

1 made to an immediate consumer buyer extends to any member of the family or household or an
2 invitee of the immediate consumer buyer or a transferee from the immediate consumer buyer
3 who may reasonably be expected to use or be affected by the goods and who suffers damage
4 other than injury to the person resulting from a breach of warranty. As to damages other than
5 injury to person, the operation of this section may not be disclaimed ~~excluded~~ [style], modified,
6 or limited unless the seller has a substantial interest based on the nature of the goods in having a
7 warranty or a remedial promise extend only to the immediate consumer buyer.

8 (b) Damages for personal injury to an individual other than the immediate buyer that
9 proximately result from any breach of warranty may be recovered by

10 **Alternative A**

11 any individual who is in the family or household of the immediate buyer or who is a guest
12 in the immediate buyer's home if it is reasonable for the seller to expect that the individual may
13 use, consume, or be affected by the goods. A seller may not disclaim ~~exclude~~ or limit the
14 operation of this subsection.

15 **Alternative B**

16 any individual who may reasonably be expected to use, consume, or be affected by the
17 goods. A seller may not disclaim ~~exclude~~ or limit the operation of this subsection.

18 **End of Alternatives**

19 (c) The scope of any warranty extended under this section to other than the immediate
20 buyer and the remedies for breach may be limited by the enforceable terms of the contract
21 between the seller and the immediate buyer. To the extent not limited, the scope of the warranty
22 is determined by Sections 2-402, 2-403, 2-404, and 2-405, and the remedies for breach of

1 warranty or a remedial promise for other than the immediate buyer are determined by Section 2-
2 408(f)(2) and (3).

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

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

9 **SOURCE: Sales, Section 2-318.**

10 **Comments**

11 1. **Source:** Derived from former Section 2-318.

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

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

18 There is no extension of warranties under this subsection when the immediate buyer is
19 not a consumer. Express warranties, however, may be made to remote buyers and others under
20 2-408 or one of the Alternatives in Subsection (b). The implied warranty of merchantability is
21 not extended by Article 2 in commercial cases but may be extended under other state law. See
22 subsection (c).

23 Damage under subsection(a) includes damage to property, including property other than
24 the goods sold, but does not include personal injuries.

25 The extended warranty under this subsection is a derivative warranty: Its existence, scope
26 and enforcement depends upon the enforceable terms of the contract between the seller and the
27 immediate consumer buyer. Thus, if there is an enforceable disclaimer of warranty or exclusion
28 of consequential damages in that contract, the persons to whom warranties are extended are

1 bound by those limitations. See subsection (c). Otherwise, the scope of warranties created is
2 determined by Part 4 and the remedies available to protected persons are set forth in 2-408(f).

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

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

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

13 2. Subsection (b), with the two Alternatives for state enactment, restates Alternatives A
14 and B of 2-318. Alternative A was enacted in ___ states and Alternative B was enacted in ___
15 states.

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

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

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

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

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

14 4. Subsection (c) states that 2-408 does not diminish or displace other applicable law
15 extending express or implied warranties from a seller to an immediate buyer to any other remote
16 buyer or other protected persons. For example, a true third party beneficiary of a warranty would
17 be protected, as would the assignee of a warranty made by the seller to the immediate buyer. In
18 addition, the courts in some states have eliminated or modified the privity requirement beyond
19 the extensions in 2-409 or 2-408. There is no intention in this section or 2-408 to preempt or
20 discourage these judicial developments.

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

24 5. International sales. There is no comparable provision in **CISG**.

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

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

36 A seller subject to CISG who makes "pass through" express warranties or makes

1 affirmations in advertising has potential liability to remote buyers and others in the United States
2 under 2-408. In fact, that seller’s obligation is created and enforced under Article 2.

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

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

11 Finally, CISG is not concerned with the “validity of the contract or of any of its
12 provisions or of any usage. Arguably, controls imposed by 2-406 on the validity of disclaimers
13 or 2-810 on the validity of clauses excluding liability for consequential damages, including
14 personal injuries, are not covered by CISG. Again, they are covered by Article 2.

15
16 **PART 5**

17 **TRANSFERS, IDENTIFICATION, CREDITORS, AND GOOD-FAITH PURCHASERS**

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

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

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

25 (1) Title to goods may not pass under a contract for sale before their identification
26 to the contract. ~~Unless otherwise expressly agreed, the buyer acquires by their identification a~~
27 ~~special property interest as limited by this article.~~

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

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

5 (4) Unless otherwise expressly agreed, title passes to the buyer at the time and
6 place the seller completes performance with reference to the physical delivery of the goods,
7 despite any reservation of a security interest and even if a document of title is to be delivered at a
8 different time or place.

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

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

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

15 (c) Unless otherwise expressly agreed, if delivery is to be made without moving goods:

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

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

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

1 **Comments**

2 1. Source: Follows former Section 2-401.

3 2. **Relevance of title.** Subsection (a) states that the location of title to or possession of
4 goods is irrelevant to the application of this article unless expressly provided in a particular
5 section. Thus, title does not determine the risk of loss to goods sold, 2-612, or whether the seller
6 can recover the price upon breach by the buyer, 2-822. Other commercial factors must be
7 considered. On the other hand, a sale of goods is the passage of title from the seller to the buyer
8 for a price and title is expressly made relevant under 2-504, dealing with power to transfer
9 interests in goods, and possession of the goods is expressly made relevant under 2-505, dealing
10 with the rights to creditors of the seller to goods sold.

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

17 2. **When title passes.** Although the location of title to goods is relevant to most issues
18 under Article 2, subsection (b) provides rules for when title passes. In most cases, these rules
19 apply unless “otherwise explicitly agreed. See 2-108.

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

27 Subsection (b)(2) continues the rule that a retention or reservation of title by the seller in
28 goods shipped or delivered is treated as creating a security interest under Article 9. See 1-
29 201(37), defining security interest. Until the buyer obtains possession of the goods, however, the
30 security interest arises under Article 2 and would have priority over a conflicting security
31 interest in the same goods created by the buyer (debtor). See 9-110.

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

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

4 **Example.** On January 1, B contracts with S, a jobber, to supply 500 units of described
5 goods on or before July 1. The jobber expected to obtain the goods from one of three possible
6 manufacturers. It was understood that B would take delivery of the goods at S's place of
7 business.

8 On January 1, B had no interest in the goods because they were neither existing nor
9 identified to the contract. There was simply a contract for the future sale of future goods.

10 If, on March 1, S contracted to purchase 500 units of existing and described goods from
11 M, the manufacturer, and upon delivery identified them to B's contract, B would have a
12 special property interest in them under 2-502(a). Unless the parties agreed otherwise,
13 however, B would not have title to the goods. See subsection (b)(3), (4). There is simply
14 a contract for the future sale of identified goods.

15 If, on June 20, S tendered delivery and B took delivery in B's truck, title passed (the sale
16 occurred) when S completed performance with reference to the "physical delivery of the
17 goods. Subsection (b)(4). Note that title passes here even though the seller reserves a
18 security interest in the goods or a document of title was to be delivered at a different time.

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

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

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

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

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

1 as goods to which the contract refers;

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

5 (4) if the contract is for the sale of the unborn young of animals to be born within
6 12 months after contracting, when the young are conceived.

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

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

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

15 **Comments**

16 1. **Source:** Follows former Section 2-501.

17 2. **When goods are identified.** “Identification means that existing goods, by explicit
18 agreement or by the circumstances stated in subsection (a), have been designated as those to
19 which the contract refers.:

20 **Example.** To illustrate, goods are identified to the contract in the following examples:

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

24 Seller has 10,000 bushels of #1 yellow corn in three silos. The buyer purchases 1,000

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

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

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

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

14 **2. Insurable interest.** The buyer obtains an insurable interest in goods identified to the
15 contract, subsection (b), and this does not impair any other insurable interest recognized under
16 “any other law, subsection (d). Although this enables the buyer to insure the goods while in the
17 seller’s possession, risk of loss does not pass to the buyer upon identification unless otherwise
18 agreed. In the absence of agreement, the risk of loss to identified goods passes as stated in 2-
19 612(b). For example, if the goods are in the seller’s possession and are not to be shipped, the risk
20 of loss passes upon receipt of the goods by the buyer. 2-612(b)(1).

21 A seller who retains a security interest in goods delivered to the buyer also has an
22 insurable interest in the goods. Subsection (c). Unless otherwise agreed, however, upon delivery
23 or shipment to the buyer the insurable interest protecting the seller’s security interest will be in
24 goods for which the buyer has the risk of loss. Thus, where identified goods are lost or damaged
25 during shipment, both parties can purchase insurance to protect their respective interests in the
26 goods. See 2-614.

27 **3. Effect of special property interest.** The buyer also obtains a special property
28 interest when existing goods are identified to the contract. Subsection (b). This interest can arise
29 before the buyer has possession of or title to the goods and provides some limited remedial
30 protection. For example:

31 (a) Upon identification, the buyer can become a buyer in the ordinary course of business
32 if the other requirements of 1-201(37) are satisfied. This increases the chance that the buyer will
33 take free of interests in the goods created by creditors of the seller or take better title to goods
34 than had a merchant to whom the owner entrusted the goods. 2-504(c).

35 (b) Upon identification, the buyer has, in addition to the remedy of specific performance,

1 a limited right to the goods as against a seller in possession and the seller's creditors. See 2-
2 505(a), 2-807, 2-822, and 2-824.

3 Upon identification, the parties to the contract may have an action against a third person
4 who causes injury to the goods. 2-813.

5 Whether goods are identified or not is a factor in the power to sell, 2-106, 2-107(b),
6 tender of delivery by the seller, 2-305(b), 2-603(a), 2-604, inspection, 2-609, risk of loss, 2-
7 612(3), 2-506(b), casualty to goods, 2-714, and various remedies upon breach, 2-805, 2-815(3),
8 2-817, 2-819, 2-822, and 2-823.

9
10 4. **International sales.** CISG does not use the concepts of "identification" or "special
11 property interest.

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

13 (a) If a seller or buyer ~~assigns contract rights~~ agrees to assign or assigns rights under a
14 contract, the following rules apply:

15 (1) Subject to paragraph (3), all rights of either seller or buyer may be assigned
16 unless the assignment would materially change the duty of the other party, materially increase
17 the burden or risk imposed on that party by the contract, or materially impair that party's
18 likelihood of obtaining return performance. A right to damages for breach of the whole contract
19 or a right arising out of the assignor's due performance of its entire obligation may be assigned
20 despite an agreement otherwise.

21 (2) Subject to Section 9-406, an assignment of rights under this paragraph is
22 effective even if a contractual term prohibits the assignment of rights or makes it a breach, but
23 the assignment is a breach of contract for which damages under this article are available, whether
24 or not the contract so provides.

25 (3) The creation, attachment, perfection, or enforcement of a security interest in
26 the seller's interest under a contract is not a transfer that materially changes the duty of or

1 increases materially the burden or risk imposed on the buyer or impairs materially the buyer's
2 chance of obtaining return performance within the purview of subsection (1) unless, and then
3 only to the extent that, enforcement actually results in a delegation of material performance of the
4 seller. Even in that event, the creation, attachment, perfection, and enforcement of the security
5 interest remain effective, but (i) the seller is liable to the buyer for damages caused by the
6 delegation to the extent that the damages could not reasonably be prevented by the buyer, and (ii)
7 a court having jurisdiction may grant other appropriate relief, including cancellation of the
8 contract for sale or an injunction against enforcement of the security interest or consummation of
9 the enforcement.

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

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

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

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

22 (4) A contractual term prohibiting the delegation of duties otherwise delegable

1 under paragraph (1) is enforceable, and an attempted delegation is not effective. Unless the
2 circumstances otherwise indicate, a prohibition of assignment or transfer of "the contract" must
3 be construed as barring only the delegation to the assignee or transferee of the assignor's duty to
4 perform.

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

9 **Comments**

10 **1. Source: Derived from former Section 2-210 and conformed to Article 9.**

11 **2. Assignment of Rights.** Subsection (a) treats the effect of an assignment by either the
12 seller or the buyer of rights but not the duties arising under the contract for sale. These rights
13 may be effectively assigned to a third person even if the contract prohibits the assignment.
14 Subsection (a)(2), which is subject to 9-406. Although the assignment to a third person is
15 effective, between the parties the assignment is a breach of the prohibition for which damages
16 can be recovered. See 2A-303.

17 An assignment, however, is not effective if it would "materially change the duty of the
18 other party, increase materially the burden or risk imposed on that party by the contract, or
19 increase materially that party's likelihood of obtaining return performance. Subsection (a)(1).
20 The cases where these limitations apply are rare. For example, a seller who has fully performed
21 the contract should always be able to assign the right to payment. This is the basis for most
22 accounts receivable financing. If, however, the contract is still executory, the assignment of the
23 right to payment to a third person might decrease the seller's incentive to perform and, thus,
24 increase the buyer's risk. Similarly, the buyer's assignment of the right to receive a fixed
25 quantity of goods should not usually be objectionable but if the parties have a "requirements
26 contract, the assignment could increase materially the seller's risk.

27 Subsection (a)(3) follows the conforming amendment to former Section 2-210, which is
28 needed if revised Article 9 is enacted in a particular state and former Article 2 is not revised.

29 Subsection (a) is illustrated by the following examples.

30 **Example #1.** S and B enter a 3 year contract under which S is to manufacture and deliver

1 in installments 500 units of goods. B agrees to advance part of the contract price at specified
2 intervals to facilitate performance. The contract contains a clause prohibiting S from assigning
3 its rights or delegating its duties under the contract.

4 The clause prohibiting the assignment of rights is not effective to prevent an assignment
5 of rights to a third person. Subsection (a)(2). See Restatement, Second, Contracts
6 §322(2)(b). This restraint on alienation is subject to 9-406, particularly 9-406(d). The
7 assignment, however, is a breach of the prohibition clause for which the buyer can
8 recover damages.

9 Without a prohibition clause, rights arising under the contract, including a right to
10 damages for breach, can be assigned, subject to the limitations stated in subsection (a)(1).
11 See Restatement, Second, Contracts §§317, 320, 321. Without more, B might argue that
12 the assignment, without B's consent, materially impaired its likelihood of obtaining the
13 return promise, i.e., that if S is paid for rights arising under the contract by a third party
14 S's incentive to perform for B may be impaired. At a minimum, B could demand
15 adequate assurance of due performance.

16 If the assignment of rights creates a security interest in the seller's interest under the
17 contract, including a right to future payments, subsection (a)(3) states that there is no
18 material impairment under subsection (a)(1) unless the creation, attachment, perfection
19 and enforcement "results in a delegation of material performance of the seller. Since
20 this is not likely in most assignments, the buyer's basic protection is to demand adequate
21 assurance of due performance from the seller.

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

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

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

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

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

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

10 **5. Article 9.** In general, Article 9 applies to the sale of accounts, chattel paper and
11 payment intangibles. 9-109(a)(3). The transactions are treated as creating security interests. The
12 definitions of “account , 9-102(a)(1), and “payment intangible , 9-102(a)(61), are quite broad,
13 and cover most rights to payment arising under contracts for sale. To the extent that these
14 transactions are not excluded from Article 9 under 9-109(c) or 9-109(c)(3-9), in a contract for
15 sale the effectiveness of the transfer is determined by 2-503(a)(3) and the effectiveness of a
16 contractual restriction on transfer is determined by 9-406(d). In either case, the purpose is to
17 promote free alienability of accounts and payment intangibles for purposes of secured financing.

18 **6. International sales.** There is no comparable provision in CISG.

19 **SECTION 2-504. POWER TO TRANSFER; GOOD-FAITH PURCHASE OF**
20 **GOODS; ENTRUSTING.**

21 (a) A purchaser of goods acquires all title to the goods [style] that the transferor had or
22 had power to transfer. However, a purchaser of a limited interest in goods acquires rights only to
23 the extent of the interest purchased.

24 (b) A person with voidable title has power to transfer good title to the goods to a good-
25 faith purchaser for value. Under this subsection, voidable title is acquired when the goods have
26 been delivered under a transaction of purchase even if:
27

28 (1) the transferor was deceived as to the identity of the purchaser;

29 (2) the delivery was in exchange for a check later dishonored;

30 (3) it was agreed that the transaction was to be a cash sale; or

1 (4) the delivery was procured through fraud punishable as a crime. ~~larceny under~~
2 ~~criminal law~~.

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

6 (d) Entrusting by a person with title to or an interest in goods includes any delivery and
7 any acquiescence in retention of possession of the goods, regardless of any condition expressed
8 between the parties to the delivery or acquiescence or whether the procurement of the entrusting
9 or the possessor's disposition of the goods was punishable as a crime. ~~larceny under criminal law~~.

10 **Comments**

11 1. Source: Former Section 2-403, rephrased and clarified.

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

19 3. **Voidable title.** Subsection (b) states the so-called "voidable title" exception to the
20 common law rule. In the paradigm transaction, the owner intends to sell the goods but is induced
21 to transfer possession by the purported buyer's fraud. In this case, the fraudulent buyer is given
22 power, as a seller, to transfer good title to a good faith purchaser for value to whom the goods
23 have been delivered. See *Johnson & Johnson Prod. v. Dal Int'l Trading*, 798 F.2d 100 (3d Cir.
24 1986). See also 2-102(a)(11), defining delivery to mean the "transfer of physical possession or
25 control. The terms "good faith," "purchaser," and "value" are defined in other parts of the
26 UCC.

27 The line between "voidable" and "void" title, like the difference between "real" and
28 "personal" defenses in the law of negotiable instruments, is often difficult to draw. In a paradigm
29 case of "void" title, the owner delivers goods to another person relying on that person's material
30 misrepresentation that the record signed by both was a bailment rather than a sale. Here the risk
31 is put on a good faith purchaser, even though the owner voluntarily transferred possession of the

1 goods to a non-merchant. As between an owner deceived as to the nature of the transaction and
2 the good faith purchaser for value, the owner prevailed at common law. Subsection (b) preserves
3 that fragile distinction and states four borderline situations where possession is transferred that
4 are treated as “voidable title cases. In all voidable title cases, the goods must be delivered to the
5 purported buyer by the seller. See *Inmi-Etti v. Aluisi*, 492 A.2d 917 (Md. 1985).

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

14 Subsection (c) also clarifies the protection that a biocob would have from a security
15 interest perfected by the entruster in the goods. Even though the biocob might not be protected
16 under the relevant provisions of Article 9, subsection (c) provides that the biocob takes free of an
17 interest in the goods created by an entruster in the goods who has a security interest in the goods
18 entrusted.

19 Here are some problems that illustrate the basic principles.

20 **Example #1.** S owns a valuable, small sculpture by Rodin. T breaks into S’s house,
21 avoiding the security system, steals the Rodin and sells it to M, an art dealer, for \$50,000. M, in
22 turn, sells the Rodin to B, a biocob, for \$75,000. S claims the Rodin. S wins under subsection
23 (a). Neither subsection (b) or (c) apply on these facts. The biocob is not protected.

24 **Example #2.** S wants to sell the Rodin. She consigns it to a man claiming to be Mr.
25 Southby from London. The man, who is in fact a con artist named Joe Zilch from New Jersey,
26 sells it to B, who is a GFP for value. If a consignment is a “purchase of goods , B wins over S
27 under subsection (b)(1). If not, S wins under subsection (a). The question is the meaning of
28 purchase. If a broad meaning is intended, almost any transaction where goods delivered for value
29 is a “purchase of goods.

30 **Example #3.** S entrusts the Rodin to M, a dealer, for the purpose of restoration. No
31 power to sell is given. If M sells to a B who is a biocob, good title is transferred under
32 subsection (c). B is a buyer in the ordinary course of business from a merchant to whom goods
33 have been entrusted. Subsequent buyers from B will take good title even though they are not
34 biocobs.

35 **Example #4.** S sells the Rodin to B but retains title and possession as a perfected
36 security interest. S entrusts the Rodin to M for repairs. M sells the Rodin to a biocob. The
37 biocob takes good title and takes free of the security interest created by S and B, even though the

1 security interest was not created by the biocob's seller, M. See 9-320(a).

2 **Example #5.** S sells a used automobile to D, a dealer, and transfers the certificate of title
3 to D. D sells the car to B#1 who pays the price but permits D to retain possession to replace a
4 muffler. D then sells the car to B#2 who pays and takes possession of the car and the certificate
5 of title. B#2 obtains a new certificate of title in its name. As between B#1 and B#2, B#1 wins if
6 the state certificate of title law makes a certificate of title only presumptive evidence of title. B#1
7 was first and has good title. If state law makes a certificate of title conclusive evidence of title,
8 B#2 wins unless B#1 is a buyer in the ordinary course of business who rights arose "before a
9 certificate of title covering the goods is effective in the name of any other buyer. 2-104(a)(1).

10 5. **International sales.** There is no comparable provision in CISG, which is not
11 concerned with "the effect which the contract may have on the property in the goods sold. Art.
12 4(b).

13 **SECTION 2-505. RIGHTS OF SELLER'S CREDITORS AGAINST GOODS**
14 **SOLD.**

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

19 (b) A creditor of a seller may treat a sale or an identification of goods to a contract for
20 sale as void if, as against the creditor, a retention of possession or identification by the seller is
21 fraudulent under any law of the State in which the goods are situated. However, the retention of
22 possession in good faith and current course of trade by a merchant-seller for a commercially
23 reasonable time after a sale or identification is not fraudulent.

24 (c) Except as otherwise provided in subsection (a) and Section 2-504(c), this article does
25 not impair rights of creditors of the seller:

26 (1) under Article 9; or

27 (2) if identification to the contract or delivery is not made in current course of

1 trade but is made in satisfaction of or as security for a preexisting claim for money, security, or
2 the like under circumstances that under any law of the State in which the goods are situated ,
3 apart from this article, would constitute a fraudulent transfer or voidable preference

4 **Comments**

5 1. **Source:** Former Section 2-402.

6 2. **Rights of seller's creditors in goods retained.** Sellers frequently retain possession of
7 goods after they are identified to the contract for sale. In some cases the goods conform to the
8 contract and are "laid away" until the price is paid and in other cases they are retained for the
9 convenience of the buyer. In some transactions, the goods may be in the process of being
10 manufactured for buyer who is making advances. The components are identified but do not
11 conform to the contract. If the seller breaches and the buyer has not perfected a security interest
12 in the goods, the buyer's limited Article 2 rights to the goods against the seller are stated in 2-
13 807(a) (specific performance), 2-822(b) (action for the price), 2-824(a) (pre-paying buyer), and
14 2-824(b) (replevin). With the exception of 2-824(a), these sections simply restate the goods
15 oriented remedies of the buyer in original Article 2.

16 Subsection (a) extends the buyer's rights against the seller to the goods to creditors of the
17 seller "if the buyer's rights vest before a creditor's claim in rem attaches to the goods.
18 "Creditor" is defined in 1-201 to include unsecured creditors, secured creditors, lien creditors
19 and the trustee in bankruptcy. This is broader than the phrase "unsecured creditors" in former 2-
20 402(1).

21 To illustrate, suppose that a creditor obtains a judicial lien on the goods. If the lien
22 attaches before the buyer's rights vest under any of the three listed sections, the buyer is subject
23 to the lien. If the buyer's rights vest before the judicial lien attaches, the buyer is entitled to the
24 goods from the seller free of the judicial lien. Similarly, if the security interest of the seller's
25 secured party attaches before the buyer's right vests, the buyer is subject to the security interest.
26 If the buyer's right vests first, the buyer may claim the goods from the seller free of the security
27 interest without the need to comply with Article 9.

28 There are two critical questions here. First, when do the buyer's rights attach to the
29 goods? Second, if the creditor's right attaches before the buyer's right vests, when is the earliest
30 time that the buyer could be a buyer in the ordinary course of business and take free of the
31 attached right?

32 Under 2-824(a), a revision of current 2-502, a pre-paying consumer buyer's rights vest
33 "upon acquisition of a special property, even if the seller had not then repudiated or failed to
34 delivery. A similar vesting time is proposed for consumers who seek to replevin goods under 2-
35 2-824(b). Thus, the right vests upon identification even though the seller is not yet in breach.

1 If the creditor interest attaches before vesting, a buyer in the ordinary course of business
2 may take free of that interest, particularly a security interest. How early in the transaction may a
3 buyer be in the ordinary course? Amended 1-201(9) provides: “Only a buyer that takes
4 possession of the goods or has a right to recover the goods from the seller under Article 2 may be
5 a buyer in the ordinary course of business. A “right to recover, however, is not the same as
6 identification. Thus, a buyer’s rights may vest earlier than the time when the buyer can be in the
7 ordinary course, usually when the right vests and the seller is in breach.

8 **3. When retention of goods by seller fraudulent.** Subsection (b) follows former 2-
9 401(2). Most retention of goods by a seller will satisfy the requirements of the second sentence
10 and not be fraudulent. A retention outside of the protection of the second sentence may be void
11 against creditors of the seller if fraudulent “under any law of the state where the goods are
12 situated. There has been little litigation of significance under this provision.

13 4. Subsection (c) emphasizes the limited role that this article plays in determining the
14 rights of the seller’s creditors under Article 9 or where fraudulent conveyances or voidable
15 preferences are involved.

16 **5. International sales.** There is no comparable provision in CISG.

17 **SECTION 2-506. SALE ON APPROVAL AND SALE OR RETURN; SPECIAL**
18 **INCIDENTS; ~~CONSIGNMENTS.~~**

19 (a) If goods delivered by a seller to a buyer conform to the contract and may be returned
20 by the buyer, the transaction is:

21 (1) a sale on approval, if the goods are delivered primarily for use; or

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

23 (b) Under a sale on approval:

24 (1) the risk of loss and the title to goods identified to the contract do not pass to
25 the buyer until acceptance;

26 (2) use of the goods consistent with the purpose of trial is not an acceptance, but a
27 failure seasonably to notify the seller of election to return the goods is an acceptance, and
28 acceptance of any part of conforming goods is an acceptance of the whole; and

1 (3) after reasonable notice of election to return, the return is at the seller's risk and
2 expense, but a merchant buyer shall follow any reasonable instructions.

3 (c) Under a sale or return:

4 (1) the option to return extends to the whole or any commercial unit of the goods
5 while in substantially their original condition but must be exercised seasonably; and

6 (2) the return is at the buyer's risk and expense.

7 (d) An "or return" term of a contract for sale is treated as a separate contract for sale
8 under Section 2-201 and as negating the sale aspect of a contract under Section 2-202.

9 (e) Goods held on approval are not subject to claims of a buyer's creditors until
10 acceptance. Goods held on sale or return are subject to those claims while in the buyer's
11 possession.

12 **Comments**

13 1. **Source:** Former Sections 2-326 and 2-327, which Section 2-506 integrates into one
14 section.

15 2. **Definitions.** Subsection (a) , following former 2-326(1), defines sale on “approval
16 and “sale or return. In both cases, there is a contract for sale between a seller and buyer with a
17 return condition. The reason for the return, however, differs. The former goes to the buyer’s
18 satisfaction with the goods and the latter goes to the buyer’s ability to resell them.

19 3. **Sale on approval.** Subsection (b), which follows former 2-327(1), elaborates aspects
20 of the sale on approval other than whether goods are subject to claims of creditors of the buyer.
21 See subsection (e). The question is whether the buyer in possession elects to accept or return the
22 goods. During the period of inspection or trial, the risk of loss remains on the seller and if a
23 timely notice to return the goods is given the return is at the seller’s risk and expense. Upon
24 acceptance of the goods, however, the return condition is discharged and the normal principles
25 apply.

26 4. **Sale or return.** Subsection (c), which follows former 2-327(2), elaborates aspects of
27 the sale or return other than issues of creditor’s rights. For example, the option to return the
28 goods must be exercised seasonably and in good faith. See 2-307(b). Also, the return is at the
29 buyer’s risk and expense.

1 obligated to transfer and deliver the goods and that the buyer was obligated to accept and pay for
2 the goods in accordance with the contract. This section was rephrased to apply to all of the
3 parties' obligations under the contract. This change recognizes commercial practices in
4 contracting which often couple non-goods related obligations with obligations related to delivery
5 and payment for the goods. Such contracts and obligations may fall within the scope of Article 2
6 under a jurisdiction's application of the predominant purpose test or other tests for determining
7 the scope of Article 2's application to "transactions in goods. Section 2-103.

8 2. To determine the parties' obligations under the contract requires an inquiry into the
9 parties' agreement, defined in section 1-201(3), applicable sections of the U.C.C. and other
10 applicable rules of law. Section 1-201(11). Determination of the parties' contractual obligations
11 thus includes usage of trade, course of dealing and performance and the general background of
12 circumstances in order to determine the meaning of words the parties may have used to set forth
13 any conditions or duties. See section 2-202.

14 3. This article contains many provisions that can be used to determine the parties'
15 obligations under the contract if the parties do not agree otherwise. For example, section 2-606
16 provides that the seller's obligation to tender delivery is a condition to the buyer's duty to accept
17 and pay for the goods. Unless otherwise agreed, the seller is obligated to tender delivery first but
18 the seller need not complete its performance until buyer has tendered payment according to the
19 contract. Section 2-606. If the buyer tenders payment, then the seller is obligated to complete its
20 performance. Section 2-607. See e.g. section 2-303 (open price term); section 2-305 (absence of
21 specification of place for delivery).

22 4. **International Sales.** Compare CISG Article 30 (seller must deliver goods and
23 documents as required by contract and convention) and Article 53 (buyer must pay price and take
24 delivery as required by contract and convention); UNIDROIT Article 7.1.1 (defining non-
25 performance as a "failure by a party to perform any of its obligations under the contract,
26 including defective performance or late performance.)

27 **SECTION 2-602. SELLER'S TENDER OF DELIVERY.**

28 (a) Tender of delivery requires that the seller put and hold conforming goods at the
29 buyer's disposal and give the buyer any notice reasonably necessary to enable the buyer to take
30 delivery. ~~A tender of delivery includes the performance of any agreement to install or assemble~~
31 ~~the goods.~~ The agreement and this article determine the manner, time and place for tender and,
32 in particular:

33 (1) tender must be at a reasonable hour;

1 (2) a tender of goods must be kept available for the period reasonably necessary
2 to enable the buyer to take delivery of the goods; and

3 (3) the buyer shall furnish facilities reasonably suited to receive the goods.

4 (b) If the seller is required or authorized to send the goods to the buyer, the following
5 rules apply:

6 (1) If the agreement does not require delivery at a particular destination, tender
7 requires that the seller deliver conforming goods to the carrier and comply with Section 2-603.

8 The seller need not deliver at a particular destination unless required by a specific agreement or
9 by the understanding of the terms used by the parties as interpreted in light of applicable usage of
10 trade and any course of performance or course of dealing between the parties.

11 (2) If the agreement requires the seller to deliver at a particular destination, tender
12 requires compliance with subsection (a) and, in an appropriate case, the tender of a document of
13 title pursuant to subsections (c) and (d). ~~The seller need not deliver at a particular destination~~
14 ~~unless required by a specific agreement or by the commercial understanding of the terms used by~~
15 ~~the parties.~~

16 (c) If conforming goods of a seller are in the possession of a bailee and are to be delivered
17 to a buyer without being moved, the following rules apply:

18 (1) Tender requires the seller to tender a negotiable document of title covering the
19 goods or to procure an acknowledgment by the bailee to the buyer of the buyer's right to
20 possession of the goods.

21 (2) Tender to the buyer of a nonnegotiable document of title or a record directing
22 the bailee to deliver is sufficient tender unless the buyer seasonably objects. However, risk of

1 loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or
2 to obey the direction remains on the seller until the buyer has had a reasonable time to present the
3 document of title or direction. A refusal by the bailee to honor the document of title or to obey
4 the direction defeats the tender. Except as provided in Article 9, receipt by the bailee of notice of
5 the buyer's rights fixes those rights as against the bailee and all third parties.

6 (d) If a contract requires a seller to deliver a document of title, the following rules apply:

7 (1) The required document of title must be tendered in correct form~~], except as~~
8 ~~provided in this article with respect to bills of lading in a set].~~

9 (2) Tender through customary banking channels is sufficient, and dishonor of a
10 draft or other demand for payment accompanying the document of title constitutes nonacceptance
11 or rejection.

12 **Source: Article 2, Section 2-503.**

13 **Comment**

14 1. This section continues the rules on tender of delivery from former section 2-503 with
15 the following changes. First, subsection (b)(1) provides that a destination contract is one where
16 the parties' agreement requires delivery to a particular destination. This agreement can be
17 evidenced by specific provisions or by the commercial understanding of the shipment terms used
18 in the agreement. See section 2-309. Thus, this section continues the presumption under former
19 section 2-503 that the parties intend a shipment contract in the absence of a specific agreement to
20 a destination contract. Second, subsection (c)(1) provides that the bailee's acknowledgment must
21 be to the buyer. See *Jason's Foods, Inc. v. Peter Eckrick & Sons, Inc.*, 774 F.2d 214 (7th Cir.
22 1985). Third, subsection (c)(2) provides an exception to when mere notification fixes rights as to
23 third parties to bring this subsection in line with the recent revisions to Article 9, Section 9-313.
24 Finally, former section 2-503(5)(a) provided that documents must be in correct form except as
25 provided regarding bills of lading in a set in former section 2-323. That exception has been
26 deleted to accord with the deletion of provisions governing shipping terms in Article 2. See
27 comment to section 2-309. There is no intent to change the commercial practices regarding bills
28 of lading in a set as forth in former section 2-323.

29 2. Tender of delivery has several important consequences. First, tender of delivery is a
30 necessary condition to the buyer's duty to accept and pay for the goods unless the parties agree

1 otherwise. Section 2-606. Unless the buyer has waived the right to inspect the goods prior to
2 payment, see section 2-608 and section 2-609, the buyer has a right to inspect the goods prior to
3 payment as provided in section 2-609 and the seller must allow such inspection to avoid
4 impairing the tender of delivery. The seller need not complete its performance, however, until
5 the buyer has tendered payment. Sections 2-606 and 2-607. Second, tender of delivery is relevant
6 to determining the passage of the risk of loss under section 2-612 when goods are shipped by
7 carrier or are in the hands of a bailee. An adequate tender of delivery under this section in all
8 respects, except as to conformity of the goods to the contract, is necessary to pass the risk of loss
9 to the buyer under section 2-612 if the goods are shipped by carrier or in the hands of a bailee to
10 be delivered without being moved. See comment to section 2-612. Third, tender of delivery is
11 the time for testing whether the goods conform to the contract for purposes of the buyer's right of
12 rejection under section 2-703 and for accrual of a claim for breach of warranty in a sale to an
13 immediate buyer as provided in section 2-814(c)(1), which provides that a cause of action
14 accrues for a breach of warranty at the time nonconforming goods are tendered unless the
15 warranty expressly extends to the performance of the goods after delivery, section 2-814(c)(4).
16 The seller's performance of its agreement to install or assemble the goods may be necessary in
17 particular cases in order for the buyer to inspect the goods to determine if the goods conform to
18 the contract. That factor may determine the reasonable time for rejection under section 2-703
19 and the reasonable time for inspection under section 2-609. In addition, such installation or
20 assembly as agreed by the seller, may delay the accrual of the cause of action for breach of
21 warranty if such performance is necessary in order for the buyer to determine whether the goods
22 conform to the contract.

23
24 3. Subsection (a) restates the rules from former section 2-503(1). The requirement that
25 the seller put and hold the conforming goods for the buyer means that the goods must conform to
26 the contract throughout the reasonable time that the seller is holding the goods for the buyer to
27 take possession or control. The seller's tender of delivery requires that the seller have the ability
28 to perform and offer to do so. A seller may make an appropriate tender under subsection (a) by
29 tendering documents of title which give the buyer complete control of the goods. Usage of trade,
30 course of performance, and course of dealing, as well as the other circumstances of the particular
31 case, are relevant to determining the reasonableness of the tender and the notice to the buyer that
32 enables the buyer to take delivery. Delivery is defined in section 2-102(a) as the "transfer of
33 physical possession or control of the goods. If the seller's tender complies with the
34 requirements of this section, the buyer must proceed in some manner or be in breach of contract.
35 The buyer's obligation to provide suitable facilities is not part of the seller's tender but part of the
36 buyer's obligation to cooperate with the seller in making the tender of delivery. See section 2-
37 307. A buyer's failure to furnish suitable facilities to receive the goods in an appropriate case
38 may constitute a breach of contract by the buyer. If the seller's tender does not comply with the
39 requirements of this section, then the seller has breached the contract. Of course, the parties are
40 free to agree to terms different than what is provided in this section regarding how tender of
41 delivery should be made.

42 4. Subsection (b) continues the rules from former section 2-503(2) and (3) and the
43 presumption that the parties intend a shipment contract unless they specifically agree otherwise.

1 Subsection (b)(1) specifies a test for determining when the parties have agreed to a destination
2 contract that follows comment 5 to former section 2-503.

3 5. Subsection (c) continues the rules from former section 2-503(4) making it clear that
4 the bailee's acknowledgment must be to the buyer and that a notification to the bailee fixes
5 rights as against the bailee and third parties except as provided in Article 9.

6 6. Subsection (d) continues the rules from former section 2-503(5) except that no
7 exception is stated for bills of lading in a set. Subsection (d) applies only when documents are
8 required by the contract, not when documents are authorized. Whether the documents are in
9 correct form depends upon the form the contract requires. Thus the parties' agreement as well as
10 usage of trade, course of performance, course of dealing and other circumstances will determine
11 whether the documents are in the correct form. If a prescribed document cannot be procured, the
12 provisions of this article on substitute performance should be consulted to determine whether the
13 agreed manner of delivery is commercially impracticable or whether a substitute manner of
14 delivery is commercially reasonable. Sections 2-715 and 2-716. **Note that Article 5 governs the**
15 **rights and obligations of a person that presents or receives documents under a letter of**
16 **credit. See section 2-104.**

17
18 7. **International Sales.** Under CISG Article 30, the seller must "deliver the goods, hand
19 over any documents relating to them and transfer the property in the goods, as required by the
20 contract and this Convention." Articles 31-34 then state when and how this is to be done, with
21 Article 31 the counterpart of section 2-602 and Article 32 the counterpart of section 2-603.

22 Article 31(b) deals with the case where no carriage of the goods is involved and the
23 "contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to
24 be manufactured or produced, and at the time of the conclusion of the contract the parties knew
25 that the goods were at, or were to be manufactured or produced at, a particular place." Here the
26 delivery obligation is satisfied by "placing the goods at the buyer's disposal at that place,"
27 whether it be a place controlled by the seller but not its place of business or by a bailee. Where
28 that place is controlled by the seller, the same result can be reached through sections 2-305(a)
29 and 2-602(a).

30 **SECTION 2-603. SHIPMENT BY SELLER.**

31 (a) If a seller is required or authorized to send the goods to the buyer and the contract
32 does not require delivery at a particular destination, the following rules apply:

33 (1) The seller shall put the goods in the possession of a carrier and make a
34 contract for the transportation of the goods as may be reasonable having regard to the nature of
35 the goods and other circumstances of the case. ~~However, unless requested by the buyer or~~

1 required by usage of trade, the seller need not make a contract for their transportation or obtain
2 and deliver any documents of title necessary to enable the buyer to obtain possession or control
3 of the goods.

4 ~~_____ (2) If the seller is so requested or required to make a contract for transportation or~~
5 ~~to obtain and deliver documents under paragraph (1), the following rules apply:~~

6 ~~_____ (2)(B) The seller shall obtain and promptly deliver or tender in due form any~~
7 ~~documents of title necessary to enable the buyer to obtain possession of the goods or otherwise~~
8 ~~required by the agreement or by usage of trade.~~

9 (3) The seller shall promptly notify the buyer of the shipment. ~~if the goods are not~~
10 ~~clearly identified to the contract by markings on the goods, shipping documents, or otherwise.~~

11 (b) A seller's failure to notify the buyer of the shipment or to make a proper contract for
12 transportation, ~~if so required by subsection (a)~~, is a ground for rejection only if material delay or
13 loss results.

14 **Source: Article 2, Section 2-504**

15 **Comment**

16 1. This section is the same as former section 2-504 regarding the seller's obligation for
17 carriage in a shipment contract. The seller is obligated to make a reasonable contract and to
18 promptly obtain and to deliver the documents of title. This section requires the seller to notify the
19 buyer of the shipment.

20 2. This section applies to shipment contracts, not destination contracts. Whether a
21 contract is a shipment or destination contract depends upon whether the parties have specifically
22 agreed or the commercial understanding of the terms is such that agreement requires the seller to
23 deliver to the particular destination. See section 2-602 and section 2-309. Proper tender of
24 delivery in a shipment contract means that the seller must also comply with the requirements of
25 this section. Section 2-602(b)(2). Compliance with this section is also a necessary step in
26 passing the risk of loss to the buyer in a shipment contract. Section 2-612(b)(2)(A).

27
28 3. Under subsection (a), the parties may agree to shipment terms subject to any

1 substitution necessary under section 2-715. The parties' agreement as to shipment both as to the
2 contract for transportation and the obligation to obtain and deliver documents must be read in
3 light of commercial understanding. In the absence of an express agreement otherwise, the
4 reasonableness of any contract of transportation including choice of carrier and routing is
5 determined by the nature of the goods and the circumstances of the case. Regardless of whether
6 the shipment is at the buyer's or seller's expense, the seller must make any arrangements
7 reasonable under the circumstances in light of the nature of the goods. These arrangements could
8 include refrigeration or heating, specialized containers, or sending necessary personnel to tend to
9 the goods. The seller acts unreasonably if the seller agrees to a valuation below the true
10 valuation of the goods which cuts off the buyer's ability to recover from the carrier in the event
11 of a loss given that the risk of loss will pass upon delivery to the carrier in the usual shipment
12 contract. Section 2-612(b)(2)(A). The seller's obligation to obtain and to deliver documents may
13 be in addition to the seller's obligation to arrange a reasonable contract for transportation.
14

15 4. Subsection (a)(3) requires the seller to promptly notify the buyer of shipment. The
16 consequence of failure to notify is provided in subsection (b) in the absence of agreement
17 otherwise. The parties may agree that the failure to notify is a ground for rejection in all cases,
18 not just in the case of material delay or loss. See section 1-201 on definition of notify.
19

20 5. Under subsection (b), the buyer may reject the goods if the seller's failure to do so is
21 in fact followed by material delay or damage. The seller has the burden to establish that the
22 seller's failure to follow the requirements of this section have not been followed by events which
23 justify rejection of the goods.
24

25 **6. International Sales.** Many international contracts for sale involve "carriage of the
26 goods." In the absence of agreed delivery terms, such as the Incoterms 1990 of the International
27 Chamber of Commerce, CISG Articles 31(a) and 32 determine what the seller must do to deliver
28 the goods. In the absence of agreement to deliver at "any other particular place," delivery consists
29 of "handing the goods over to the first carrier for transmission to the buyer." Art. 31(a). If the
30 goods are "clearly identified to the contract" the seller need not notify the buyer of the
31 "consignment." Art. 32(1). More to the point, unless the seller is "bound to arrange for carriage
32 of the goods" it need not make any contracts for carriage. Art. 32(2). Even if the seller is not
33 bound to obtain insurance on the carriage, it must "at the buyer's request, provide...all available
34 information necessary to enable [the buyer] to effect such insurance." Art. 32(3).

35 **SECTION 2-604. SELLER'S SHIPMENT UNDER RESERVATION.**

36 (a) If a seller has identified goods to the contract by the time of shipment, the following
37 rules apply:

38 (1) The seller's procurement of a negotiable bill of lading reserves in the seller a
39 security interest in the goods. The seller's procurement of the bill to the order of a financing

1 agency or the buyer indicates in addition only the seller's expectation of transferring that interest
2 to the person named.

3 (2) The seller's procurement of a nonnegotiable bill of lading to the seller or its
4 nominee reserves possession of the goods as security. However, except in a case of conditional
5 delivery, a nonnegotiable bill of lading naming the buyer as consignee does not reserve a security
6 interest, even if the seller retains possession of the bill of lading.

7 (b) If a shipment by a seller with reservation of a security interest breaches a contract for
8 sale, the shipment constitutes an improper contract for transportation under Section 2-603.
9 However, the shipment does not impair the rights given to the buyer by shipment and
10 identification of the goods to the contract or the seller's powers as a holder of a negotiable
11 document of title.

12 **Source: Article 2, Section 2-505**

13 **Comment**

14
15 1. This section is the same in substance as former section 2-505 and states the effect of
16 the seller's procurement of either a negotiable bill of lading or a nonnegotiable bill of lading
17 unless otherwise agreed by the parties to the contract for sale. This section does not address
18 whether the seller can ship under reservation, when payment is due, or the buyer's ability to
19 inspect the goods. Those matters are addressed in section 2-611. This section also does not
20 address when title to the goods passes from the seller to the buyer, see section 2-501, or passage
21 of the risk of loss for the goods, see section 2-612. This section also does not address the rights
22 or obligations of the carrier who issued the bill of lading. See Article 7 on Documents of Title.
23

24 2. If goods are identified to the contract and the seller obtains a negotiable bill of lading,
25 the seller has reserved a security interest in the goods. The security interest created in this
26 manner is a mechanism for the seller to enforce its rights under the sales contract against the
27 buyer and is not effected by the passage of title. Section 2-501. The parties' agreement on
28 passage of title does not alter the operation of this section. The security interest is a security
29 interest arising under Article 2 and is governed by Article 9, section 9-110.
30

31 3. A nonnegotiable bill of lading to the seller or its nominee means that the seller has
32 possession of the goods as security for performance of the sales contract. If the seller seeks to

1 withhold the goods improperly, the buyer may tender its obligations under the sales contract and
2 recover the goods. Unless there is a conditional delivery under section 2-606, if the seller obtains
3 a nonnegotiable bill of lading naming the buyer as the consignee, the seller does not have either a
4 security interest under this section or possession of the goods as the seller has relinquished its
5 control over the goods except in those situations where the seller has a right to stop delivery.
6 Sections 2-816 and 2-818. In the case of a conditional delivery under section 2-606, the seller
7 has the right to demand payment upon delivery of the goods or documents and the seller has the
8 right to withhold delivery until paid or reclaim the goods as provided in sections 2-816 and 2-
9 818. Conditional delivery does not prevent the buyer from transferring good title to a purchaser
10 under section 2-504. The buyer has a right to inspect before payment as provided in section 2-
11 609. Section 2-611(b).

12
13 4. Unless otherwise agreed, the seller's reservation of a security interest in the goods is
14 not a breach of contract. See section 2-611(b). Under subsection (b), however, the seller's
15 reservation of a security interest does not allow the seller whose reservation of a security interest
16 is a breach of the sales contract to obtain more than the seller is due under the sales contract.
17 However, the fact that the seller's reservation of a security interest breached the sales contract
18 does not impair the seller's rights as a holder of a negotiable document of title.

19
20 5. **International Sales.** There is no comparable provision in CISG. Article 58(1) & (2),
21 however, permits a seller in cases where documents are involved to make payment a condition
22 for handing over the goods or the documents. Nevertheless, the buyer may still examine the
23 goods before payment unless otherwise agreed. Art. 58(3).

24 **SECTION 2-605. RIGHTS OF FINANCING AGENCY.**

25
26 (a) Except as otherwise provided in subsection (c), a financing agency, by paying or
27 purchasing for value a draft that relates to a shipment of goods, acquires, to the extent of the
28 payment or purchase and, in addition to its own rights under the draft and any document of title
29 securing it, any rights of the shipper in the goods, including the right to stop delivery and the
30 shipper's right to have the draft honored by the buyer.

31 (b) Except as otherwise provided in subsection (c), the right to reimbursement of a
32 financing agency that in good faith has honored or purchased a draft under commitment to or
33 authority from the buyer is not impaired by later discovery of defects in any relevant document of
34 title that was apparently regular on its face.

1 (c) Article 5 provides for the rights of a financing agency under a letter of credit.

2 **Source: Article 2, Section 2-506**

3 **Comment**

4
5 1. This section is the same in substance as former section 2-506 except for the addition
6 of a new subsection (c) that provides that a financing agency that honors a presentation under a
7 letter of credit has rights as provided in Article 5. See section 5-108.
8

9 2. Subsection (a) provides that the financing agency acquires the shipper's rights to the
10 goods in addition to the financing agency's own rights under a draft or document of title when
11 the financing agency purchases or pays a draft. Paying includes any situation where the financing
12 agency, by arrangement with the buyer or other consignee, pays a draft for the price of the goods
13 regardless of whether it is drawn on that party, whether it is a sight or time draft, or whether the
14 payment is viewed as conditional or absolute. Purchasing for value is similarly broad and does
15 not recognize any distinction between a purchase, discount, or advance against collection or
16 similar situations. The financing agency's right to have the draft honored is against the buyer and
17 not other parties unless another party has a separate obligation to the financing agency. The draft
18 must relate to a shipment of goods and includes drafts against invoices or delivery orders. After
19 shipment, the shipper's rights in the goods are rights that secure payment for the goods and are
20 subject to the buyer's right to force delivery upon payment of the price. Those rights may be
21 limited if the goods are covered by a document of title and that document has been transferred or
22 negotiated to a third party. See Article 7 on rights of transferees and holders of documents of
23 title. Similarly, the financing agency has only the rights of the shipper to stop delivery as
24 provided in section 2-818. A financing agency under a letter of credit has rights as provided in
25 Article 5. Subsection (c).
26

27 3. Subsection (b) addresses the rights of a financing agency in the situation where the
28 documents of title have defects that were not on the face of the documents. This rule parallels
29 the rule found in former Article 5 section 5-114(2) and in Revised Article 5 section 5-109(a).

30 4. **International Sales.** CISG does not have a provision dealing with the rights of
31 financing agencies.

32 **SECTION 2-606. EFFECT OF SELLER'S TENDER; DELIVERY ON**
33 **CONDITION.**

34 (a) The seller's tender of delivery is a condition to a buyer's duty to accept and to pay for
35 the goods. Tender of delivery entitles the seller to acceptance of the goods and to payment
36 according to the contract. The seller shall tender first but need not complete ~~delivery~~ its

1 performance under the contract until the buyer has tendered payment. Completion of the seller's
2 performance under the contract includes the performance of the seller's agreement to install or
3 assemble the goods.

4 (b) Subject to Section 2-816, if payment is due and demanded on the delivery to the buyer
5 of goods or of a document of title, a buyer's right against the seller to retain or to dispose of them
6 is conditional upon the buyer making the payment due.

7 **Source: Article 2, Section 2-507**

8 **Comment**

9 1. This section is derived from former section 2-507 on tender of delivery as a condition
10 to the buyer's obligation to accept and pay for the goods. Even though the conditions of tender
11 of delivery and tender of payment are presumed to be concurrent conditions, unless otherwise
12 agreed, the seller should tender delivery first. The seller's tender of delivery in accord with
13 section 2-602 entitles the seller to the buyer's acceptance of and payment for the goods according
14 to the terms of the contract which includes the parties' agreement and applicable law such as
15 provisions on failure of agreed manner of payment. See section 2-715. Even if payment is due
16 and demanded upon tender of delivery of the goods, the buyer still has the right to inspect the
17 goods as provided in section 2-609. Completion of performance encompasses any agreement by
18 the seller to install or assemble the goods. If the parties have not agreed to the seller performing
19 any installation or assembly, then completion of the seller's performance does not require the
20 installation or assembly. The parties are free to agree that performance and payment take place
21 differently than as provided in this section.

22
23 2. Subsection (b) addresses the conditional delivery of goods when payment is due and
24 demanded upon delivery of the goods. Conditional delivery does not prevent the passage of title
25 as provided in section 2-501. Sections 2-504 and 2-816 protect the rights of third parties who
26 obtain rights in the goods from the buyer. The seller's right in the goods delivered in a
27 conditional delivery is in the nature of a lien and the seller's right to reclaim the goods from the
28 buyer's possession is determined under section 2-816. A seller may waive rights granted by this
29 section, section 2-209, or be precluded from exercising its rights under this section by estoppel or
30 ratification of the buyer's right to keep the goods without payment. Section 1-103.

31
32 3. **International Sales.** CISG Article 58(1), in accord, provides that if the buyer is "not
33 bound to pay the price at any other specific time, he must pay it when the seller places either the
34 goods or documents controlling their disposition at the buyer's disposal in accordance with the
35 contract and this Convention." If, however, the buyer must pay "on the date fixed by or
36 determinable from the contract and this Convention," it must pay "without the need for any

1 request or compliance with any formality on the part of the seller." Thus, if no time is fixed to
2 pay the seller must tender first. But if a time for payment is fixed, the buyer must pay at that time
3 whether the seller tenders or not.

4 **SECTION 2-607. TENDER OF PAYMENT BY BUYER.**

5 (a) Subject to Section 2-606(a), tender of payment by a buyer is a condition to the seller's
6 duty to complete its performance ~~a delivery~~.

7 (b) Tender of payment by a buyer is sufficient if made by any means or in any manner
8 current in the ordinary course of business unless the seller demands payment in money and gives
9 any extension of time reasonably necessary to procure it.

10 **Source: Article 2, Section 2-511**

11 **Comment**

12 1. This section is derived from former section 2-511. In accord with the rule from
13 section 2-606, subsection (a) provides that the seller need not complete performance until the
14 buyer tenders payment unless the parties otherwise agree. See section 2-611 on when and where
15 payment is due, section 2-602 on tender of delivery, and section 2-305 on place for delivery. In
16 transactions where the parties agree to credit terms, these provisions on when payment is due will
17 not apply. This section should also be read in light of the provisions on the buyer's right to
18 inspect. A buyer has a right to inspect the goods prior to payment unless the contract requires
19 payment before inspection. Sections 2-608 and 2-609. That reasonable inspection may require
20 the seller to perform its agreement to install or assemble the goods if necessary to enable the
21 buyer to determine conformity of the goods. In an installment contract, where delivery of the
22 goods is in separate lots to be separately accepted, section 2-710, payment may be appropriate
23 after each delivery. Section 2-302. Finally, even before delivery, the buyer should not impair the
24 seller's expectation of receiving payment in due course. Section 2-711.

25
26 2. Subsection (b) follows the rule from former section 2-511(2) that the buyer may tender
27 payment in the ordinary course of business. The seller may demand money, section 1-201(24).
28 If the seller demands payment in money, the seller must give a reasonable extension of time to
29 procure the money. This provision avoids undue surprise of the buyer. A party may satisfy the
30 obligation to pay with money by making a funds transfer under Article 4A, section 4A-406(b).

31
32 3. Subsection (3) of former section 2-511 is omitted as unnecessary. Section 3-310
33 provides the effect of dishonor of a check on the underlying obligation to pay for the goods.
34 Payment by drafts, including checks, is a commercially reasonable and ordinary manner of
35 payment for goods. Making a payment by a non-post dated check is a conditional payment as

1 between the parties that is treated as a cash transaction. If the check is subsequently dishonored,
2 the payment for the goods has been defeated as provided in section 3-310 and the seller may
3 proceed on its rights on the check as well as its rights under this article. See section 2-816(b)(2)
4 regarding the seller's right to reclaim the goods if a conditional payment fails. A post dated
5 check is a credit transaction as to third parties and the seller's right to reclaim is governed by the
6 provisions of section 2-816(b)(1).

7
8 **4. International Sales.** CISG Article 53 provides that the buyer "must pay the price for
9 the goods...as required by the contract and this Convention." It is frequently agreed that payment
10 shall be by a letter of credit, a method of payment not within the scope of the Convention. In the
11 absence of contrary agreement, questions about the time of payment are answered in Articles 58
12 and 59. If a time for payment has not been fixed, the duty to pay arises when the seller tenders
13 delivery. Art. 58(1) & (2). If a time for payment is fixed, the buyer must pay at the time "without
14 the need for any request or compliance with any formality on the part of the seller."

15
16 **SECTION 2-608. PAYMENT BY BUYER BEFORE INSPECTION.**

17 (a) If the contract requires payment before inspection, nonconformity of the goods does
18 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 of title, the circumstances would
21 justify injunction against honor under Article 5.

22 (b) Payment under subsection (a) is not an acceptance of goods and does not impair the
23 buyer's right to inspect or other remedies of the buyer.

24 **Source: Article 2, Section 2-512**

25 **Comment**

26 1. Section 2-608 continues the rules from former section 2-512 without substantive
27 change.

28 2. Subsection (a) provides a limited right of the buyer to refuse to make payment prior to
29 inspection of the goods in the situation where the contract requires payment prior to inspection. If
30 the contract provides that the buyer is to pay before inspection, the buyer takes the risk of paying
31 first and litigating later as to any defects in the goods. Inspection in this section means an
32 inspection in a manner reasonable for detecting nonconformities in goods whose surface
33 appearance is satisfactory. Subsection (a)(1) states an exception to that general rule, that if the

1 nonconformity is apparent upon taking delivery, the buyer need not pay prior to inspection.
2 Subsection (a)(2) provides an analogous rule for defects in the required documents of title.

3 3. Subsection (b) states the rule that if payment is required before inspection, that
4 payment is not an acceptance of the goods under section 2-706, does not alter the buyer's right to
5 inspect the goods under section 2-609 in any other way, and does not preclude the exercise of any
6 of the buyer's remedies for the seller's breach, section 2-823. If payment is required prior to
7 inspection, the buyer need not comply with the provision on reservation of rights, section 1-207,
8 in making payment in order to assert its rights as to any nonconformity in the goods discovered
9 upon inspection.

10 4. This section should be read in conjunction with section 2-609 which states the usual
11 rule that the buyer may inspect the goods prior to payment or acceptance of the goods unless the
12 contract provides otherwise. The parties may agree expressly to require payment before
13 inspection or may use delivery terms that in commercial usage preclude inspection prior to
14 payment. Section 2-609(c). As to the relationship between inspection, acceptance of the goods,
15 payment, passage of title, and risk of loss, see the comment to section 2-609.

16 5. **International Sales.** CISG Article 58(3) protects the buyer's right to examine the
17 goods before paying the price "unless the procedures for delivery or payment agreed upon by the
18 parties are inconsistent with his having such an opportunity." Assuming such agreement, there is
19 no provision comparable to section 2-608.

20 **SECTION 2-609. BUYER'S RIGHT TO INSPECT GOODS.**

21 (a) Subject to subsection (c), if goods are tendered, delivered or identified to the contract
22 for sale, the buyer may, before payment or acceptance, inspect them at any reasonable place and
23 time and in any reasonable manner. If the seller is required or authorized to send the goods to the
24 buyer, the inspection may be after their arrival.

25 (b) Expenses of inspection must be borne by the buyer, but may be recovered as
26 incidental damages if the buyer is entitled to those damages.

27 (c) The buyer is not entitled to inspect the goods before payment of the price if the
28 contract provides for:

29 (1) delivery "C.O.D. ", "C.I.F. ", or "C. & F. " or delivery on terms that under
30 applicable, course of performance, course of dealing, or usage of trade are interpreted as

1 precluding inspection before payment; or

2 (2) payment upon tender of required documents of title, unless payment is due
3 only after the goods become available for inspection.

4 (d) A place, method, or standard of inspection fixed by the parties is presumed to be
5 exclusive. However, unless otherwise expressly agreed, the fixing of a place, method, or standard
6 of inspection does not postpone identification or shift the place for delivery or for passing the
7 risk of loss. If compliance becomes impossible, inspection must be made as provided in this
8 section unless the place, method, or standard fixed was clearly intended as an indispensable
9 condition the failure of which avoids the contract.

10 **Source: Article 2, Section 2-513**

11 **Comment**

12 1. Section 2-609 continues the rules from former section 2-513 with three substantive
13 changes. First, subsection (b) allows recovery of expenses of inspection anytime the buyer is
14 entitled to recover incidental damages, not just when the buyer rejected the goods as under
15 former section 2-513(2). Second, with the deletion of delivery terms from Article 2, the
16 determination of whether the contract provides that the buyer will make payment prior to
17 inspection depends upon the commercial interpretation of the shipping terms used as provided in
18 section 2-309. Third, complying with a standard of inspection as a condition to further
19 performance of the contract has been added to subsection (d). Just as with the place or method of
20 inspection, the parties may intend that the standard of inspection is an indispensable condition of
21 the contract.

22 2. In the case where the contract does not require the buyer to pay before inspection, the
23 buyer has a right to inspect the goods as provided in subsection (a). That inspection need not
24 take place at the point at which the seller tenders delivery under section 2-602 in a shipment
25 contract but may be after arrival of the goods at the buyer's destination. See section 2-611(b). If
26 payment is due when the buyer receives the goods under section 2-611(a), this section allows the
27 buyer to inspect prior to making payment. The buyer's right to inspect must be exercised in a
28 reasonable manner and at a reasonable place and time. The reasonableness of each of these
29 factors is determined by trade usages, course of dealing, course of performance and other relevant
30 circumstances. Reasonable inspection under this section may included that the seller perform an
31 agreement to install or assemble the goods if such installation or assembly is necessary to
32 determine whether the goods conform to the contract.

1 3. Acceptance of the goods under section 2-706 does not take place unless the buyer has
2 a reasonable opportunity to inspect the goods unless the buyer does an unreasonable act
3 inconsistent with the seller's ownership or inconsistent with the buyer's claim of rejection or
4 revocation of acceptance which act is ratified by the seller as an acceptance. Compare section 2-
5 706. Reasonable use of the goods for inspection purposes should not be treated as an acceptance
6 of the goods under section 2-706. As stated in section 2-608, in a contract where the buyer has
7 agreed to payment before inspection, payment is not an acceptance of the goods. If the buyer has
8 not agreed to payment before inspection, payment does not waive the right to inspect before
9 acceptance of the goods as the rule of subsection (a) applies to give the buyer a right to inspect
10 "before payment or acceptance.

11 4. The buyer's right to inspect in subsection (a) is unaffected by passage of title under
12 section 2-501 or by passage of the risk of loss under section 2-612. As provided in subsection
13 (d), unless the parties expressly agree otherwise, title passes to the buyer as provided in section 2-
14 501 and the risk of loss passes to the buyer under section 2-612 regardless of the buyer's right to
15 inspect under this section.

16 5. Inspection under this section is inspection designed to determine whether the seller has
17 complied with the contract requirements regarding the goods and should not be confused with the
18 buyer's examination of the goods prior to formation of the contract under section 2-406(e) in
19 regard to implied warranties.

20 6. Subsection (b) provides that inspection expenses are normally expenses of the buyer
21 unless the parties otherwise agree. The buyer has a right to recover inspection expenses as
22 incidental damages in the event of seller's breach. Section 2-823 and section 2-805.

23
24 7. Subsection (c) provides for circumstances in which the commercial understanding is
25 that the buyer has agreed to postpone its right to inspect until after payment. A documentary
26 transaction falls within the exception to subsection (c)(2) providing for payment after the goods
27 become available for inspection in situations where the parties agree that the payment is to await
28 arrival of the goods, where the parties agree that the documents are to be held until arrival, or
29 where payment is to be made against storage documents or delivery orders.

30 8. Under subsection (d), the question of whether the place, method or standard of
31 inspection was an indispensable condition of the contract is one of the parties' intent. If the
32 parties agree to a place of inspection, the buyer's failure to inspect may be a waiver of the right to
33 inspect and thus an acceptance of the goods with such defects as an inspection would have
34 revealed. Sections 2-209 and 2-702. Agreements on the time allowed for inspection of the goods
35 must be a reasonable time. Section 2-306. A standard of inspection as an express condition to
36 performance is not the same as a promise or warranty that the goods will perform up to the
37 standard.

38
39 9. **International Sales.** Unless otherwise agreed, the buyer has a right to examine the
40 goods upon tender and before payment. CISG Art. 58(3). If carriage of the goods is involved,

1 examination "may be deferred until after the goods have arrived at their destination." Art. 38(2).
2 A special rule applies when the goods are redirected or redispached in transit. Art. 38(2). The
3 buyer must act fast to examine the goods, Art. 38(1), and may lose the right to rely upon a
4 non-conformity if timely notice, as defined in Article 39, is not given. The buyer, however, is
5 protected from the rigors of Articles 38 and 39 if the seller knew "or could not have been
6 unaware of" the non-conformity and did not disclose it, Art. 40, and is entitled to damages if "he
7 has a reasonable excuse for his failure to give the required notice." Art. 44.

8 **SECTION 2-610. WHEN DOCUMENTS OF TITLE DELIVERABLE ON**
9 **ACCEPTANCE OR PAYMENT.**

10 (a) Except as provided in subsection (b), documents of title against which a draft is
11 drawn must be delivered to the drawee that honors the draft on acceptance of the draft if the draft
12 is payable more than [a reasonable time] [three days] after presentment. Otherwise, delivery of
13 the documents of title is required only on payment.

14 (b) Article 5 provides for the rights of a person that presents or receives documents under
15 a letter of a credit.

16 **Source: Article 2, Section 2-514**

17 **Comment**

18 1. This section continues the rule from former section 2-514 with the addition of
19 subsection (b) to govern drafts presented under a letter of credit. This section states a
20 presumption as to when documents of title must be released to the drawee of the draft and
21 parallels the rules found in section 4-503. Acceptance of the draft means acceptance as defined
22 in section 3-409.

23 2. **International Sales.** CISG has no comparable provision.

24 **SECTION 2-611. OPEN TIME FOR PAYMENT OR RUNNING OF CREDIT;**
25 **AUTHORITY TO SHIP UNDER RESERVATION.**

26 (a) Payment is due at the time and place the buyer is to receive the goods, even if the
27 place of shipment is the place for tender of delivery.

1 (b) If the seller is required or authorized to send the goods, the seller may ship them under
2 reservation and may tender the documents of title. However, the buyer may inspect the goods
3 after their arrival before payment is due unless the inspection is inconsistent with the terms of the
4 contract.

5 (c) If tender of delivery is agreed to be made by way of documents of title other than
6 under subsection (b), payment is due at the time and place at which the buyer is to receive the
7 documents of title, regardless of where the goods are to be received.

8 (d) If the seller is required or authorized to ship the goods on credit, the credit period runs
9 from the time of shipment. However, post-dating the invoice or delaying its dispatch
10 correspondingly delays the starting of the credit period.

11 **Source: Article 2, Section 2-310**

12 **Comment**

13 1. This section continues the rules from former section 2-310 without substantive change.
14 This section states rules concerning the time of payment for shipments in the event the parties
15 have not agreed otherwise.

16 2. Subsection (a) provides that payment is due at the time and place the buyer receives
17 the goods even if the seller tenders delivery at an earlier time or at a different place as provided in
18 section 2-602 on tender of delivery. This rule allows for the buyer to inspect prior to payment as
19 provided in section 2-609. The time and place of payment does not affect the passage of the risk
20 of loss for the goods as provided in section 2-612.

21 3. Subsection (b) protects the seller in the case where a credit sale is not contemplated by
22 allowing the seller to ship under reservation as provided in section 2-604 so that the seller need
23 not give up the goods until paid, but the buyer may still inspect the goods prior to payment unless
24 the parties have agreed otherwise. Section 2-609. Subsection (c) must also be read in light of the
25 buyer's inspection right. Under section 2-609(c)(2), agreeing to pay upon tender of documents
26 of title waives the buyer's right to inspect prior to payment unless the parties have agreed that
27 payment will wait until after the goods are available for inspection.

28 4. Subsection (d) is based upon the commercial understanding that an agreed credit
29 period runs from the time of shipment. An invoice usually represents the date of shipment.

1 Delay in sending the invoice or in post-dating the invoice deprives the buyer of notice of the time
2 in which the buyer should be prepared to make payment.

3 **5. International Sales.** CISG Article 57 provides that the buyer must pay the price at
4 the seller's place of business or where documents are handed over. Article 58 provides that the
5 buyer must pay the price when the goods or documents are at the buyer's disposal. The seller
6 may condition delivery of either goods or documents on paying the price. The buyer has a right
7 to inspect prior to paying the price. All of the above are subject to contrary agreement of the
8 parties.

9 **SECTION 2-612. RISK OF LOSS.**

10 (a) This section is subject to Section 2-506(b) and (c).

11 (b) Except as otherwise provided in subsection (c), risk of loss passes to the buyer
12 regardless of the conformity of the goods to the contract as follows:

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

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

18 (A) If the contract does not require delivery at a particular destination, the
19 risk of loss passes to the buyer when the goods are delivered to the carrier and the seller complies
20 with Sections 2-602 and 2-603, even if the shipment is under reservation.

21 (B) If the contract requires delivery at a particular destination and the
22 goods arrive there in the possession of the carrier, the risk of loss passes to the buyer when the
23 goods are tendered in the manner required by Section 2-602.

24 (3) If the goods are held by a bailee to be delivered without being moved, the risk
25 of loss passes to the buyer:

1 (A) on the buyer's receipt of a negotiable document of title covering the
2 goods with any required indorsement;

3 (B) on acknowledgment by the bailee to the buyer of the buyer's right to
4 possession of the goods; or

5 (C) after the buyer's receipt of a nonnegotiable document of title or record
6 directing delivery as provided in Section 2-602(c)(2).

7 (c) A breach of contract by either party affects risk of loss only in the following cases:

8 (1) If the buyer rightfully rejects the goods or justifiably revokes acceptance of the
9 goods, the seller has the risk of loss from the time the rejection or revocation is effective.

10 (2) If the seller has tendered nonconforming goods so that the buyer would have
11 the right to reject the goods or revoke acceptance of the goods, the goods are damaged or lost
12 before the buyer effectively rejects or revokes acceptance, and the risk of loss would have
13 otherwise passed to the buyer under subsection (a) or (b), the seller has the risk of loss to the
14 extent the nonconformity of the goods caused the damage or loss.

15 (3) If conforming goods are identified to the contract when the buyer repudiates or
16 is otherwise in breach and the risk of loss has not otherwise passed to the buyer, the buyer has the
17 risk of loss for those goods for a commercially reasonable time after the breach or repudiation.

18 **Source: Article 2, Sections 2-509 and 2-510**

19 **Comment**

20 1. This section is derived from former sections 2-509 and 2-510 but has made several
21 substantive changes in the rules regarding passage of the risk of loss for the goods from the seller
22 to the buyer. The underlying theory of this section is that risk of loss passes to the buyer at a
23 stated point in time based upon assumptions about who is in the best position to prevent the harm
24 to the goods or to insure against that harm regardless of who has title to the goods or who has a
25 property interest in the goods and regardless of whether either party is in breach of contract

1 except for the limited circumstances in subsection (c). Thus the conformity or nonconformity of
2 the goods to the contract is not relevant to the passage of the risk of loss for the goods except as
3 provided in subsection (c). Whether one or both parties have insured against the loss is not
4 relevant to determine who has the risk of loss for the goods.

5 The effect of the seller having the risk of loss for the goods is that if the goods are lost or
6 damaged, the seller must still deliver goods conforming to the contract or answer in damages for
7 breach of contract. Similarly, if the buyer has the risk of loss for the goods, the buyer must
8 perform its obligations under the contract or answer in damages for breach of contract. Of
9 course, the obligations of either the buyer or the seller may be excused in an appropriate case
10 under sections 2-714 through 2-717 on excuse. As under former law, the parties may agree to
11 passage of the risk of loss at a time different than what is provided in this section. Section 2-108;
12 Section 1-201(3) on the meaning of agreement which includes course of dealing, course of
13 performance and usage of trade.

14 2. Subsection (a) continues the rule that the risk of loss rules in this section are subject to
15 the rules on risk of loss found in section 2-506 for sales on approval or sales and return.

16 3. Subsection (b)(1) changes the previous rule that provided that risk of loss passed upon
17 tender of delivery in case of a nonmerchant seller, instead adopting the rule that formerly applied
18 only to merchant sellers, that risk of loss passes upon buyer's receipt of the goods, as the
19 appropriate rule for all sales. Receipt is defined in section 2-102 as taking delivery of the goods
20 and delivery is defined in section 2-102 as transfer of physical possession or control of the goods.
21 If the buyer does not intend to take possession, then risk of loss will pass when the buyer takes
22 control of the goods. This rule that passes risk of loss to the buyer upon physical possession or
23 control of the goods applies when the goods are not shipped by carrier as authorized or required
24 under the contract, when the goods are not held by a bailee to be delivered without being moved,
25 and when none of the circumstances in subsection (c) apply.

26
27 The goods need not be conforming goods for the buyer to have the risk of loss under this
28 section. Assume the seller tenders nonconforming goods and the buyer takes possession of the
29 goods. At this point the risk of loss for the goods is on the buyer under subsection (b)(1). If the
30 goods are destroyed before the buyer has accepted the goods or rejected the goods, the buyer has
31 the risk of loss unless the destruction of the goods was caused by the nonconformity, subsection
32 (c)(2).

33 4. Subsection (b)(2) continues the rules regarding passage of the risk of loss in shipment
34 and destination contracts as under former law with only one change, that is, the goods need not
35 be conforming at the point of delivery to the carrier in the case of a shipment contract or delivery
36 by the carrier in the case of a destination contract, for the risk of loss to pass to the buyer. In
37 every other respect except as to the conformity of the goods, however, the seller or carrier, as the
38 case may be, must comply with the sections on tender of delivery and obligations in the case of a
39 shipment contract, section 2-602 and 2-603, in order for the risk of loss to pass at the point stated
40 in subsection (b)(2). Thus the seller must make a reasonable contract under section 2-603 in

1 order for the risk of loss to pass to the buyer at the time the goods are placed in the possession of
2 the carrier. As under former law, if the goods are already in transit when the contract for sale is
3 made, the risk of loss cannot pass until the goods are identified to the contract and absent special
4 agreement passage of the risk of loss should not be made retroactive to the time of shipment.

5 A carrier within the meaning of this section is generally an entity that is separate from the
6 seller and not controlled by the seller.

7 5. Subsection (b)(3) continues the rules from former law regarding risk of loss for goods
8 in the hands of a bailee with two subsequent clarifications; first the risk of loss passes when the
9 negotiable documents are indorsed if an indorsement is required for negotiation and second, the
10 acknowledgement must be to the buyer in accord with the changes to the tender of delivery rules
11 in section 2-602.

12 Under current law, controversy has arisen whether a seller who continues to hold
13 possession of the goods after sale is a bailee under the rules in subsection (b)(3). In the usual
14 case, if the continued possession after sale made the seller a bailee, the general rule of subsection
15 (b)(1) would be undermined and thus in the usual case, the seller should not be a bailee within
16 the meaning of this subsection. See *Silver v. Wycombe, Meyer & Co., Inc.*, 477 N.Y.S.2d 288
17 (Civil Court, City of N.Y. 1984). In some cases, however, the seller may qualify as a bailee if the
18 seller and the buyer have entered into a separate agreement for bailment.

19 6. Subsection (c) addresses three situations where the risk of loss depends not only upon
20 who has possession of the goods but also on whether the contract has been breached. In all cases,
21 regardless of who has the risk of loss for the goods, the aggrieved party has an action against the
22 breaching party for breach of contract. Subsection (c)(1) has a limited rule to pass the risk of loss
23 back to the seller after an effective and rightful rejection of the goods or justifiable revocation of
24 acceptance of the goods. This makes the risk of loss rule compatible with the rules on the
25 buyer's obligation to take reasonable care of the goods in section 2-704. If the goods are
26 destroyed while in buyer's possession after the buyer has effectively and rightfully rejected the
27 goods or justifiably revoked acceptance of the goods, the buyer is liable to the seller only if the
28 buyer has failed to take reasonable care of the goods, section 2-704, or failed to take an action
29 required under section 2-705. Passing the risk of loss back to the seller in this situation
30 encourages the seller to take action to regain possession of the goods.

31 7. If the goods are destroyed prior to the rightful and effective rejection or revocation of
32 acceptance, the seller has the risk of loss only to the extent the nonconformity caused the
33 destruction. Subsection (c)(2). If the nonconformity did not cause the destruction, the buyer has
34 the risk of loss for the goods prior to the rejection or revocation of acceptance and also a cause of
35 action against the seller for the nonconformity that operates as an offset for the liability caused by
36 having to bear the risk of loss.

37
38 8. If the seller tenders conforming goods, the buyer takes possession of the goods, the
39 buyer wrongfully but effectively rejects those goods, and then the goods are destroyed, the buyer

1 retains the risk of loss and is liable for the price under section 2-822(a)(2). If in that case, the
2 seller took possession of the goods back from the buyer and then the goods were destroyed, the
3 buyer may also be liable for the price if the destruction took place within a commercially
4 reasonable time after the seller repossessed the goods. Section 2-822(a)(2). If the destruction of
5 the goods takes place outside the commercially reasonable time, the seller still has a cause of
6 action for breach against the buyer based upon the wrongful rejection, but in effect the risk of
7 loss for the goods has passed back to the seller as the buyer is no longer liable for the price.

8 9. Subsection (c)(3) allows the risk of loss to be placed on the buyer if the buyer has
9 repudiated or breached the contract after conforming goods are identified to the contract in order
10 to protect the seller in the case of a surprise breach and allow the seller time to adequately protect
11 the goods. The primary effect of this subsection is to entitle the seller to the price under section
12 2-822(a)(2) if the goods are destroyed within the commercially reasonable time provided in
13 subsection (c)(3). The seller still has a cause of action for breach of contract against the buyer
14 even if the buyer does not have the risk of loss under this subsection.

15 10. **International Sales.** "Passing of Risk" is treated in CISG Articles 66-70. Art. 67(1),
16 dealing with "carriage of the goods," is comparable to section 2-612(b)(2). The distinction
17 between "origin" and "destination" contracts, however, is not made. The question is whether the
18 seller agreed to deliver to a carrier at a "particular" place. The answer may come from Incoterms
19 used by the parties. Art. 68, dealing with goods sold in transit, has no exact counterpart in section
20 2-612, the closest provision being section 2-612(b)(2). Furthermore, there is no provision like
21 section 2-612(b)(3), which treats goods in the possession of a bailee. Cases not otherwise
22 covered are picked up in Art. 69, which is CISG's equivalent to old section 2-509(3). Even
23 between commercial parties, the buyer, in some cases, may have the risk of loss before taking
24 possession of the goods. See Art. 69(2).

25 Breach of contract is relevant to passage of risk under CISG. For example, if risk has
26 passed to the buyer and the goods are lost or damaged thereafter, the obligation to pay the price is
27 discharged if "the loss or damage is due to an act or omission of the seller." Art. 66. Also, under
28 Art. 69(1) risk passes to the buyer before possession is transferred regardless of any deficiency in
29 insurance coverage if the buyer "commits a breach of contract by failing to take delivery." But a
30 breach by the seller apparently does not prevent or reallocate the passage of risk. Rather, risk
31 passes if the conditions of Articles 67-69 are satisfied but the "remedies available to the buyer on
32 account of the breach" are not impaired. Art. 70.

33 PART 7

34 BREACH, REPUDIATION, AND EXCUSE

35 SECTION 2-701. BREACH OF CONTRACT GENERALLY; SUBSTANTIAL 36 IMPAIRMENT.

1 (a) Whether a party is in breach of contract is determined by the contract.

2 (b) A breach of contract occurs in the following circumstances, among others:

3 (1) The seller is in breach if it wrongfully fails to deliver, wrongfully fails to
4 perform a contractual obligation, makes a nonconforming tender of performance, or repudiates
5 the contract.

6 (2) The buyer is in breach if it wrongfully rejects a tender of delivery, wrongfully
7 attempts to revoke acceptance, repudiates the contract, fails to make a required payment, or
8 wrongfully fails to perform a contractual obligation.

9 (c) To determine whether the value of an installment or the whole contract has been
10 substantially impaired by a breach of contract under Sections 2-708, 2-710, or 2-712, the court
11 may consider the following factors, among others:

12 (1) the extent to which the aggrieved party has been deprived of the benefit that it
13 reasonably expected under the contract;

14 (2) the extent to which the aggrieved party will ~~can~~ be compensated for the benefit
15 of which it has been deprived;

16 (3) whether cure of the breach is ~~permitted~~ and likely;

17 (4) whether adequate assurance of due performance has been given;

18 (5) whether the party in breach acted in good faith; and

19 (6) whether the party in breach will suffer a forfeiture.

20 (d) The cumulative effect of individual, insubstantial breaches of contract may
21 substantially impair the value of the whole contract to the other party.

22 **SOURCE: Article 2, Sections 2-703, 2-711; Restatement (Second) of Contracts Section 241.**

1 **Comments**

2 1. Section 2-701 is a new section that is derived, in part, from former sections 2-703 and
3 2-711 which defined breach as part of the index to the remedies sections and from the
4 Restatement (Second) of Contracts section 241 statement of factors to determine material breach.

5 2. Subsection (a) corresponds to the statement of the parties' obligation in section 2-601
6 which provides that the parties are obligated to perform in accord with the requirements of the
7 contract. Subsection (a) provides that if a party does not perform in accord with the contract
8 requirements, the party has breached the contract. The contract's requirements are the total legal
9 obligation of the parties, section 1-201(11), which includes the parties' agreement, section 1-
10 201(3), and the provisions of applicable law including the provisions of this Article.

11 3. Section 2-701(b) identifies those events that are usually breaches of contract and
12 correspond to those breaches identified in former section 2-703 and 2-711. The buyer's breach
13 includes failure to pay after delivery as well as "payment due on or before delivery" as provided
14 in former section 2-703. If the failure to pay after acceptance of the goods is a default under a
15 security agreement, Article 9 would govern enforcement of the security interest. In addition,
16 subsection (b) identifies that the failure to perform any obligation under the contract is a breach.
17 Neither section 2-703 nor section 2-711 contained that definition of breach. Section 2-815
18 (seller's remedies) and section 2-823 (buyer's remedies) merely index the remedies that either
19 the seller or buyer is entitled to exercise if there is a breach of contract. This Article rejects any
20 doctrine of election of remedies as a fundamental policy and thus the remedies indexed in section
21 2-815 and section 2-823 are cumulative in nature. Whether the pursuit of one remedy bars
22 another depends entirely on the facts of the individual case. This section defining breach must be
23 read in light of the sections on excuse of an obligation to perform (sections 2-714 through 2-
24 717), on cure (section 2-709), and on waiver (section 2-702).

25 4. Subsection (c) is a new section based upon Restatement (Second) of Contracts section
26 241 which defines material breach. See *Midwest Mobile Diagnostic Imaging v. Dynamics Corp.*
27 *of America*, 965 F. Supp. 1003, 1012 (W.D. Mich 1997). The substantial impairment concept is
28 relevant only to the installment contract situation (section 2-712), the anticipatory repudiation
29 situation (section 2-710) and the revocation of acceptance situation (section 2-708). In those
30 circumstances, the question of whether the rights of the aggrieved party are substantially
31 impaired can be determined by the factors listed in this subsection.

32
33 5. Subsection (d) adopts the position of the cases which hold that substantial impairment
34 of the value of the whole contract may be the result of the cumulative effect of insubstantial
35 breaches. See *Oberg v. Phillips*, 615 P.2d 1022 (Ct. App. Okla. 1980).

36
37 6. **International Sales.** Compare CISG Art. 45 and Art. 61. An aggrieved party may
38 exercise rights and claim damages if the other party "fails to perform any of his obligations under
39 the contract or this Convention."
40

1 **SECTION 2-702. WAIVER OF BREACH; PARTICULARIZATION OF**
2 **NONCONFORMITY.**

3 (a) Except as otherwise provided in [Section 2-707(c)(1) and] subsection (c), if a party
4 that knows that the other party's performance constitutes a breach of contract but accepts that
5 performance, the following rules apply:

6 (1) That party is precluded from relying on the breach to cancel the contract if it
7 fails within a reasonable time to object to the breach; and

8 (2) That party's acceptance of the performance and failure to object does not
9 preclude a claim for damages unless the party in breach has changed its position reasonably and
10 in good faith in reliance on the aggrieved party's inaction.

11 (b) Failure to object to a nonconforming performance under subsection (a) does not
12 preclude objection to the same or similar breach of the contract in future performances of like
13 kind unless the party precluded expressly so states. A statement waiving future performance
14 may be retracted by seasonable notice received by the other party that strict performance will be
15 required unless retraction would be unjust in view of a material change of position in reliance on
16 the waiver. ~~the waiver has induced the other party to change its position reasonably and in good~~
17 ~~faith.~~

18 (c) A party is precluded from relying on a nonconforming performance as follows:

19 (1) Payment upon tender of a document of title [to a buyer, other than under a
20 letter of credit,] made without reservation of rights waives the right to [recover the payment for]
21 [assert] defects apparent on the face of the document of title.

22 (2) The buyer's failure to state, in connection with a rejection under Section

1 2-703, a particular nonconformity that is ascertainable by reasonable inspection precludes
2 reliance on the unstated nonconformity to justify rejection ~~or to establish a breach of contract~~ if:

3 (A) the seller, upon a seasonable particularization, had a right to cure
4 under Section 2-709 and could have cured the nonconformity; or

5 (B) between merchants, the seller after rejection has made a request in a
6 record for a full and final statement in a record of all nonconformities on which the buyer
7 proposes to rely.

8 (3) The buyer's failure to state, in connection with a revocation of acceptance
9 under Section 2-708, the known nonconformity that justifies the revocation precludes the buyer
10 from relying on that nonconformity to justify the revocation ~~or to establish breach of contract~~ if
11 the seller had a right to cure under Section 2-709 and could have cured that nonconformity.

12 **Source: Article 2, Section 2-605.**

13 **Comment**

14 1. This section is new and states the rules regarding waivers of breach. Former section
15 2-209 has been criticized as an unclear effort to both incorporate and control waiver in the
16 context of Article 2.

17
18 2. Both this section and section 2-209(c) do not operate on a clean slate in terms of
19 determining when there is a waiver and what the effect of a waiver is on the parties' rights and
20 obligations. Under section 1-103 principles of waiver as developed at common law operate to
21 supplement Article 2 provisions. It is unrealistic to preclude completely common law principles
22 of waiver by attempting a complete and full statement of waiver principles within Article 2.
23 Rather the approach taken in this section and section 2-209(c) is to clarify particular effects of
24 application of the waiver concept without defining what is a waiver for all cases.

25 3. Section 2-209(c) clarifies that a party may waive an express condition to its own
26 performance obligation. The effect of that waiver of an express condition is that the performance
27 obligation arises even if the condition does not come to pass. If that condition is not also a
28 performance obligation of the party, the failure of the condition is not a breach of contract.
29 Restatement (Second) Contracts §225. Often it is difficult to tell whether the contract term is
30 merely a condition to performance of the other party or whether it is also a performance

1 obligation of that first party.

2 For example, S agrees to sell goods to B for \$5,000 with delivery on May 1. Is delivery
3 May 1 a condition to B's duty to pay or is delivery May 1 a promise that S will deliver on May
4 1? If, in the unlikely event the term is interpreted to be a condition, then if S does not deliver on
5 May 1, B has no duty to perform its obligation to pay. S, however, has not breached the contract.
6 B's conduct or words, however, may have indicated that B waived the condition of delivery May
7 1. In that case, because the condition is waived, B's obligation to pay arises, even if delivery is
8 not by May 1. B has no cause of action for breach against S because the condition was not a
9 performance obligation of S.

10
11 Assume, however, that the delivery term is a promise to perform by delivering on May 1.
12 S's promise to perform is assumed to be dependent upon B's promise to perform and vis versa.
13 Restatement (Second) of Contracts § 232. If S does not deliver on May 1, S has breached the
14 contract. B would be able to pursue its remedies for breach against S, including canceling the
15 contract and damages for breach. If B, by B's conduct or words, waives performance of the
16 promise to deliver on May 1, at common law, the effect of the waiver is that B could not cancel
17 the contract, but could recover damages for S's breach by failing to deliver on May 1. See
18 Restatement (Second) of Contracts § 246.

19 Unless it is very clear that a term is only an express condition to performance and not a
20 performance obligation, courts should employ the presumption that terms in a contract are
21 performance obligations and not mere conditions. See Restatement (Second) of Contracts § 227.

22 4. Subsection (a) implements the common law rule that a party may waive a performance
23 obligation and by doing so loses the right to cancel the contract but not the right to recover
24 damages unless the other party detrimentally relies on the failure to object. To illustrate the
25 operation of this section, assume that S agrees to sell goods to B, with delivery on May 1. S
26 communicates to B that S can deliver the goods on May 5, but cannot make the delivery on May
27 1. The contract does not include a no oral modification or an anti-waiver clause. B accepts
28 delivery on May 5 and does not object. Delivery on May 1 should be presumed to be a promise,
29 not a mere condition to B's performance obligation, unless the contract clearly provides
30 otherwise. S's failure to deliver on May 1 is a breach of S's performance obligation. B's
31 acceptance of S's performance and failure to object to S's late delivery means that B cannot
32 cancel the contract, but may pursue B's claim for damages caused by S's late delivery, unless S
33 has detrimentally relied on B's failure to object. In an installment contract, the party who
34 receives nonconforming performance but who accepts that performance should object to the
35 nonconformity in order to preserve the right to use that nonconformity to assert a substantial
36 impairment of the value of the whole contract. Section 2-710(c). A notice of breach sufficient
37 under section 2-707 satisfies the test of subsection (a).

38 5. Subsection (b) addresses the effect of a waiver under subsection (a) of a previous
39 performance obligation on future performance obligations. Assume that in the contract above, S
40 agreed to deliver goods the first of every month for 6 months. S's first delivery is late and not

1 delivered until May 5. B accepts the delivery and does not object to its lateness. S's obligation to
2 deliver the next month's installment on time on the first of June is intact. B's failure to object to
3 the first late delivery is not a waiver of future timely deliveries under subsection (b) nor does it
4 preclude an ability to request adequate assurance of performance. Section 2-711. Assume,
5 however, that B accepts the late delivery on May 5 and tells S that as long as the deliveries are
6 made before the 5th of every month, B will take the deliveries. That may be a statement waiving
7 future performance of timely deliveries. In order to retract that waiver of future performance, B
8 would have to give reasonable notice to S before S relied on the waiver to S's detriment. If both
9 B and S agreed to a new delivery date of the 5th of the month, that agreement could be a
10 modification under section 2-209.

11 6. Subsection (c) states three situations where failure to object waives the right to take
12 some action based upon the particular nonconforming performance. Subsections (c)(1) and
13 (c)(2) are from former section 2-605. As under prior law, if payment is required against
14 documents, the documents will be inspected prior to payment and payment constitutes
15 acceptance of the documents and waiver of the right to assert defects in the documents that are
16 apparent on the face of the documents. Acceptance of the documents, however, is not acceptance
17 of the goods. See section 2-609. **Jim Barnes objects to this provision from old Article 2 being**
18 **carried forward into new Article 2 if used to preclude a buyer from asserting defects in**
19 **documents against a seller when the seller has obtained payment through use of a letter of**
20 **credit. The issuer's payment of the letter of credit should not waive the buyer's rights to**
21 **assert defects in the documents. The bracketed language is an attempt to carve out letter of**
22 **credit presentations from this rule.** Subsection (c)(2) is the same as former section 2-605(1)
23 with two substantive changes. First, the requirement of particularization that this section requires
24 only affects the buyer's right to reject, not the buyer's right to establish breach. The failure to
25 notify, as opposed to particularize as required under subsection (c)(2), may waive the right to
26 damages for breach under subsection (a)(2). Second, this section requires the seller to have had a
27 right to cure under section 2-709 for the principle in subsection (c)(2)(A) to operate, a concept
28 perhaps implicit in the former section 2-605(1)(a). As under former law, the policy is to allow the
29 buyer to give informal notice of defects without penalizing the buyer for failure to state all
30 defects and at the same time protect the seller in those situations where the failure to state a
31 defect misleads the seller. Thus if the defect is one that could be cured under section 2-709, the
32 buyer will have waived that defect so as to reject the goods if the buyer does not state it with
33 sufficient particularity to facilitate the seller's exercise of its right to cure as provided in section
34 2-709.

35
36 Subsection (c)(3) is a new section included to dovetail with the expansion of the right to
37 cure in the post-revocation situation under section 2-709. The limitation to nonconformities
38 ascertainable by reasonable inspection contained in subsection (c)(2) does not make sense in the
39 revocation situation as the only situation where the seller has a right to cure after revocation is
40 when the defect is not easily discoverable. Thus, subsection (c)(3) is narrowly drawn to require a
41 particularization of the defects justifying revocation that the seller had a right to cure under
42 section 2-709 and could have been cured. Subsection (c)(3) thus parallels subsection (c)(2)(A).

1 Not listed in subsection (c) is the effect of the failure to particularize in the notice of
2 breach in the case of the accepted goods under section 2-707(c)(1). That omission is intentional.
3 A particularization requirement would not facilitate a statutory cure as the seller has no statutory
4 right to cure under section 2-709 when the goods are accepted and acceptance is not revoked. A
5 deemed waiver by failure to particularize would be inconsistent with the prejudice standard in
6 section 2-707 where notice itself is excused unless there is prejudice by failure to notify.
7

8 To illustrate the operation of subsection (c), assume that S agreed to deliver goods that
9 conformed to an express warranty on May 1. S delivered the goods on May 1 but the goods did
10 not conform to the warranty. B timely rejects the goods under section 2-703. Under subsection
11 (a), B has objected by its rejection to the nonconforming performance. Under subsection (c)(2),
12 if the nonconformity is ascertainable by reasonable inspection and the seller had the right to cure
13 the breach under section 2-709 and could have cured, then B has to particularize the
14 nonconformity or is barred from asserting the nonconformity to justify the rejection. If the
15 nonconformity is not ascertainable by reasonable inspection, B need not particularize the defect
16 and will not suffer any adverse consequences from failing to particularize unless B knows of the
17 defect when it accepts S's performance. In that case, subsection (a) will operate to preclude a
18 cancellation and perhaps damages if the second sentence of subsection (a) applies.

19 Assume the same facts but that B did not reject, but accepted. B then timely and properly
20 revoked acceptance under section 2-708(a)(2). B's timely and proper revocation should satisfy
21 the objection required under subsection (a). If S has a right to cure under section 2-709 and
22 could have cured, then B must particularize those defects justifying revocation or not be allowed
23 to assert those defects to justify revocation. As to nonconformities not sufficient to justify
24 revocation that B knows about, subsection (a) would operate to determine B's rights.
25

26 Assume the same facts but that B accepted the goods and did not revoke acceptance. If
27 S's performance is not in conformity with the contract requirements, B must give notice of
28 breach under section 2-707(c). That notice satisfies the requirements of subsection (a).
29

30 **7. International Sales.** CISG Article 39(1) provides that the buyer "loses the right to
31 rely on a lack of conformity of the goods if he does not give notice to the seller specifying the
32 nature of the lack of conformity within a reasonable time after he has discovered it or ought to
33 have discovered it." Presumably, this failure to specify bars the use of that alleged
34 non-conformity for all remedial purposes. Article 40 provides that the seller is "not entitled to
35 rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he
36 knew or could not have been unaware and which he did not disclose to the buyer." Other related
37 Articles include Art. 39(2) and Art. 44.

38 **SECTION 2-703. BUYER'S RIGHTS ON NONCONFORMING DELIVERY;**
39 **RIGHTFUL REJECTION.**

40 (a) Subject to Sections 2-603(b), 2-710, 2-809, and 2-810, if the goods or the tender of

1 delivery fail in any respect to conform to the contract, the buyer may:

2 (1) reject the whole;

3 (2) accept the whole; or

4 (3) accept any commercial units and reject the rest.

5 (b) Rejection of goods must be within a reasonable time after their delivery or tender and
6 is not effective unless the buyer seasonably notifies the seller.

7 **SOURCE: Article 2, Section 2-601, 2-602(1)**

8 **Comment**

9 1. Section 2-703 continues the perfect tender rule from former section 2-601. The only
10 substantive change to subsection (a) is to add a cross reference to section 2-603(b) regarding the
11 ability to reject when required to give notice in a shipment contract and material loss or delay
12 results. This does not change the current law as it relates to the right to reject, it only makes the
13 rejection rule from that section visible (former section 2-504). As under current law, the buyer's
14 remedies are presumed to be cumulative unless the contract expressly limits those remedies.
15 Section 2-810. Thus preclusion of the right to reject the goods must be clearly expressed.
16 Rejection of the goods is not a rescission of the contract.

17 2. Under subsection (a), the buyer's right to reject is determined by whether the goods or
18 delivery fail to conform to the contract, the parties' total legal obligation, which includes the
19 parties' bargain in fact, applicable course of performance, course of dealing and usage of trade,
20 as well as terms incorporated from the U.C.C. and other applicable law. Section 1-201(11). The
21 buyer's right to reject must be exercised in good faith. Section 1-203. A rejection made in bad
22 faith is wrongful. Even if the buyer rightfully rejects, the buyer's ability to cancel the contract
23 or pursue other remedies is tempered by the seller's right to cure in section 2-709. If the seller
24 has the right to cure under section 2-709, the buyer has an obligation to allow the seller to make
25 the cure. If the seller properly cures, the buyer's ability to force the goods back on the seller
26 through rejection is defeated. Generally, a buyer will have the right to inspect the goods prior to
27 making the decision whether to accept or reject the goods. Section 2-609 and section 2-706.
28 Reasonable use of the goods as part of a reasonable inspection is not an acceptance of the goods.
29 Acceptance of the goods or a tender that does not conform to the contract does not by itself
30 preclude the buyer from pursuing the seller for a remedy for breach of contract. Section 2-
31 707(b). See section 2-701(b) on breach and section 2-823 for an index of buyer's remedies. The
32 buyer, however, should comply with section 2-702 and section 2-707 so as to avoid losing
33 remedies for breach.

34
35 If a buyer rejects the goods, the buyer's obligation in regard to care of the goods is

1 addressed in sections 2-704 and 2-705. Actions taken with respect to the goods as allowed in
2 those sections is not an acceptance of the goods.

3 Partial acceptance of commercial units is permitted whether the part of the goods
4 accepted conforms or not. The obligation of good faith in acceptance or rejection requires that a
5 partial acceptance not unreasonably impair the value of the remaining portion of the goods. If a
6 partial acceptance occurs and the price can be apportioned, section 2-302, the buyer is obligated
7 to pay the price for the goods accepted. Section 2-822.

8 Once the buyer accepts the goods under section 2-706, the buyer may no longer reject the
9 goods. The buyer may, however, notify the seller that the goods are rejected and then later
10 retract that rejection if the seller still has the tender of the goods open. If the buyer has
11 possession of the goods and has retracted the rejection, the seller has the ability to treat actions of
12 the buyer that are inconsistent with the claimed rejection as an acceptance, sections 2-704 and 2-
13 706.

14
15 3. Subsection (b) follows former section 2-602(1) without substantive change. The
16 reasonable time for rejection and the seasonable notice to the seller of the rejection must be read
17 in light of the buyer's reasonable time to inspect the goods. Section 2-609. The parties may
18 agree as to the time periods for rejection and notice. Section 1-204. A rejection not permitted
19 under subsection (a) is wrongful and a breach of contract by the buyer even if the buyer gives
20 prompt notice under subsection (b). Thus a rejection may be effective but wrongful. Section 2-
21 701(b)(1). A rejection may be rightful under the standard of subsection (a) but ineffective under
22 subsection (b). A rightful but ineffective rejection may be an acceptance under section 2-706.
23 This dichotomy follows current law.

24
25 4. **International Sales.** Under CISG, buyer remedies are triggered when the seller "fails
26 to perform any of his obligations under the contract," Art. 45(1), and preserved when proper
27 notice of the nonconformity is given under Article 39(1). There is no rejection remedy, however,
28 and the buyer is required to pay the price as agreed unless the contract can be avoided for a
29 "fundamental" breach. See Art. 25. Upon finding non-conforming goods, the buyer's remedial
30 options include requiring the seller to deliver substitute goods or repair them under Article 46,
31 fixing an additional length of time for the seller to perform under Article 47 and avoiding the
32 contract for "fundamental breach" under Article 49. In addition, the seller has broad power to
33 "cure" under Article 48 unless the buyer can avoid the contract under Article 49. Thus, although
34 a minor non-conformity may be a breach for which rights and remedies are provided, the buyer
35 cannot buy replacement goods (cover) under Art. 75 unless the contract is avoided for
36 fundamental breach.

37
38 **SECTION 2-704. EFFECT OF EFFECTIVE REJECTION AND JUSTIFIABLE**
39 **REVOCAION OF ACCEPTANCE.**

40 (a) Subject to Sections 2-705 and 2-829(b), after an effective rejection or justifiable

1 revocation of acceptance, a buyer in physical possession of the goods shall hold the goods with
2 reasonable care at the seller's disposition for a sufficient time to permit the seller to remove them.
3 However, the buyer has no further obligation with regard to goods rightfully rejected or to which
4 an acceptance has been justifiably revoked.

5 (b) If a buyer uses the goods after an effective rejection or justifiable revocation of
6 acceptance, the following rules apply:

7 (1) Any use by the buyer which is unreasonable under the circumstances and
8 which is either inconsistent with the seller's ownership or inconsistent with the buyer's claim of
9 rejection or justifiable revocation of acceptance is an acceptance if ratified by the seller.

10 (2) If the buyer wrongfully rejected the goods, any use of the goods by the buyer
11 which is inconsistent with the seller's ownership or inconsistent with the buyer's claim of
12 rejection is unreasonable.

13 (3) If use of the goods is reasonable under the circumstances, the use is not an
14 acceptance and, the buyer, upon returning or disposing of the goods, shall pay the seller the
15 reasonable value of the use to the buyer. The value must be deducted from the sum of the price
16 paid to the seller, if any, and any damages to which the buyer is otherwise entitled under this
17 article.

18 **SOURCE: Article 2, Sections 2-602 and 2-608(3).**

19 **Comment**

20 1. Section 2-704 is derived from former sections 2-602 and 2-608(3) and addresses the
21 buyer's obligations as to the goods after an effective rejection and a justifiable revocation of
22 acceptance. Under section 2-703, a buyer may effectively reject the goods by giving notice of a
23 rejection within a reasonable time. That rejection may be rightful as the goods or the tender did
24 not conform to the requirements of the contract. That rejection could be wrongful if the goods
25 and the tender of delivery conformed to the requirements of the contract but still effective if the

1 notice of rejection is given within the appropriate time. Thus a rejection can be either rightful or
2 wrongful but nonetheless effective if the buyer complies with the notice requirement in section 2-
3 703(b). A wrongful but effective rejection is a breach of contract by the buyer. Section 2-701.
4 If the buyer rightfully rejects the goods, of course, the seller has breached the contract by making
5 a nonconforming tender. Section 2-701.
6

7 A buyer who has grounds to revoke acceptance under section 2-708 must give the notice
8 required under that section in order to effect the revocation. If the buyer has grounds for
9 revocation, but has not yet given the required notice of revocation, the buyer has not undone its
10 acceptance of the goods. If the buyer attempts to revoke acceptance wrongfully by giving a
11 notice of revocation, the acceptance has not been undone and there is no revocation of
12 acceptance. Thus this section speaks of a justifiable revocation which presumes that the buyer
13 has given the required notice in a case in which the buyer is justified in revoking acceptance
14 under section 2-708. In either case where the buyer has not given notice of a justifiable
15 revocation or where the buyer has given notice of an unjustifiable revocation, the acceptance has
16 not been undone, the goods are the buyer's goods and this section does not apply. An attempt to
17 revoke acceptance when revocation is not justifiable under section 2-708 may be a breach of
18 contract by the buyer. Section 2-701. If the buyer has not given notice of a justifiable revocation,
19 the seller may be in breach of contract for tendering nonconforming goods. Section 2-701.
20

21 2. Subsection (a) states the rule that the buyer who possess the goods after an effective
22 rejection or a justifiable revocation of acceptance must exercise reasonable care in taking care of
23 the goods. That effective rejection may be either rightful or wrongful. The buyer's obligation to
24 take care of the goods is subject to the requirements of the next section and to the buyer's
25 exercise of its security interest in the goods under section 2-829(b). If the rejection is rightful or
26 the revocation of acceptance is justified, the buyer's obligation as to the goods is determined by
27 this section and the requirements of section 2-705 and section 2-829(b). If the rejection is
28 wrongful but nonetheless effective, the buyer may have the risk of loss as to the goods as
29 provided under section 2-612 in addition to the obligations stated in subsection (a). If the
30 attempt to revoke acceptance is unjustified, the buyer has not undone the acceptance and this
31 section does not apply.

32 3. Subsection (b) is derived from former section 2-602(b)(1) but has been revised to deal
33 with the problem of post rejection or revocation use of the goods. The courts have developed
34 several alternative approaches. Under former Article 2, a buyer's post rejection or revocation use
35 of the goods could be treated as an acceptance thus undoing the rejection or revocation, could be
36 a violation of the buyer's obligation of reasonable care, or could be neither an acceptance or a
37 violation of the reasonable care obligation but rather a reasonable use for which the buyer must
38 compensate the seller. Subsection (b) adopts the third approach. If the buyer's use after an
39 effective rejection or a justified revocation of acceptance is both unreasonable under the
40 circumstances and is inconsistent with the rightful rejection, justified revocation of acceptance,
41 or the seller's ownership, the seller has the option to treat the buyer's use as an acceptance of the
42 goods. If the buyer's use is reasonable, however, the buyer's actions cannot be an acceptance
43 and the buyer must compensate the seller for the value of the buyer's use. If the buyer

1 wrongfully but effectively rejected the goods, the buyer's use inconsistent with the seller's
2 ownership is unreasonable and an acceptance of the goods if the seller chooses to treat the use as
3 an acceptance. If the seller does not treat the unreasonable use as an acceptance, the seller may
4 have non-code remedies for conversion. Factors that are relevant to whether the buyer's use of
5 the goods is reasonable under this section include whether the seller has given instructions to the
6 buyer about what to do with the goods, the hardship the buyer would suffer if the buyer did not
7 use the goods, whether use of the goods mitigates harm resulting from the seller's breach, the
8 prejudice the seller suffers as a result of the buyer's use of the goods, whether the seller has
9 offered to cure or provide compensation to the buyer for the seller's breach, and the parties' good
10 faith. See *Wilk Paving, Inc. v. Southworth-Milton, Inc.*, 649 A.2d 778, 27 UCC Rep. Serv. 2d
11 130 (Vt. 1994).

12
13 4. **International Sales.** Under CISG Art. 86, if a buyer has received and intends to
14 reject goods, he must take reasonable steps to preserve the goods. If the goods shipped to the
15 buyer are at the buyer's disposal at the destination, unless a seller's agent is present at the
16 destination, the buyer must take possession if that can be done without paying the price or
17 incurring unreasonable inconvenience or expense.

18 **SECTION 2-705. MERCHANT BUYER'S DUTIES; BUYER'S OPTIONS AS TO**
19 **SALVAGE.**

20 (a) Subject to a buyer's security interest under Section 2-829(b), if the seller does not have
21 an agent or place of business at the market where the goods were rejected or acceptance was
22 revoked, a merchant buyer, after an effective rejection or justifiable revocation of acceptance of
23 goods in the buyer's possession or control, shall follow any reasonable instructions received from
24 the seller with respect to the goods. In the absence of such instructions, a merchant buyer shall
25 make a reasonable effort to sell or otherwise dispose of the goods for the seller's account if they
26 are perishable or threaten to decline speedily in value. In the case of a rightful rejection or a
27 justifiable revocation of acceptance, instructions are not reasonable if on-demand indemnity for
28 expenses is not forthcoming.

29 (b) In the case of a rightful rejection or a justifiable revocation of acceptance:

30 (1) A merchant buyer that sells goods under subsection (a) is entitled to

1 reimbursement from the seller or out of the proceeds for the reasonable expenses of caring for
2 and selling them.

3 (2) If the expenses under paragraph (1) do not include a sales commission, the
4 buyer is entitled to a commission usual in the trade or, if there is none, to a reasonable sum not
5 exceeding 10 percent on the gross proceeds.

6 (c) Except as otherwise provided in subsection (a), after an effective rejection or a
7 justified revocation of acceptance, a buyer may store the rejected goods for the seller's account,
8 reship them to the seller, or resell them for the seller's account, with reimbursement in the case of
9 a rightful rejection or a justifiable revocation of acceptance as provided in subsection (b).

10 (d) In complying with this section, a buyer shall act in good faith. Conduct in good faith
11 under this section does not constitute acceptance or conversion and may not be the basis of a
12 claim for damages.

13 **SOURCE: Article 2, Sections 2-603 & 2-604.**

14 **Comment**

15 1. Section 2-705 carries forward the rules from former sections 2-603 and 2-604 with
16 two changes designed to broaden its applicability. This section applies not only in the case of a
17 rightful effective rejection as under former law but also to a wrongful effective rejection and to a
18 justifiable revocation of acceptance.

19 2. Subsection (a) continues the rule that imposes duties on the merchant buyer to take
20 action as regards to the goods in the buyer's possession or control only if the seller has no agent
21 or place of business in the market where the goods were located when rejected or when
22 acceptance was justifiably revoked. The merchant buyer's duties in that case are to follow
23 reasonable instructions or if no reasonable instructions are given to sell the goods if the goods are
24 perishable or threaten to decline in value quickly. If no reasonable instructions are forthcoming
25 and the goods are not perishable or declining quickly in value, the merchant buyer has no
26 obligation to sell the goods for the seller's account. In that case, the merchant buyer need only
27 take reasonable care of the goods under section 2-704 and may take action as to the goods under
28 subsection (c) of this section. As under former Article 2, the merchant buyer has the ability to
29 demand indemnity for expenses the buyer will incur in performing its obligation under this

1 section. This ability to demand indemnity is limited to the cases of a rightful rejection or a
2 justified revocation of acceptance. A merchant buyer who has wrongfully rejected, has the
3 obligation to act under subsection (a), but not the right to get up front indemnity for the expenses.
4 A financing agency acting on behalf of the seller in the relevant market is sufficiently the seller's
5 agent to free the merchant buyer from its duties under this subsection. A merchant buyer who has
6 an obligation to act under this section but who fails to do so may be liable for damages that result
7 from its failure to take the required action. Nonmerchant buyers have no obligations under
8 subsection (a) but a privilege to act as regards the goods under subsection (c).

9 3. Subsection (b) follows former Article 2, allowing the merchant buyer to be reimbursed
10 or collect from the proceeds of sale the expenses of caring for the goods and the sale of the goods
11 as well as providing for a usual commission in the case of a rightful rejection or justified
12 revocation of acceptance.

13 4. Subsection (c) follows former section 2-604 which allows any buyer, merchant or non-
14 merchant to take action as regards the goods to store, reship or resell the goods on seller's
15 account. These are options given to a buyer, not duties imposed upon a buyer. This section
16 applies to merchant buyers who are not required to take action under subsection (a) and to non-
17 merchant buyers in any case. A buyer acting under subsection (c) has the ability to be
18 reimbursed for its expenses as provided in subsection (b).

19 5. Subsection (d) requires a buyer to act in good faith in making the decisions as to what
20 to do with the goods after an effective rejection or a justifiable revocation of acceptance. If the
21 buyer acts in good faith, the buyer's actions are not an acceptance of the goods and do not
22 constitute a conversion of the goods. This section must be read in light of section 2-704. In the
23 usual case, the buyer who takes action under this section will also be taking reasonable care of
24 the goods under section 2-704 as the obligation of good faith under this section includes acting in
25 light of reasonable commercial standards of fair dealing. Section 2-102. In some instances,
26 however, action taken pursuant to this section may violate the buyer's obligation to take
27 reasonable care for the goods even if the buyer acts in good faith. Section 2-704 imposes a
28 separate obligation on the buyer to take reasonable care of the goods and subsection (d) does not
29 preclude the seller from pursuing remedies against the buyer based upon the buyer's actions
30 under section 2-704.

31
32 6. **International Sales.** CISG Art. 87 allows a buyer who has taken possession of the
33 goods under Art. 86 (see note under section 2-704) to store the goods at the expense of the other
34 party as long as that expense is not unreasonable. Under Art. 88, the buyer may sell the goods if
35 the seller unreasonably delays in regaining possession of the goods or providing for the expense
36 of preserving the goods. If goods will decline speedily in value or will be unreasonably
37 expensive to preserve, the buyer must sell the goods. A party selling the goods may deduct from
38 the proceeds the expenses of preserving and selling the goods and account to the other party for
39 the balance.

40 **SECTION 2-706. WHAT CONSTITUTES ACCEPTANCE OF GOODS.**

1 (a) Goods are accepted when the buyer:

2 ~~(1) receives the goods and states to the seller at any time that the goods conform~~
3 ~~to the contract or are acceptable;~~

4 (1)(2) after a reasonable opportunity to inspect the goods, signifies to the seller
5 that the goods conform or will be taken or retained despite their nonconformity;

6 (2)(3) after a reasonable opportunity to inspect the goods, fails to make an
7 effective rejection; or

8 (3)(4) does any unreasonable act inconsistent with the seller's ownership or
9 inconsistent with the buyer's claim of rejection or justifiable revocation of acceptance, and the act
10 is ratified by the seller as an acceptance.

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

12 **SOURCE: Article 2, Section 2-606.**

13 **Comment**

14 1. Section 2-706 is derived from former section 2-606 with one substantive change.
15 Subsection (a)(3) is redrafted to dovetail with the rights of a buyer who uses the goods post
16 rejection or revocation. Section 2-704. As under former law, acceptance of the goods under this
17 section is completely separate from passage of title to the goods under section 2-501. Although
18 acceptance of the goods precludes rejection, acceptance of the goods does not preclude the buyer
19 from exercising any other remedies for breach of contract if the goods or the tender of delivery
20 do not conform to the contract's requirements. Sections 2-707 and 2-702. Of course, if the goods
21 and the tender of delivery conform to the contract, the buyer is obligated to accept the goods or
22 the buyer will have breached the contract. Section 2-701. If the buyer has rejected the goods,
23 the buyer can still accept the goods thereafter if the seller has indicated that the tender is still
24 open to acceptance. See comment to section 2-703.

25 2. Subsection (a)(1) follows former law that allows the buyer a reasonable opportunity to
26 inspect the goods before deciding whether to accept the goods. The buyer's acceptance in this
27 instance may be by conduct after the reasonable time to inspect has expired. Section 2-609. If
28 the buyer has not agreed to make payment prior to inspection, payment may be one circumstance
29 to consider in determining whether the buyer has accepted the goods but is not conclusive. If the
30 buyer has waived its right to inspect prior to payment, payment is not an acceptance of the goods

1 under this section, section 2-608(b), the buyer still has a reasonable time to inspect the goods
2 before the buyer's conduct should be construed to constitute an acceptance.

3 4. Subsection (a)(2) follows former law that a buyer who fails to make an effective
4 rejection within the time stated in section 2-703(b) will have accepted the goods. The reasonable
5 time for rejection should be construed in light of the buyer's reasonable time for inspection under
6 section 2-609.

7 5. Subsection (a)(3) dovetails with section 2-704 concerning the buyer's actions with
8 regard to the goods that are inconsistent with the seller's ownership or inconsistent with the
9 buyer's claim of rejection or justifiable revocation of acceptance. The buyer's actions may be
10 either before or after the claim of rejection or justifiable revocation and if inconsistent with the
11 seller's ownership rights or with the buyer's claim of rejection or revocation and unreasonable,
12 the seller has the ability to treat those actions as an acceptance. The seller may choose to not
13 treat those actions as an acceptance in which case, the seller may have an action for damages
14 against the buyer for violation of the buyer's obligation of reasonable care for the goods or for
15 conversion of the goods. Section 2-704, section 2-501(d). The buyer's actions pursuant to
16 section 2-705, however, are not an acceptance of the goods. Reasonable use of the goods for
17 inspection purposes is also not an acceptance.

18 6. Subsection (b) follows the rule from former section 2-606(2) that acceptance or
19 rejection must be by commercial unit. Section 2-703.

20
21 7. **International Sales.** Under CISG, the remedies of the buyer for breach by the seller
22 do not depend upon whether the buyer has accepted the goods.

23 **SECTION 2-707. EFFECT OF ACCEPTANCE; NOTICE OF BREACH; BURDEN**
24 **OF ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE OF CLAIM OR**
25 **LITIGATION TO PERSON ANSWERABLE OVER.**

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

27 (b) Acceptance of goods by the buyer precludes rejection of the goods accepted but does
28 not by itself impair any other remedy provided by this article for nonconformity.

29 (c) If a tender of delivery has been accepted, the following rules apply:

30 (1) The buyer or a person entitled to enforce a warranty or warranty obligation
31 shall notify the party claimed against of the breach of contract, warranty, or warranty obligation

1 within a reasonable time after the breach was discovered or should have been discovered.

2 However, a failure to give timely notice bars the person required to notify the party claimed
3 against from a remedy only to the extent that the party entitled to notice establishes that it was
4 prejudiced by the failure.

5 (2) If a claim for infringement or the like is made against a buyer for which a
6 seller is answerable over and the buyer is sued as a result of that claim, the buyer shall notify the
7 seller within a reasonable time after receiving notice of the litigation or be barred from any
8 remedy over for liability established by the litigation.

9 (d) The buyer has the burden of establishing a breach of contract with respect to goods
10 accepted. A person entitled to enforce a warranty obligation under Section 2-408 or a warranty
11 under Section 2-409 has the burden of establishing that the warranty was breached.

12 (e) In a claim for indemnity, breach of a warranty, or other obligation against the buyer
13 for which another party is answerable over, the following rules apply:

14 (1) The buyer may give notice of the litigation to the other party in a record, and
15 the person notified may then give similar notice to any other person that is answerable over. If
16 the notice invites the person notified to intervene in the litigation and defend and states that
17 failure to do so will bind the person notified in any action later brought by the buyer as to any
18 determination of fact common to the two actions, the person notified is so bound unless, after
19 reasonable receipt of the notice, the person notified intervenes in the litigation and defends.

20 (2) If the claim is one for infringement or the like, the original seller may demand
21 in a record that its buyer turn over control of the litigation, including settlement, or otherwise be
22 barred from any remedy over. If the seller also agrees to bear all expense and to satisfy any

1 adverse judgment, the buyer is so barred unless, after reasonable receipt of the demand, control is
2 turned over to the seller.

3 (f) Subsections (c), (d), and (e) apply to an obligation of a buyer to hold the seller
4 harmless against infringement or the like.

5 **SOURCE: Article 2, Section 2-607.**

6 **Comment**

7 1. Section 2-707 follows former section 2-607 except for the following changes. First,
8 subsection (c)(1) provides that a failure to give notice bars a buyer from a remedy for breach of
9 contract only if the party who was entitled to notice suffers prejudice due to the failure to notify.
10 The requirement that the party claimed against establish prejudice is a middle position between
11 stating that the failure to give notice is an absolute bar to recovery and requiring proof of
12 material prejudice. See Restatement (Second) of Contracts §229, excusing a condition where the
13 failure is not material and implementation would result in disproportionate forfeiture. This also
14 follows those cases that have held that in order to determine whether notice was given within a
15 reasonable time, the prejudice to the seller entitled to notice must be evaluated. Second, the
16 notice must be given to the “person claimed against” not “the seller” as under current law. “A
17 person entitled to enforce a warranty or warranty obligation” language in (c)(1) and (d) also
18 adapts the rule for persons who are entitled to enforce warranties under part 4 but who are not
19 buyers. This accommodates the notice requirement to the non-privity situations contemplated in
20 Part 4 of this article. Third, the vouching in procedure in subsection (e) has been expanded to
21 include indemnity actions and persons other than the seller who are answerable over. As under
22 former Article 2, all the provisions of this section are subject to any explicit reservation of rights.
23 Section 1-207.

24
25 2. Subsection (a) provides that the buyer must pay at the contract rate for goods accepted.
26 In the case of a partial acceptance, section 2-703 and section 2-706, the price of the portion
27 accepted should be apportioned based upon the contract rate. See section 2-302.

28
29 3. Subsection (b) makes clear that the buyer’s acceptance of the goods by itself does not
30 impair any of the buyer’s rights upon a seller’s breach of contract except for the right to reject.
31 After acceptance, if the buyer wants to force the goods back to the seller, the buyer must comply
32 with the provision on revocation of acceptance. Section 2-708. A buyer who wants to preserve
33 its rights fully should comply with section 2-702(a) and section 2-707(c). Subsection (b) is
34 consistent with the rule from section 2-702 that an acceptance of nonconforming performance
35 does not waive the right to receive conforming performance as to future installments.

36 4. Subsection (c)(1) continues the rule that the buyer must notify the party claimed
37 against of any breach of contract and also applies that rule to persons who are not buyers but are

1 entitled to enforce a warranty or warranty obligation that arises under Part 4 of this Article. The
2 requirement that there be notice of a breach means that the notice must indicate that problems
3 have arisen with regard to the goods and does not require any particular form of notice. The
4 notification that preserves remedies for breach need only be such that informs the person claimed
5 against that the transaction is claimed to involve a breach. This notice can be informal, such as a
6 telephone call, or formal, such as initiating a lawsuit. A notice sufficient under this section is
7 also sufficient under section 2-702(a) to avoid waiving any remedies for breach. The time for
8 sending the notice should be judged by taking into account not only the nature of the transaction
9 but also the status of the buyer or person who is asserting a claim and the relationship with the
10 party claimed against. The focus of requiring notice is to avoid bad faith assertions of breach,
11 not to deprive a person acting in good faith of a remedy. In line with that philosophy, if the
12 notice is untimely, the person who failed to give timely notice is not barred from obtaining a
13 remedy for breach unless the party claimed against demonstrates the failure to timely notify
14 resulted in prejudice to that party. Prejudice could be demonstrated if the delay in giving notice
15 prevented the party claimed against from collecting evidence relevant to the breach. The party
16 who is alleged to have breached the contract or warranty is ultimately protected from stale claims
17 by the statute of limitations. Section 2-814.

18 5. Subsection (c)(2) continues the rule that the buyer must notify the seller within a
19 reasonable time of being sued on a claim for infringement for which the seller is answerable over
20 in order to give the seller an opportunity to defend against the infringement. This notification
21 obligation works hand in hand with the right conferred on the seller in subsection (e)(2) to
22 control the infringement litigation.

23 6. Subsection (d) continues current law that the person asserting the breach has the
24 burden to establish the party claimed against breached the contract, warranty, or warranty
25 obligation.

26 7. Subsection (e)(1) continues the codification of the vouching in process for parties who
27 are answerable over for claims that have been asserted against a buyer. Vouching in does not
28 confer a right on the party notified to intervene, does not confer jurisdiction of any kind on the
29 court over the person answerable over, and does not create a duty to defend on the part of the
30 person answerable over. Those matters continue to be governed by the applicable rules of civil
31 procedure and substantive law outside this section. Vouching in is based upon the principle that
32 the person answerable over is liable for its contractual obligations regarding the quality or title to
33 the goods which the buyer is being forced to defend.

34 8. Subsection (f) continues the rule that if the buyer is liable to the seller for infringement
35 under section 2-402, the provisions of subsections (c), (d), and (e) apply to the seller's claim
36 against the buyer.

37
38 9. **International Sales.** Under CISG, although the buyer is obligated to take delivery
39 and pay the price "as required by the contract and this Convention," Art. 53, the concept of
40 acceptance is irrelevant to the obligations of either party. Thus, there is no need to state the

1 "effect" of acceptance.

2
3 **SECTION 2-708. REVOCATION OF ACCEPTANCE.**

4 (a) The buyer may revoke acceptance of a lot or commercial unit whose nonconformity
5 substantially impairs its value to the buyer if the lot or unit was accepted:

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

8 (2) without discovery of its nonconformity if acceptance was reasonably induced
9 either by the difficulty of discovery before acceptance or by the seller's assurances.

10 (b) The buyer's acceptance must be revoked under subsection (a) within a reasonable time
11 after the buyer discovers or should have discovered the ground for it and before any substantial
12 change in the condition of the goods which is not caused by their own defects. The revocation is
13 not effective until the buyer notifies the seller of it.

14 (c) A buyer that justifiably revokes acceptance has the same rights and duties under
15 Sections 2-704 and 2-705 with regard to the goods as if they had been rejected.

16 **SOURCE: Article 2, Section 2-608.**

17 **Comment**

18 1. Section 2-708 follows former section 2-608. As under former law, revocation of
19 acceptance does not prevent the buyer from exercising other remedies for the seller's breach of
20 contract and is not a rescission or cancellation of the contract, although an aggrieved buyer may
21 also cancel a contract as part of the buyer's available remedies for breach. Sections 2-808 and 2-
22 823. As with rejection, revocation of acceptance is by lot or commercial unit. Revocation of
23 acceptance is as against the seller who sold the goods to the buyer and not as to parties not in
24 privity with the buyer. Rights of a remote buyer to return goods to a seller who has created a
25 warranty obligation under section 2-408 is governed by that section.

26 2. Subsection (a) continues the policy of the former law that the test is whether the value
27 of the goods to the buyer is in fact substantially impaired by the nonconformity of the goods to
28 the contract not whether the seller knew in advance about the buyer's particular circumstances.

1 Nonconformity of the goods to the contract requirements is essential to the ability of the buyer to
2 revoke acceptance of the goods. Thus the contract of the parties must be evaluated to determine
3 how the lot or commercial unit failed to conform to the contract's requirements. Section 1-
4 201(11) definition of contract and section 2-102 definition of conforming. The reasonable
5 assumption of cure under subsection (a)(1) is not based upon the seller's right to cure under
6 section 2-709 but rather on communications or other circumstances which lead a buyer to
7 reasonably assume that the seller will cure the nonconformity within a reasonable time. If the
8 seller then fails to do so, the buyer ought not to be forced to keep the goods if the value of the
9 goods to the buyer is substantially impaired. Subsection (a)(2) allows the buyer to revoke
10 acceptance if the nonconformities are difficult to discover or the seller has offered assurances that
11 induce the buyer to delay discovery of the nonconformities. Those assurances may be part of the
12 contract or circumstances at the time of delivery. Explicit assurances may be actionable as
13 fraudulent based upon law other than this Article and the buyer should have the remedies
14 available under this article. Section 2-811.

15 3. Subsection (b) continues the rule that a buyer must notify a seller to make an effective
16 revocation and that a revocation must be within a reasonable time after discovery. Since this
17 remedy will be generally resorted to only after attempts at adjustment have failed, the reasonable
18 time period should extend in most cases beyond the time for notification of breach, section 2-
19 707, beyond the time for discovery of nonconformity after acceptance, section 2-702, and beyond
20 the time for rejection after tender, section 2-703. The parties may provide in their agreement the
21 time periods for revocation subject to section 1-204. Except as provided in section 2-702(c)(3),
22 the contents of the notice must be determined based upon considerations of good faith,
23 prevention of surprise and reasonable adjustment. More is required than mere notice of a breach
24 under section 2-707. In addition, section 2-702(c)(3) operates in the circumstance where the
25 seller has a right to cure under section 2-709 after a revocation of acceptance pursuant to
26 subsection (a)(2). The requirements for notification should be applied less stringently in the case
27 of a non merchant buyer.

28 The buyer's ability to revoke is limited to those circumstances where the goods have not
29 materially deteriorated unless that deterioration is caused by the nonconformity of the goods.
30 Worthless goods, however, need not be offered back and minor defects in the goods should be
31 ignored.

32 4. Subsection (c) provides that, consistent with sections 2-704 and 2-705, the buyer who
33 justifiably revokes acceptance under this section must comply with those sections in regard to the
34 care of the goods after the revocation. A buyer who is not justified in its revocation under
35 subsection (a) or who does not act effectively under subsection (b) to revoke acceptance has not
36 undone the acceptance and thus may do what it wants with the goods and is not subject to the
37 provisions of sections 2-704 and 2-705.

38
39 5. **International Sales.** Under CISG, the buyer may declare the contract avoided for a
40 fundamental breach. Art. 49. The buyer cannot declare the contract avoided unless he can make
41 restitution of the goods in substantially the same condition as he received them unless restitution

1 is rendered impossible not due to an act or omission of the buyer, the goods have deteriorated
2 due to the inspection allowed by Art. 38, or the goods are sold, consumed or transformed in the
3 buyer's normal course before he discovered or should have discovered the nonconformity. Art.
4 82.

5
6 **SECTION 2-709. CURE.**

7 (a) If the buyer rightfully rejects goods or a tender of delivery under Section 2-703 or
8 justifiably revokes an acceptance under Section 2-708(a)(2) and the agreed time for performance
9 has not expired, the seller, upon seasonable notice to the buyer and at its own expense, may cure
10 the breach of contract by making a conforming tender of delivery within the agreed time. The
11 seller is obligated to compensate the buyer for all of the buyer's reasonable and necessary
12 expenses caused by the nonconforming tender and subsequent cure.

13 (b) If the buyer rightfully rejects goods or a tender of delivery under Section 2-703 or
14 justifiably revokes an acceptance under Section 2-708(a)(2) and the agreed time for performance
15 has expired, the seller, upon seasonable notice to the buyer and at its own expense, may cure the
16 breach of contract, if the cure is appropriate and timely under the circumstances, by making a
17 tender of conforming goods. The seller is obligated to compensate the buyer for all of the
18 buyer's reasonable and necessary expenses caused by the nonconforming tender and subsequent
19 cure.

20 **SOURCE: Article 2, Section 2-508; Unidroit Principles, Art. 7.1.4; CISG Art. 37, Art. 48.**

21 **Comment**

22 1. Section 2-709 is derived from former section 2-508 and has been substantially
23 influenced by the Unidroit Principles and CISG provisions. The seller's right to cure has been
24 expanded in two ways. First, if the buyer has revoked acceptance under section 2-708(a)(2), the
25 seller may cure. The revocation, however, must be because of nondiscovery of the
26 nonconformity under section 2-708(a)(2) and not because of a failure to cure under section 2-
27 708(a)(1). To allow a further cure after revocation of acceptance because of a failure to cure
28 would give the seller two opportunities to cure. Second, if the time for contract performance has

1 expired, the requirement under former section 2-508(2) that the seller have reasonable grounds to
2 believe that the nonconforming tender would be acceptable has been deleted. Instead, the test is
3 whether the cure is “appropriate and timely under the circumstances.

4 The seller’s right to cure has been restricted in the following ways. The section makes
5 explicit that the cure is at the seller’s expense and the cure must either be a conforming tender
6 (subs. a) or of conforming goods (sub. b). In addition, the seller has a statutory obligation to
7 compensate the buyer for the buyer’s reasonable expenses in both subsection (a) and (b). This
8 obligation is not part of the action required to have an effective cure under this section but rather
9 imposed on the seller in order to make the buyer completely compensated for any harm the
10 seller’s breach and cure may cause. If the seller has a right to cure and has given timely notice of
11 cure, the buyer may not cancel within the time period for cure. See section 2-808. Cure as
12 allowed under this section is one method for the seller to attempt to mitigate harm caused by its
13 own nonconforming performance.

14
15 2. Subsection (a) allows the seller to cure a nonconformity in the goods or the tender of
16 delivery if the buyer has rightfully rejected or justifiable revoked acceptance under section 2-
17 708(a)(2). This presumes that the buyer has effectively rejected or revoked acceptance through
18 timely notification to the seller. The time for performance in which the seller may still make a
19 conforming tender of delivery is determined by the contract of the parties, including any agreed
20 modifications. The seller’s notice of an intent to cure must be seasonable. Section 1-204. The
21 closer to the end of the time for the seller’s performance, the more prompt the seller must be in
22 notifying the buyer of the seller’s intention to cure.

23 3. Subsection (b) expands the seller’s right to cure after the time for performance has
24 expired. As under subsection (a), the buyer’s rightful rejection or justifiable revocation of
25 acceptance under section 2-708(a)(2) trigger the seller’s right to cure. This presumes that the
26 buyer has effectively rejected or revoked acceptance through timely notification to the seller.
27 Former section 2-508(2) was directed toward preventing surprise rejections by requiring the
28 seller to have “reasonable grounds to believe the nonconforming tender was acceptable. The
29 concept of “appropriate and timely is broad enough to deal with the case of surprise rejection
30 as well as with the “shaken faith cases and the just in time manufacturing mode of doing
31 business. If the seller has tried to cure a breach and not succeeded, at some point, the buyer need
32 not allow further attempts to cure and thus the seller’s continuing offers to cure are no longer
33 timely. If the buyer needs to procure substitute goods from another supplier in order to keep the
34 buyer’s process moving, the cure would not be timely. If the seller knows from the circumstances
35 that strict compliance with the contract obligations is expected, the seller’s cure would not be
36 appropriate. [The comment to this section will identify typical cases that have arisen and discuss
37 their resolution under this test in order to give guidance on the meaning of “appropriate and
38 timely.] Seasonable notice to the buyer and timely cure incorporate the idea that the notice and
39 offered cure would be untimely if the buyer has reasonably changed its position in good faith
40 reliance on the non-conforming tender.

41 The seller’s cure must be of conforming goods. Conforming goods includes not only

1 conformity to the contracted for quality but also as to quantity or assortment or other similar
2 obligations under the contract. Since the time for performance has expired, however, the seller's
3 tender of conforming goods required to effect a cure under this section could not conform to the
4 contracted for time for performance. Again, as under subsection (a), the seller has an obligation
5 to compensate the buyer for harm caused by the non-conforming tender and subsequent cure.
6 This compensation would include compensation for harm caused by the delay in making a tender
7 of conforming goods.
8

9 4. Under former section 2-508, there was some controversy about whether the goods may
10 be made conforming by repair. Whether repair is an acceptable way to cure a breach depends
11 upon whether the repair results in conforming goods, as that is the hallmark of an effective cure
12 under this section. Similarly, the seller's compensation of the buyer's expenses provided in both
13 subsection (a) and (b) is not controlled by remedy limitations that the parties may have agreed to
14 as provided in section 2-810. A remedy limitation under section 2-810 is based upon
15 compensation to the aggrieved party for a breach. The reasonable expenses contemplated under
16 this section are designed to cure the breach in conjunction with the seller's provision of a
17 conforming tender or conforming goods. If the seller is not attempting to cure its breach, a
18 remedy limitation agreed to by the parties under section 2-810 is an effective way to provide
19 compensation for breach.
20

21 5. **International Sales.** Under CISG, the buyer has no remedy of rejection for a
22 nonconforming tender and cannot "avoid" the contract unless the seller has committed a
23 "fundamental breach," see Art. 49(1)(a) and Art. 25. Article 37 deals with Seller's cure where
24 nonconforming goods are delivered "before the date for delivery. Seller may cure "up to that
25 date if the "exercise of this right does not cause the buyer unreasonable inconvenience or
26 unreasonable expense. Buyer retains any right to claim damages. Article 48(1), which does not
27 apply if the contract is avoided for fundamental breach under Art. 49, gives a right to cure "even
28 after the date for delivery. Seller may "remedy at his own expense any failure to perform his
29 obligations, if he can do so without unreasonable delay and without causing the buyer
30 unreasonable inconvenience or uncertainty or reimbursement by the seller of expenses advanced
31 by the buyer. Again, Buyer retains any right to claim damages. The Unidroit Principle on cure
32 provides in Article 7.1.4:

33 (1) The non-performing party may, at is own expense, cure any non-performance,
34 provided that

35 (a) without due delay, it gives notice indicating the proposed manner and timing
36 of the cure;
37 (b) cure is appropriate in the circumstances;
38 (c) the aggrieved party has no legitimate interest in refusing cure; and
39 (d) cure is effected promptly.

40 (2) The right to cure is not precluded by notice of termination.

41 (3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with
42 the non-performing party's performance are suspended until the time for cure has expired.

43 (4) The aggrieved party may withhold performance pending cure.

44 (5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay

1 as well as for any harm caused or not prevented by the cure.

2 **SECTION 2-710. INSTALLMENT CONTRACT: BREACH.**

3 (a) An "installment contract" means a contract in which the terms require or the
4 circumstances permit the delivery of goods in separate lots to be separately accepted, even if the
5 agreement requires payment other than in installments or contains a term stating "Each delivery
6 is a separate contract" or words of similar import.

7 (b) In an installment contract, the buyer may reject any nonconforming tender of delivery
8 of an installment if the nonconformity substantially impairs the value of that installment to the
9 buyer or if the nonconformity is a defect in the required documents of title.

10 (c) If a nonconformity or default with respect to one or more installments in an
11 installment contract is a substantial impairment of the value to the aggrieved party of the whole
12 contract, there is a breach of the whole contract and the aggrieved party may reject any
13 nonconforming unaccepted installment and cancel the contract. ~~However, the power to cancel the~~
14 ~~contract for breach is waived, or a canceled contract is reinstated,~~ If the aggrieved party accepts
15 a nonconforming installment without seasonably giving notice of cancellation, brings an action
16 with respect to only past installments, or demands performance as to future installments, the
17 contract has not been cancelled.

18 **SOURCE: Article 2, Section 2-612.**

19 **Comment**

20 1. Section 2-710 is derived from former section 2-612.

21 2. Subsection (a) defines an installment contract and adds language that makes clear that
22 how payment is to be made does not determine whether a contract is an installment contract but
23 rather the focus is on the delivery of the goods in lots to be separately accepted. Section 2-302
24 governs the apportionment of the price for installments. As under former law, an installment

1 contract includes installment deliveries tacitly authorized by the circumstances or by the option
2 of either party. See section 2-302. Subsection (a) also continues the policy of former law that
3 clauses that attempt to provide that each delivery is to be considered a separate contract should
4 not be given their literal effect. Consistent with good faith and commercial standards, such
5 clauses should not be permitted to operate contrary to the commercial sense of the situation, that
6 each delivery is an installment under a single contract.

7 3. Subsection (b) allows the buyer to reject a nonconforming installment if the value to
8 the buyer of that installment is substantially impaired. Section 2-701(c). The test for substantial
9 impairment based upon the value to the buyer follows the test used in the revocation of
10 acceptance section. Section 2-708. An installment contract may require accurate conformity as a
11 condition to acceptance either by express provision or by the circumstances. The effect of such a
12 requirement is to define what amounts to a substantial impairment that cannot be cured. Such a
13 condition to acceptance must have a basis in reason to avoid surprise or hardship and may be
14 waived. Section 2-209. Substantial impairment of the value of an installment may turn on
15 quality, timeliness, quantity, assortment or the like and should be judged similarly to the test
16 under section 2-708. Trivial defects generally do not result in substantial impairment. Defects in
17 the required documents of title are not subject to a substantial impairment test but if appropriate
18 documents of title are obtainable, the defects in the tender of documents may be cured.

19 Section 2-709 does not apply to the cure contemplated by this subsection as section 2-709
20 depends first upon a rightful rejection or a justifiable revocation. In this section, the ability to
21 cure the nonconformity in the goods is relevant to whether the value of the installment is
22 substantially impaired. If the nonconformity is curable or the seller gives adequate assurance of
23 cure, the likelihood that there is a substantial impairment of the value of the installment to the
24 buyer is minimal. See section 2-701(c). Cure may be afforded in any reasonable manner and the
25 court should be guided by the other requirements of section 2-709 in determining whether a cure
26 is sufficient to prevent substantial impairment of the value of the installment to the buyer so as to
27 preclude the buyer from rejecting the installment. Even if the offered cure results in precluding
28 the buyer from rejecting the installment, however, if the tender of the installment is not in
29 conformity with the contract requirements, the seller may still have breached the contract and the
30 buyer is entitled to damages for the nonconformity. Sections 2-823 and 2-827. Adequate
31 assurance of a cure should be measured by the same standard applicable in section 2-711. A
32 buyer need not accept a nonconforming unaccepted installment if the value of the whole contract
33 has been substantially impaired as provided in subsection (c).

34 4. Subsection (c) follows the policy of former law that a party may cancel an installment
35 contract only if the nonconformity of the installments substantially impairs the value of the entire
36 contract. The first sentence makes explicit what was implicit in the former section, that if there
37 is a substantial impairment, the aggrieved party may cancel the contract. In addition, if the value
38 of the whole contract is substantially impaired, the buyer may reject a nonconforming and
39 unaccepted installment even if the value of that installment is not substantially impaired. The
40 second sentence then provides that if the aggrieved party takes one of three actions the contract
41 has not been cancelled. This limitation on the right to cancel is consistent with section 2-702(a)

1 on waivers that prevent cancellation. Subsection (c) applies to a buyer's default as well as a
2 seller's default in an installment contract.

3 Whether the nonconformity as to any installment results in substantial impairment of the
4 value of the whole contract depends upon more than the aggrieved party's security as to whether
5 the party in breach of contract will perform adequately in future installments. Section 2-711
6 provides a mechanism for the aggrieved party to get assurances about future performance.
7 Nonconformities in performance are cumulative in effect, section 2-701(d), so that acceptance of
8 prior nonconforming installments does not preclude an aggrieved party from using those prior
9 nonconformities to justify a cancellation based upon substantial impairment of the value of the
10 whole contract. A party who accepts nonconforming installments should give the notice required
11 under sections 2-702 and 2-707 in order to fully preserve their rights.

12 5. The right to cancel is governed further by section 2-808. A reasonable time for an
13 aggrieved party to notify the party in breach of a cancellation should take into account any
14 reasonable time the aggrieved party waits for the party in breach to cure nonconformities in its
15 performance and any time devoted to good faith negotiations to resolve the dispute.

16
17 **6. International Sales.** CISG Article 73 governs a contract for "for delivery of goods by
18 installments." Either party may avoid either a particular installment or the entire contract in
19 defined cases of fundamental breach. See Art. 25. The concept is consistent with section 2-710
20 but the terminology is somewhat different.

21
22 **SECTION 2-711. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.**

23 (a) A contract for sale imposes an obligation on each party not to impair the other's
24 expectation of receiving due performance. If reasonable grounds for insecurity arise with respect
25 to the performance of either party, the other party may demand in a record adequate assurance of
26 due performance and, until that assurance is received, if commercially reasonable, may suspend
27 any performance for which the agreed return has not already been received.

28 (b) Between merchants, the reasonableness of grounds for insecurity and the adequacy of
29 any assurance offered is determined according to commercial standards.

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

32 (d) After receipt of a justified demand under subsection (a), failure to provide within a

1 reasonable time, not exceeding 30 days, assurance of due performance which is adequate under
2 the circumstances of the particular case is a repudiation of the contract under Section 2-712(a).

3 **SOURCE: Article 2, Section 2-609.**

4 **Comment**

5 1. Section 2-711 follows former section 2-609. This section recognizes that commercial
6 parties bargain for actual performance and provides a process for ascertaining whether the
7 promised performance will be forthcoming. If either party's ability to perform materially
8 deteriorates after contracting and the other party's security and reliance on the promised
9 performance is compromised, this section provides a mechanism for obtaining assurances that
10 the promised performance will be forthcoming. This section should not be used to adjust for
11 risks that were known or apparent at the time the contract was formed. The rights given under
12 this section are analogous to the right of the seller to stop or withhold delivery except for cash in
13 the event of the buyer's insolvency, a circumstance that may impair the seller's reasonable
14 expectation of receiving the buyer's performance. Section 2-818. The parties may agree in their
15 contract to terms that seek to provide a process when insecurity arises. Such clauses may be
16 effective to increase the protection given under this section, to fix the reasonable time for
17 responding to a request for assurances, or to define the adequacy of the assurances. Such clauses,
18 however, cannot set up arbitrary standards for such actions. Of course, the obligation of both
19 parties to act in good faith permeates the operation of this section.

20 2. Under subsection (a), a party must have reasonable grounds for insecurity in order to
21 have a right to demand adequate assurance of due performance. Between merchants, what
22 constitutes reasonable grounds for insecurity should be determined by commercial standards.
23 Subsection (b). Such grounds for insecurity need not arise from the contract at issue or from
24 circumstances surrounding that contract but could result from a party's performance under a
25 different contract with other parties. Reasonable insecurity may also arise based upon
26 trustworthy information from third parties. Assignment of rights or delegations of duties under a
27 contract may also create reasonable grounds for insecurity. Section 2-503. A party who
28 attempts to assert grounds for insecurity based upon facts that the party had notice of prior to
29 contracting should not constitute reasonable grounds for insecurity that justifies the demand for
30 assurance unless new circumstances come to light that in combination with the previously known
31 circumstances make it reasonable for the party to be insecure about the other's performance.
32

33 Adequate assurance in each case depends upon the factual circumstances and between
34 merchants, on reasonable commercial standards. Subsection (b). If the other party is trustworthy
35 and has a good reputation, a promise of renewed attention may suffice. In other circumstances,
36 such a promise may be insufficient. Adequate assurance, however, does not depend upon the
37 subjective satisfaction of the party assured but must depend upon objective evidence, reasonable
38 commercial standards and good faith. Of course, if there are repeated delinquencies in
39 performance, the quantum of assurance necessary in order to be an adequate assurance will rise.

1 Similarly, if there are repeated demands for assurance, the basis for such demands must be
2 increasingly obvious.
3

4 When a party has made a justified demand for assurance, the party who demanded such
5 assurance may suspend performance of its own obligation if such suspension is commercially
6 reasonable. Suspension of performance or actions preparatory to such performance may occur
7 while awaiting the requested assurance.
8

9 3. Subsection (c) continues the rule that accepting a defective performance does not
10 preclude a party from requesting assurances about future performance. This principle is also
11 reflected in section 2-702(b).
12

13 4. Subsection (d) provides that after a justified demand for assurance, the failure to
14 provide adequate assurance within a reasonable time not to exceed 30 days is a repudiation.
15 Upon a repudiation, the aggrieved party has the rights as provided in section 2-712. A party may
16 retract a repudiation as provided in section 2-713.
17

18 5. **International Sales.** See CISG Article 71(a), which recognizes a more limited
19 principle of performance insecurity. A party suspending performance under Art. 71(a) must
20 notify the other party "immediately" and must continue with performance "if the other party
21 provides adequate assurance of his performance." Art. 71(3).
22

23 **SECTION 2-712. ANTICIPATORY REPUDIATION.**

24 (a) If either party to a contract repudiates a performance not yet due and the loss of
25 performance will substantially impair the value of the contract to the other party, the aggrieved
26 party may:

27 (1) await performance by the repudiating party for a commercially reasonable
28 time or resort to any remedy for breach of contract, even if it has urged the repudiating party to
29 retract the repudiation or has notified the repudiating party that it would await the agreed
30 performance; and

31 (2) in either case, suspend its own performance or, if a seller, proceed in
32 accordance with Section 2-817.

33 (b) Repudiation includes language that one party will not or cannot make a performance

1 still due under the contract or voluntary, affirmative conduct that reasonably appears to the other
2 party to make a future performance impossible.

3 **SOURCE: Article 2, Section 2-610.**

4 **Comment**

5 1. Section 2-712 follows former section 2-610 and adds a new subsection (b) that
6 provides guidance on when a party has repudiated its performance obligation.
7

8 2. Subsection (a) allows an aggrieved party faced with a party's repudiation of its
9 obligation to perform to either await performance or resort to any remedy for breach as well as in
10 either case to stop its own performance. A party faced with a repudiation of performance may
11 take these actions if the repudiation substantially impairs the value of the contract to that party.
12 Section 2-701(c) addresses the factors to be used in determining substantial impairment. This is
13 the same test as used in the installment contract for breach of the whole contract. Section 2-
14 710(c). An aggrieved party's actions under this section must be taken in good faith but do not
15 require notice to the repudiating party, unless the aggrieved party has taken some positive action
16 which in good faith requires notice to the other party before pursuing a remedy. An aggrieved
17 party's market price based damages for breach in the case of a repudiation are addressed in
18 sections 2-821 and 2-826. In recovering those damages for breach based upon a repudiation, a
19 commercially reasonable time for awaiting performance should be read in light of the mitigation
20 principle in section 2-803.
21

22 3. Subsection (b) provides guidance on when a party can be considered to have
23 repudiated a performance obligation based upon the Restatement (Second) of Contracts § 250
24 and does not purport to be an exclusive statement of when a repudiation has occurred. As under
25 prior law, repudiation centers upon an overt communication of intention, actions which render
26 performance impossible, or a demonstration of a clear determination not to perform.
27 Repudiation does not require that performance be made utterly impossible, rather, actions which
28 reasonably indicate rejection of the performance obligation suffice. Failure to provide adequate
29 assurance of due performance under section 2-711 also operates as a repudiation. A demand for
30 more than is required under the contract and that is not justified under section 2-711 is not a
31 repudiation unless it amounts to a statement of intention to not perform except on conditions
32 which go beyond the contract requirements.
33

34 4. **International Sales.** CISG Article 72(1) states that if "prior to the date for
35 performance of the contract it is clear that one of the parties will commit a fundamental breach of
36 contract, the other party may declare the contract avoided." Unless that party has "declared that
37 he will not perform his obligations," Art. 72(3), however, the other must give reasonable notice
38 of an intention to avoid the contract in order to permit that party "to provide adequate assurance
39 of his performance." Art. 72(3). Adequate assurance presumably requires more than just a
40 simple retraction of the repudiation.

1
2 **SECTION 2-713. RETRACTION OF ANTICIPATORY REPUDIATION.**

3 (a) A repudiating party may retract its repudiation until its next performance is due unless
4 the aggrieved party, after the repudiation, has canceled the contract, materially changed its
5 position, or otherwise indicated that the repudiation is considered to be final.

6 (b) A retraction may be by any method that clearly indicates to the aggrieved party that
7 the repudiating party intends to perform the contract. However, a retraction must contain any
8 assurance justifiably demanded under Section 2-711.

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

11 **SOURCE: Article 2, Section 2-611.**

12 **Comment**

13 1. Section 2-713 follows former section 2-611 without substantive change. A
14 repudiating party's ability to retract the repudiation depends upon the retraction taking place
15 before the aggrieved party has taken action on the repudiation. Subsection (a). A repudiation
16 gives an aggrieved party reasonable grounds for insecurity under section 2-711 and the aggrieved
17 party may demand adequate assurances of performance as part of the conditions of accepting the
18 retraction. Subsection (b). After an unambiguous and timely retraction, the aggrieved party
19 should allow a reasonable time for the assurances to be worked out before proceeding to any
20 remedies for breach of contract.

21
22 2. Subsection (c) makes clear that the aggrieved party may take some time to adjust to
23 the repudiating party's intention to continue performance under the contract.

24
25 3. **International Sales.** There is no comparable provision in CISG. Under Articles 71
26 and 72, however, a party suspending performance for an apparent inability of the other to
27 perform a substantial part of the contract, Art. 71(3), or intending to declare the contract avoided
28 for a repudiation, Art. 72(2), must give immediate notice to the other. At that point, the other has
29 the chance to provide adequate assurance of performance. Presumably that adequate assurance
30 will include a retraction.

31 **SECTION 2-714. CASUALTY TO IDENTIFIED GOODS.** If the parties to a

1 ~~contract assume the continued existence and eventual delivery to the buyer of contract requires~~
2 ~~for its performance goods identified when the contract is made and the goods suffer casualty~~
3 ~~without the fault of either party before the risk of loss passes to the buyer ~~and no commercially~~~~
4 ~~reasonable substitute is available~~, the following rules apply:

5 (1) The seller shall seasonably notify the buyer of the nature and extent of the loss.

6 (2) If the loss is total, the contract is avoided [terminated].

7 (3) If the loss is partial or the goods no longer conform to the contract, the buyer may
8 nevertheless demand inspection and may treat the contract as avoided [terminated] or accept the
9 goods with due allowance from the contract price for the partial loss or the nonconformity but
10 without further right against the seller.

11 **SOURCE: Article 2, Section 2-613.**

12 **Comment**

13 1. Section 2-714 continues the rules from former section 2-613 two substantive changes.
14 First, the reference to “no arrival, no sale” terms has been deleted in accordance with the decision
15 to not include shipping terms definitions within revised Article 2. Second, the revision requires
16 the seller to give notice to the buyer of the nature and extent of the loss in a seasonable manner.
17 This change is designed to bring this section within the notice requirement of section 2-717. The
18 seller should be obligated to notify the buyer seasonably in order to take advantage of the excuse
19 provided in this section.

20
21 2. This section operates when the seller has the risk of loss (section 2-612), the parties
22 assume the particular goods identified when the contract is made will continue to exist, the buyer
23 has contracted for those particular goods, and the seller has undertaken the responsibility for the
24 continued existence and condition of the particular identified goods through the time of tender of
25 delivery. It is in those situations where the contract “requires” the goods for its performance. A
26 factor relevant to this inquiry of the parties’ intent regarding whether the particular identified
27 goods are required for performance of the contract is whether a commercially reasonable
28 substitute is available. The contract is the total legal obligation of the parties. Section 1-201(11).
29 This section excuses the seller’s performance when the goods suffer casualty without the fault of
30 either party. Fault in this context includes negligence not just willful conduct. If the goods are
31 totally destroyed or damaged, the seller is excused from performing as the contract is avoided. If
32 the destruction is partial, the buyer has the choice as to whether to treat the contract as avoided

1 and thus excuse the seller's performance or whether to accept the goods and have an allowance
2 against the price for the value of the harm to the goods without any further remedy against the
3 seller. If this section does not apply, sections 2-715 or sections 2-716 govern excuse from
4 performance obligations.
5

6 3. This section requires the seller to give notice to the buyer of the nature and extent of
7 the loss. The effect of the seller giving the notice is to provide a time limit on the buyer's
8 response to the notice under section 2-717(b).
9

10 4. **International Sales.** CISG Article 79(1) provides that a "party is not liable for a
11 failure to perform any of his obligations if he proved that the failure was due to an impediment
12 beyond his control and that he could not reasonably be expected to have taken the impediment
13 into account at the time of the conclusion of the contract or to have avoided or overcome it or its
14 consequences." Article 79(2) also provides limited excuse where a party's failure is "due to the
15 failure by a third person." Arguably, this provision provides as much excuse from performance as
16 does section 2-714 (formerly section 2-613).
17

18 **SECTION 2-715. SUBSTITUTED PERFORMANCE.**

19 (a) If, without the fault of either party, agreed berthing, loading, or unloading facilities or
20 an agreed type of carrier becomes unavailable, or an agreed manner of delivery otherwise
21 becomes commercially impracticable, a party may claim excuse under Section 2-716 unless a
22 commercially reasonable substitute is available. In that case, reasonable substitute performance
23 must be tendered and accepted.

24 (b) If an agreed means or manner of payment fails because of domestic or foreign
25 governmental regulation, the seller may withhold or stop delivery until the buyer provides a
26 means or manner of payment which is commercially a substantial equivalent. If delivery has
27 already been made, payment by the means or in the manner provided by the regulation
28 discharges the buyer's obligation unless the regulation is discriminatory, oppressive, or
29 predatory.

30 **SOURCE: Article 2, Section 2-614.**

31 **Comment**

1 1. Section 2-715 makes only one substantive change to former section 2-614. Subsection
2 (a) provides that if a commercially reasonable substitute is not available, the performance may be
3 excused under section 2-716. This section distinguishes shipping and other delivery obligations
4 where a reasonable substitute if available must be tendered and accepted from performance that
5 goes to the heart of the contract where commercial impracticability will excuse performance.
6 The substitution allowed under this article operates as between buyer and seller and not as
7 against a financing agency or an issuer of a letter of credit who are entitled to exercise their rights
8 under Article 5.

9 2. Subsection (b) allows the seller to not deliver unless the buyer obtains a commercial
10 reasonable substitute for the agreed means or manner of payment contemplated in the contract
11 but which has failed due to government regulation. However, if the buyer has taken delivery, the
12 seller must take the payment in the means or manner specified in the regulation unless the
13 regulation is discriminatory, oppressive or predatory.

14 Subsection (b) may have increased importance when the European Union implements on
15 January 1, 2002, the EURO as the common and exclusive currency for those members that have
16 been approved to participate. Under the continental doctrine of *lex monetae*, the EURO would be
17 treated as the currency of the country whose currency was displaced. There would be no
18 interruption in the continuity of a contract originally expressed to pay in French Francs just
19 because the currency of France was now the EURO. Subsection (b) would normally reach the
20 same result in a less direct manner. Suppose that the conversion from francs to the EURO has
21 occurred and the seller has not delivered the goods. The seller can stop delivery until the buyer
22 “provides a means or manner of payment which is commercially a substantial equivalent.
23 Clearly, tender of the EURO would satisfy this test. But suppose that the buyer decides not to
24 tender anything and claims excuse from the contract. Subsection (b) does not address this
25 problem. Rather, the excuse question must be answered under either 2-716(a) or the common
26 law: Did both parties assume at the time of contracting that the conversion would not happen
27 and, if so, does the conversion make performance as agreed impracticable? Again, the answer is
28 probably no to one or both questions, but there is some uncertainty. See Michael Gruson, *The*
29 *Introduction of the Euro and its Implications for Obligations Denominated in Currencies*
30 *Replaced by the Euro*, 21 *Fordham Int’l L.J.* 65 (1997).

31 Three states, New York, Illinois, and California, have enacted legislation that preempts
32 Article 2 and declares that in the case of substitution or replacement the EURO will be a
33 commercially reasonable substitute and the replacement will not have the effect of discharging or
34 excusing performance under any contract. See N.Y. General Obligations Law, §§ 5-1601 et seq.
35 (1997); Illinois Statutes, Ch. 815, §§ 617.1 et seq. (1997); Civil Code of California §1663, 1998
36 Cal. Stat. 62, §2 (1998).

37
38 3. **International Sales.** CISG has no comparable provision.

39 **SECTION 2-716. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.**

1 (a) Subject to subsection (b) and Section 2-715, delay in performance or nonperformance
2 by a seller is not a breach of contract if the seller's performance as agreed has been made
3 impracticable by:

4 (1) the occurrence of a contingency whose nonoccurrence was a basic assumption
5 on which the contract was made; or

6 (2) compliance in good faith with any applicable foreign or domestic
7 governmental regulation, statute, or order, whether or not it later proves to be invalid.

8 (b) A party claiming excuse under subsection (a) shall seasonably notify the other party
9 that there will be delay or nonperformance. If the claimed excuse affects only a part of the seller's
10 capacity to perform, the seller shall also allocate production and deliveries among its customers
11 in a manner that is fair and reasonable and notify the buyer of the estimated quota made
12 available. In allocating production and deliveries, the seller may include regular customers not
13 then under contract as well as its own requirements for further manufacture.

14 **SOURCE: Article 2, Section 2-615.**

15 **Comment**

16 1. Section 2-716 continues the rules for excuse from performance from former section 2-
17 615 with two substantive changes. First, the concept of excuse from "delivery obligations has
18 been broadened to excuse from "performance in recognition that the seller's obligations may
19 include more than delivery of the goods. Second, the phrase "except so far as the seller may
20 have assumed a greater obligation has been eliminated. The parties should be able to agree to
21 either a lesser or greater obligation than what is provided in this default rule. This section
22 governs excuse in situations not within the ambit of section 2-714 on destruction of specific
23 goods and not governed by section 2-715 on substituted performance.

24
25 2. In determining whether the nonoccurrence of a contingency was a basic assumption of
26 the contract, consideration should be made of the risks foreshadowed at the time of contracting
27 sufficiently to be regarded as within the business risks assumed in contracts of the type at issue.
28 Notably, increased cost of performance, changes in the market, or continuation of the usual
29 source of supply are typical business risks that should be contemplated. Severe shortages due to

1 war, embargo or the like, however, may not be reasonably contemplated. An evaluation of
2 whether excuse from performance is justified under this section must be made depending upon
3 the circumstances which existed at the time the contract was formed. At its core, the principle of
4 this section is based upon consideration of how the risk of the contingency was allocated in the
5 contracting process. The more remote the contingency the less likely the parties contemplated an
6 allocation of the risk and the more likely this section should be used to reallocate the risk. Of
7 course, the parties are free to expressly agree to provisions in their agreement that allocate the
8 risk of subsequent events occurring in a manner different than provided in this section.
9

10 Although the section is phrased in terms of the seller seeking to be excused from
11 performance, as under prior law, the buyer may in appropriate circumstances seek to be excused
12 from its performance obligation where both parties contemplate that the reason for the sale to the
13 buyer is the buyer's further use or sale of the goods in a specific venture and that venture
14 collapses or other circumstances which justify excusing the buyer from its performance
15 obligations.

16 If the seller is complying in good faith with a government regulation, statute or order, the
17 seller is excused to the extent the compliance makes the seller's performance commercially
18 impracticable beyond the seller's assumption of the risk of the government action. Of course,
19 good faith would preclude reliance on this provision for an excuse if the seller induced the
20 government action.

21 3. A party that seeks to use an excuse under this section must notify the other party.
22 Subsection (b). As under the former section, the seller must allocate in a fair and reasonable
23 manner any production among both existing and regular customers, both as to contracts in
24 existence at the time of the occurrence of the contingency and ones later in time. The seller's
25 allocation decision must be made in good faith.
26

27 4. **International Sales.** See CISG Article 79(1), which grants excuse for an "impediment
28 beyond his control and that he could not reasonably be expected to have taken...into account at
29 the time of the conclusion of the contract or to have avoided or overcome..." This language is
30 consistent with the law interpreting Force Majeure clauses. "Impediment" suggests external
31 interference with the capacity to perform rather than changes affecting the incentive to perform.
32 Thus, an unexpected labor dispute may impede the buyer's duty to take delivery of the goods but
33 a severe drop in market prices would not impede the buyer's duty to pay for goods taken.
34

35 **SECTION 2-717. PROCEDURE ON NOTICE CLAIMING EXCUSE.**

36 (a) A party that receives notice of a material or indefinite delay in performance or an
37 allocation permitted under Section 2-714 or 2-716 as to any delivery concerned, or if there is a
38 breach of the whole contract under Section 2-710(c), then as to the whole, by notice in a record,

1 may:

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

3 (2) modify the contract by agreeing to take the available allocation in substitution
4 under Section 2-716 or by accepting the goods with due allowance as provided in Section 2-714.

5 (b) If, after receipt of notice under Section 2-714 or 2-716, a party fails to modify the
6 contract within a reasonable time not exceeding 30 days, the contract is terminated with respect
7 to any performance affected.

8 (c) This section may be varied by agreement only to the extent that the parties have
9 assumed an obligation different from that provided under Sections 2-714 and 2-716.

10 **SOURCE: Article 2, Section 2-616.**

11 **Comment**

12 1. Section 2-717 makes the following substantive changes to the rules provided in former
13 section 2-616. First, the notification procedure is made applicable to the excuse provision of
14 section 2-714. Second, subsection (c) is redrafted to allow a different process for notice if the
15 parties assume an obligation other than the obligation provided in the default rules of sections 2-
16 714 and 2-716. If the default rules govern excuse from performance, the parties cannot modify
17 the rules of this section.

18 2. This section provides a process for the person notified to respond to the notice of
19 excuse under either section 2-714 or section 2-716. The person notified may either agree to
20 modify the contract as provided or terminate the contract. Subsection (a). If the party fails to
21 respond within the reasonable time not exceeding thirty days, the contract is terminated.
22 Subsection (b).

23 3. Subsection (c) allows the parties to agree to a different process for responding to
24 notice of claimed excuse if the parties have allocated the risks of contingencies differently than
25 the way the risks are allocated in sections 2-714 or section 2-716. This change is not meant to
26 allow the parties to have a contract clause in advance of trouble to require the buyer to stand
27 ready to take deliveries even if the seller is excused from performing.

28 4. **International Sales.** There is no comparable provision in CISG. Article 79(4),
29 however, requires that the party who fails to perform "must give notice to the other party of the
30 impediment and its effect on his ability to perform." The penalty for failure to notify is damages.
31
32

1 Also, Article 79(3) provides that the excuse or exemption provided by Art. 79(1) "has effect for
2 the period during which the impediment exists." These requirements provide a framework within
3 which the parties can negotiate over allocations and adjustments.

4 **SECTION 2-718. PRESERVING EVIDENCE OF GOODS IN DISPUTE.** To further
5 the adjustment of a claim or dispute, the following rules apply:

6 (1) Either party to a contract, on reasonable notice to the other party, has a right to
7 inspect, test, and sample the goods for the purpose of ascertaining the facts and preserving
8 evidence. This right extends to goods that are in the possession or control of the other party.

9 (2) Parties to a contract may agree to an inspection or survey by a third party to determine
10 the conformity or condition of the goods and may agree that the findings will be binding upon
11 them in any later litigation or adjustment.

12 **SOURCE: Article 2, Section 2-515.**

13 **Comment**

14 1. Section 2-718 follows former section 2-515 without substantive change and is
15 intended to provide a method for aiding the parties in settlement of disputes.

16
17 2. This section should not interfere with the seller's right to resell the goods in the event
18 of buyer's breach, section 2-819, or the buyer's right to sell the goods to enforce its security
19 interest, section 2-829. Rather, the parties who desire to use this section to preserve evidence or
20 ascertain the facts should act promptly to do so. The parties' actions under this section should be
21 taken in good faith. This section does not change the parties' rights as to inspection as provided
22 in sections 2-608 or 2-609. Normally this section will be used after the buyer has inspected and
23 determined that the goods do not conform to the contract.

24
25 3. In subsection (2), conformity of the goods means conformity of the goods to the
26 contract requirements whereas condition of the goods refers to their deterioration or damage.
27 The scope and effect of the inspection or survey by a third party depends upon the parties'
28 agreement as to those matters and the admissibility of any report generated depends upon the
29 applicable rules of evidence in any proceeding where it is relevant.

30 4. **International Sales.** CISG does not contain a comparable provision although Articles
31 85 through 88 address preservation of the goods similar to the provisions of this article's
32 provisions in sections 2-704 and 2-705.

1 **PART 8**

2 **REMEDIES**

3 **[A. IN GENERAL]**

4 **SECTION 2-801. SUBJECT TO GENERAL LIMITATIONS.** The remedies of the
5 seller, buyer, and other protected persons under this article are subject to the general limitations
6 and principles stated in Sections 2-802 through 2-814.

7 **SOURCE:** New.

8 **Comments**

9 1. This section is new and sets out the remedial hierarchy of Part 8. Subpart A (Sections
10 2-801 through 2-814) contain sections that are applicable to buyers, sellers and other persons
11 entitled to enforce obligations under this article. Persons other than buyers and sellers who are
12 able to enforce obligations under this article include those persons who may enforce warranty
13 obligations under Part 4 of this article. Subpart A sets forth remedial policies that control the
14 application of the more specific remedial rules in Subpart B (seller's remedies are set forth in
15 sections 2-815 through 2-822) and Subpart C (buyer's remedies are set forth in sections 2-823
16 through 2-829). Part 8 follows the organizational structure used in Article 2A, Part 5.

17 2. **International Sales.** Revised Part 8 is consistent with the remedial structure in CISG.
18 Chapter II states the obligations of the seller (Articles 30-44) and the remedies of the buyer upon
19 breach of contract by the seller. Article 45. Buyer's remedies include the "rights" provided in
20 Articles 46-52, which are unique to the buyer, and "damages" claimed under Articles 74-77,
21 which are common to the buyer and the seller. Similarly, Chapter III states the obligations of the
22 buyer (Articles 53-59) and the remedies of the seller upon breach by the buyer. Article 61.
23 Seller's remedies include the "rights" provided in Articles 62-65, which are unique to the seller,
24 and "damages" claimed under Articles 74-77, which are common to both parties. In general, the
25 prefers specific performance over damages and states applicable damage principles in general
26 terms.

27 **SECTION 2-802. BREACH OF CONTRACT; PROCEDURES.** If a party is in
28 breach of a contract, the party seeking enforcement:

29 (1) has the rights and remedies under this article and, except as limited by this part, under
30 the agreement;

1 (2) may reduce its claim to judgment or otherwise enforce the contract by any available
2 administrative or judicial procedure, or the like, including arbitration or other dispute-resolution
3 procedure if agreed to by the parties; and

4 (3) may enforce the rights granted by and remedies available under other law.

5 **SOURCE: Article 2A, Section 2A-501.**

6 **Comment**

7 1. This section has no counterpart in current article 2 and is based on section 2A-501.
8 This section provides a summary of the aggrieved party's general remedial rights upon a breach
9 of contract. Whether a party is in breach of contract depends upon the principles in Part 7. The
10 rights and remedies under this article are cumulative and this article rejects any doctrine of
11 election of remedies as a fundamental principle. Whether the pursuit of one remedy bars another
12 depends entirely on the facts of the individual case and is governed by the general principles
13 stated in Subpart A.

14 2. Both this article and the parties' agreement should be consulted to determine what
15 remedies are available to an aggrieved party in the event of breach. An agreement may provide
16 for a dispute resolution process. In addition, an aggrieved party may use administrative or
17 judicial process to enforce rights. Finally, this article does not preempt other rights and remedies
18 available under law outside this article. Section 1-103.

19
20 3. **International Sales.** CISG Articles 45 and 61 provide that the aggrieved party may
21 exercise rights under the conventions and is entitled to damages as provided under the
22 convention in the event of the other party's breach.

23
24 **SECTION 2-803. REMEDIES IN GENERAL.**

25 (a) In accordance with Section 1-106, the remedies provided in this article must be
26 liberally administered with the purpose of placing the aggrieved party in as good a position as if
27 the other party had fully performed.

28 (b) Unless the contract provides for liquidated damages enforceable under Section 2-809
29 or a limited remedy enforceable under Section 2-810, an aggrieved party may not recover that
30 part of a loss resulting from a breach of contract that could have been avoided by reasonable

1 measures under the circumstances. The burden of establishing a failure to take reasonable
2 measures under the circumstances is on the party in breach.

3 (c) The rights granted by and remedies available under this article are cumulative, but a
4 party may not recover more than once for the same injury.

5 (d) This article does not impair a remedy for breach of any obligation or promise
6 collateral or ancillary to a contract for sale.

7 **SOURCE: Article 2, Section 2-701; Article 1, Section 1-106; Restatement (Second) of**
8 **Contracts, Section 350.**

9 **Comment**

10 1. The bulk of this section has no counterpart in former Article 2.

11 2. Subsection (a) is derived from the statement of remedial policy in section 1-106. This
12 remedial policy is designed to allow an aggrieved party to recover the value of its expectation
13 interest or the benefit of the bargain. See Restatement (Second) of Contracts section 344. The
14 specific remedies in Subparts B and C are designed to compensate the aggrieved party based
15 upon its expectation interest.

16 3. Subsection (b) contains a statement of the mitigation principle derived from the
17 Restatement (Second) of Contracts, Section 350. An aggrieved buyer who has not accepted the
18 goods has two alternative measures of damages, the cover price minus the contract price (section
19 2-825) or the market price minus the contract price (section 2-826). The aggrieved buyer is not
20 required to cover although the statement of the mitigation principle in subsection (b) may
21 preclude the recovery of loss that could have been prevented if the aggrieved buyer could have
22 reasonably avoided that loss by making a cover transaction. If the buyer covers under section 2-
23 825 by reasonably and in good faith making a purchase in substitution for the goods from the
24 seller without undue delay, the buyer has appropriately mitigated under the principle of this
25 section.

26 An aggrieved seller has three alternative damage measurements, the contract price minus
27 the resale price (section 2-819), the contract price minus the market price (section 2-821(a)) or
28 lost profit and reliance expenditures (section 2-821(b)). The seller is not required to resell goods.
29 Again, the mitigation principle of subsection (b) may prevent the seller from recovering the part
30 of the loss that could have been prevented if the seller could have reasonably sold the goods. If
31 the seller does resell and complies with the requirements of section 2-819, the seller has
32 appropriately mitigated the loss.

1 4. Subsection (c) declares that the rights and remedies are cumulative. This statement
2 accords with the former Article 2's rejection of a policy of an election of remedies subject to a
3 preclusion of double recovery for the same harm. See comment to section 2-802. As stated in the
4 comment to section 2-802, whether the exercise of one remedy may preclude use of another
5 remedy depends upon whether the use of both remedies violates the principles stated in Subpart
6 A, including the principles of this section. Any choice among remedial options must be made in
7 good faith.

8 Under former Article 2, if the buyer had covered by buying goods in substitution of the
9 ones due the seller in good faith, reasonably and without unreasonable delay, the buyer must use
10 the cover section to measure its damages and may not use the section on market price to measure
11 damages. See *Commonwealth Edison C. v. Allied Chemical Nuclear Products Inc.*, 684 F. Supp.
12 1434, 1435 (N. D. Ill. 1984) (“Official comment 5 to §2-713 indicates that when a party covers,
13 his damages are measured by §2-712, not §2-713. ”); *Dickson v. Dehli Seed Co.*, 760 S.W. 2d
14 382, 389 (Ct. App. Ark. 1988) (“Because appellee chose to purchase substitute goods its remedy
15 was limited to that of §2-712 unless the purchase did not constitute ‘cover.’ ”); *Neibert v.*
16 *Schwenn Agri-Production Corp.*, 579 N.E.2d 389, 393 (Ill. Ct. App. 1991) (Section 2-713 “only
17 applies when and to the extent the buyer has not covered. ”); *James J. White & Robert S.*
18 *Summers*, UNIFORM COMMERCIAL CODE §6.4, subsection c (4th ed. 1995) (advocating that a
19 cover that qualifies under §2-712 should preclude the buyer from recovering a greater amount by
20 using the market price formula of §2-713). Similarly, if the seller resold the goods in compliance
21 with the section on recovering damages based upon the resale, some courts have precluded the
22 seller from obtaining damages based upon the market price measurement. See *Sharp Electronics*
23 *Corp. v. Lodgistix, Inc.*, 802 F. Supp. 370, 380-81 (D. Kan. 1992) (In that case, seller could not
24 use market price damages when it had resold the goods); *White & Summers*, UNIFORM
25 COMMERCIAL CODE, §7-7 (4th ed. 1995) (advocating that a resale complying with the
26 requirements of section 2-706 should preclude seller from recovering a larger amount by using
27 the market price formula of section 2-708(1)). This section does not change the results of these
28 cases under former Article 2.

29 5. Subsection (d) is the same as former section 2-701.

30
31 6. **International Sales.** CISG Articles 74 through 77 contain statements applicable to
32 damage recoveries of a seller and a buyer. Of note is the endorsement of the expectancy interest,
33 Art. 74, the preference for using the substitute transaction as the measure for damages, Art. 75,
34 and a statement of a mitigation principle, Art. 77.

35 **SECTION 2-804. MEASUREMENT OF DAMAGES IN GENERAL.** [Subject to
36 section 2-803, if] [If] there is a breach of contract the aggrieved party may recover compensation
37 for the loss resulting in the ordinary course from the breach as determined under Sections 2-815
38 through 2-829 or as determined in any other reasonable manner, together with incidental

1 damages and consequential damages, less expenses avoided as a result of the breach.

2 **SOURCE: Article 2, Section 2-714(a).**

3 **Comment**

4 1. Section 2-804 is new and provides a general statement of a measurement rule that can
5 be used if the specific measurement rules are not sufficient to compensate the aggrieved party's
6 expectancy interest under the principle of section 2-803(a). Although compensation of the
7 expectancy interest of the aggrieved party is the general rule, a party may also use this
8 measurement to compensate the aggrieved party's reliance or restitution interests. See
9 Restatement (Second) of Contracts, section 349 and section 371. For example, assume a buyer is
10 unable to recover any damages based upon either the cover or market price measurements
11 because the price for the good has not changed but the buyer has incurred damages in preparing
12 to perform its part of the contract. Even if an aggrieved party cannot establish any general or
13 direct damages, an aggrieved party may recover incidental and consequential damages resulting
14 from the breach. Reliance based expenses that do not fall into the category of incidental or
15 consequential damages but could also be recovered under this section. Of course, recovery under
16 this section is subject to the general principles stated in section 2-803.

17 2. An aggrieved party should not be able to use section 2-804 to recover damages based
18 upon its reliance or restitutionary interests when those interests are greater than its expectancy
19 interest. To illustrate, assume seller and buyer enter into an installment contract for 10 deliveries
20 at \$20,000 per delivery. Seller's cost of performing is actually \$25,000 per delivery. The market
21 price at time of delivery is \$20,000 and Seller could resell undelivered goods for at most
22 \$20,000. Seller made a bad deal by underestimating the cost of Seller's performance. Thus on
23 each delivery that Buyer accepts, Seller is losing \$5,000. Buyer breaches. Seller's general
24 damage recovery under either the market price or resale formula is \$0. Under a restitution
25 theory, Seller could argue that it should get the value of the benefit it conferred on Buyer by its
26 part performance. If the value of the benefit conferred on Buyer is measured by the market value
27 of the goods, the restitution recovery is identical to the expectancy recovery. If the value of the
28 benefit conferred on Buyer is measured by the contract price Buyer agreed to pay, than as to any
29 installments accepted, the Buyer is already liable for the price under section 2-822, and Seller
30 gets no benefit from asserting restitution. If the value of the benefit conferred on Buyer is
31 measured by the cost of performance, then Seller will get the \$25,000 per delivery as to the
32 goods accepted by Buyer. See *Boomer v. Muir*, 24 P.2d 570 (Cal. App. 1933) (a construction
33 contract situation where the value of the benefit conferred on the buyer was measured by the cost
34 of performance of the builder); *U.S. v. Western States Mechanical Contractors*, 834 F.2d, 1533
35 (10th Cir. 1987) (subcontractor's contract price was \$295,706, the reasonable value of work
36 under the subcontract as determined at trial was \$475,000, subcontractor wrongly fired so general
37 contractor in breach, 40% of the work was done by subcontractor prior to firing, subcontractor
38 received 40% of \$475,000 as restitution for the value of the work performed). See also
39 Restatement (Second) of Contracts section 371. Recovery based upon the reliance or restitution
40 interest that exceeds the expectancy interest of the aggrieved party should not be allowed when

1 the aggrieved party enters into a losing contract. See Restatement (Second) of Contracts section
2 349 comment a. If the party completely performs the contract and they are owed only money, the
3 Restatement (Second) of Contracts section 373(2) provides that restitution is not allowed, thus
4 the seller would be limited to the price.

5
6 3. **International Sales.** CISG recognizes the restitutionary interest when a contract is
7 avoided. Art. 81.

8
9 **SECTION 2-805. INCIDENTAL DAMAGES.** Incidental damages resulting from
10 breach of contract include compensation for any commercially reasonable charges, expenses, or
11 commissions incurred with respect to:

12 (1) inspection, receipt, transportation, care, and custody of identified goods which are the
13 subject of the contract;

14 (2) stopping delivery or shipment;

15 (3) effecting cover, return, or resale of the goods;

16 (4) reasonable efforts otherwise to minimize or avoid the consequences of breach; and

17 (5) otherwise dealing with the goods or effectuating other remedies after the breach.

18 **SOURCE: Article 2, Sections 2-715(1), 2-710.**

19 **Comment**

20 1. Section 2-805 combines former section 2-710 and former section 2-715(1) into one
21 section. However, the recovery of incidental damages under subsection (1) is not limited for an
22 aggrieved buyer to goods rightfully rejected. This limitation under former law had been
23 criticized as more restrictive than the common law rule and as encouraging rejection in the
24 marginal case. See also section 2-609(b).

25 2. An aggrieved party should be able to recover damages based on this section for
26 expenses that are incurred in dealing with the goods after a breach, in mitigation of the
27 consequence of the breach, or in exercising other remedies for the breach. The incurring of
28 charges or other expenses must be commercially reasonable to be recovered. Compensating an
29 aggrieved party for its incidental damages is part of placing the aggrieved party in the position it
30 would have been in if the contract had been fully performed. Section 2-803(a).

31
32 3. **International Sales.** CISG does not use the concept of incidental damages.

1 **SECTION 2-806. CONSEQUENTIAL DAMAGES.**

2 Consequential damages resulting from a breach of contract include compensation for:

3 (1) any loss, including loss to property other than the goods sold, resulting from
4 the aggrieved party's general or particular requirements and needs of which the party in breach at
5 the time of contracting had reason to know and which could not reasonably be prevented; and

6 (2) injury to [person] [an individual] proximately resulting from any breach of
7 warranty.

8 **SOURCE: Article 2, Section 2-715(2).**

9 **Comment**

10 1. Section 2-806 is derived from the provision governing buyer's consequential damages
11 in former section 2-715(2) with the following changes. First, the section has been rephrased to
12 govern both the seller and buyer as the aggrieved party. This change rejects the position under
13 former Article 2 that a seller should not be entitled to consequential damages for a buyer's breach
14 of contract. Second, damage to property other than the goods sold is governed by the
15 foreseeability test and mitigation principle in subsection (a)(1) and not the proximate cause test
16 of subsection (a)(2). The proximate cause test turns on whether it was reasonable for the person
17 to use the goods without an inspection that would have revealed the defect on which the breach
18 of warranty is based. If it was unreasonable to use the goods without such an inspection or the
19 defect was in fact discovered prior to use, the personal injury is not a proximate result of the
20 breach of warranty. Whether a person is entitled to enforce a breach of warranty which has
21 resulted in personal injury depends upon other provisions of this article. See Part 4 of this
22 article.

23 2. Compensating an aggrieved party for consequential loss is part of placing the
24 aggrieved party in the position it would have occupied but for the breach of contract. Section 2-
25 803(a). Assuming the contract does not contain an enforceable exclusion of consequential
26 damages (section 2-810), the aggrieved party must satisfy four conditions to recover:

27 (a) The loss must result from (be caused by) the breach. This cause-in-fact requirement is
28 common to all breach of contract claims, but may be more difficult to establish when the loss is
29 remote from the breach.

30 (b) The loss must result from general or particular requirements of the aggrieved party of
31 which the breaching party had reason to know at the time of contracting. This statement of the
32 foreseeability test rejects the tacit agreement test for recover of consequential damages. The party
33 in breach need not have consciously accepted this liability nor is liability limited to situations
34 where the party in breach fails to act in good faith. The aggrieved party's particular needs must

1 be made known to the party in breach but the general needs must rarely be made known to
2 charge the party in breach with knowledge.

3 (c) An otherwise foreseeable loss is not recoverable if it could have been reasonably
4 prevented by either the aggrieved or the breaching party. This limitation is a specific application
5 of the mitigation principle of section 2-803(b). Normally, the breaching party must establish that
6 the aggrieved party failed to mitigate. See section 2-803(b). In cases where both parties could
7 have avoided the loss by the same or similar acts and it is "equally reasonable" to expect the
8 breaching party to minimize damages, the breaching party is in no position to contend that the
9 aggrieved party failed to mitigate. See, e.g., *Nezperce Storage Co. v. Zenner*, 670 P.2d 871 (Id.
10 1983). Decisions about actions taken to mitigate harm must be made in good faith.

11 (d) The plaintiff must prove the loss with reasonable certainty. This limitation controls
12 loss in complex cases of remote or speculative damage, (e.g., loss of good will, new businesses).
13 This does not require the aggrieved party to demonstrate mathematical precision in the proof of
14 loss. Loss may be determined in any manner which is reasonable under the circumstances.

15 3. Some courts have used the Restatement (Second) of Contracts section 351(3) to limit
16 consequential damages if under the circumstances "justice so requires in order to avoid
17 disproportionate compensation. See *Perini Corp. v. Great Bay Hotel & Casino, Inc.*, 610 A.2d
18 364, 381-83 (N. J. 1992) (disproportion between loss suffered by aggrieved party and price
19 charged by breaching party); *International Ore & Fertilizer Corp. v. SGS Control Services, Inc.*,
20 743 F. Supp. 250 (S.D.N.Y. 1990) (same). The essence of the principle is that in some cases the
21 consequential damages sought may be significantly greater than the risk the party in breach
22 assumed under the contract. That principle may be appropriate to apply in some cases under this
23 article.

24
25 4. **International Sales.** Both buyer and seller can recover foreseeable consequential
26 damages. CISG Article 74.

27 **SECTION 2-807. SPECIFIC PERFORMANCE.**

28
29 (a) A court may enter a decree for specific performance if the goods or the agreed
30 performance of the party in breach of contract are unique or in other proper circumstances. In a
31 contract other than a consumer contract, a court may enter a decree for specific performance if
32 the parties have expressly agreed to that remedy. However, even if the parties expressly agree to
33 specific performance, a court shall not enter a decree for specific performance if the breaching
34 party's sole remaining contractual obligation is the payment of money.

35 (b) The decree for specific performance under this section may include terms and

1 conditions as to payment of the price, damages, or other relief the court considers just.

2 **SOURCE: Section 2A-521; Article 2, Section 2-716(1) & (2).**

3 **Comment**

4 1. Section 2-807 is derived from former section 2-716(1) & (2) but is no longer limited
5 to a buyer's remedy. Either party may obtain a decree for specific performance in an appropriate
6 case. Subsection (a) recognizes that unique goods or unique performance as well as other
7 circumstances that are not based upon uniqueness may be the basis for a specific performance
8 decree. Uniqueness should be determined in light of the total circumstances of the contract and
9 is not limited to goods identified when the contract is formed. Evidence of other circumstances
10 in which it might be appropriate to order specific performance include when a buyer is unable to
11 cover or when a seller has no other outlet for the goods.

12 2. This section recognizes that the parties may agree to specific performance. This
13 agreement to specific performance is symbolized by the "take and pay" contracts in the oil and
14 gas industry. The parties' agreement to specific performance could be enforced even if legal
15 remedies are entirely adequate. This enforceability of an agreement to specific performance has
16 been limited to commercial cases to avoid having a consumer buyer be forced to take and pay for
17 goods that the consumer may not want. The third sentence of subsection (a) prevents the
18 aggrieved party from getting specific performance if the party in breach is only obligated to pay
19 money. Thus in the case of accepted goods, the buyer who is obligated to pay the price, section
20 2-707, should not have that obligation enforced by an action for specific performance. The
21 seller's right to be paid in that case should be enforced through an action for the price. Section 2-
22 822.

23 3. Nothing in this section constrains the court's exercise of its equitable discretion in
24 deciding whether to enter a decree for specific performance or in determining the conditions or
25 terms of such a decree. This section assumes that the decree for specific performance will
26 condition the decree on full performance by the party who seeks the other party's specific
27 performance of its obligation. Thus, a seller seeking to enforce a "take and pay" term should be
28 required to tender goods that conform to the contract requirements.
29

30 4. **International Sales.** Specific performance is the preferred remedy for sellers and
31 buyers under the CISG. See Articles 46 and 62. Article 28 provides, however, that if under
32 CISG "one party is entitled to require performance of any obligation by the other party, a court is
33 not bound to enter a judgment for specific performance unless the court would do so under its
34 own law in respect of similar contracts of sale not governed by this Convention."
35

36 **SECTION 2-808. CANCELLATION; EFFECT.**

37 (a) An aggrieved party may cancel a contract if there is a breach of contract under Section

1 2-701, or in the case of an installment contract, a breach of the whole contract under Section 2-
2 710(c), unless there is a waiver of the breach or the right to cancel under Section 2-702 or there is
3 a right to cure the breach under Section 2-709.

4 (b) Cancellation is not effective until the canceling party notifies the party in breach of
5 the cancellation.

6 (c) Except as otherwise provided in subsection (d), upon cancellation of the contract all
7 obligations that are still executory on both sides are discharged.

8 (d) Unless the agreement otherwise provides, the obligations surviving cancellation of a
9 contract include:

10 (1) a right based on a previous breach or performance of the contract;

11 (2) a term establishing a choice of law or forum;

12 (3) a term creating an obligation to arbitrate or otherwise resolve disputes by
13 alternative dispute resolution procedures;

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

15 (5) a remedy for breach of the whole contract or any unperformed balance;

16 (6) any right, remedy, or obligation stated in the agreement as surviving
17 cancellation to the extent enforceable under other law; and

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

20 (e) Unless a contrary intention clearly appears, language of cancellation, rescission, or
21 avoidance of the contract or similar language shall not be construed as a renunciation or
22 discharge of any claim in damages for an antecedent breach of contract.

1 **SOURCE: Article 2, Sections 2-106(3) & (4), 2-720.**

2 **Comment**

3 1. Section 2-808 is an articulation of the cancellation remedy and consequences of
4 cancellation derived from former section 2-106(3) & (4). Both a buyer and a seller have a right to
5 cancel as a remedy for breach as under former Article 2. This section provides greater definition
6 to the exercise of cancellation as a remedy for breach of contract. Cancellation is defined in 2-
7 102 as a party ending a contract because of the other party's breach. Cancellation of a contract as
8 a remedy for breach generally affects only future performance of the contract and is not a
9 rescission of the contract. Performances accepted prior to cancellation need not be returned to
10 the other party as cancellation does not operate as a rescission of the contract.

11 2. Subsection (a) makes clear that the right to cancel depends upon a breach of contract.
12 The index of seller's remedies (Section 2-815) and the index of buyer's remedies (Section 2-823)
13 both list cancellation as a remedy for breach of contract. A party may not cancel the contract if
14 they have waived the breach or the right to cancel under section 2-702(a). A buyer may not
15 cancel the contract if the seller has a right to cure under section 2-709. A seller's right to cure
16 depends in part upon sending timely notice of the intent to cure to the buyer. If the buyer does
17 not receive notice of the seller's intent to offer a cure that satisfies section 2-709 within the
18 reasonable time for notice, the buyer may cancel the contract.

19 3. Subsection (b) is new and resolves a controversy under current law about whether an
20 aggrieved party needs to notify the other party of the cancellation. See the definition of notify in
21 section 1-201(26).

22 4. Subsection (c) continues the rule from former section 2-106(4) that upon cancellation,
23 all obligations that are executory on both sides are discharged. If the parties have already
24 rendered their performance so that obligations are not executory on both sides, then cancellation
25 is a meaningless remedy. Assume in a non-installment contract that the seller has delivered non-
26 conforming goods and the buyer has accepted those goods. The buyer cancels due to the non-
27 conformity of the goods. The buyer is still liable for the price under section 2-707(a) and has a
28 counterclaim for damages under section 2-827 unless buyer can revoke acceptance under section
29 2-708. The buyer's cancellation does not affect the buyer's obligation to pay for the goods nor
30 give the buyer the ability to return the goods to the seller outside of the revocation right. If the
31 seller has delivered a nonconforming installment of goods and the nonconforming installment
32 results in a breach of the whole contract, the buyer may cancel the contract. Section 2-710(c).
33 When the buyer cancels, the buyer can not return the accepted nonconforming installments to the
34 seller unless entitled to revoke acceptance, but has the right to obtain damages due to the
35 nonconformity of those past installments. The cancellation means that the seller need not deliver
36 any of the remaining installments but the seller is liable for breach of the whole contract.

37 5. Subsection (d) provides a nonexclusive list of other rights that survive cancellation.
38 Under former law, the rights that survived cancellation of the contract were rights based on a

1 prior breach or performance and rights for remedy of breach of the whole contract or an
2 unperformed balance. Subsection (d) continues those rules. In addition, courts have found that
3 other rights that survive cancellation are rights based upon a term in the agreement concerning
4 dispute resolution processes, a term concerning choice of law or choice of forum, and terms that
5 provide rights the parties specify should survive a cancellation. Those rights are reflected in the
6 list of rights in subsection (d). Of course, the parties are free to specify any rights created in the
7 contract survive cancellation of the contract. In addition, the court may find that a right must
8 survive cancellation even if the parties did not explicitly specify in order to achieve the purposes
9 of the parties.

10 6. Subsection (e) is the same as former section 2-720. A party's use of the term
11 cancellation or rescission should not result in an impairment or waiver of a right to a remedy for
12 breach of a contract that has occurred unless there is a clear statement that the canceling party
13 intends to so waive those rights.

14 7. **International Sales.** CISG's equivalent to "cancellation" is "avoidance" for a
15 fundamental breach of contract. See Art. 25, 49(1) and 64(1). The effects of a proper avoidance
16 are stated in Art. 81-84. In general, it is more difficult to avoid the contract under CISG than it is
17 to cancel under Article 2. Moreover, the seller's remedies of contract-market price damages or
18 resale and the buyer's remedies of contract-market price damages and "cover" depend upon
19 avoidance. Art. 75 and 76.

20 **SECTION 2-809. LIQUIDATION OF DAMAGES; DEPOSITS.**

21 (a) Damages for breach of contract by either party may be liquidated in the agreement but
22 only at an amount that is reasonable in the light of the difficulties of proof of loss in the event of
23 breach and either the actual loss or the then anticipated loss caused by the breach. If a term
24 liquidating damages is unenforceable under this subsection, the aggrieved party may pursue the
25 remedies provided in this article. A term that does not liquidate damages but attempts to limit
26 damages available to the aggrieved party must be evaluated under Section 2-810.

27 (b) If the seller justifiably withholds delivery of goods or stops performance because of
28 the buyer's breach of contract or insolvency, the buyer is entitled to restitution of any amount by
29 which the sum of payments exceeds the amount to which the seller is entitled under a term
30 liquidating damages in accordance with subsection (a).

1 (c) The buyer's right to restitution under subsection (b) is subject to set off to the extent
2 that the seller establishes a right to recover damages under the provisions of this article other than
3 subsection (a) and the amount or value of any benefits received by the buyer directly or indirectly
4 by reason of the contract.

5 (d) If the seller has received payment in goods, their reasonable value or the proceeds of
6 their resale are payments for the purposes of subsection (b). However, if the seller has notice of
7 the buyer's breach before reselling goods received in part performance, the resale is subject to the
8 requirements of Section 2-819.

9 **SOURCE: Article 2, Section 2-718.**

10 **Comments**

11 1. Section 2-809 continues the rules from former section 2-718 with several substantive
12 changes. First, in subsection (a) the tests of inconvenience or non-feasibility of obtaining an
13 adequate remedy have been eliminated. The enforceability of a liquidated damages clause is
14 determined by looking at the anticipated difficulties of proving loss and either the anticipated
15 loss or the actual loss. This continues the policy from former law that evaluates a liquidated
16 damages term in light of the circumstances of the case. A valid liquidated damages clause may
17 liquidate the amount of all damages, including consequential and incidental damages. If the
18 parties have not attempted to liquidate damages in light of these factors in this section, a term
19 limiting the amount of the damages would be tested under the section on limited remedies.
20 Section 2-810. Second, the provision from former law stating that an unreasonably large
21 liquidated damages clause is void as a penalty has been eliminated as unnecessary. If the
22 liquidated damages term is reasonable in light of the test of subsection (a), the term should be
23 enforceable and the penalty language of the former law is unnecessary. Similarly, if a liquidated
24 damages clause is unreasonably small under the test of subsection (a), it would be unenforceable.
25 Third, the third sentence of subsection (a) is new and states what was implicit in the former rule,
26 that if a liquidated damages clause is unenforceable, the remedies of the Article become available
27 to the aggrieved party.

28 2. Subsection (b) continues the rules from former section 2-718(2) allowing for
29 restitution of the payments the buyer has already made but expands the situations in which
30 restitution might be available to any situation where the seller stops performance on account of
31 the buyer's breach or insolvency. See sections 2-816(a) and 2-818. Only the buyer's payments
32 that are more than the amount of an enforceable liquidated damages term need be returned to the
33 buyer. The statutory liquidated damages provision found in prior law has been deleted as an

1 unwarranted penalty. If the buyer has made payment by virtue of a trade in or other goods
2 deposited with the seller, subsection (d) provides that the reasonable value of such goods or their
3 resale price should be used to determine what the buyer has paid, not the value the seller allowed
4 the buyer in the trade in. To assure that the seller obtains a reasonable price for the goods so
5 deposited, the seller must comply with the resale provisions of section 2-819 if the seller knows
6 of the buyer's breach before it has resold the goods deposited with the seller.

7 3. Subsection (c) continues the rule from former law without change. If there is no
8 enforceable liquidated damages clause, the buyer is entitled to restitution under subsection (b)
9 subject to a set off of the seller for any damages it is otherwise entitled to under this Article.

10 4. **International Sales.** There is no provision dealing with liquidated damages.
11 Restitution claims are permitted in certain cases of avoidance for fundamental breach. See CISG
12 Articles 81(2), 82 and 84.

13 **SECTION 2-810. CONTRACTUAL MODIFICATION OF REMEDY.**

14 (a) Subject to subsections (b) and (c) and Section 2-809, the following rules apply:

15 (1) An agreement may add to or substitute for the remedies available under this
16 article and may limit or alter the measure of damages recoverable [for breach of contract] [under
17 this Article] such as by limiting the buyer's remedies to return of the goods and repayment by the
18 seller of the price or to repair and replacement of nonconforming goods or parts by the seller.

19 (2) Resort to an agreed remedy under paragraph (1) is optional. However, if the
20 parties expressly agree that the agreed remedy is exclusive, it is the sole remedy.

21 (3) A remedial promise is an agreed remedy under this section. ~~An agreed remedy~~
22 ~~under this section may create a remedial promise.~~

23 (b) If circumstances cause an exclusive or limited remedy to fail of its essential purpose,
24 the following rules apply:

25 (1) In a contract other than a consumer contract, the aggrieved party may pursue
26 all remedies available under this article. However, an agreement expressly providing that
27 consequential damages, including those resulting from the failure to provide the exclusive or
28
29

1 limited remedy, are excluded is enforceable to the extent permitted under subsection (c).

2 (2) In a consumer contract, an aggrieved party may reject the goods or revoke
3 acceptance and, [to the extent of the failure], may pursue all remedies available under this article
4 including the right to recover consequential damages, despite any term purporting to exclude or
5 limit that remedy.

6 (c) Subject to subsection (b), consequential damages may be limited or excluded by
7 agreement unless the operation of the limitation or exclusion is unconscionable. Limitation of
8 consequential damages for injury to the person in the case of a consumer contract is presumed to
9 be unconscionable [but limitation of damages where the loss is commercial is not].

10 **SOURCE: Article 2, Section 2-719.**

11 **Comment**

12 1. Section 2-810 continues the rules from former section 2-719. Subsection (a) allows
13 parties to shape their remedies to their particular requirements and reasonable agreements
14 limiting or modifying those remedies are given effect. However, it is of the very essence of a
15 sales contract that at least minimum adequate remedies be available. If the parties intend to
16 conclude a contract for sale within this Article they must accept the legal consequence that there
17 be at least a fair quantum of remedy for breach of the obligations or duties outlined in the
18 contract. Thus any clause purporting to modify or limit the remedial provisions in an
19 unconscionable manner so as to deny a party an adequate minimum remedy is subject to deletion
20 and in that event the remedies made available by this Article are applicable as if the stricken
21 clause had never existed. Subsection (a) presumes that remedy terms in an agreement are
22 intended to be cumulative and if the parties intend the remedy term to be an exclusive, that
23 intention must be clearly expressed. Subsection (a) also provides that a limited or exclusive
24 remedy may create a remedial promise that is an enforceable obligation separate from the
25 warranty obligation under Part 4 of this Article.

26 2. Subsection (b) is based upon the principle that a fair and reasonable term in a contract
27 may because of circumstances fail in its purpose or operate under the circumstances to deprive a
28 party of the substantial value of its bargain. If that happens, the aggrieved party should be able to
29 resort to remedies under this Article. Subsection (b) addresses the troublesome issue of what to
30 do with a consequential damage excluder in the event the exclusive agreed remedy fails to
31 achieve its purpose. This issue is frequently litigated. In these cases, the seller, either directly or
32 through a dealer, obtains an agreement with the buyer that may: (1) Make a limited express

1 warranty, (2) Exclude or limit implied warranties, (3) Promise, on breach of express warranty, to
2 repair, replace parts or otherwise cure the breach for a stated period of time, and (4) Exclude
3 liability for consequential damages. These clauses, typically, are well drafted and are stated to be
4 "exclusive." The test adopted in subsection (b) provides clear results in both commercial cases
5 and consumer cases without resorting to complicated factual analysis that has been used by some
6 courts to determine the enforceability of the consequential damage excluder in these types of
7 cases. Thus in a commercial contract, the parties may expressly provide that the consequential
8 damage excluder will be enforced even if the exclusive or limited remedy has failed in its
9 essential purpose. In that case, the consequential damages are excluded by the agreement as long
10 as the excluder is enforceable under subsection (c). In a consumer contract, the consequential
11 damage excluder is unenforceable no matter what a term of the contract may provide in the event
12 the exclusive or limited remedy fails in its essential purpose. This dichotomy between the
13 commercial and consumer contracts in regard to the enforcement of the consequential damage
14 excluder in this circumstance follows the majority of the cases approach to this problem.

15 3. Subsection (c) recognizes the validity of clauses limiting or excluding consequential
16 damages but makes it clear that they may not operate in an unconscionable manner. This
17 principle is made subject to subsection (b) in recognition that a consequential damage excluder
18 that is conscionable under subsection (c) may be unenforceable under the rule of subsection (b).
19 In a consumer contract (defined in 2-102), a seller may not exclude consequential damages for
20 personal injury as such an exclusion is presumed to be unconscionable. This continues the policy
21 of former law that a seller who sells goods to a consumer should be liable for that personal injury
22 harm under this article if the seller has given a warranty which has been breached proximately
23 resulting in personal injury. Section 2-806(2). A seller may, however, choose to disclaim a
24 warranty for the quality of the goods without violating this section. Section 2-406.
25

26 4. **International Sales.** CISG provides that the parties may derogate from or vary the
27 effect of any of its provisions. Art. 6. Presumably this applies to the provisions on remedies for
28 breach and damages.

29 **SECTION 2-811. REMEDIES FOR MISREPRESENTATION OR FRAUD.**

30 Remedies for material misrepresentation or fraud include all remedies available under this article
31 for nonfraudulent breach of contract. Rescission or a claim for rescission of a contract for sale or
32 rejection or return of the goods does not bar and is not inconsistent with a claim for damages or
33 other remedy.

34 **SOURCE: Article 2, Section 2-721.**

35 **Comment**

1 1. This section is the same as former section 2-721. This section continues the policy that
2 the remedies for material misrepresentation or fraud should be construed in light of the policy of
3 this Article that remedies are designed to place the aggrieved party in the position that it would
4 have been in if the contract had been performed. Thus a party who claims fraud but affirms the
5 contract should be entitled to damages based upon its expectation interest. Similarly, a party
6 claiming to rescind the contract and seeking to return the goods to the seller should also be able
7 to enforce its remedies under this article in light of that same principle of compensation of its
8 expectancy interest. Section 2-803. Rejection and revocation of an acceptance are not a
9 rescission of the contract and do not result in a cancellation of a contract. Cancellation is an
10 additional remedy for breach of contract. Sections 2-815 and 2-823.

11
12 2. **International Sales.** The Convention uses the concept of “avoidance for fundamental
13 breach” which functions in effect as a cancellation and not a rescission of the contract as it does
14 not alter the ability to recover for damages. Art. 25, Art. 26, Art. 70, Art. 81.

15
16 **SECTION 2-812. PROOF OF MARKET PRICE.**

17 (a) If evidence of a price prevailing at a time or place described in this article is not
18 readily available, the following rules apply:

19 (1) The price prevailing within any reasonable time before or after the time
20 described may be used.

21 (2) The price prevailing at any other place that in commercial judgment or usage
22 of trade is a reasonable substitute for the one described may be used, making proper allowance
23 for any cost of transporting the goods to or from the other place.

24 (3) Evidence of a relevant price prevailing at a time or place other than one
25 described in this Article offered by one party is not admissible unless the party has given the
26 other party notice that the court finds sufficient to prevent unfair surprise.

27 (b) If the prevailing price or value of any goods regularly bought and sold in any
28 established commodity market is in dispute, reports in official publications or trade journals or in
29 newspapers, periodicals, or other means of communication in general circulation and published
30 as the reports of that market are admissible in evidence. The circumstances of the preparation of

1 such a report may affect the weight of the evidence but not its admissibility.

2 **SOURCE: Article 2, Sections 2-723, 2-724.**

3 **Comments**

4 1. Section 2-812 restates the rules from former section 2-723(2) & (3) and former section
5 2-724.

6
7 2. Subsection (a) provides guidance on where and when to measure market price. The
8 court may allow a party to submit other times and places to measure market price if that is
9 reasonable in the circumstances of the case subject to protection of the other party from unfair
10 surprise.

11 3. Subsection (b) allows reports of market prices to be admissible while providing
12 flexibility for a determination of the weight of the evidence offered. An “established market
13 under this section requires a market where transactions in the commodity are frequent and open
14 enough to make a market established by usage in which one price can be expected to affect
15 another and in which an informed report of the range and trend of prices can be assumed to be
16 reasonably accurate. This section is not meant to prevent admission of other types of relevant
17 evidence on market price under any other rule of evidence.

18
19
20 4. **International Sales.** CISG Article 76 addresses measurement of the current price in a
21 similar manner.

22 **SECTION 2-813. LIABILITY OF THIRD PERSONS FOR INJURY TO GOODS.**

23 If a third person deals with goods identified to a contract for sale and causes actionable injury to
24 the goods, the parties to the contract have the following rights and remedies:

25 (1) A party with title to, or a security interest, special property interest, or insurable
26 interest in, the goods has a right of action against the third person.

27 (2) If the goods have been destroyed or converted, the party that had the risk of loss under
28 the contract for sale, or since the injury has assumed that risk as against the other party, also has
29 a right of action against the third person.

30 (3) If at the time of the injury the plaintiff does not have the risk of loss as against the

1 other party to the contract for sale and there is no arrangement between them for disposition of
2 the recovery, the plaintiff's right of action or settlement is, subject to the plaintiff's interest, as a
3 fiduciary for the other party to the contract.

4 (4) Either party, with the consent of the other, may maintain an action for the benefit of a
5 concerned party.

6 **SOURCE: Article 2, Section 2-722.**

7 **Comment**

8 1. Section 2-813 continues the rules of former section 2-722 with no substantive change.
9 This provision is a procedural rule that details who has standing to pursue an action for damages
10 for harm to the goods. The injury to the goods is usually actionable under law other than Article
11 2. This section concerns who has a right of action for injury to the goods after identification of
12 the goods to the contract, section 2-502, as before that time, the seller will have the right of
13 action for such injury. During the period after identification of the goods to the contract and
14 before the buyer has finally accepted the goods, both parties may have a right of action against
15 third persons for harm to the goods. A seller may have a right of action even after the buyer's
16 acceptance due to the seller retaining an interest in the goods. See section 2-501.

17
18 2. **International Sales.** CISG does not contain a comparable provision.

19 **SECTION 2-814. STATUTE OF LIMITATIONS.**

20 (a) An action for breach of a contract or other obligation under this article must be
21 commenced within the later of four years after the right of action has accrued under subsection
22 (b) or (c) or one year after the breach was or should have been discovered, but no longer than five
23 years after the right of action accrued. The original agreement may reduce the period of
24 limitation to not less than one year, except that in a consumer contract, the period of limitation
25 may not be reduced.

26 (b) Except as otherwise provided in subsection (c), the follow rules apply:

27 (1) Except as otherwise provided in this subsection, a right of action accrues for

1 breach of contract when the breach occurs, even if the aggrieved party did not have knowledge of
2 the breach.

3 (2) For breach of a contract by repudiation under section 2-712, a right of action
4 accrues at the earlier of when the aggrieved party elects to treat the repudiation as a breach of
5 contract or when a commercially reasonable time for awaiting performance has expired.

6 (3) For breach of a remedial promise, a right of action accrues [when the remedial
7 promise is not performed when due] [when the seller fails to perform its remedial promise].

8 (4) In an action by a buyer against a person who is answerable over to the buyer
9 for a claim asserted against the buyer, the buyer's right of action against the person answerable
10 over accrues at the time the claim was originally asserted against the buyer.

11 (c) If a breach of warranty is claimed, the definitions in section 2-401 and the following
12 rules apply:

13 (1) Except as otherwise provided in paragraph (4), a right of action accrues for
14 breach of a warranty that arises under sections 2-403, 2-404, 2-405 or 2-409 when a seller has
15 ~~completed~~ tendered delivery of nonconforming goods to the immediate buyer [and has
16 completed performance of any agreed installation or assembly of the goods necessary to
17 determine conformity of the goods.]

18 (2) Except as otherwise provided in paragraph (4), a right of action accrues for a
19 breach of an express warranty obligation arising under section 2-408 when the new goods or
20 goods sold as new goods are received by the remote buyer.

21 (3) For a breach of the warranty arising under section 2-402, a right of action
22 accrues when the aggrieved party discovers or should have discovered the breach.

1 (4) If the seller has made an express representation about the performance or
2 quality of the goods which extends to the performance or quality of the goods after delivery and
3 that representation creates a warranty under section 2-403 or a warranty obligation under section
4 2-408, a right of action accrues when the buyer discovers or should have discovered that the
5 goods failed to conform to that representation.

6 (d) If an action for breach of contract or other obligation commenced within the
7 applicable time limitation is terminated but a remedy by another action for the same breach is
8 available, the other action may be commenced after the expiration of the time limitation and
9 within six months after the termination of the first action unless the termination resulted from
10 voluntary discontinuance or from dismissal for failure [or neglect] to prosecute.

11 (e) This section does not alter the law on tolling of a statute of limitations and does not
12 apply to a right of action that accrued before the effective date of this article.

13 **SOURCE: Article 2, Section 2-725.**

14 **Comments**

15 1. Section 2-814 continues the rules from former section 2-725 with several changes.

16 2. Subsection (a) continues the 4 year limitation period but provides for a possible one
17 year extension to accommodate a discovery of the breach late in the four year period after
18 accrual. The four year period under this article is shorter than many other statute of limitations
19 for breach of contract and provides a period which is appropriate given the nature of the contracts
20 under this article and modern business practices. This four year period governs all obligations
21 under this article even if not technically part of a contract for sale of the goods, such as the
22 obligations created under section 2-408. As under prior law, the period of limitations can be
23 reduced to one year by an agreement in a commercial contract. That reduction of the period for
24 suit allows commercial parties to control the time for suit but is not appropriate in the context of
25 consumer contracts where such a reduction is less likely to be a product of an explicitly
26 bargained for exchange. The rule from former law that the parties could not extend the
27 limitations period has been eliminated as not effective to prevent the limitations period from
28 being waived or tolled by agreement.

1 3. Subsections (b) and (c) provide rules for accrual of various types of actions that this
2 Article allows. Certainty of commercial relationships is advanced when the rules for when a
3 cause of action can be brought are clearly set forth. Subsection (b) treats accrual rules for actions
4 other than for breach of a warranty claims while subsection (c) treats the accrual rules for the
5 various types of warranty claims that can be asserted pursuant to the provisions of Part 4 of this
6 Article.

7 Subsection (b)(1) states the general rule from prior law that a right of action for breach of
8 contract accrues when the breach occurs without regard to the aggrieved party's knowledge of
9 the breach. This general rule is then subject to the three more explicit rules in subsection (b) and
10 the rules for breach of warranty stated in subsection (c).

11 Subsection (b)(2) provides an explicit rule about repudiation cases. In a repudiation, the
12 aggrieved party may await performance for a commercially reasonable time or resort to any
13 remedy for breach. Section 2-712. The accrual rule for breach of contract in a repudiation case
14 is keyed to the earlier of those two time periods.

15 Subsection (b)(3) addresses the accrual of a cause of action for breach of a remedial
16 promise. Section 2-102. If a seller has promised to take remedial action with respect to the
17 goods, the cause of action accrues whenever the promised action is not taken. This addresses the
18 problem in the cases where the courts have mistakenly held that a cause of action for failure to
19 follow through on a promised remedy accrues when the warranty concerning the quality of goods
20 is breached. The warranty and the remedial promise represent two separate obligations, each with
21 their own accrual rule for breach of those obligations.

22
23 Subsection (b)(4) addresses the problem that has arisen in the cases when an intermediary
24 party is sued for a breach of obligation for which its seller or another person is answerable over,
25 but the limitations period in the upstream lawsuit has already expired. This subsection allows a
26 party four years, or if reduced in the agreement, not less than one year, from when the claim is
27 asserted against the buyer for the buyer to sue the person who is answerable over to the buyer.
28 Whether a party is in fact answerable over to the buyer is not addressed in this section.

29
30 4. Subsection (c) addresses the accrual rules for breach of warranty or warranty
31 obligations that arise based upon the provisions of Part 4 of this article. The accrual rules should
32 be read in light of the definitions of terms in Part 4. Subsection (c)(1) continues the general rule
33 that an action for breach of warranty accrues in the case of an express or implied warranty upon
34 completion of tender of delivery of nonconforming goods to the immediate buyer and upon the
35 completion of any agreed assembly or installation necessary to determine whether the goods
36 conform to the warranty. This accrual rule governs even when that warranty is extended to
37 persons other than the immediate buyer under section 2-409. A cause of action of a person to
38 whom a warranty is extended under section 2-409 is governed by the same time limit as the
39 immediate buyer's cause of action.

40 Subsection (c)(2) addresses the accrual of the cause of action for breach of a warranty

1 obligation to a remote buyer that is governed by section 2-408. It that case, the cause of action
2 accrues when the remote buyer receives the new goods or the goods sold as new goods. That
3 time period governs even if that warranty is extended to other persons under section 2-408. This
4 accrual rule balances the rights of the remote buyer to be able to have a cause of action based
5 upon the warranty obligation the seller has created against the rights of the seller to have some
6 limit on the length of time the seller is liable.

7 Both of these accrual rules are subject to an exception for express representations about
8 the performance or quality of the goods after delivery in subsection (c)(4). If the seller makes an
9 express representation such as “these goods will be defect free for five years, the seller is
10 warranting that for five years the goods will not have defects. If anytime within that five years,
11 the goods have or develop a defect, the cause of action accrues when the buyer discovers or
12 should have discovered the defect. In order to take advantage of this accrual rule, the
13 representation must be express as to the future performance of the goods rather than an implied
14 representation about the future performance of the goods. Representations that are tied to time
15 periods or dates in the future would certainly qualify as express representations about future
16 performance but are not necessary in order to qualify as an express representation about future
17 performance.

18 Subsection (c)(3) allows a cause of action to accrue upon discovery of the breach of
19 warranty of title or against infringement when the aggrieved party discovers or should have
20 discovered the breach. In a typical case, the aggrieved party will not discover the breach of
21 warranty until it is sued by a party asserting title to the goods or an infringement which could be
22 many years after the buyer acquired the goods. This accrual rule allows the aggrieved party
23 appropriate leeway to then bring a claim against the person who made the warranty of title or the
24 warranty against infringement.

25 5. Subsection (d) continues the rule from former Article 2 to allow a short period for
26 bringing an action where suits begun within the statute of limitations are terminated and the
27 aggrieved party still has a remedy for breach.

28 6. Subsection (e) does not prescribe any rules for tolling the running of the statute of
29 limitations. If the seller has a right to cure a nonconforming tender of delivery under section 2-
30 709, the time in which the seller is effecting a cure may be an appropriate time period for tolling
31 the running of the statute of limitations in order to not prejudice the buyer’s rights.
32

33 7. **International Sales.** CISG does not contain a comparable provision. [Reference to
34 and brief discussion of the Convention on Limitations for international sales.]
35

36 [B. SELLER'S REMEDIES]

37 SECTION 2-815. SELLER'S REMEDIES IN GENERAL.

38 (a) If a buyer is in breach of the contract under Section 2-701, or in breach of the whole

1 contract under Section 2-710(c), the seller may:

2 (1) withhold delivery of the goods under Section 2-816(a);

3 (2) stop delivery of the goods under Section 2-818(b);

4 (3) proceed with respect to goods still unidentified to the contract or unfinished
5 under Section 2-817;

6 (4) reclaim the goods under Section 2-816(b)(2);

7 (5) obtain specific performance under Section 2-807 or recover the price under
8 Section 2-822;

9 (6) resell the goods and recover damages under Section 2-819;

10 (7) recover damages for repudiation or nonacceptance under Section 2-821;

11 (8) recover incidental and consequential damages under Sections 2-805 and
12 2-806;

13 (9) cancel the contract under Section 2-808;

14 (10) recover liquidated damages under Section 2-809;

15 (11) enforce limited remedies under Section 2-810; or

16 (12) recover damages under Section 2-804.

17 (b) If a buyer becomes insolvent [but is not in breach], the seller may:

18 (1) withhold or stop delivery of the goods under Section 2-818; or

19 (2) reclaim the goods under Section 2-816(b)(1).

20 **SOURCE: Article 2, Section 2-703.**

21 **Comment**

22 1. Section 2-815 is derived from former section 2-703 and indexes the remedies the seller
23 may pursue subject to the principles stated in Subpart A of this Part 8 and subject to the

1 requirements of the individual sections in Subpart B. The seller's ability to exercise its remedies
2 depends upon whether the buyer has breached the contract. In an installment contract, the breach
3 must be of the whole contract in order for the seller to exercise its remedies. The remedies
4 available to the seller upon the buyer's insolvency are listed in this section and are fairly limited
5 to withholding delivery, stopping delivery and reclamation in a credit sale. Not all of the
6 remedies listed are available to the seller in every case but depend upon application of the
7 principles of full compensation to the aggrieved party developed in Subpart A, notably section 2-
8 803. Whether the buyer has breached the contract is determined under section 2-701 and section
9 2-710(c).

10
11 2. **International Sales.** Compare CISG Article 61.

12 **SECTION 2-816. SELLER'S RIGHT TO WITHHOLD DELIVERY OF GOODS**
13 **OR TO RECLAIM GOODS AFTER DELIVERY TO BUYER.**

14 (a) If the buyer is in breach of contract under Section 2-701, the seller may withhold
15 delivery of the goods directly affected. In an installment contract, if the breach is of the whole
16 contract under Section 2-710(c), the seller may withhold delivery of any undelivered balance.

17 (b) Under this article, the seller may reclaim goods delivered to the buyer under a contract
18 for sale only in the following circumstances:

19 (1) A seller that discovers that the buyer has received goods on credit while
20 insolvent may reclaim the goods upon a demand made within a reasonable time after the buyer's
21 receipt of the goods.

22 (2) If payment is due and demanded on delivery to the buyer, the seller may
23 reclaim the goods delivered upon a demand made within a reasonable time after the seller
24 discovers or should have discovered that payment was not made.

25 (c) Reclamation under subsection (b) is subject to the rights under this article of a buyer
26 in ordinary course of business or other good-faith purchaser for value that vest before the seller
27 takes possession under a timely demand for reclamation. Successful reclamation of the goods

1 under subsection (b)(1) precludes all other remedies with respect to them.

2 **SOURCE: Article 2, Sections 2-507(2), 2-702, 2-703(a).**

3 **Comment**

4 1. This section is derived from former sections 2-507(2), 2-702 and 2-703(a) with several
5 substantive changes.

6 2. Subsection (a) is a statement of the principle in former section 2-703(a). Section 2-
7 701 provides different means by which a buyer may breach a contract. The seller need not
8 continue on with delivery of the goods if the buyer has breached. Section 2-701. In an
9 installment contract, however, the breach must be of a magnitude to be a breach of the whole
10 contract under section 2-710(c) before the seller can withhold its future performance. Under
11 principles of nemo dat, the buyer's creditors can assert no greater rights to the goods than the
12 buyer could assert and thus the buyer's creditors are subject to the seller's right to withhold the
13 goods under this section. Section 2-504(a).

14 3. Subsection (b) provides for the seller's ability to reclaim goods that have been
15 delivered to a buyer. This right to reclamation exists in a credit sale if the delivery is made when
16 the buyer is insolvent. The basis of this right is the assumption that a buyer who receives goods
17 on credit is making a tacit representation of solvency and receipt when insolvent is fraudulent
18 against the seller. This section has been changed from prior law to eliminate artificial barriers to
19 the seller's right to reclaim in a credit sale. In a cash sale, the buyer may tender a payment that
20 later fails, such as a bounced check. In that case, subsection (b)(2) governs the seller's right to
21 reclaim. This rule codifies the result in PEB Commentary 1. A seller should note, however, that
22 if the buyer enters bankruptcy, compliance with this section and with 11 U.S.C. § 546(c) is
23 necessary in order to have the reclamation claim recognized in bankruptcy. If the seller does not
24 have the right to reclaim under this section, the seller's rights to recover the goods delivered to
25 the buyer depend upon the seller's compliance with Article 9 in obtaining a security interest in
26 the goods.

27 4. Subsection (c) addresses the priority of the seller's right to reclaim under subsection
28 (b) against other person's claims to the goods. In order for the seller's reclamation right to
29 triumph over the rights of a buyer in the ordinary course of business or a good faith purchaser for
30 value, the seller must actually take possession of the goods back from the buyer pursuant to a
31 demand for reclamation that is timely under subsection (b) before the rights of the other persons
32 vest. Vesting means when a person has fulfilled all necessary conditions to becoming a buyer in
33 the ordinary course, section 1-201(9), or becoming a good faith purchaser for value, section 1-
34 201(32). For example, assume a buyer's secured party's security interest attaches to the goods
35 pursuant to an after acquired property clause under Article 9. That attachment of the security
36 interest would be the vesting of the secured party's rights in the goods. Unless the secured party
37 has not acted in good faith, the secured party's right as a good faith purchaser for value will
38 triumph over the seller who seeks to reclaim as the attachment of the security interest will be

1 prior in time to the seller's repossession of the goods under the timely reclamation demand.

2 **The second sentence of subsection (c) precludes the exercise of other remedies if the**
3 **seller successfully reclaims the goods in a credit sale where the right to reclaim is**
4 **predicated on the buyer's insolvency. The preclusive effect of the credit sale reclamation**
5 **upon insolvency is based upon the concept that a buyer who receives goods on credit while**
6 **insolvent has engaged in fraud. The seller who elects to reclaim is electing a rescission**
7 **remedy for fraud which the older cases held was inconsistent with the right to get damages**
8 **for breach of contract. Query whether this distinction should be maintained given the**
9 **Code's general disdain for election of remedies doctrine and the fact that in many instances**
10 **a buyer will both be insolvent (giving rise to the right to reclaim) and may have breached**
11 **the contract as well. This election of remedies idea has not been applied in the cash seller**
12 **reclamation situation, see Burk v. Emmick, 637 F.2d 1172 (8th Cir. 1980). If the buyer is**
13 **insolvent and has otherwise breached the contract, should reclamation preclude other**
14 **remedies for breach? If the fear is the reclamation creates a secret lien on behalf of the**
15 **seller, it is unclear how precluding the seller from obtaining breach of contract damages if**
16 **the seller reclaims makes the lien any less secret.**

17 5. The right to reclaim extends only to the goods involved and does not extend to any
18 proceeds of the goods.

19 6. **International Sales.** Under the CISG, a seller who avoids a contract for fundamental
20 breach can reclaim delivered goods from the buyer. Although goods delivered either for cash or
21 on credit can be reclaimed, there are no express limitations on the time or method of reclamation.
22 See Art. 64(1), 81(2), and 84(2).
23

24 **SECTION 2-817. SELLER'S RIGHT TO IDENTIFY GOODS TO CONTRACT**
25 **DESPITE BREACH OR TO SALVAGE UNFINISHED GOODS.**

26 (a) If the buyer has breached the contract, an aggrieved seller may:

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

29 (2) resell goods that are shown to have been intended for the particular contract,
30 even if those goods are unfinished.

31 (b) If goods are unfinished at the time of breach of contract, an aggrieved seller, in the
32 exercise of reasonable commercial judgment for the purposes of minimizing loss and of

1 effective realization, may complete the manufacture and wholly identify the goods to the
2 contract, cease manufacture and resell for scrap or salvage value, or proceed in any other
3 reasonable manner.

4 **SOURCE: Article 2, Section 2-704.**

5 **Comment**

6 1. Section 2-817 follows former section 2-704 without substantive change.

7 2. Subsection (a) allows a seller to identify goods to the contract that have not already
8 been identified in order to allow the seller to resell the goods under section 2-819 or to obtain the
9 price in the appropriate case when resale is not practicable under section 2-822. Subsection (b)
10 allows the seller to take action as to unfinished goods in order to minimize loss. The burden is on
11 the buyer to demonstrate that any action taken to finish the goods is commercially unreasonable.

12
13 3. The seller's exercise of these options is of course subject to the principles stated in
14 Subpart A, including the mitigation obligation stated in section 2-803, and the obligation of good
15 faith. The reasonableness of the seller's actions under this section should be judged in light of
16 the circumstances available to the seller at the time the seller acted and not evaluated with
17 hindsight.

18
19 4. **International Sales.** CISG has no comparable provision.

20
21 **SECTION 2-818. SELLER'S REFUSAL TO DELIVER BECAUSE OF BUYER'S**
22 **INSOLVENCY; STOPPAGE IN TRANSIT OR OTHERWISE.**

23 (a) A seller that discovers that the buyer is insolvent may refuse to make delivery except
24 for cash, including payment for all goods previously delivered under the contract.

25 (b) Subject to subsection (d), the seller may stop delivery of goods in the possession of a
26 carrier or other bailee if the buyer is insolvent or repudiates or fails to make a payment due
27 before delivery or if, for any other reason, the seller has a right to withhold or reclaim the goods.

28 (c) As against a buyer under subsection (b), the seller may stop delivery until:

29 (1) receipt of the goods by the buyer;

1 (2) acknowledgment to the buyer by any bailee of the goods, other than a carrier,
2 that the bailee holds the goods for the buyer;

3 (3) acknowledgment to the buyer by a carrier by reshipment or as warehouseman
4 that the carrier holds the goods for the buyer; or

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

7 (d) If notice to stop delivery has been given, the following rules apply:

8 (1) The notice must afford the carrier or bailee a reasonable opportunity to prevent
9 delivery of the goods.

10 (2) After notification, the carrier or bailee shall hold and deliver the goods
11 according to the directions of the seller. The seller is liable to the bailee or carrier for any
12 resulting charges or damages. A carrier or bailee need not stop delivery if the seller does not
13 provide indemnity for charges or damages upon demand of the carrier or bailee.

14 (3) If a negotiable document of title has been issued for goods, the carrier or
15 bailee need not obey a notice to stop until surrender of the document.

16 (4) A carrier or bailee that has issued a nonnegotiable document of title need not
17 obey a notice to stop received from a person other than the person named in the document as the
18 person from which the goods have been received for shipment or storage.

19 **SOURCE: Article 2, Sections 2-702(1) & 2-705.**

20 **Comment**

21 1. Section 2-818 restates the rules from former sections 2-702(1) and 2-705.

22 2. Subsection (a) allows a seller to withhold delivery except for cash for that delivery
23 and all previous deliveries upon discovering the buyer's insolvency.

1 3. Subsection (b) allows a seller to stop delivery when the buyer is insolvent, the buyer
2 has breached the contract, or the seller otherwise has a right to stop performance such as in the
3 case of insecurity, see section 2-711. Where a stoppage occurs for insecurity under section 2-
4 711, if the assurances are forthcoming, delivery must be resumed. If the seller has no right to
5 stop delivery, the seller's actions may be a breach of contract if it results in an interference with
6 the buyer's right to a tender of delivery of the goods. Section 2-701, section 2-602. A bailee or a
7 carrier who obeys an unjustified stop order may have liability to the buyer under Article 7 for
8 which the bailee or carrier may demand indemnity against the seller under subsection (d)(2).
9 After an effective stoppage of delivery, the seller's rights in the goods are the same as if the seller
10 had never made a delivery.

11 The right to stop delivery is no longer limited to when the buyer has a right to stop an
12 entire "carload, truckload, planeload or larger shipments of express or freight. This language is
13 out of date in light of changing shipping methods and practices which now allows individual
14 tracking of goods in shipment. The carrier or bailee is protected from harm by the on demand
15 indemnity provision added to subsection (d)(2). The right to stop delivery under subsection (b)
16 is subject to the rules under subsection (d).

17 The buyer's receipt of goods under subsection (b)(1) includes receipt by a subpurchaser
18 when the seller makes shipment directly to the subpurchaser.

19 4. Subsection (c) restates the rules from former section 2-705(2) on when the seller has
20 the right to stop the goods as against a buyer in terms of when it is too late for the seller to
21 effectively exercise its rights under subsection (b). Under subsection (c)(3), as under former law,
22 a diversion of shipment which is merely an incident to the original contract of transportation or a
23 change in name of the person named in the document is not a reshipment. Acknowledgment by
24 a carrier as warehouseman requires a contract different from the original shipment whereby the
25 carrier does not merely extend the transit but undertakes to store the goods.

26 5. Subsection (d) is concerned with the rights of the carrier or bailee to whom the seller
27 is communicating its right to stop delivery as against the buyer and seeks to provide reasonable
28 rules for the protection of the carrier or bailee.

29 6. As with the right to withhold delivery under section 2-816(a), the buyer's creditors are
30 subject to the seller's rights under this section to withhold or stop delivery. Section 2-504(a).

31
32 7. **International Sales.** CISG Article 71(1) states when a party may suspend
33 performance of obligations and Article 71(2) carries that right over to cases where the goods
34 have been "dispatched." These provisions have little detail. Article 71(2) provides that delivery
35 can be suspended even if the buyer has a document entitling the buyer to obtain the goods. The
36 Article 2 rule in subsection (c)(3) is to the contrary. Article 71(3), however, requires the party
37 suspending performance to give immediate notice of suspension to the other and to continue
38 performance if the other provides adequate assurance of his performance. These latter
39 requirements are not found in Article 2.

1 **SECTION 2-819. SELLER'S RESALE.**

2 (a) If the buyer has breached a contract, the seller may resell the goods concerned that are
3 in the seller's possession or control. If the resale is made in good faith, within a commercially
4 reasonable time, and in a commercially reasonable manner, the seller may recover the contract
5 price less the resale price together with any consequential and incidental damages, less expenses
6 avoided as a result of the breach.

7 (b) A resale:

8 (1) may be at a public auction or private sale including a private auction, a sale by
9 one or more contracts to sell, or by identification to an existing contract of the seller;

10 (2) may be as a unit or in parcels and at any time and place and on any terms, but
11 every aspect of the sale, including the method, manner, time, place, and terms, must be
12 commercially reasonable; and

13 (3) must be reasonably identified as referring to the breached contract, but the
14 goods need not be in existence or have been identified to the contract before the breach.

15 (c) If the resale is at a public auction, the following rules apply:

16 (1) Only identified goods may be sold unless there is a recognized market for the
17 public sale of futures in goods of the kind.

18 (2) The resale must be made at a usual place or market for public sale if one is
19 reasonably available. Except in the case of goods that are perishable or that threaten to decline in
20 value speedily, the seller shall give the buyer reasonable notice of the time and place of the
21 resale.

22 (3) If the goods are not to be within the view of persons attending the sale, the

1 notice of sale must state the place where the goods are located and provide for their reasonable
2 inspection by prospective bidders.

3 (4) The seller may buy the goods.

4 (d) A good-faith purchaser at a resale takes the goods free of any rights of the original
5 buyer, even if the seller fails to comply with this section.

6 (e) The seller is not accountable to the buyer for any profit made on a resale. However, a
7 person in the position of a seller or a buyer which has rightfully rejected or justifiably revoked
8 acceptance shall account for any excess over the amount of the claim secured by the security
9 interest provided in Section 2-829(b).

10 [(f) A seller that fails to resell in the manner required under this section is not barred from
11 any other available remedy.]

12 **SOURCE: Article 2, Section 2-706.**

13 **Comments**

14 1. Section 2-819 is based on former section 2-706.

15 2. Subsection (a) allows the seller to resell the goods after a buyer's breach of contract if
16 the seller has possession or control of the goods. See section 2-701 on buyer's breach of contract.
17 The seller may have possession or control of the goods at the time of the breach or may have
18 regained possession of the goods under section 2-716(b)(2). If the seller has regained possession
19 of the goods pursuant to its rights under Article 9 after delivery to the buyer, Article 9 controls
20 the seller's rights of resale. If the seller resells the goods in compliance with this section, the
21 seller may then use the resell price in determining its damages for breach of contract. In
22 addition, a seller may recover both incidental and consequential damages under sections 2-805
23 and 2-806 assuming the seller's damages have not been liquidated under section 2-809 or limited
24 under section 2-810. A seller who has resold the goods pursuant to the requirements of this
25 section has mitigated its harm in compliance with the principle of section 2-803(b).

26 3. Subsection (b) prescribes the requirements for a resale under this section. A seller
27 may sell at a public auction or a private sale as long as the choice is commercially reasonable. A
28 public auction is one in which members of the public are admitted. All auctions are not public
29 auctions. A private sale may be by auction or by solicitation directly or through a broker. Sales

1 by public auction have further requirements stated in subsection (c) which requirements follow
2 former law. The requirement of notice in a private sale as under former law is deleted.

3 The seller's resale must be in good faith, made at a commercially reasonable time and
4 made in a commercially reasonable manner. Commercially reasonable practices are allowed in
5 order to realize as high a price as possible under the circumstances. What is a reasonable time
6 depends upon the nature of the goods, the conditions of the market and other circumstances of
7 the case. If the seller receives a demand from the buyer for inspection of the goods, section 2-
8 718, the time may be appropriately lengthened. The seller need not resale at the place for
9 delivery of the goods if that place is not commercially reasonable. The seller may resell on
10 different terms and conditions other than the breached contract if such action is commercially
11 reasonable.

12 The seller may identify goods to the contract after the breach, section 2-817, but must
13 identify the goods being sold as pertaining to the breached contract.

14 4. Subsection (c) states requirements for resale by public auction which operate in
15 addition to the requirements of subsection (b) which pertain to all resales under this section.
16 Subsection (c)(1) allows goods not identified to the contract to be sold only if there is a
17 recognized market for public sales of futures in that type of good. Subsection (c)(2) is designed
18 to allow for competitive bidding by being held at a usual market for those type of goods.
19 Whether such a market is reasonably available depends upon whether it is a market where
20 prospective bidders may reasonably be expected to attend. If such a market is not reasonably
21 available, a duly advertised public auction may be held at another place where prospective
22 bidders may reasonably be expected to attend even if it is not a "usual place. A buyer is entitled
23 to notice of a public sale, except in the cases noted, in order to give the buyer an opportunity to
24 bid or secure the attendance of other bidders. Subsection (c)(3) is designed to permit intelligent
25 bidding. Subsection (c)(4) allows the seller to buy the goods which may work to the benefit of
26 the buyer by allowing a higher price to be obtained than would otherwise.

27 5. Subsection (d) allows a purchaser to take the goods free of the rights of the buyer even
28 if the seller has not complied with this section. The policy of resolving any doubts in favor of
29 the resale purchaser operates to the benefit of the buyer by increasing the price the purchaser
30 should be willing to pay.

31 6. Subsection (e) recognizes that when the seller is entitled to resell under this article, the
32 goods are the sellers and the purpose of resale under this section is to set the seller's damages as
33 against the buyer. A person in the position of the seller or a buyer asserting a security interest in
34 the goods under section 2-829(b) has only a limited right in the goods and so must account to the
35 seller for any excess over the limited amount necessary to satisfy those rights.

36 **7. Subsection (f) is presented for discussion for the drafting committee. It parallels**
37 **the provision in the cover sections of both current article 2, 2-712, and the revision, 2-825.**
38 **It is also in accord with comment 2 of current 2-706. Please read the note to 2-803 on**

1 mitigation in order to decide the policy on when the aggrieved party might be prevented
2 from recovering part of the loss when the party does not resell or cover but such an action
3 might have mitigated the recovery that is based upon market price. The mitigation rule of
4 2-803 might lead to some portion of the market price based damages being nonrecoverable.
5 This situation is likely to occur in the case of a wildly fluctuating market.
6

7 8. **International Sales.** CISG Article 75 permits the seller to resell the goods after the
8 contract has been avoided for fundamental breach, but contains none of the detail in section
9 2-819. If the seller resells, damages are measured by the "difference between the contract price
10 and the price in the substitute transaction." Furthermore, if the seller resells, damages measured
11 by the difference between the contract price and the market price are not available. Article 76.

12 **SECTION 2-820. PERSON IN POSITION OF SELLER.**

13 (a) In this section, a person in the position of a seller includes, as against a principal, an
14 agent that has paid or become responsible for the price of goods on behalf of the principal or any
15 person that otherwise holds a security interest or other right in goods similar to that of a seller.

16 (b) A person in the position of a seller has the same remedies as a seller under this article.

17 **SOURCE: Article 2, Section 2-707.**

18 **Comment**

19 1. Section 2-820 restates the rules from former section 2-707 with one substantive
20 change. A person in the position of the seller gets all of the seller's remedies. Former section 2-
21 707 appeared to limit the remedies to withholding or stopping delivery, reselling and incidental
22 damages for no apparent reason.

23
24 2. **International Sales.** CISG has no comparable provision.

25 **SECTION 2-821. SELLER'S DAMAGES FOR BREACH BASED ON MARKET** 26 **PRICE, LOST PROFIT, OR RELIANCE.**

27 (a) If the buyer breaches a contract, the seller may recover damages based upon market
28 price, together with any incidental and consequential damages, less expenses avoided as a result
29 of the breach, as follows:

30 (1) Except as provided in paragraph (2), the measure of damages is the contract

1 price less the market price of comparable goods at the time and place for tender of delivery.

2 (2) In the case of a repudiation governed by Section 2-712, the measure of
3 damages is the contract price less the market price of comparable goods at the place for tender of
4 delivery and ~~at the time~~ when a commercially reasonable period after the seller learned of the
5 repudiation has expired, but no later than the time stated in paragraph (1). The [commercially
6 reasonable] period includes the commercially reasonable time for awaiting performance under
7 Section 2-712 and any further commercially reasonable time that would have been needed for the
8 seller to obtain substitute performance.

9 (b) If the measure of damages under Section 2-819 or Section 2-821(a) are inadequate
10 under Section 2-803(a), a seller may recover damages measured by other than the market price or
11 the resale price, together with incidental and consequential damages, including:

12 (1) lost profits, including reasonable overhead, resulting from the breach of
13 contract determined in any reasonable manner; and

14 (2) reasonable expenditures made in preparing for or performing the contract.

15 **SOURCE: Article 2, Section 2-708; Section 2-723(1).**

16 **Comment**

17 1. Section 2-821 is based upon former section 2-708 and former section 2-723(1).

18
19 2. Subsection (a) provides for the seller to recover damages based upon the market price
20 when the buyer has breached the contract. Section 2-701 and section 2-710(c). This recovery
21 should be given in light of the general principles of section 2-803. Subsection (a)(1) follows
22 former law in using the time and place for tender as the appropriate time and place for measuring
23 market price in the case of the buyer's breach other than by repudiation. The provisions of this
24 Article on proving the market price are relevant to determining the market price in order to
25 measure the seller's damages. Section 2-812. The time and place of tender of delivery is
26 determined under section 2-602.

27
28 Subsection (a)(2) addresses the question troublesome under former law on the time when

1 the market price should be measured in the case of an anticipatory repudiation by the buyer. This
2 section provides that the market price should be measured in a repudiation case at the end of the
3 time for awaiting performance under section 2-712 and any further time that the seller would
4 have needed to obtain substitute performance. This time is designed to approximate the market
5 price at the time the seller would have resold the goods, even though the seller has not done so
6 under section 2-819, and is designed to attempt to put the seller in the position the seller would
7 have been in if the buyer had performed, section 2-803, by approximating the harm the seller has
8 suffered without allowing the seller an unreasonable time to speculate on the market at the
9 buyer's expense. This rule on measuring the time for measuring market price in a repudiation
10 case is a particular application of the mitigation principle incorporated in section 2-803. This
11 time for measuring market price in the repudiation case cannot extend beyond the time for tender
12 of delivery.

13
14 The price term in a long term contract may or may not have an escalation clause. The
15 time for determining the contract price in a long term contract should not necessarily be tied to
16 the time for measuring the market price in the repudiation situation. What is the appropriate
17 contract price should be determined in light of the general principle of full compensation for the
18 aggrieved party under section 2-803(a).

19 3. Subsection (b) is a revision of the rule from former section 2-708(2) that had been
20 interpreted by the courts to allow sellers to recover lost profits and reliance expenditures. The
21 former subsection (2) was used in the cases of uncompleted goods, jobbers or middlemen, or lost
22 volume sellers. This remedy is an alternative to the remedy under sections 2-819 or 2-821(a) and
23 is available when the damages based upon resale of the goods or market price of the goods does
24 not achieve the goal of full compensation for harm caused by the buyer's breach. Section 2-803.
25 No effort has been made to state how lost profits should be calculated given the variety of
26 situations in which this measurement may be appropriate and the variety of ways in which courts
27 have measured lost profits. If a seller can recoup its reliance expenditures by salvage, resale or
28 other reasonable measures, the mitigation principle in section 2-803 would operate to prevent the
29 seller from recovering those expenditures from the buyer.

30
31 4. In addition to recovery under this section, the seller may recover incidental and
32 consequential damages, Sections 2-805 and 2-806, assuming that there is no agreement limiting
33 the seller's ability to recover those damages. Section 2-809 and section 2-810.

34
35 5. **International Sales.** If the contract is avoided and the aggrieved seller has not
36 resold the goods under CISG Art. 75, Art. 76 allows for contract damages to be measured by the
37 difference between the contract price and the current price.

38 **SECTION 2-822. ACTION FOR PRICE.**

39
40 (a) If the buyer fails to pay the price as it becomes due, the seller may recover, together
41 with any incidental and consequential damages, the price of:

1 (1) goods accepted;

2 (2) conforming goods lost or damaged after risk of their loss has passed to the
3 buyer, but, if the seller has retained or regained control of the goods, the loss or damage must
4 occur within a commercially reasonable time after the risk of loss has passed to the buyer; and

5 (3) [conforming] goods identified to the contract, if the seller is unable after a
6 reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that
7 this effort would be unavailing.

8 (b) A seller that remains in control of the goods and sues for the price shall hold for the
9 buyer any goods identified to the contract. If the seller is entitled to the price and resale becomes
10 possible, the seller may resell the goods under Section 2-819 at any time before the collection of
11 the judgment. The net proceeds of the resale must be credited to the buyer. Payment of the
12 judgment entitles the buyer to any goods not resold.

13 (c) If the buyer has breached a contract, a seller that has sued for but is held not to be
14 entitled to the price under this section may still obtain damages under Section 2-821.

15 **SOURCE: Article 2, Section 2-709.**

16 **Comment**

17 1. Section 2-822 continues the rules from former section 2-709.

18
19 2. Subsection (a) allows the seller to recover the price in the same three situations as
20 under former law. As under former law, this section is exhaustive in its enumeration of cases
21 where an action for the price is allowed. Goods accepted under subsection (a)(1) include only
22 goods as to which there has been no justified revocation of acceptance under section 2-708.
23 Subsection (a)(2) allows the seller to recover the price if the goods were conforming and if the
24 buyer has the risk of loss at the time the goods were lost or damaged. Section 2-612. In the
25 circumstance where the buyer has wrongfully forced conforming goods back on the seller so that
26 the seller is in possession or control of the goods, the seller may still obtain the price for the
27 goods if the loss or damage to the goods takes place within a commercially reasonable time after
28 the risk of loss has passed to the buyer. If the loss or destruction of the goods takes place after

1 that commercially reasonable time, the seller may have an action against the buyer for breach of
2 its obligations under the contract under other sections of this article but can no longer recover the
3 price. In effect the risk of loss for the goods has passed back to the seller. Subsection (a)(3)
4 allows a seller to obtain the price of identified [conforming] goods if the seller cannot resell the
5 goods. The goods may be identified to the contract after the breach. Section 2-817.
6

7 3. Subsection (b) requires that the seller who sues for the price shall hold goods for the
8 buyer if the seller has control of the goods. If a resale becomes possible, the seller may resale the
9 goods under section 2-819 and credit the proceeds against any judgment for the price.
10

11 4. Subsection (c) allows a seller to recover damages for the buyer's breach in the same
12 lawsuit in the event the seller is not entitled to the price under this section.
13

14 5. In addition to recovery under this section, the seller may recover incidental and
15 consequential damages, Sections 2-805 and 2-806, assuming that there is no agreement limiting
16 the seller's ability to recover those damages. Section 2-809 and section 2-810.
17

18 6. **International Sales.** Under CISG Article 62, the seller may "require the buyer to pay
19 the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy
20 which is inconsistent with this requirement." There are no conditions, such as those found in
21 section 2-822, and there is no specific provision permitting recovery of the price.
22

23 [C. BUYER'S REMEDIES]

24 **SECTION 2-823. BUYER'S REMEDIES IN GENERAL.** If the seller is in breach of
25 the contract under section 2-701, or in breach of the whole contract under Section 2-710(c), the
26 buyer may:

27 (1) recover the price paid under Section 2-829(a) or deduct damages from price unpaid
28 under Section 2-828;

29 (2) cancel the contract under Section 2-808;

30 (3) cover and obtain damages under Section 2-825;

31 (4) recover damages based on market price under Section 2-826;

32 (5) recover damages for breach with regard to accepted goods under Section 2-827.

33 (6) recover identified goods under Section 2-824;

- 1 (7) obtain specific performance under Section 2-807;
- 2 (8) enforce a security interest under Section 2-829(b);
- 3 (9) recover incidental and consequential damages under Sections 2-805 and 2-806;
- 4 (10) recover liquidated damages under Section 2-809;
- 5 (11) enforce limited remedies under Section 2-810; or
- 6 (12) recover damages under Section 2-804.

7 **SOURCE: Article 2, Section 2-711.**

8 **Comment**

9 1. Section 2-823 is based on former section 2-711. Consistent with the revisions to the
10 seller's index section, this section indexes the aggrieved buyer's remedies. The buyer's ability to
11 exercise its remedies depends upon whether the seller has breached the contract. In an
12 installment contract, the breach must be of the whole contract in order for the buyer to exercise
13 its remedies. A seller's cure of its breach under section 2-709 may preclude the buyer's ability to
14 resort to any remedy. Whether a buyer is in fact entitled to any particular remedy depends upon
15 the requirements of the each particular section and the principles of Subpart A, including section
16 2-803.

17
18 2. **International Sales.** Compare CISG Art. 45.

19 **SECTION 2-824. BUYER'S RIGHT TO GOODS.**

20 (a) A buyer that pays all or a part of the price of goods identified to the contract, whether
21 or not they have been shipped, and makes and keeps good a tender of full performance has a right
22 to recover them in a civil action from the seller if the seller repudiates or fails to deliver as
23 required by the contract.

24 (b) The buyer may recover from the seller by [insert appropriate civil action], goods
25 identified to a contract if, after reasonable efforts, the buyer is unable to effect cover for the
26 goods or the circumstances reasonably indicate that an effort to obtain cover would be unavailing
27 and the buyer tenders full performance of its obligation under the contract or if the goods have

1 been shipped under reservation and satisfaction of the security interest in them has been made or
2 tendered.

3 (c) The buyer's right vests under subsection (a) or (b) upon identification of the goods to
4 the contract for sale even if the seller has not then repudiated the contract or failed to deliver as
5 required by the contract.

6 **SOURCE: Article 2, Sections 2-502 & 2-716(3).**

7 Legislative Note: States should insert the appropriate name for their civil action for replevin,
8 claim and delivery, detinue, sequestration or the like in subsection (b)

9 **Comment**

10 1. Section 2-824 is derived from former sections 2-502 and 2-716(3).
11

12 2. Subsection (a) expands the ability of a prepaying buyer to recover the goods from the
13 seller. Thus the right is no longer limited to cases of seller's insolvency and the goods need only
14 be identified and need not be conforming. There is significant doubt whether a right to the goods
15 that is triggered by insolvency is enforceable in a seller's bankruptcy. See 11 U.S.C. § 545; In re
16 G. Paoletti, Inc., 205 B.R. 251, 262-64 (Bankr. N.D. Cal. 1997). The buyer's right under this
17 section to recover the goods by making and keeping a tender of full performance allows the
18 buyer a mechanism for obtaining the goods from the seller even if the buyer could obtain
19 substitute goods elsewhere. This protects the prepaying buyer's deposit for the goods. A
20 financing buyer should comply with the requirements of Article 9 for taking a security interest in
21 the goods. This section does not create a right to buyer's self help to the goods but rather a right
22 to bring an action to obtain the goods from the seller

23 3. Subsection (b) continues the rule allowing for replevin or similar legal remedy when
24 the buyer is unable to obtain cover for identified goods. Similar to subsection (a), this right is
25 available even when the buyer has not pay any of the price for the goods. The buyer's right to
26 obtain the goods under this section depends upon the buyer tendering its full performance under
27 the contract or if the seller has shipped under reservation, the buyer must tender payment of the
28 security interest created. Section 2-604. Because a shipment under reservation may be a breach
29 of the contract for sale, the buyer need not tender full performance of its obligations, but need
30 only satisfy the security interest created by such shipment.
31

32 4. Subsection (c) is a new section designed to bolster the priority rule in section 2-505(a)
33 to allow the buyer who has the right to obtain the goods to also prevail against creditors of the
34 seller in certain situations as defined in section 2-505. Subsections (a) and (b) govern the rights
35 of the buyer as against the seller. Subsection (c) and section 2-505 operate to govern the rights

1 of the buyer as against the seller's creditors. See comment to section 2-505.
2

3 **5. International Sales.** CISG has no provision dealing with a buyer's right to goods on
4 the seller's insolvency and, in general, does not deal with the claims of the seller's creditors to
5 those goods. But see Articles 41-43. Article 46(1), however, states that the "buyer may require
6 performance by the seller of his obligations" without regard to whether the buyer has prepaid the
7 price. Revised §2-824 is now closer to Article 46(1) in granting the buyer what amounts to
8 specific performance. See CISG Art. 28, which states that a court is not "bound" to specifically
9 enforce a contract under CISG "unless the court would do so under its own law in respect of
10 similar contracts of sale not governed by this Convention."
11

12 **SECTION 2-825. COVER; BUYER'S PURCHASE OF SUBSTITUTE GOODS.**
13

14 (a) If the seller breaches a contract, the buyer may cover by making in good faith and
15 without unreasonable delay any reasonable purchase of, contract to purchase, or arrangement to
16 procure comparable goods to substitute for those due from the seller.

17 (b) [Except as provided in Section 2-827] A buyer that covers in the manner required by
18 subsection (a) may recover damages measured by the cost of covering less the contract price,
19 together with any incidental or consequential damages, less expenses avoided as a result of the
20 seller's breach.

21 (c) A buyer that fails to cover in a manner required under subsection (a) is not barred
22 from any other available remedy.

23 **SOURCE: Article 2, Section 2-712.**

24 **Comment**

25 1. Section 2-825 continues the rules from former section 2-712 that allow a buyer to
26 obtain the needed goods and use that cover price to obtain damages for breach from the seller.
27 The cover based damage remedy is the equivalent of the seller's right to resell the goods under
28 section 2-819 and obtain damages based upon the resale price.

29 2. Subsection (a) defines cover which could consist of a series of contracts or a single
30 contract for sale. Goods purchased for cover need not be identical to those goods that are the
31 subject of the breached contract but could be commercially reasonable as substitutes under the
32 circumstances of the case. Contracts made as a cover transaction need not be on the same credit

1 or delivery terms but must be reasonable under the circumstances. The reasonableness of a cover
2 transaction and the good faith of the buyer in making a cover transaction must be determined
3 based upon circumstances present when the buyer acts and should not be judged in hindsight. A
4 cover may be a reasonable cover even if it later proves that the cover transaction was not the
5 cheapest or most effective cover. The reasonable time in which to make a cover transaction must
6 take into account the time the buyer needs to look around and decide as to how to best cover.
7 Both merchants and non-merchant buyers may pursue cover under this section as long as the
8 buyer acts in good faith and the cover transaction is reasonable. The standards of reasonableness
9 and good faith will vary, however, depending upon whether the buyer is a merchant.

10 3. Subsection (b) allows a buyer who has appropriately covered to measure its damages
11 by the difference between the cover price and the contract price. In addition, the buyer is entitled
12 to incidental and consequential damages, sections 2-805 and 2-806, assuming that there is no
13 agreement limiting the buyer's ability to recover those damages. Section 2-809 and section 2-
14 810. This measure of damages is available if the measure of damages for accepted goods as
15 provided in section 2-827 is not appropriate.

16 4. Subsection (c) continues the policy from former law that a buyer who does not cover
17 as provided in subsection (a) may still pursue other remedies under this Article. This subsection
18 must be read in conjunction with the mitigation principle expressed in section 2-803.

19 5. **International Sales.** Under CISG Article 75, if the contract is avoided and the buyer
20 has "bought goods in replacement," damages are measured by the "difference between the
21 contract price and the price in the substitute transaction" as well as any further damages under
22 article 74. If the buyer has made a purchase under Article 75, damages under Article 76 are not
23 available.

24
25 **SECTION 2-826. BUYER'S DAMAGES FOR BREACH BASED ON MARKET**
26 **PRICE.**

27 (a) [Except as provided in Section 2-827] If the seller breaches a contract, the buyer may
28 recover damages based upon market price, together with any incidental and consequential
29 damages, less expenses avoided as a result of the breach, as follows:

30 (1) Except as provided in paragraph (2), the measure of damages is the market
31 price for comparable goods at the time for tender of delivery or when the buyer learned that the
32 tender of delivery did not occur, whichever is later, less the contract price.

33 (2) In the case of a repudiation governed by Section 2-712, the measure of

1 damages is the market price of comparable goods at the time when a commercially reasonable
2 period after the buyer learned of the repudiation has expired, but no later than the time stated in
3 paragraph (1), less the contract price. The [commercially reasonable] period includes the
4 commercially reasonable time for awaiting performance under Section 2-712 and any further
5 commercially reasonable time that would have been needed for the buyer to obtain substitute
6 performance.

7 (b) Market price is determined at the place for tender of delivery. However, in cases of
8 rejection after arrival or revocation of acceptance, market price is determined at the place of
9 arrival.

10 **SOURCE: Article 2, Section 2-713 and Section 2-723(1).**

11 **Comment**

12 1. Section 2-826 is based upon former sections 2-713 and 2-723(1) and is comparable to
13 the seller's remedy based upon market price contained in section 2-821(a).

14 2. Unless the buyer has accepted the goods so that damages should be measured under
15 section 2-827, subsection (a) allows a buyer to recover damages based upon the market price
16 when the seller has breached the contract. Section 2-701 and section 2-710(c). Subsection (a)(1)
17 provides that the time for measuring market price is when the tender of delivery should have
18 occurred or at the time the buyer should have learned that the tender did not occur. Subsection
19 (b) follows former law on the place for measuring market price which is based upon measuring
20 market price in the market the buyer would have obtained cover. Thus, the place of tender of
21 delivery is determined under section 2-602. If the goods are rightfully rejected, section 2-703, or
22 an acceptance is justifiably revoked, section 2-708, the place for measuring the market price is
23 where the goods are. The market price is of comparable goods to the ones involved in the
24 breached contract. The provisions of this Article on proving the market price are relevant to
25 determining the market price in order to measure the buyer's damages. Section 2-812.

26 3. Subsection (a)(2) determines the time for measuring the market price when the seller
27 has repudiated the contract in the same manner as provided in section 2-821(a)(2). This time is
28 designed to approximate the time in which the buyer would have engaged in a cover transaction,
29 even if the buyer has not done so pursuant to section 2-825, and is designed to put the buyer in
30 the position the buyer would have been in if the seller had performed the contract, section 2-803,
31 by approximating the harm the buyer has suffered without allowing the buyer an unreasonable

1 time to speculate on the market at the seller's expense. This rule is a particular application of the
2 mitigation principle from section 2-803. The time for measuring market price cannot extend
3 beyond the time for tender of delivery.

4 The price term in a long term contract may or may not have an escalation clause. The
5 time for determining the contract price in a long term contract should not necessarily be tied to
6 the time for measuring the market price in the repudiation situation. What is the appropriate
7 contract price should be determined in light of the general principle of full compensation for the
8 aggrieved party under section 2-803(a).

9 4. The buyer is entitled to incidental and consequential damages, sections 2-805 and 2-
10 806, assuming that there is no agreement limiting the buyer's ability to recover those damages.
11 Section 2-809 and section 2-810.

12
13 5. **International Sales.** Under CISG Article 76, if the contract has been avoided and
14 there has been no "purchase" under Article 75, the buyer may recover the difference between the
15 contract price and "current price at the time of avoidance as well as any further damages
16 recoverable under article 74."
17

18 **SECTION 2-827. BUYER'S DAMAGES FOR BREACH REGARDING**

19 **ACCEPTED GOODS.**

20 (a) A buyer that has accepted goods and not justifiably revoked acceptance and that has
21 given any notice required pursuant to Section 2-707(c)(1) may recover as damages for any
22 nonconforming tender the loss resulting in the ordinary course of events from the seller's breach
23 of contract as determined in any reasonable manner.

24 (b) A [the] measure of damages for breach of a warranty of quality is the value of the
25 goods as warranted, less the value of the goods accepted at the time and place of acceptance,
26 unless special circumstances show proximate damages of a different amount.

27 (c) A [the] measure of damages for breach of a remedial promise is the value of the
28 promised performance, less the value of any performance made.

29 (d) A buyer under subsection (a) may also recover incidental and consequential damages.

30 **SOURCE: Article 2, Section 2-714.**

1 **Comment**

2 1. Section 2-827 continues the rules from former section 2-714 for recovery of damages
3 in the case of accepted goods where there is a nonconformity with the contract requirements.
4 The measurement of damages under this section should be determined in light of the remedial
5 principles in section 2-803.

6 2. Subsection (a) requires an acceptance that has not been justifiably revoked, section 2-
7 708, and a notice of breach under section 2-707(c)(1) in order to recover damages under this
8 section. Damages may be measured in any reasonable manner for losses which result from the
9 breach of contract. Losses recoverable under this section may be based upon a seller's delay in
10 performance, the seller's breach of warranty of title or against infringement under section 2-402,
11 or the seller's failure to perform another obligation under the contract.

12 3. Subsection (b) states a rule for measuring damages for breach of a warranty of quality
13 governed by Part 4 of this Article. The value of the goods as warranted is based upon the market
14 value of the goods if the goods had conformed to the warranty of quality made. The contract
15 price may be evidence of that value but is not conclusive. The value of the goods accepted is
16 keyed to the market value at the time and place the buyer accepted the goods, section 2-706, not
17 the time or place for tender of delivery. In some cases, the difference between those the value as
18 accepted and the value as warranted may be demonstrated by the cost of repair if the repair
19 would result in goods that conform to the contract. Subsection (c) states a general rule for
20 measuring damages for breach of a remedial promise.

21
22 4. The buyer is entitled to incidental and consequential damages, sections 2-805 and 2-
23 806, assuming that there is no agreement limiting the buyer's ability to recover those damages.
24 Section 2-809 and section 2-810.

25
26 5. **International Sales.** Under the Convention, a buyer has more power to "require" the
27 seller to perform and the seller has more power to "cure" non-conformities than under Article 2.
28 After delivery where the seller has failed to cure, however, CISG Article 50 provides that if the
29 goods "do not conform with the contract and whether or not the price has already been paid, the
30 buyer may reduce the price in the same proportion as the value that the goods actually delivered
31 had at the time of delivery bears to the value that conforming goods would have had at that
32 time." Thus, Article 50 combines the measurement standard in 2-827(b) with the buyer's power
33 to reduce the price granted in section 2-828.

34 **SECTION 2-828. DEDUCTION OF DAMAGES FROM PRICE.** The buyer, on so
35 notifying a seller of an intent to do so, may deduct all or any part of the damages resulting from
36 any breach of contract from any part of the contract price still due under the same contract.

37 **Source: Article 2, Section 2-717.**

1 **Comment**

2 Section 2-828 makes no substantive changes to former section 2-717. This section
3 permits the buyer to deduct its damages as determined under the provisions of this article from
4 the price if some or all of the price is still due under the same contract. A buyer's notification
5 need only be any language which reasonably indicates the buyer's reason for not paying.

6 **SECTION 2-829. RECOVERY OF PRICE; BUYER'S SECURITY INTEREST.**

7 (a) If the seller has breached the contract, the buyer may recover any payments made on
8 the price of goods that are not accepted.

9 (b) On rightful rejection or justifiable revocation of acceptance, the buyer has a security
10 interest in goods in the buyer's possession or control for any payments made on their price and
11 any expenses reasonably incurred in their inspection, receipt, transportation, care, and custody.
12 The buyer may hold the goods and resell them in the manner provided for an aggrieved seller
13 under Section 2-819, except that the buyer shall give the seller reasonable notice of the intended
14 resale and must account to the seller for any excess of the proceeds of resale over the amount of
15 the security interest created in this subsection.

16 **Source: Article 2, Section 2-711, Section 2-706(6).**

17 **Comment**

18 1. Section 2-829 is the derived from former section 2-711.

19 2. Subsection (a) allows the buyer to get the price back for any goods the buyer has not
20 accepted if the seller has breached the contract. Section 2-701 and section 2-710. A buyer who
21 has rightfully rejected the goods or justifiably revoked acceptance of the goods is not liable for
22 the price of the goods and is entitled to a refund to the extent the buyer has paid any of the price
23 to the seller. A buyer's ability to get the price refunded if the rejection is wrongful is determined
24 under section 2-809.

25 3. Subsection (b) continues the right of the buyer to retain goods in the case of a rightful
26 rejection or justifiable revocation in order to enforce a security interest to recover the price paid
27 or the types of incidental expenses listed. The buyer's resale should comply with section 2-819
28 and the buyer should give notice to the seller, even if the resale is a private resale. The buyer

1 also must account for any proceeds that exceed the amount of the security interest the buyer is
2 entitled to assert under this section. This is a security interest arising under Article 2 and is also
3 governed by Article 9, section 9-110. The assertion of a security interest under this section does
4 not preclude the buyer from pursuing other remedies such as market price based damages,
5 section 2-826, or cover based damages, section 2-825, but the buyer may not use a security
6 interest under this section to collect those other damages. A buyer asserting rights under this
7 section has not accepted the goods nor converted the goods and has not violated the buyer's
8 obligations under sections 2-704 or 2-705.