

D R A F T
FOR APPROVAL

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

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-EIGHTH YEAR
DENVER, COLORADO

JULY 23 – 30, 1999

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

WITH INTERIM SECTION COMMENTS

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

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

3 **PART 1**
4 **GENERAL PROVISIONS**

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

7 **Comment**

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

10 **SECTION 2-102. DEFINITIONS.**

11 (a) In this article:

12 (1) “Authenticate” means:

13 (A) to sign, or

14 (B) otherwise to execute or adopt a symbol or sound, or to use
15 encryption or another process with respect to a record, with intent of the
16 authenticating person to:

17 (i) identify that person; or

18 (ii) adopt or accept the terms or a particular term of a record that
19 includes or is logically associated with, or linked to, the authentication, or to which
20 a record containing the authentication refers.

21 (2) “Between merchants” means between parties in a transaction with
22 respect to which both parties are merchants.

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

2 (4) “Cancellation” means an act by either party which ends a contract
3 because of breach by the other party.

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

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

13 (7) “Computer information” means information in electronic form that is
14 obtained from or through the use of a computer or that is in digital or equivalent
15 form capable of being processed by a computer. The term includes a copy of the
16 information and any documentation or packaging associated with the copy.

17 (8) “Computer program” means a set of statements or instructions to be
18 used directly or indirectly in a computer to bring about a certain result. The term
19 does not include separately identifiable informational content.

20 (9) “Conforming” goods or conduct, including any part of a
21 performance, means goods or conduct that are in accordance with the obligations
22 under the contract.

1 (10) “Conspicuous”, with reference to a term, means so written,
2 displayed, or otherwise presented that a reasonable person against which it is to
3 operate ought to have noticed it. A term in an electronic record intended to evoke a
4 response by an electronic agent is conspicuous if it is presented in a form that would
5 enable a reasonably configured electronic agent to take it into account or react
6 without review of the record by an individual. Conspicuous terms include the
7 following:

8 (A) with respect to a person:

9 (i) a heading in capitals equal to or greater in size than the
10 surrounding lower case text, or in contrasting type, font, or color to, the
11 surrounding text of the same size;

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

16 (iii) a term prominently referenced in an electronic record or
17 display which is readily accessible and reviewable from the record or display; and

18 (B) with respect to a person or an electronic agent, a term or
19 reference to a term that is so placed in a record or display that the person or
20 electronic agent can not proceed without taking some action with respect to the
21 term or reference.

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

7 (12) “Consumer contract” means a contract between a merchant seller
8 and a consumer.

9 (13) “Contract” means a present sale of goods or a contract for sale of
10 existing or future goods at a future time.

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

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

16 (16) “Electronic” means relating to technology having electrical, digital,
17 magnetic, wireless, optical, electromagnetic, or similar capabilities.

18 (17) “Electronic agent” means a computer program or electronic or
19 other automated means used to initiate an action or respond to electronic messages
20 or performances without intervention by an individual at the time of the action or
21 response.

1 (18) “Electronic message” means an electronic record or display stored,
2 generated, or transmitted by electronic means for the purpose of communication to
3 another person or an electronic agent.

4 (19) “Electronic event” means an electronic authentication, message,
5 record, or performance.

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

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

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

5 (22) “Future goods” means goods that are neither existing nor
6 identified.

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

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

17 (25) “Information” means data, text, images, sounds, mask works, or
18 computer programs, including collections or compilations thereof.

19 (26) “Informational content” means information that is intended to be
20 communicated to or perceived by an individual in the ordinary use of the
21 information, or the equivalent of that information. The term does not include

1 computer instructions that control the interaction of a computer program with other
2 computer programs or with a machine or device.

3 (27) “Information processing system” means an electronic system for
4 creating, generating, sending, receiving, storing, displaying, or processing
5 information.

6 (28) “Installment contract” means a contract in which the terms require
7 or the circumstances permit the delivery of goods in separate lots to be separately
8 accepted, even if the agreement requires payment other than in installments or
9 contains a term stating “Each delivery is a separate contract” or words of similar
10 import.

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

13 (30) “Merchant” means a person:

14 (A) that deals in goods of the kind involved in the transaction;

15 (B) that by occupation purports to have knowledge or skill peculiar
16 to the practices or goods involved in the transaction; or

17 (C) to which the knowledge or skill may be attributed by the person’s
18 employment of an agent, broker, or other intermediary that by its occupation holds
19 itself out as having the knowledge or skill.

20 (31) “Present sale” means a sale that is effected by the making of a
21 contract.

22 (32) “Receive” means:

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

2 (B) with respect to a notice:

3 (i) to come to a person's attention; or

4 (ii) to be delivered to and available at a location designated by
5 agreement for the purpose of notice or, in the absence of an agreed location:

6 (I) to be delivered at the person's residence, or the person's
7 place of business through which the contract was made, or at any other place held
8 out by the person as a place for receipt of such notices; or

9 (II) in the case of an electronic notice, to come into existence
10 in an information processing system in a form capable of being processed by or
11 perceived from a system of that type, if the recipient uses, has designated, or holds
12 out that system as a place for receipt of the notices.

13 (33) "Record" means information that is inscribed on a tangible medium
14 or that is stored in an electronic or other medium and is retrievable in perceivable
15 form.

16 (34) "Remedial promise" means a promise by a seller to repair or
17 replace goods, or the like, or to refund the price if the goods do not conform to the
18 contract or a representation, as defined in Section 2-401(5), at the time of delivery
19 or if the goods conform at the time of delivery but fail thereafter to perform as
20 agreed or contain a defect.

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

- 1 (6) “Draft” Section 3-104(e).
- 2 (7) “General intangibles” Section 9-102(a)(42)
- 3 (8) “Injunction against honor” Section 5-109(b).
- 4 (9) “Instruments” Section 3-104(b).
- 5 (10) “Investment property” Section 9-102(a)(49).
- 6 (11) “Letter of credit” Section 5-102(a)(10).
- 7 (12) “Letter-of-credit rights” Section 9-102(a)(51).
- 8 (c) In addition, Article 1 contains general definitions and principles of
- 9 construction and interpretation applicable throughout this article.

10 **Comment**

11 1. **Overview.** The definitions in subsection (a) appear in two or more

12 sections of this Article. The words and phrases in subsection (b), which appear

13 infrequently in this Article, are defined in other articles of this Act. Subsection (c)

14 affirms that Article 2 is subject to the definitions and principles of construction in

15 Article 1, where applicable.

16 Defined words and phrases that appear in only one section of this Article and

17 are not defined in other articles of this Act include: “Assignment.” Section 2-503;

18 “Delegation.” Section 2-503; “Entrusting.” Section 2-504; “Sale on approval.”

19 Section 2-506; and “Sale or return.” Section 2-506.

20 Defined words and phrases which are mixed with substantive principles and

21 appear in more than one section include: “Acceptance of goods.” Section 2-706;

22 “Breach of contract.” Section 2-701; “Consequential damages.” Section 2-806;

23 “Cover.” Section 2-825; “Incidental damages.” Section 2-805; “Identification.”

24 Section 2-502; “Immediate buyer.” Section 2-401; “Insurable interest.” Section

25 2-502; “Repudiation.” Section 2-712.

26 Definitions used only in Part 4, Warranties, such as “representation,” are

27 stated in Section 2-401.

28 2. **Authenticating a record.** The former defined word, “signed, Section

29 1-201(39),” is now incorporated into the new definition, “authenticate.” See

30 Section 2-102(a)(1).

1 The former defined word, “writing, Section 1-201(46),” is now incorporated
2 into the new definition “record.” See Section 2-102(a)(33). The new definitions,
3 which are used through this Act, blend the new electronic technology with the
4 traditional. Thus, a person who has signed a writing for purposes of the statute of
5 frauds, Section 2-201(a), has authenticated a record for purposes of this Act.

6 **3. Electronic transactions.** In addition to “authenticate” and “record,”
7 other new definitions in this section are relevant to the scope of Article 2 and to
8 electronic contracting. They are computer (6), computer information (7),
9 conspicuous (10), copy (14), electronic (16), electronic agent (17), electronic event
10 (18), information (25), informational context (26), information processing system
11 (27), receive (32), and send (37). These defined terms in Section 2-102(a) are used
12 primarily in Part 2 of this Article.

13 **4. Consumer contracts.** The definition of “consumer contract”, Section
14 2-102(a)(12), is limited to a contract for sale between a merchant seller and a
15 “consumer” To be a consumer, an individual must buy goods that at the time of
16 contracting are intended by the individual to be used “primarily for personal, family,
17 or household purposes.” Section 2-102(a)(11). Thus, the sale by a consumer to a
18 consumer or a sale by a merchant to a individual who intends the goods to be used
19 primarily in a home business is not a consumer contract.

20 **5. “Foreign exchange transaction.”** This new definition, Section
21 2-102(a)(20), is designed to exclude certain currency exchange transactions from
22 the scope of this Article. See Section 2-103(d).

23 **6. “Remedial promise.”** New. Article 2 applies to “remedial promises”
24 when made in contracts for the sale of goods and several sections deal with their
25 enforcement upon breach by the seller. See Section 2-103(a), Comments.

26 **7. Definitions in former Article 2.** Several definitions from former Article
27 2 have been preserved, some with slight modifications. They are:

28 “Between merchants.” Source: Section 2-104(3).

29 “Buyer.” Source: Section 2-103(1)(a).

30 “Cancellation.” Source: Section 2-106(4). When a party may cancel for
31 breach and the effect of cancellation are treated in Section 2-808.

32 “Commercial unit.” Source: Section 2-105(6).

33 “Conforming goods or conduct.” Source: Section 2-106(2).

1 “Contract for sale.” Source: Section 2-106(1). The definition has been
2 folded into the definition of “contract” and clarified to cover a contract to sell
3 “future goods at a future time.”

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

7 “Financing agency.” Source: Section 2-104(2).

8 “Future goods.” Source: Section 2-105(2).

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

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

13 “Lot.” Source: Section 2-105(5).

14 “Merchant.” Source: Section 2-104(1).

15 “Present sale.” Source: Section 2-106(1).

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

19 “Sale.” Source: Section 2-106(1).

20 “Seller.” Source: Section 2-103(1)(d).

21 “Termination.” Source: Section 2-106(3).

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

23 “Good faith.” Source: Section 3-103(a)(4).

24 “Conspicuous.” The first sentence is taken from Section 1-201(10). The
25 second sentence, which deals with when a term in an electronic record is
26 conspicuous, is new. Both establish the general disclosure principle that controls.
27 The third sentence with subparts, which is new, is intended to illustrate applications
28 of the basic principle in the first two sentences. The subparts are not safe harbors.

1 They illustrate possible ways to satisfy the basic disclosure principles which, in the
2 final analysis, control.

3 **SECTION 2-103. SCOPE.**

4 (a) This article applies to transactions in goods.

5 (b) The following rules apply to transactions in computer information and
6 computer programs:

7 (1) Except as provided in paragraph (2), this article does not apply to
8 computer information. However, if a transaction involves both goods and computer
9 information, this article applies to the goods and not to the computer information.

10 (2) Except as provided in paragraph (3), if a transaction involves a
11 computer program embedded in goods this article applies to both the goods and the
12 computer program if:

13 (A) the computer program is associated with the goods in such a
14 manner that it customarily is considered part of the goods, or

15 (B) by becoming the owner of the goods, a person acquires a right to
16 use the program in connection with the goods. Goods in this paragraph does not
17 include goods that consist solely of the medium in which the program is embedded.

18 (3) This article does not apply to a computer program under paragraph
19 (2) if giving the buyer of the goods access to or use of the computer program itself,
20 other than for the operation of the goods in which the program is embedded, is a
21 material purpose in ordinary transactions of this type. Even if the computer

1 program is not subject to this article under this paragraph, this article applies to the
2 goods.

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

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

8 **Comment**

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

13 2. **Transactions in goods.** The phrase “transactions in goods” in
14 subsection (a) means a contract for the sale of goods in sections where the word
15 “contract” is used. In sections where “contract” is not used, the underlying
16 transaction is usually a contract for sale and, in any event, would not include a lease
17 of goods, see Article 2A, or a security interest in goods, see Article 9.

18 “Contract” as defined in this Article, Section 2-102(a)(12), could include a
19 transaction where both goods and services are provided, such as a contract to
20 deliver and install goods, but it does not include a pure service contract. When
21 Article 2 applies to mixed goods and service transactions is left for judicial inclusion
22 or exclusion under the “predominant purpose” test. Factors such as the language of
23 the contract, the usual business of the seller or supplier, and the relative cost of the
24 goods and the services and whether they are segregated assist help to determine
25 whether a sale of goods predominates. *See, e.g., Princess Cruises, Inc. v. General*
26 *Electric Co.*, 143 F.3d 828 (4th Cir. 1998), reviewing the cases and applying the
27 test. If goods predominate, the entire transaction is treated as a contract for sale
28 and is within the scope of Article 2. Conversely, if services predominate Article 2
29 does not apply unless a court decides to extend it by analogy or to apply it solely to
30 the goods issues raised in the complaint (the so called “gravaman” test).

31 A “transaction in goods” does not include a bailment or a consignment of
32 goods. These transactions are not contracts within the scope of Article 2. Article 2,

1 however, may be extended by analogy to transactions in goods that are not
2 specifically covered.

3 **3. Remedial promises.** The phrase “transaction in goods” includes
4 remedial promises, defined in Section 2-102(a)(31), made by a seller in a contract
5 for sale. It does not explicitly apply to a remedial promise made by a third person to
6 the buyer and not also made by the seller. Thus, if a seller makes and breaches a
7 remedial promise, Article 2 governs enforcement by the buyer. See Sections
8 2-408(b)(2), 2-408(f), 2-409(a), 2-409(c), 2-409(d), 2-810(a)(3), 2-814(b)(3), and
9 2-827(c).

10 **4. Transactions involving goods and computer information.**

11 Subsection (b), which follows Revised Section 9-102(a)(44), is new. It
12 clarifies the extent to which Article 2 applies to transactions, such as licenses and
13 sales, of computer information or computer programs. These phrases and
14 “computer”, are defined in Section 2-102(a).

15 Paragraph (b)(1) excludes transactions in computer information, see Section
16 2-102(a)(7), from the scope of Article 2. If a transaction involves goods and
17 computer information, however, Article 2 applies to the goods. Thus, in a
18 transaction where a both a book on financial planning is sold and software on money
19 management (computer information) is licensed, Article 2, without more, applies to
20 the sale of book but not to the computer information. The exclusion of computer
21 information encompasses the medium on which the information is contained as the
22 definition of computer information includes the copy, see Section 2-102(a)(14). For
23 example, if the computer information was on a compact or floppy disk, the compact
24 or floppy disk as well as the information contained on the disk is not governed by
25 Article 2.

26 Paragraph (b)(2), which follows Revised Section 9-102(a)(44), deals with
27 goods in which a computer program is embedded. The definition of “computer
28 program”, which is narrower than the definition of “computer information”, assumes
29 the existence of a computer that is also embedded in the goods. Thus, a person may
30 buy goods, such as an automobile, in which a programmed computer is embedded.

31 In these cases, Article 2 applies to both the goods and the computer
32 information if either of two conditions are satisfied: (1) The computer program is
33 associated with the goods in such a manner that it is customarily considered part of
34 the goods, or (2) a person by becoming owner of the goods acquires a right to use
35 the program in connection with the goods. For purposes of paragraph (b)(2),
36 however, goods does not include goods (tangibles) that consist “solely of the
37 medium in which the program is embedded.”

1 **Example #1:** A digital camera contains a computer program that enables
2 the camera to digitize the picture and store that picture for later processing. When a
3 person buys the digital camera, that computer program which runs the camera's
4 function of taking pictures is generally embedded in the goods and not the subject of
5 a separate sale or the subject of a separate license. The camera functions as more
6 than the medium in which the program is embedded. The camera and the computer
7 program that runs the camera would be governed by Article 2.

8 **Example #2:** A buyer purchases a computer that comes pre loaded with
9 numerous computer programs. Computer programs that are loaded at the option of
10 the seller and are the subject of separate licenses are not embedded in the computer
11 because they are not customarily considered to be part of the goods nor does a
12 person acquire a right to use the program merely by buying the goods. The
13 computer programs would be excluded from Article 2 under paragraph (1) but the
14 goods would be included in Article 2.

15 **Example # 3:** A person purchases a computer program that is contained on
16 a compact disk. The compact disk is the only "goods" involved in the transaction
17 but its sole function is as the medium on which the computer program is contained.
18 By virtue of the last sentence of paragraph (2), paragraph (2) does not apply, and
19 the computer program is not governed by Article 2 because of the exclusion from
20 Article 2 contained in paragraph (1). Article 2 also does not govern the medium
21 that contains the program because of the definition of computer information
22 encompasses the copy, the physical medium on which the computer program is
23 contained.

24 Paragraph (3) provides an exception to the embedded goods rule in
25 paragraph (2) if "giving the buyer of the goods access to or use of the computer
26 program itself, other than for the operation of the goods in which the program is
27 embedded, is a material purpose in ordinary transactions of this type." Article 2,
28 however, still applies to the goods in which the computer program was embedded.
29 For example, a buyer purchases an electronic calendar device that contains computer
30 programs that run the device and provide the calendaring function. The programs
31 are embedded and are associated with the device in such a manner that the programs
32 are customarily considered part of the goods. The material purpose in such a
33 transaction would ordinarily be to obtain the use of program that provides the
34 calendaring function as opposed to the programs that operate the device. In that
35 case, the computer program that runs the calendaring function would not be covered
36 under Article 2 by virtue of paragraph (3) but the operating program would be
37 covered under Article 2. Factors relevant to determining whether there is a material
38 purpose in ordinary transactions of the type include whether the program is
39 separately licensed, whether the program could have been marketed separately and
40 the choice to embed the program was merely a design or marketing function,

1 whether the program merely operates functions that are traditionally associated with
2 the functioning of the goods and, whether the program is providing functions such
3 as data processing.

4 **5. Overlaps with other UCC articles.** Subsection (c) is new and replaces
5 the language in former Section 2-102 that Article 2 “does not apply to any
6 transaction which although in the form of an unconditional contract to sell or
7 present sale is intended to operate only as a secured transaction.” That language
8 applied to “either-or” transactions and did not deal with cases where two or more
9 articles applied to the same transaction. These overlaps occur when the buyer’s
10 payment obligation is represented by a promissory note, Article 3, or is paid by
11 check, Articles 3 and 4, funds transfer, Article 4A, or letter of credit, Article 5.
12 They also occur where either the parties or creditors of the parties create security
13 interests in the goods.

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

18 In a contract for sale, the most likely overlap is with Article 9. The seller,
19 the buyer, or some third person may create a security interest in the goods sold or a
20 security interest may arise under Article 2. In these cases, Article 9 not Article 2
21 applies to the creation, perfection, priority and enforcement of the security interest.
22 For example, a security interest arising when the seller ships under reservation,
23 Section 2-604, is subject to Article 9, but Section 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
26 are not security interests, however, Article 2 rather than Article 9 governs the rights
27 and remedies between seller and buyer. These rights, however, may be subject to
28 security interests in the same goods perfected under Article 9 by third persons. For
29 example, a reclaiming seller under Section 2-816(b) is subject to the rights of a good
30 faith purchaser for value, including a secured party, whose rights vest before the
31 seller takes possession. Section 2-816(c).

32 If payment is by letter of credit, Sections 2-308 and 2-605 deal with the duty
33 of the buyer to provide and the effect of furnishing or not of the letter of credit, but
34 Article 5 defines the critical terms and covers all aspects of the transaction between
35 the seller and buyer until the letter of credit is paid or dishonored. Even then,
36 Article 5 prescribes the effect of payment or dishonor between the issuing bank and
37 its customer, the buyer or seller.

1 **6. Foreign exchange transactions.** Subsection (d), which is new, excludes
2 “foreign exchange transactions”, defined in Section 2-102(a)(21), from the scope of
3 Article 2. Although a contract where the commodity exchanged is currency is a sale
4 of goods and not usually excluded under Section 2-102(a)(24), an exchange where
5 delivery is “through funds transfer, book entry accounting, or other form of payment
6 order, or other agreed means to transfer a credit balance” is not governed by Article
7 2. Rather, Article 4A or other applicable federal law applies. See Section
8 2-102(a)(23), which excludes foreign exchange transactions from the definition of
9 goods. On the other hand, if the parties agree to a forward transaction where, after
10 January 1, 2002, dollars are to be physically delivered in exchange for the delivery of
11 Euros, the transaction is not within the “foreign exchange” exclusion and Article 2
12 applies.

13 **7. International sales.** CISG applies to “contracts of sale of goods” where
14 the jurisdictional requirements of the Convention are satisfied. Article 1(1). Article
15 3 excludes transactions where a party who orders goods to be manufacturer or
16 produced supplies a “substantial part of the materials necessary for such
17 manufacture or production,” Article 3(1), or where the “preponderant part” of the
18 obligation of the party furnishing goods “consists in the supply of labour or other
19 services.” Article 3(2).

20 CISG does not apply to sales of consumer goods, certain obligations to pay
21 money, “ships, vessels, hovercraft or aircraft,” and electricity. Article 2.

22 **Cross References:** Sections 2A-103, 3-102, 4-102, 4A-102, 5-103, and 9-109.

23 **Definitional Cross References:** “Goods”, “computer information”, “copy”,
24 “foreign exchange transaction”.

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

26 (a) Except as otherwise provided in subsection (b), this Article does not
27 impair:

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

1 (2) any applicable law that establishes a different rule for consumers; or
2 (3) any other law of this State to which the transaction is subject, such as
3 laws dealing with:
4 (A) the sale of agricultural products;
5 (B) the transfer of blood, blood products, human tissues, and organs;
6 (C) the consignment or transfer by artists of works of art or fine
7 prints;
8 (D) distribution agreements, franchises, and other relationships
9 through which goods are sold;
10 (E) liability for products that cause injury to person or property;
11 (F) the making and disclaimer of warranties;
12 (G) the misbranding or adulteration of food products and drugs; and
13 (H) dealers in particular products, such as automobiles, motorized
14 wheelchairs, agricultural equipment, and hearing aids.
15 (b) [Except as otherwise provided in [list], if] [I]f a law of this State applies
16 to a transaction subject to this article, the following rules apply:
17 (1) A requirement that a term, waiver, notice, or disclaimer be in a
18 writing is satisfied by a record.
19 (2) A requirement that a writing or a term be signed is satisfied by an
20 authentication.

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

4 (d) A transaction under this article is subject to the [Uniform Electronic
5 Transactions Act]. However, in the event of a conflict between this article and the
6 [Uniform Electronic Transactions Act], this article governs.

7 (e) Failure to comply with the laws of the kind referred to in subsection (a)
8 has only the effect specified in those laws.

9 **Comment**

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

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

13 In subsection (a), it is assumed that Article 2 is subject to any applicable
14 federal law, such as the United Nations Convention on Contracts for the
15 International Sale of Goods (CISG) or the Magnuson-Moss Warranty Act.

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

20 **Illustration #1.** Suppose that a used car is stolen from Owner by Thief and
21 Thief, by fraud, is able to obtain a clean certificate of title from State X. Thief
22 sells the car to B, a good faith purchaser, and transfers the certificate of title.
23 Under Section 2-504(a), B does not get good title from a thief, regardless of the
24 certificate, and O can replevy the car. The same result follows if the applicable
25 state certificate of title law makes the certificate prima facie evidence of
26 ownership. If, however, the applicable law makes issuance of the certificate
27 conclusive on title, Section 2-504 does not apply and B (probably) gets good
28 title.

29 **Illustration #2.** Owner entrusts a car to Dealer, a merchant, for repairs. D sells
30 the car to B#1, a buyer in the ordinary course of business. D holds the car for

1 further work and promises to deliver it shortly with a certificate of title.
2 Thereafter, D sells the car to B#2, a buyer in the ordinary course of business,
3 and delivers the car and a new certificate of title in B#2's name. Since B#1's
4 rights as a buyer in the ordinary course of business arose first, B#1 gets title to
5 the car regardless of the scope of the applicable certificate of title statute.

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

9 Subsection (b) validates Article 2's concepts of record and authentication in
10 electronic and other transactions against other state law unless the enacting State
11 lists statutes, such as digital signature statutes, designed to preempt the field,
12 including Article 2. Each State should provide such a list in the enactment process.

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

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

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

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

35 **Other state law.** Subsection (a)(2) and subsection (a)(3) replace language
36 in former Section 2-102, which provided: "[N]or does this Article impair or repeal

1 any statute regulating sales to consumers, farmers or other specified classes of
2 buyers.”

3 Subsection (a)(3) provides an illustrative but not exhaustive list of other
4 applicable state law that may preempt all or part of Article 2. For example,
5 franchise contracts may be regulated by state franchise acts, the seller of
6 unmerchantable blood or human tissue may be insulated from warranty liability and
7 disclaimers of the implied warranty of merchantability may be invalidated by non-
8 uniform amendments to Article 2. The existence, scope, and effect of these statutes
9 must be assessed from State to State.

10 **4. International sales.** When applicable to a contract for sale of goods,
11 CISG, a treaty, largely preempts Article 2 under Article VI of the Constitution of
12 the United States.

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

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

34 The parties to a transaction covered by CISG may contract out and choose
35 applicable United States law, such as Article 2. Even if there is no choice of law
36 term, Article 2 may apply to parts of the transaction excluded by Articles 2, 4, and
37 5, if under applicable choice of law principles state law in the United States is
38 applicable.

1 **Cross References:** Section 2-504.

2 **Definitional Cross References:** “Authenticate”, “consumer”, “record”.

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

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

9 (b) In a consumer contract, a nonnegotiated term in a standard form record
10 is unconscionable and is not enforceable if it:

11 (1) eliminates the essential purpose of the contract;

12 (2) subject to Section 2-202, conflicts with other material terms to which
13 the parties have expressly agreed; or

14 (3) imposes manifestly unreasonable risk or cost on the consumer in the
15 circumstances.

16 (c) If a court as a matter of law finds that a consumer contract or any term
17 thereof has been induced by unconscionable conduct or that unconscionable conduct
18 has occurred in the collection of a claim arising from a consumer contract, the court
19 may grant appropriate relief.

20 (d) If it is claimed or appears to the court that a contract or any term thereof
21 may be unconscionable, the parties must be afforded a reasonable opportunity to

1 present evidence as to its commercial setting, purpose, and effect to aid the court in
2 making the determination.

3 **Comment**

4 1. **Source:** Subsections (a) and (d) are former Section 2-302. Subsections
5 (b) and (c) are new.

6 2. **Unconscionability.** Subsection (a), which applies to commercial
7 contracts and to consumer contracts not covered by subsections (b) and (c), gives a
8 court power, after the hearing required in subsection (d), to find as a matter of law
9 that a contract or a term in the contract was “unconscionable at the time it was
10 made.”

11 **The basic test.** The assumption is that the contract or term is not *per se*
12 illegal or against public policy. In such a case, there would be no need for Section
13 2-105(a). Subsection (a), however, does not define unconscionability. The concept
14 integrates elements beyond the traditional defenses of fraud, mistake and duress into
15 a broader test for enforceability. In the past 40 years, the courts have embraced and
16 worked with language in Comment 1 to former Section 2-302, which provided in
17 part:

18 “The basic test is whether, in the light of the general commercial background
19 and the commercial needs of the particular trade or case, the terms involved are
20 so one-sided as to be unconscionable under the circumstances existing at the
21 time of the making of the contract. . . . The principle is one of the prevention of
22 oppression and unfair surprise . . . and not of disturbance of allocation of risks
23 because of superior bargaining power.”

24 Most courts have recognized that there are two elements of
25 unconscionability, procedural and substantive. *See Brower v. Gateway 2000, Inc.*,
26 676 N.Y.S.2d 569 (N.Y.A.D. 1998); *NEC Technologies, Inc. v. Nelson*, 478 S.E.2d
27 769 (Ga. 1996).

28 Procedural unconscionability means the absence of meaningful choice, i.e.,
29 the presence of unfair surprise or oppression. Assuming that the party seeking to
30 avoid the contract has objectively assented to a record, absence of meaningful
31 choice may be found by examining some or all of several factors: (1) Age,
32 education, and intelligence; (2) Business acumen and experience; (3) Relative
33 bargaining power; (4) Who drafted the contract; (5) Whether the terms were
34 explained to the weaker party; (6) Whether alternations of a term were permitted;
35 and (7) Whether there were alternative sources of supply. *See Maxwell v. Fidelity*
36 *Financial Services, Inc.*, 907 P.2d 51 (Ariz. 1995). If one is unfairly surprised by a

1 term, there is no need to examine whether, if fully informed, the party would have
2 been able to reject the offer and find an alternative source of supply. If there is no
3 unfair surprise, the term may still be oppressive if it is offered on a take it or leave it
4 basis and there is no alternative source of supply.

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

9 Most courts have concluded that unconscionability requires a “certain
10 quantum” of both procedural and substantive unconscionability. *See NEC*
11 *Technologies, supra*; *American Software, Inc. v. ALI*, 54 Cal.Rptr. 477 (Cal.App.
12 1996). Thus, if there is unfair surprise but the term is commercially reasonable, the
13 term is conscionable. Conversely, if there is no unfair surprise and the term is
14 commercially unreasonable, the term, if not per se against public policy, is probably
15 conscionable.

16 **Remedies for unconscionability.** The available judicial remedies under
17 Section 2-105(a) include refusing to enforce the contract, deleting the enforceable
18 term and enforcing the rest, or limiting an “unconscionable term” as to avoid an
19 “unconscionable result.” A damage remedy is usually not available unless the
20 unconscionable conduct breaches some other obligation, such as the duty of good
21 faith or a duty imposed by other state law, such as a deceptive trade practices act.
22 Moreover, subsection (a) does not authorize a court to delete or limit a term that
23 was conscionable at the time of contracting because its enforcement may cause an
24 unconscionable result. See Section 2-310(c).

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

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

34 **Agreed remedies.** The unconscionability issue is raised frequently in
35 disputes over the enforceability of terms limiting or excluding liability for
36 consequential damages. For example, where circumstances cause a limited or
37 agreed remedy to “fail of its essential purpose”, buyers may argue that a term

1 excluding liability for consequential damages which survives the failure, see Section
2 2-810(b)(1), is unconscionable. Under Section 2-810(c), these terms are not
3 presumed to be unconscionable where the loss claimed is other than to a personal
4 injury. Whether they are, as a matter of law, unconscionable is determined under
5 Section 2-105(a).

6 **3. Consumer contracts.**

7 **Non-negotiated terms.** Subsection (b), which is new, gives a court limited
8 power to declare a non-negotiated term in a standard form record substantively
9 unconscionable but does not confer power to declare the entire contract
10 unconscionable. The subsection gives clearer guidance to a court on what terms are
11 unconscionable. So-called procedural unconscionability is not required. A motion
12 to delete this subsection was defeated at the May, 1999 annual meeting of the
13 American Law Institute.

14 **Illustration #1.** Consumer buys a ladder described as a “10’ ladder” with 12
15 rungs. Consumer later discovers a term in the standard form that states:
16 “Warning, do not stand on any of the top six rungs.” This is far more restrictive
17 than the usual warning not to stand on the top rung. If the restrictive label, a
18 non-negotiated term, eliminates the essential purpose of the contract to sell and
19 buy a 10 foot ladder, it is not enforceable. As such, the ladder probably does not
20 conform to the representation that it was a “10 foot ladder.”

21 **Illustration #2.** Consumer buys a coat for his son, who is not along. He is
22 assured by the sales person that the coat can be exchanged within 10 days if it
23 does not fit. The standard form sales slip, however, provides that “all sales are
24 final.” The coat does not fit. Assuming that the parol evidence rule is
25 inapplicable, the non-negotiated term is not enforceable because it conflicts the
26 sales person’s representation, a material term to which the parties have expressly
27 agreed.

28 **Illustration #3.** Consumer in California buys a new stove and in the standard
29 form covering the purchase there is a non-negotiated term requiring that any
30 litigation regarding defects in the stove must be litigated in Georgia, the location
31 of the seller’s home office. If this imposes a manifestly unreasonable cost in the
32 circumstances, the term is not enforceable.

33 **Unconscionable inducement or collection.** Subsection (c), which is taken
34 from Section 2A-108(2), gives a court limited power to police against “hide the
35 terms” tactics, whether pursued before or after the sale. The court may grant
36 “appropriate relief” if a consumer contract or a term of a consumer contract has
37 been induced by unconscionable conduct or if unconscionable conduct has occurred

1 in collecting a claim arising under the consumer contract. This is a particularized
2 application of procedural unconscionability. It does not provide for a right to
3 attorney fees. A motion to delete this subsection was also defeated at the 1999
4 annual meeting of the American Law Institute.

5 Subsection (c) creates incentives for sellers to disclose rather than to hide
6 terms that, while not substantively unconscionable, impair the buyer's reasonable
7 expectations. For example, it might be an unconscionable inducement for a seller to
8 advertise a watch to be "moisture resistant" but to state in the box that it was
9 resistant only "to 50 mm", or to show in advertising a certain fire extinguisher being
10 used to put out a kitchen fire but to state in the box that the extinguisher is "not to
11 be used for kitchen or grease fires," or to sell a computer described as "loaded with
12 software" but not to disclose before the sale that operating software must be
13 upgraded every year.

14 In addition to subsections (b) and (c), consumers and consumer contracts are
15 given separate treatment in the following sections: Section 2-102(a)(11), (12)
16 (definitions); Section 2-104(a)(2) (relationship to other consumer law); Section
17 2-202(b) (merger clauses); Section 2-406(b), (c) (disclaimer of implied warranty);
18 Section 2-408(b)(2)(a) (express warranty obligation; Section 2-409(a) (extension of
19 warranty); Section 2-806(b) (consequential damages); Section 2-807(a) (specific
20 performance); Section 2-809(a) (liquidation of damages); Section 2-810(b), (c);
21 (agreed remedies); and Section 2-814(a) (statute of limitations).

22 Unless stated otherwise in the particular section, compliance with the
23 particular section does not necessarily foreclose the possible application of the
24 general standard in Section 2-105.

25 4. **International contracts.** In general, CISG does not apply to the
26 "validity of the contract or of any of its provisions or of any usage." Article 4(a).

27 **Cross References:** Sections 2-311(a), 2-406.

28 **Definitional Cross References:** "Contract", "term".

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

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

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

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

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

8 **Comment**

9 1. **Source:** Subsection (a) follows former Section 2-105(2), first sentence;
10 subsection (b) follows former Section 2-105(3); subsection (c) follows former
11 Section 2-105(2), the last sentence; subsection (d) follows former Section 2-105(4).
12 There are no changes of substance.

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

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

20 Second, if goods exist and are identified, whether a single unit or a bulk of
21 fungible goods, the seller may sell a part interest in them to the buyer. Subsection
22 (b). Thus, the seller may sell a one-half interest in an existing piece of factory
23 equipment or fungible corn in a silo. Subsection (d) states that a seller can sell an
24 undivided but unquantified share of a bulk of fungible goods and when the buyer
25 becomes an owner in common. Thus, a sale of 50% of the seller's one-half interest
26 in the yellow corn in Silo #1 is sufficient to make the buyer an "owner in common"
27 of that amount.

28 Third, goods that are neither existing nor identified are "future" goods.
29 Section 2-102(a)(21). Under subsection (d), a purported sale of future goods is
30 treated as a contract to sell goods, i.e., a contract for the future sale of future goods.
31 Section 2-102(a)(12).

1 3. **International sales.** CISG is not “concerned with . . . the effect which
2 the contract may have on the property in the goods sold.” Article 4(b).

3 **Cross References:** Sections 2-501, 2-502.

4 **Definitional Cross References:** “Contract,” “future goods”, “goods”, “sale”.

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

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

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

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

1 property. The recording constitutes notice to third parties of the buyer's rights
2 under the contract for sale.

3 **Comment**

4 1. **Source:** Former Section 2-107. There are no changes of substance.

5 2. **Things that are part of real property.** Subsection (a) deals with things
6 so integrated with land that they are fairly classified as real property. They include,
7 for example, oil and gas to be extracted and, depending on the degree of structural
8 integration, a building to be removed from the land. Under a contract for sale, if a
9 buyer is permitted to enter the land and sever the things, the things are treated as
10 real property and Article 2 does not apply. The permission to enter and sever,
11 frequently granted by a lease, is treated as the transfer of a limited interest in land
12 and the transaction is subject to applicable statutes of limitations for and recording
13 requirements in real property law.

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

21 Revised Section 9-102(a)(44) excludes "oil, gas, or other minerals before
22 extraction" from the definition of goods, regardless of whether the owner is to
23 extract or not. There is a definition of "As-extracted collateral" in Section
24 9-102(a)(6) for purposes of creating and perfecting security interests in minerals
25 before extraction.

26 3. **Things apart from real property.** Subsection (b), which is subject to
27 subsection (a), treats things attached to real property and capable of severance
28 without material harm to the real property as goods, regardless of who is to sever
29 them. The assumption is that the severance of growing crops or timber will not
30 materially harm the real property. As to other things not covered in subsection (a),
31 the lack of material harm test must be satisfied. For example, the removal of a rock
32 wall or a portable aluminum storage shed is within subsection (b) and probably does
33 not result in material harm. In these cases, the parties may conclude a present sale
34 before severance by identifying the goods at the time of contracting.

35 Revised Article 9 includes in the definition of goods: "(i) fixtures, (ii)
36 standing timber that is to be cut and removed under a conveyance or contract for

sale, . . . (iv) crops grown, growing or to be grown, even if the crops are produced on trees, vines, or bushes” Section 9-102(a)(44). Article 2 does not deal with fixtures.

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

Cross References: Sections 2-103, 2-104, 2-502.

Definitional Cross References: “Buyer”, “contract”, “future goods”, “seller”.

SECTION 2-108. EFFECT OF AGREEMENT; QUESTIONS DETERMINED BY COURT.

(a) Unless a section in this article otherwise provides, the effect of any provision of this article may be varied by agreement.

(b) The presence of mandatory language, such as “must” or “shall,” or the absence of enabling language, such as “unless otherwise agreed,” does not by itself preclude the parties from varying by agreement a provision of this article.

(c) Whenever this article allocates a risk or imposes a burden between the parties, they may agree to shift the allocation and to apportion the risk or burden.

(d) Whether a term is conspicuous or unconscionable under Section 2-105 is a question to be determined by the court.

Comment

1. **Source:** Subsection (a) follows former Section 1-102(3); subsection (b) modifies former Section 1-102(4); subsection (c) follows former Section 2-303; subsection (d) follows former Section 1-201(10). There are no substantive changes.

1 **2. Power to vary the effect of Article 2 by agreement.** Subsection (a)
2 restates the principle found in Article 1 that the parties have power to vary the effect
3 of Article 2 by agreement, unless that power is limited by Section 1-102(3). Section
4 1-102(3) prohibits the disclaimer of the “obligations of good faith, diligence,
5 reasonableness and care” but permits the parties to agree on the standards for
6 measuring these obligations if the standards are not “manifestly unreasonable.”

7 The power to vary the effect of Article 2 is also limited by provisions in
8 Article 2 itself. A very few provisions explicitly state that their effect cannot be
9 varied by agreement. See Sections 2-409(a), (b), 2-503(a), 2-809(a), 2-814(a). In
10 other sections a limitation may be implied from the mandatory language used, the
11 nature of the policies involved, and other factors, such as whether the rights of
12 persons not party to the contract are involved. Assuming that the parties have tried
13 to vary the effect by agreement, the invalidity of the agreement is strongly suggested
14 by the following sections: Section 2-105(a) (unconscionable contract or term);
15 Section 2-107(a) (seller must sever); Section 2-201 (statute of frauds); Section
16 2-201(e) (seal not effective); Section 2-204 (firm offer requirements); Section 2-105
17 (consumer contracts); Section 2-209(b) (no oral modification term in consumer
18 contracts); Section 2-311(b) (failure to give notice on termination); Section 2-406
19 (warranty disclaimers); Section 2-505(a) (rights of seller’s creditors); Section
20 2-506(e) (rights of buyer’s creditors); Section 2-803(b) (obligation to mitigate
21 damages); Section 2-810 (limits on agreed remedies); Section 2-819 (conditions for
22 proper resale); Section 2-822(a) (action for price limited); Section 2-824 (buyer’s
23 right to goods in seller’s possession); and Section 2-825(a) (conditions for proper
24 cover).

25 Nevertheless, mandatory language by itself does not mean that the effect of
26 the provision cannot be varied by agreement. Unless a rule of non-variance is stated
27 in the section, the assumption is that variance is permitted unless an implied
28 limitation can be established.

29 3. Based upon subsection (b), the phrase “unless otherwise agreed” is not
30 necessary to empower variance by agreement and does not appear in Article 2.

31 Unlike Article 6 of CISG, this section does not state that the parties can
32 contract out of Article 2 when it applies. Nor does it state that the parties can
33 contract into Article 2 when it does not apply. Presumably the parties have some
34 power to contract in or contract out, but the limitations of that power are not stated
35 in revised Article 2.

36 4. Subsection (c) follows Section 2-303 and is repositioned in Section
37 2-108, which deals with the effect of an agreement. The phrase “unless otherwise

1 agreed” is deleted from the original Section 2-303 because Revised Article 2 does
2 not use that phrase.

3 **5. Decisions for court.** Subsection (d) follows Section 1-201(10): Whether
4 a term is conspicuous is a question for the court. Similarly, whether a contract or
5 term is unconscionable is also a question for the court. See Section 2-105(a).

6 **6. Arbitration and other dispute resolution forums.** Although the word
7 “court” is not defined, it necessarily includes an arbitration or other dispute-
8 resolution forum if the parties have agreed to use that forum or its use is required by
9 law.

10 This Article leaves the enforceability of agreements to arbitrate and choice of
11 forum clauses to other law.

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PART 2
FORM, FORMATION, TERMS, AND READJUSTMENT
OF CONTRACT; ELECTRONIC CONTRACTING

[SUBPART A. FORM, FORMATION, TERMS, AND READJUSTMENT]

SECTION 2-201. FORMAL REQUIREMENTS.

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

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

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

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

(2) with respect to goods for which payment has been made and accepted or which have been received and accepted; or

(3) if the party against which enforcement is sought admits in pleading or testimony in court, or otherwise under oath, facts sufficient to indicate that a contract has been made, but the contract is not enforceable beyond the quantity admitted.

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

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

Comment

1. **Source:** Derived from former Section 2-201, with some substantive changes: (1) The threshold for application has been increased to \$5,000 or more; (2) A record may be sufficient even though it omits a quantity term; (3) In subsection (c), only the person receiving the confirmation need be a merchant; (4) The phrase “or otherwise under oath” has been added to subsection (c)(3); and (5) The so-

1 called “one year” provision of the general statute of frauds is made inapplicable to
2 Article 2.

3 2. **Scope.** Under subsection (a), the requirements of the statute of frauds
4 apply to a contract for the price of \$5,000 or more. An authenticated record is not
5 required where the price is less than \$5,000. The \$500 price in former Section
6 2-201(1) has been increased to reflect changes in the cost of living over the last 50
7 years.

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

20 To illustrate, if Buyer draws a check to the order of Seller in the amount of
21 \$10,000 and states on the check “this is payment for the computers,” the statute of
22 frauds is satisfied. The seller must then prove the terms of the contract, including
23 the quantity ordered. On the other hand, if a record signed by the buyer stated “this
24 confirms our contract for 30 computers” but did not state a price, the statute of
25 frauds is satisfied but the seller cannot enforce the contract for more than 30
26 computers, even if the buyer claims that the quantity terms was incorrectly stated.

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

36 To illustrate, suppose that buyer, a grain dealer, sends seller, a farmer, an
37 authenticated record that states: “This confirms our agreement to sell your output of
38 corn for \$2.10 per bushel, October delivery.” Seller receives the record and ignores

1 it. Assuming that the seller was a merchant, since the authenticated record was
2 sufficient against the buyer under subsection (a) and was received and not objected
3 to by the seller, the seller cannot raise the statute of frauds defense under subsection
4 (b). The parties, however, must still prove that a contract was formed and its terms,
5 except that the contract is not enforceable beyond the seller's "output" of corn. See
6 Section 2-306(a).

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

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

13 Second, subsection (c)(2) retains the "part performance" exception in former
14 Section 2-201(3)(c). Thus, if the oral agreement called for delivery of 1,000 units in
15 an installment contract for a price of \$10,000 and the seller tenders and the buyer
16 accepts 400 units, the statute is satisfied as to 400 units. Similarly, if the buyer pays
17 the seller \$4,000 before any delivery, the statute is satisfied with regard to the
18 quantity paid for. In the payment cases, evidence is admissible to show what goods
19 were paid for.

20 Third, subsection (c)(3) follows former UCC Section 2-201(3)(b), with one
21 changes: The admission may be made by testimony in court or "otherwise under
22 oath." An admission of facts sufficient to show that a contract was made removes
23 the statute of frauds bar to the extent that the agreed quantity was admitted.

24 **4. Promissory estoppel.** The statement of three statutory exceptions to
25 subsection (a) does not preclude the possibility that a promisor will be estopped to
26 raise the statute of frauds defense in appropriate cases. See Revised Section
27 1-102(b). For example, suppose a farmer orally agrees to delivery 5,000 bushels of
28 corn after harvest to a dealer for \$5 per bushel. The dealer resells the corn to a third
29 party for \$6 per bushel but neglects to send the farmer a confirmation. Under
30 Section 139 of the Restatement (Second) of Contracts, the farmer may be estopped
31 by the oral promise to deliver that induces reliance by the dealer, especially where
32 the reliance "corroborates evidence of the making and terms of the promise, or the
33 making and terms are otherwise established by clear and convincing evidence." See
34 Section 139(2)(c).

35 **4. One year provision.** Subsection (d), which is new, repeals the "one
36 year" statute of frauds provision for contracts for sale. The phrase "any other
37 applicable period" recognizes that some state statutes apply to periods longer than

1 one year. The confused and contradictory interpretations under the so-called “one
2 year” clause are illustrated in *C.R. Klewin, Inc. v. Flagship Properties, Inc.*, 600
3 A.2d 772 (Conn. 1991) (Peters, J).

4 **5. Modifications.** Under Section 2-209(b), a modification that itself is for
5 the price of \$5,000 or more or which increases the value of the quantity sold by
6 \$5,000 or more must satisfy Section 2-201.

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

12 **Cross References:** Sections 2-203, 2-205.

13 **Definitional Cross References:** “Contract”, “goods”, “merchant”, “record”,
14 “term”.

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

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

20 However, terms in the record may be supplemented by evidence of:

21 (1) consistent additional terms, unless the court finds that the record was
22 intended as a complete and exclusive statement of the terms of the agreement; and

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

24 (b) In a consumer contract, a term purporting to make the record a final
25 expression of the agreement is not conclusive evidence of an intent that a record be
26 a complete and exclusive statement of the terms of the agreement.

(c) Terms in a record may be explained by evidence of course of performance, course of dealing, or usage of trade without a preliminary determination by the court that the language used is ambiguous. Terms in a record may also be explained from other sources as determined by the court under applicable law.

Comment

1. **Source:** Subsection (a) is former Section 2-202(b). No substantive changes have been made. Subsection (b), dealing with consumer contracts, is new. In subsection (c), the first sentence is taken from former Section 2-202(a) and Comment 1(c). The second sentence is new.

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

3. **Total integration.** The best evidence of intention to have a total integration, i.e., that the record was intended as a complete and exclusive statement of all of the terms of the agreement, is the so-called “merger” term. In the absence of a merger clause, a total integration can be inferred if the terms, even though apparently consistent additional terms, if agreed upon would certainly have been included in the record.

Although a merger term is strong evidence of intention, it is not necessarily conclusive. A court may conduct a preliminary hearing to determine whether both parties intended a total integration. *See Betaco, Inc. v. Cessna Aircraft Co.*, 103 F.3d 1281 (7th Cir. 1996). Subsection (b) codifies this principle of interpretation for consumer contracts.

The effect of a total integration is clear under subsection (a). The record may not be contradicted or supplemented by “evidence of any prior agreement or of a contemporaneous oral agreement.” Alleged terms from these sources are excluded even though they are perfectly consistent or are in harmony with those in the record. However, terms may be supplemented by evidence of course of

1 performance, usage of trade, and course of performance. Thus, unless carefully
2 negated in the merger term, evidence from trade usage may always be admitted to
3 supplement a term in the record. The conditions of Section 1-205, however, must
4 be satisfied.

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

13 **4. Partial integration.** In the absence of a merger term, the intention to
14 integrate a record with regard to some of all of the terms must be inferred from the
15 circumstances. The inference will be strongest where the parties have assented to a
16 record that appears to be complete on its face. Nevertheless, the court should
17 conduct a hearing to confirm that inference and to determine what other terms, if
18 any, should be included in the agreement. For example, if a term does not
19 contradict but is additional to a partially integrated record, the court might conclude
20 that the term is not a consistent additional term or, if agreed to, probably would
21 have been included in the record. If so, evidence of the term is not admissible.

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

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

28 If the plaintiff claims that the parties agreed to an upward escalation term in the
29 pre-contract negotiations and this evidence does not contradict the fixed price
30 term, the evidence is admissible if it is a consistent additional term. If so, and
31 this depends upon inferences from the circumstances, the evidence is excluded.

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

34 5. Subsection (b) states that terms in an record, whether integrated or not,
35 may be explained by evidence from course of performance, usage or trade, or course

1 of dealing without a preliminary determination by the court that the terms are
2 ambiguous. This follows former Section 2-202(a) and Comment 1(c).

3 Terms in a record may also be explained by evidence from other sources as
4 determined by the court under applicable law. Put differently, Section 2-202 does
5 not state the principles of contract interpretation beyond those provided in
6 subsection (c). These are determined, variously, by other state law. See Sections
7 212, 200-203 of the Restatement, Second, of Contracts; Margaret N. Kniffen, *A*
8 *New Trend in Contract Interpretation: The Search for Reality as Opposed to*
9 *Virtual Reality*, 74 Oregon L. Rev. 643 (1995).

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

18 7. **International Sales.** There is no comparable provision for parol
19 evidence in CISG. CISG Article 8, however, provides standards for the
20 interpretation of statements by and conduct of parties to a contract for sale. See
21 Unidroit Principles of International Commercial Contracts (UPICC) Article 2.17,
22 which states the effect of a merger term.

23 **Cross References:** Sections 1-205, 2-201, 2-208.

24 **Definitional Cross References:** “Course of dealing”, “course of performance”,
25 “record”, “terms”, “usage of trade”.

26 **SECTION 2-203. FORMATION IN GENERAL.**

27 (a) A contract may be made in any manner sufficient to show agreement,
28 including offer and acceptance, conduct of both parties which recognizes the
29 existence of a contract, or the interaction of electronic agents.

30 (b) If the parties so intend, an agreement sufficient to constitute a contract
31 may be found even if the time of its making is undetermined, one or more terms are

1 left open or to be agreed upon, the records of the parties do not otherwise establish
2 a contract, or one party reserves the right to modify terms.

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

6 (d) Language that expressly conditions the intention to make a contract
7 upon agreement by the other party to terms proposed prevents contract formation
8 unless the other party agrees or conduct by both parties recognizes the existence of
9 a contract. However, an express condition contained as a standard term in a record
10 must be conspicuous.

11 **Comment**

12 1. **Source:** Subsection (a) follows former Section 2-204(1); subsection (b)
13 is derived from former Section 2-204(2); subsection (c) follows former Section
14 2-204(3); subsection (d), which is derived from former Section 2-207(1), last clause,
15 is new; subsection (e), which follows the UETA, is new.

16 2. **Contract formation.** Subsection (a) states the flexible principle that a
17 contract may be made “in any manner sufficient to show agreement.” This includes
18 but is not limited to offer and acceptance and the conduct of both parties or the
19 interaction of electronic agents which recognize the existence of a contract.

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

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

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

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

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

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

32 **5. International Sales.** Detailed contract formation principles are provided
33 in Articles 14-24 of CISG The definition, effect and revocability of an offer are
34 covered in Articles 14-17 and the definition and effect of an acceptance are covered
35 in Articles 18-23. Although Article 18(1) recognizes that an offer may be accepted
36 by conduct, there is no explicit statement that a contract may be formed by conduct
37 of both parties. Article 23 provides that a “contract is concluded at the moment

1 when an acceptance of an offer becomes effective in accordance with the provisions
2 of this Convention.”

3 **Cross References:** Sections 1-103, 2-105, 2-202, 2-204, 2-205, 2-210 through
4 2-213.

5 **Definitional Cross References:** “Contract”, “conspicuous”, “electronic agent”,
6 “electronic message”, “term”.

7 **SECTION 2-204. FIRM OFFERS.** An offer by a merchant to buy or sell
8 goods which is made in an authenticated record that by its terms gives assurance
9 that the offer will be held open is not revocable for lack of consideration during the
10 time stated. If a time is not stated, the offer is irrevocable for a reasonable time not
11 exceeding 90 days. A term of assurance in a form record supplied by the offeree to
12 the offeror is ineffective unless the term is separately authenticated.

13 **Comment**

14 1. **Source:** Former Section 2-205. There are no changes of substance.

15 2. Section 2-204 enables a merchant offeror to create an irrevocable offer,
16 i.e., an option contract, by an authenticated record that assures or promises the
17 offeree that the offer will be held open for a stated time or a reasonable time not to
18 exceed ninety days. Within that period, the offeror cannot revoke the offer and the
19 offeree can accept even though it knows that the offeror no longer wants to
20 contract.

21 To reduce the risk of unfair surprise, if the offeree provides the merchant
22 offeror with a form record containing a term of assurance, the term must be
23 separately authenticated.

24 Section 2-204 supplements rather than displaces other methods by which
25 option contracts are created, such as with consideration or by reliance. See
26 Restatement, Second, Contracts § 87(2).

27 3. **International sales.** Article 16(a) provides that an offer “cannot be
28 revoked . . . if it indicates, whether by stating a fixed time for acceptance or

1 otherwise, that it is irrevocable . . . or if it was reasonable for the offeree to rely on
2 the offer as being irrevocable and the offeree has acted in reliance on the offer.”

3 **Cross References:** Sections 2-203, 2-205.

4 **Definitional Cross References:** “Authentication”, “merchant”, “record”.

5 **SECTION 2-205. OFFER AND ACCEPTANCE.**

6 (a) Except as otherwise provided in Section 2-203(e), unless otherwise
7 unambiguously indicated by the language or circumstances, the following rules
8 apply:

9 (1) An offer to make a contract invites acceptance in any manner and by
10 any medium reasonable under the circumstances.

11 (2) An order or other offer to buy goods for prompt or current shipment
12 invites acceptance by a prompt promise to ship or a prompt or current shipment of
13 conforming goods or nonconforming goods. However, a shipment of
14 nonconforming goods is not an acceptance if the seller seasonably notifies the buyer
15 that the shipment is offered only as an accommodation to the buyer.

16 (b) A definite and seasonable expression of acceptance operates as an
17 acceptance even if it contains terms that add to or differ from the offer.

18 (c) If the beginning of a requested performance is a reasonable mode of
19 acceptance, an offeror that is not notified of acceptance within a reasonable time
20 may treat the contract as terminated.

21 **Comment**

22 1 **Source:** Follows former Section 2-206.

1 **2. Method and manner of acceptance.** Assuming that an offer has been
2 made, Section 2-206(a)(1) states the basic principle regarding the manner and
3 medium of acceptance: Unless unambiguously indicated by the “language or
4 circumstances”, the offer invites acceptance in “any manner and by any medium
5 reasonable under the circumstances.” Thus, if the seller offers to sell goods in a
6 letter communicated to the buyer and does not define or restrict the manner or
7 medium of acceptance, the buyer can create a contract by making a promissory
8 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,
11 upon posting or sending the acceptance or upon receipt. If the reasonable medium
12 of communication involves a delay in transmission of the acceptance, the common
13 law rule is that the contract is created upon posting or sending. If instantaneous
14 communication is involved, such as by electronic contracting, however, the contract
15 is not formed until the acceptance is received. See Section 2-203(e)(3).

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

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

37 **5. Acceptance by part performance.** Subsection (c) follows former
38 Section 2-206(2) except that the offeror who is not promptly notified of acceptance
39 by beginning performance may treat the contract formed as terminated rather than

1 the offer as having lapsed. This is consistent with the Restatement, Second, of
2 Contracts, which treats part performance invited by the offeror as an acceptance by
3 promise, § 62, but treats the failure of the offeree to notify the offeror of the
4 acceptance as a discharge of the offeror’s contractual duty. Section 54(2).

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

11 6. **Electronic contracting.** An acceptance by an electronic message or by
12 an electronic performance is effective when received. See Section 2-206.

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

23 **Cross References:** Sections 1-204, 2-203, 2-204.

24 **Definitional Cross References:** “Contract”, “goods”, “term”.

25 **SECTION 2-206. ELECTRONIC CONTRACTING; CONTRACT**

26 **FORMATION.** Except as otherwise provided in Sections 2-210 through 2-313,
27 the following rules apply:

28 (1) A contract may be formed by the interaction of electronic agents. If the
29 interaction resulting from the electronic agents’ engaging in operations is sufficient

1 to show agreement under Section 2-203 or 2-205, a contract is formed unless the
2 operations resulted from fraud, electronic mistake, or the like.

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

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

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

11 (3) In an interaction between individuals, if an offer made in an electronic
12 message evokes an electronic message in response, a contract is formed, if at all:

13 (A) if the offer is accepted under Section 2-205, when the acceptance is
14 received; or

15 (B) if the offer is accepted by an electronic performance, when the
16 electronic performance is received, unless the originating message required
17 acceptance in a different manner.

18 **Cross References:**

19 **Definitional Cross References:**

20 **Comment**

21 **Electronic contracting.** Section 2-206 is a particularized application of the
22 general principles of electronic contracting found in Subpart B of Part 2, especially
23 Sections 2-212 and 2-213. Those sections and the applicable definitions in Section
24 2-102 should be consulted before applying this section.

1 Paragraph (1) deals with contract formation by the interaction of electronic
2 agents and builds on Section 2-213. It is consistent with the formation principle in
3 Section 2-203(a).

4 Paragraph (2) deals with contract formation by the interaction of an
5 individual and an electronic agent. Here an individual includes an agent contracting
6 on behalf of a person other than an individual. The assumption is that the electronic
7 agent is programmed for a limited range of responses and that the individual is
8 responsible for making the choice to avoid or to make a response that will cause the
9 agent to complete the transaction or performance or indicate acceptance of an offer.
10 The individual must be free to take an action that avoids a contract. Also, the
11 individual who makes a statement must have reason to know that a contract will
12 result. See Section 2-213(c), which provides that terms of a contract formed under
13 Section 2-203(e) do not include “terms provided by the individual not using an
14 electronic agent if it had reason to know that the electronic agent could not react to
15 the terms as provided.” Thus, if the individual has reason to know that its action
16 will indicate acceptance of an offer and that additional terms proposed by the
17 individual cannot be reacted to by the electronic agent, there will be a contract
18 without the additional terms.

19 Paragraph (3) deals with contract formation between an individual who
20 sends an offer by electronic message and an individual who accepts the offer under
21 Section 2-205 or by an electronic performance, such as by payment. The
22 acceptance, whether by promise or performance, is effective when received.

23 **SECTION 2-207. EFFECT OF ADDITIONAL OR DIFFERENT TERMS**
24 **IN RECORD; CONFIRMATION.**

25 (a) This section is subject to Section 2-105.

26 (b) If a contract is formed by offer and acceptance and the acceptance is by
27 a record containing terms additional to or different from the offer, or if the conduct
28 of the parties recognizes the existence of a contract but the records of the parties do
29 not otherwise establish a contract, the terms of the contract include:

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

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

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

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

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

(1) terms in the confirmation and the confirmed contract, to the extent that they agree;

(2) terms in the confirmed contract to which the parties have previously agreed;

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

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

(d) In this section, a party does not expressly agree to a term by the mere retention or use of goods.

Comment

1. **Source:** Subsection (a) is derived from former Section 2-302(1); subsection (b) is derived from former Section 2-207(1); subsection (c) is derived from former Section 2-207(1). There are changes of substance in this section.

2. **Overview.** There are no contract formation rules in Section 2-207, which deals exclusively with what the terms of the contract are. Assuming a

1 contract is formed under other sections, subsection (b) deals primarily with cases
2 where the records of the party do not agree on the term in dispute and subsection
3 (c) deals with the effect of a confirmation of a contract that contains additional
4 terms.

5 These cases usually do not involve contracts where all of the terms are
6 included in one record signed by both parties. Rather, they involve relatively
7 unstructured transactions where it is more difficult to determine when the contract
8 was formed and whether certain terms proposed either before or after formation are
9 part of the contract. The problem is further complicated by the likelihood that one
10 or both parties will use standard forms or terms to which the other party appears to
11 have agreed by conduct or otherwise but which, in fact, have not been read or
12 understood. In most cases, Section 2-207 operates to exclude terms of this sort
13 unless the party has expressly agreed to them. See subsection (e), which states that
14 a party who merely retains or uses goods does not expressly agree to terms in
15 records that accompany or precede delivery. Even then, the included terms are still
16 subject to Section 2-105(a). See subsection (a).

17 The line between Section 2-207 and the usual fact pattern for contract
18 modification governed by Section 2-209(a) is often difficult to draw. A helpful
19 distinction is the time frame within which the terms are intended or proposed for
20 inclusion in the contract. Typically under Section 2-209(1), a contract is formed,
21 performance begins and an event occurs that prompts one party to request a
22 modification. If the other party agrees and the agreement is in good faith the
23 modification is enforceable. Under Section 2-207, the time when the contract is
24 formed may not be clear and the additional terms are proposed in and around the
25 formation process. There is a greater risk that one party will be unfairly surprised
26 when the other claims that standard terms are part of the agreement or that one
27 party will take unfair advantage of the process. Although terms included after
28 contract formation are, in general, modifications, the test for inclusion under
29 Sections 2-207 and 2-209(a) differ.

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

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

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

8 Third, form or standard terms in records excluded under subsection (b)(1) or
9 (2) become part of the contract if they have been expressly agreed to. Thus, a term
10 “knocked out” of the agreement because the records do not agree may be included
11 by express agreement. A party does not “expressly agree” to a term simply by using
12 goods shipped or tendered. Subsection (e). Something more is required, such as
13 initialing the term or evidence that the party was aware of the term and had a
14 realistic opportunity to object to it. In all probability, these issues will arise most
15 frequently where the parties exchange standard forms that are not read. See former
16 Sections 2-205 and 2-209(2) where the word “form” is used without definition and
17 the Comments to Section 2-207 where both “forms” and “expressly agreed” are
18 used. This tends to prevent unfair surprise and opportunistic behavior through the
19 use of standard forms, the problem to which former Section 2-207 was directed.

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

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

26 **Example #1.** After negotiations, B offered to buy goods from S. The offer
27 was made on a purchase order that on the front stated price, quantity, time of
28 delivery and method of payment and on the back stated several standard terms,
29 including a term requiring arbitration under AAA rules in St. Louis. S accepted the
30 offer in an acknowledgment form, on the back of which was a standard term
31 requiring arbitration in Chicago under Endispute rules and a disclaimer of the
32 implied warranty of merchantability. Without more, a contract was formed. The
33 terms include the terms on the front of Buyer’s purchase order to which Seller
34 assented and arbitration to the extent that the records agree. The terms include the
35 implied warranty of merchantability under Section 2-404 but not the Seller’s form
36 disclaimer of the implied warranty, even if the term otherwise complied with Section
37 2-406.

1 **Example #2.** Either party in Example #1 could prevent contract formation
2 by a conspicuous term stating, in effect, “unless you agree to all of my terms there is
3 no contract.” See Section 2-204(d). These conditions govern contract formation
4 and are not terms of the contract. If, nevertheless, the seller shipped and the buyer
5 accepted and used the goods, a contract by conduct would be formed unless the
6 party for whose benefit the condition is included objects.

7 **4. Confirmations.** Subsection (c) follows language in former Section
8 2-207(1) and elaborates on the effect of a confirmation of a contract by a record.

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

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

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

16 **5. Terms first disclosed after payment.**

17 In some sales over the telephone, the internet or by other direct marketing
18 methods, all of terms of the deal are not disclosed by one party, usually the seller,
19 before payment for the goods is made. The parties are in privity of contract,
20 compare Section 2-408, the parties may or may not exchange records, see
21 subsection (b), and no confirmation is involved. After payment the seller proposes
22 terms that add to those already agreed and, typically, gives the buyer a choice to
23 accept the terms or to reject them and return the goods. Most courts have
24 supported the seller in these transactions by interpreting former Article 2 to create a
25 “rolling contract” where no contract is formed unless the buyer accepts the
26 additional terms and holding that the terms are accepted by using the goods without
27 objection to the terms. Put differently, despite payment for and shipment of the
28 goods, conduct that usually creates a contract, the courts have held that the
29 additional terms are the seller’s offer to sell which the buyer must accept or reject
30 and that acceptance of the terms can be inferred from conduct. In these cases,
31 Section 2-207 does not apply.

32 If, however, a contract is formed by conduct or otherwise before the
33 additional terms are proposed, Section 2-207 should be applied to determine
34 whether the terms are part of the contract. In these cases, standard terms would not
35 be part of the contract unless the buyer “expressly agreed” to them.

1 The following example illustrates how revised Article 2 should be interpreted
2 to deal with the problem.

3 **Example #1.** B, responding to S's advertisement, telephones S [or uses a
4 computer] and orders the goods. B is asked to pay at that time by credit card. S
5 does not disclose that additional terms will be proposed later and does not expressly
6 condition contract formation on agreement to those terms. On these facts, when S
7 ships the goods a contract arguably is formed by conduct under Section 2-203. The
8 terms, when they arrive with the goods, are proposals to modify the contract. They
9 do not become part of the contract unless there is a good faith agreement to include
10 them under Section 2-209(a) or, if Section 2-207(b) applies, the buyer has expressly
11 agreed to them. Under Section 2-207(d), the mere use of the goods after receiving
12 the terms is not an express agreement. These protections are specific applications
13 on the requirement of conscionable contracts and terms in Section 2-105(a).

14 **6. Expressly agreed.**

15 Subsections (b) and (c) require "express" agreement to include standard
16 terms in a contract and subsection (d) states what is **not** express agreement, the
17 mere retention or use of the good delivered. This neutralizes the risk of unfair
18 surprise in transactions where the goods are used without reading or negotiating
19 over standard terms and the focus is on the negotiated terms. In the usual case, a
20 court may find express agreement where the parties have negotiated the standard
21 term, one party has separately authenticated it, or because of a prior course of
22 dealing or course of negotiation in the particular transaction, the party knows or has
23 reason to know that the standard term is present and does not object to it. This
24 follows the explanation in Comment 3 to former Section 2-207 and interpretation by
25 the courts.

26 **7. CISG.** The principle underlying revised Section 2-207(b) is rejected in
27 Article 19 of CISG. In essence, a purported acceptance of an offer which contains
28 additions, limitations or other modifications is a rejection and a counteroffer unless
29 the reply contains "additional or different terms which do not materially alter the
30 terms of the offer." Article 19(2) Thus, the counteroffer is the offeree's "last shot"
31 which can be accepted by "conduct . . . indicating assent" to the offer. Article
32 18(1). CISG contains no protection against unfair surprise and provides no explicit
33 method of determining what are the terms of a contract formed by mutual conduct.

34 **Cross References:** Sections 2-105, 2-203, 2-204, 2-205, [2-206], 2-209.

35 **Definitional Cross References:** "Contract", "record", "term".

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

(a) If a contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the agreement.

(b) The express terms of an agreement and any course of performance, course of dealing, and usage of trade must be construed whenever reasonable as consistent with each other. However, if the construction is unreasonable:

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

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

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

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

Comment

1. **Source:** Former Section 2-208. There are no changes of substance.

2. Section 2-208 will, in all probability, be moved to revised Article 1.

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

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

1 (b) A modification must satisfy the requirements of the statute of frauds if
2 the modification itself is for the price of \$5,000 or more or increases the quantity of
3 goods by the value of \$5,000 or more.

4 (c) An authenticated record containing a term that prohibits modification or
5 rescission, except by an authenticated record, may not be otherwise modified or
6 rescinded. If the term is in a form record supplied by a merchant to a nonmerchant,
7 it must be separately authenticated. A party whose language or conduct is
8 inconsistent with the term is precluded from asserting the term if the assertion is
9 unjust in view of a material change of position in reliance on the language or
10 conduct.

11 (d) A condition in a contract may be waived by the party for whose benefit
12 it was included. Language or conduct is relevant to show a waiver. A waiver
13 affecting an executory portion of a contract may be retracted by reasonable notice
14 received by the other party that strict performance will be required of any term
15 waived unless the retraction would be unjust in view of a material change of position
16 in reliance on the waiver.

17 **Comment**

18 1. **Source:** Follows former Section 2-209, with revisions of substance: (1)
19 The requirement of “good faith” is added to subsection (a); (2) Subsection (b)
20 clarifies when a modification must satisfy the statute of frauds; (3) Subsection (c)
21 states when a no oral modification clause can be waived; and (4) Subsection (d)
22 clarifies the content and scope of waiver.

23 2. **Agreed modification.** Subsection (a) follows former Section 2-209(1),
24 except that the requirement of a good faith modification, previously found in a
25 Comment 2, is explicitly stated in the statute. This follows the cases, *see, e.g., Roth*
26 *Steel Products v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983), and avoids the

1 argument that a contract modification is not a “performance or enforcement” of a
2 contract under Section 1-203.

3 Subsection (a) is subject to Section 2-207. In the situations covered there,
4 Section 2-207 rather than Section 2-209(a) determines whether terms proposed
5 after contract formation become part of the contract.

6 **Example #1.** S and B enter a five year contract for the supply of a stated
7 quantity of goods at a fixed price. There is no disagreement about what the terms of
8 the contract are. After three years of performance, S’s cost of performance rises
9 dramatically and S asks B if the contract price can be adjusted upward. After due
10 deliberation, B agrees to the change and the writing is modified. Whether the
11 agreed modification is enforceable is determined under Section 2-209(a).

12 **Example #2.** B orders goods from S over the internet. B pays by credit
13 card and S ships the goods, along with a record containing terms additional to those
14 previously agreed. B ignores the terms and uses the goods without objection. If a
15 contract is formed, whether the additional terms are part of the contract is
16 determined by Section 2-207(b).

17 **3. Relationship to statute of frauds.** Subsection (3) of former Section
18 2-209, which stated that the requirements of the statute of frauds must be satisfied if
19 the contract as modified is within its provisions,” has been revised to focus on the
20 price or value of increase quantity in the modification itself. Thus, a modification
21 for a \$4,000 price increase is not within the statute of frauds (although a \$5,000
22 modification would be) but a modification that increased the quantity of goods the
23 value of which exceeded \$5,000 would be. In cases where neither the original
24 agreement nor the modification were in excess of \$5,000 but together they are, the
25 phrase “contract” in Section 2-201(a) should be interpreted to include a contract as
26 modified and the statute of frauds will apply.

27 **4. “No oral modification” terms.** Subsection (b) follows former Section
28 2-209(2), with two exceptions.

29 First, a NOM term in a form supplied by a merchant to a non-merchant must
30 be separately authenticated. This follows the last clause of former Section 2-209(2),
31 but changes the requirement of “between merchant” and substitutes “separately
32 authenticated” for “separately signed.” These changes both protect the non-
33 merchant from the fine print and facilitate electronic commerce.

34 Second, the party for whose benefit the NOM term was included is
35 precluded from enforcing it if language or conduct inconsistent with the NOM term
36 have induced reasonable, good faith reliance by the other party. *See Brookside*

1 *Farms v. Mama Rizzo's, Inc.*, 873 F. Supp. 1029 (S.D. Tex. 1995). For example,
2 suppose that a buyer insisted on a NOM term to control the extra work of a seller of
3 manufactured goods. Seller asks buyer for a written change order to increase the
4 quality of an important component. Buyer tells the seller "not to worry about the
5 writing" and to "make the change and send me the bill." If the change was made,
6 Buyer would be foreclosed from defending that the oral agreement was
7 unenforceable because of the NOM term.

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

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

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

26 **Example #3.** Suppose that a contract for installment deliveries contains a
27 NOM term. The seller encounters production problems, misses a due date and
28 requests an extension of delivery time from the buyer.

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

36 Second, suppose the buyer does not insist on a written modification and
37 simply accepts the late installment without objection. Later, the buyer invokes the

1 NOM term and sues the seller for damages arising from late delivery. Once again,
2 the NOM term is waived by the buyer's conduct which induced reliance under
3 subsection (b). Whether accepting the late delivery without objection is a waiver of
4 seller's breach is determined under Section 2-702.

5 **Cross References:** Sections 2-201, 2-207.

6 **Definitional Cross References:** "Authentication", "contract", "good faith",
7 "merchant", "record", "term".

8 [SUBPART B. ELECTRONIC CONTRACTING]

9 **SECTION 2-210. LEGAL RECOGNITION OF ELECTRONIC**
10 **RECORDS AND AUTHENTICATIONS.**

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

13 (b) This article does not require that a record or an authentication be
14 created, generated, sent, communicated, received, stored, or otherwise processed by
15 electronic means or in electronic form.

16 (c) In any transaction, a person may establish reasonable requirements
17 regarding the type of record or authentication acceptable to it.

18 **SECTION 2-211. ATTRIBUTION.** An electronic record is attributed to a
19 person if it was the act of the person or its electronic agent or if the person is
20 otherwise bound by the act under the law of agency. The party relying on
21 attribution of an electronic record to another person has the burden of establishing
22 attribution.

1 **SECTION 2-212 . CONTRACT FORMATION; ELECTRONIC**
2 **RECORD.**

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

5 (b) If an offer in an electronic message evokes an electronic message in
6 response, a contract, if any, is formed as determined in Section 2-206.

7 (c) Receipt of an electronic acknowledgment establishes that the message
8 was received but, in itself, does not establish that the content sent corresponds to
9 the content received.

10 **SECTION 2-213. CONTRACT FORMATION; ELECTRONIC AGENT.**

11 (a) A person that uses an electronic agent for authentication, agreement, or
12 performance is bound by the operations of the electronic agent even if no person
13 was aware of or reviewed the agent's actions or the results of the operations.

14 (b) Whether a contract is formed by the interaction of electronic agents or
15 the interaction of an electronic agent and a person is determined by Section 2-206.

16 (c) The terms of a contract formed under Section 2-208 do not include
17 terms provided by the person not using an electronic agent if it had reason to know
18 that the electronic agent could not react to the terms as provided.

1 **Comment to Subpart B**

2 **1. Basic definitions.**

3 The principles of electronic contracting in revised Article 2 are derived from
4 UCITA, as modified by the Uniform Electronic Transactions Act. They rest upon
5 several key definitions.

6 The first pair is “authenticate” and “record.” Section 2-102(a)(1), (32).
7 These core definitions are common through out the Act.

8 A second group includes “computer,” “computer information”, “computer
9 program”, “copy,” “information”, “informational content”, “informational
10 processing system”. This group follows definitions in UCITA and is limited to the
11 scope of Article 2. See Section 2-103(b).

12 A third group includes definitions in Section 2-102(a) that specifically related
13 to electronic transactions. They include “electronic”, “electronic agent”, “electronic
14 message,” “electronic event”, “receive”, and “send”.

15 **2. Basic principles.**

16 Sections 2-210 through 2-213 create a limited framework for electronic
17 contracting in Article 2. Section 2-104(b) accommodates those principles with
18 other state law dealing with such issues as authentication by digital signatures and
19 Section 2-104(d) accommodates Article 2 with the Uniform Electronic Contracting
20 Act.

21 Section 2-206 provides specific contract formation principles for Sections
22 2-203 and 2-205 where there is an interaction between electronic agents, or between
23 a person and an electronic agent, or between persons who use electronic messages.
24 Section 2-206, in effect, builds on and implements the general principles in Subpart
25 B.

26 **Example.** Buyer, an individual, interacts with Seller through Seller’s
27 electronic agent on the internet. Buyer has reason to know that the electronic agent
28 is programmed for a limited reaction. Electronic agent makes an offer to sell
29 jewelry to Buyer at a stated price, with acceptance to be by a funds transfer from
30 Buyer’s bank account. At this point:

31 Whether S’s electronic message is an offer is determined in Subpart A of Part 2.

32 The offer in a record will not be denied effect solely because it is in electronic
33 form. Section 2-210(a).

1 The offer made by the electronic agent is attributed to S. Section 2-211. S is
2 bound by the operations of the electronic agent whether or not aware of them or
3 the action or results were reviewed. Section 2-213(a).

4 The offer in an electronic record was effective when received even though Buyer
5 was unaware of its receipt. Section 2-212(a). See Section
6 2-102(a)(31)(B)(ii)(II) for when an electronic record is received. See Section
7 2-212(c).

8 Whether a contract between B, a person, and S, an electronic agent, is
9 formed is determined by Subpart A of Part 2 and Section 2-206. When an
10 acceptance is effective is determined by Section 2-206(2)(B). See Section 2-213(2).
11 In essence, if B is free to reject the offer yet takes action that indicates acceptance of
12 the offer, i.e., transfers funds, the contract is formed, Section 2-206(2)(B),
13 presumably when the performance is received. See Section 2-206(3)(A). The terms
14 of the contract are limited by Section 2-213(c).

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PART 3

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

SECTION 2-301. HOW CONTRACT PRICE PAYABLE.

- (a) The contract price may be made payable in money or otherwise. If the price is payable in whole or in part in goods, each transferor is a seller of the goods transferred.
- (b) If all or part of the contract price is payable in an interest in real property, this article applies to the transfer of goods but not to the transfer of the interest in real property or the transferor’s obligations in connection therewith.

Comment

1. **Source:** Former Section 2-304. There are no changes of substance.
2. **“Default” terms as part of the contract.** Part 3 on “General Obligation and Construction of Contract” assumes, in most cases, that a contract has been formed between the parties and that they are obligated to perform in accordance with the contract. Section 2-601. Further, the sections on Part 3 normally apply unless otherwise agreed by the parties. See Section 2-108. Thus, most sections in Part 3 supply “gap fillers” that are not, strictly speaking, “terms” of the “agreement” as those words are defined. See Section 1-201(3), (42). Nevertheless, the “gap fillers” are supplied terms of the contract that are reasonable in the circumstances and will be enforced as if the parties had agreed to them. See Restatement, Second, Contracts § 204.
3. **Price to be paid.** In most contracts for sale, the buyer agrees to pay the price in money. Under subsection (a), however, the parties may agree to pay the price in goods, or services or an interest in real property. A barter is permitted. If goods are sold in exchange for goods, both parties are sellers of the goods transferred and their obligations are governed by this article. Thus, a party who trades in a used car to purchase a new car is a seller of the used car and would have obligations of a seller, including a warranty of title under Section 2-402.
3. **Interest in real property as price.** Subjection (b) applies when goods are sold in exchange for an interest in real property. Article 2 does not apply to the

1 transfer of real property or any obligations connected with the transfer. In this
2 transaction, therefore, Article 2 applies to the goods transfer and the law of real
3 property applies to the real property transfer. The same analysis follows if the
4 goods are sold in exchange for the performance of services: Article 2 does not apply
5 to the service obligation.

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

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

15 **Cross References:** Sections 2-107, 2-303, 2-601.

16 **Definitional Cross References:** “Contract”, “goods”, “money”.

17 **SECTION 2-302. FULL OR PART PERFORMANCE.**

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

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

25 **Comment**

26 1. **Source:** Former Section 2-307. Revised to include the completion of
27 full performance by the seller as a condition to the buyer’s duty to pay.

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

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

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

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

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

30 **Cross References:** Sections 2-602, 2-606, 2-607, 2-710.

31 **Definitional Cross References:**

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

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

(1) nothing is said as to price;

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

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

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

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

(d) If the parties intend not to be bound unless the contract price is fixed or agreed and it is not fixed or agreed, a contract is not formed. In that case, the buyer shall return any goods already received or, if unable to do so, pay their reasonable value at the time of delivery, and the seller shall return any portion of the contract price paid on account.

Comment

1. **Source:** Section 2-305. Revised for style and clarity.

2. **Open prices.** Subsection (a) deals with agreements where the parties intend to contract even though the price is not agreed, or is left to be agreed in the

1 future, or is left to be fixed by external standards. These “open” price agreements
2 contrast with contracts where the price is fixed, with or without various forms of
3 escalation. Section 2-303 does not apply in these cases.

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

8 The primary purpose of open price contracts is to share rather than to
9 allocate the risk of changing market conditions. This is especially important in
10 contracts with extended duration. For example, in a fixed price installment contract
11 for a five year duration market fluctuations could create incentives for either party
12 to breach. Thus, in rising markets the seller would prefer to sell to other buyers at
13 the market price and in falling markets the buyer would prefer to buy from other
14 sellers at the market price. The fixed price, however, allocates the risk to the party
15 against whom the market moved. In an open or flexible price contract, the contract
16 price tracks changes in the market price. Neither party would have an incentive to
17 breach the contract because of price movements.

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

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

35 **4. Effect of failure to fix price.** If the price is not fixed through the fault of
36 one party, subsection (b) rather than subsection (a) applies. The other party has an
37 option to cancel the contract or to fix a reasonable price. If the price were to be

1 fixed by agreement of the parties and it was not agreed or one party was in bad
2 faith, subsection (a) applies.

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

7 Note that the failure to agree on a material term, such as price, may mean
8 that no contract was formed. Section 2-203(b). Section 2-303(a) assumes that a
9 contract was formed despite the open price terms but subsection (d) reintroduces
10 the intention requirement: Did the parties intend to be bound even if the price was
11 not fixed or agreed? If not, “a contract is not formed.” See Restatement, Second,
12 Contracts §§ 32, 33.

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

18 **Cross References:**

19 **Definitional Cross References:**

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

22 (a) A term that measures the quantity of goods by the output of the seller or
23 the requirements of the buyer means actual output or requirements that may occur in
24 good faith. If actual outputs or requirements occur in good faith, a party may not
25 tender or demand a quantity unreasonably disproportionate to a stated estimate or,
26 in the absence of a stated estimate, to any normal or otherwise comparable previous
27 output or requirements.

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

Comment

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

2. **“Output” or “Requirements” as quantity terms.** Subsection (a) states the meaning of “output” and “requirements” when used as quantity terms in a contract for sale. The parties may agree upon a fixed quantity or no quantity or something in between. But unless the parties agree to measure all or part of the quantity by “output” or “requirements,” Section 2-304(a) does not apply. *See Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, 925 S.W. 2d 759 (Tex. 1996) (holding that contested quantity term was not a requirements or output contract).

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

3. **Unreasonably disproportionate.** In cases where there are some actual output or requirements in good faith, subsection (a) further controls the exercise of discretion by requiring a reasonable proportion between agreed estimates or prior comparable output or requirements and the goods actually supplied or ordered. Suppose, for example, that the buyer estimated its requirements to be 50,000 units per year. Over a five year period, the buyer’s orders averaged between 45,000 to

1 55,000 per year. In the 6th year, buyer's actual requirements in good faith were
2 100,000 per year. If 100,000 units were ordered, the question is whether the
3 quantity is "unreasonably disproportionate" to the stated estimate and this question
4 is answered more by the size of the variations and whether they were reasonably
5 foreseeable at the time of the contract than the motives of the buyer or seller. In
6 short, a buyer can be in good faith and still order requirements that are unreasonably
7 disproportionate. *See Orange & Rockland v. Amerada Hess Corp.*, 397 N.Y.S.2d
8 814 (N.Y.A.D. 1977).

9 **4. Going out of business.** Subsection (a), as revised, clarifies that if there
10 are no actual output or requirements in good faith, the party has no duty to perform
11 even though there are estimates in the contract or there was prior output or
12 requirements. The question is whether the lack of output or requirements occurred
13 in good faith, not whether the lack of actual output or requirements was
14 "unreasonably disproportionate." This follows the interpretation of prior Section
15 2-306(1) in *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333 (7th Cir.
16 1988), but rejects the court's dictum that the unreasonably disproportionate
17 limitation is not applicable to any decrease in quantity or requirements. *See in*
18 *accord, Brewster of Lynchburg, Inc. v. Dial Corp.*, 35 F.3d 355 (4th Cir. 1994);
19 *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119 (3d Cir. 1992).

20 The question when a party with no actual output or requirements has acted
21 in good faith, i.e., has been dishonest in fact or failed to observe reasonable
22 commercial standards of fair dealing, Section 2-102(a)(23), is more difficult to
23 answer. Some courts have distinguished decisions made because the contract is
24 simply unprofitable or too costly (bad faith) from those made because an event
25 external to the contract has adversely affected the viability of the entire enterprise
26 (good faith). *Feld v. Henry S. Levy & Sons, Inc.*, 335 N.E.2d 320 (N.Y. 1975). At
27 least one court has held, however, that bad faith is established if the party claiming
28 no actual requirements fails to offer a reason for that situation. *See Empire Gas*
29 *Corp., supra; Canusa Corp. v. A & R Lobosco, Inc.*, 986 F. Supp. 723 (E.D.N.Y.
30 1997).

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

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

5 **Cross References:** Section 2-201.

6 **Definitional Cross References:** "Good faith", "goods", "term".

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

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

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

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

16 **Comment**

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

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

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

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

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

Cross References: Sections 2-502, 2-602.

Definitional Cross References:

SECTION 2-306. TIME FOR PERFORMANCE NOT SPECIFIED.

(a) Except as otherwise provided in this article, the time for performance is a reasonable time.

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

Comment

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

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

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

1 monthly requirements without stating a duration would be governed by subsection
2 (b).

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

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

7 (a) An agreement that is otherwise sufficiently definite to form a contract is
8 not unenforceable because it leaves particulars of performance to be specified by one
9 of the parties or to be fixed by agreement. If one party is to specify the particulars
10 of performance, the specification must be made in good faith and within limits of
11 commercial reasonableness.

12 (b) An agreement that does not specify the standard of performance, but
13 provides that performance by the seller must be to the satisfaction of the buyer,
14 requires the performance to be such that a reasonable person in the position of the
15 buyer would be satisfied.

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

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

1 (1) is excused for any resulting delay in its own performance; and
2 (2) may proceed to perform in any reasonable manner or, after the time
3 for a material part of the party's own performance, treat the failure to specify or
4 cooperate as a breach of contract by failure to deliver or accept the goods.

5 **Comment**

6 1. **Source:** Follows former Section 2-311. Subsections (a), (c), and (d) are
7 revised for clarity and style. Subsection (b) is new.

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

14 Consistent with the spirit of subsection (a), if the agreement leaves
15 particulars of performance to be fixed by agreement and they fail to agree, the
16 assumption is that both parties have disagreed in good faith. If, despite the failure,
17 they still intended to contract, the court should try to fill the gap from the default
18 rules in Part 3. This follows the approach of Section 2-303 where the parties intend
19 to contract but leave the price to be agreed.

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

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

29 **CREDIT.** If the parties agree that the primary method of payment will be by letter
30 of credit, the following rules apply:

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

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

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

Comment

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

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

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

4. Subsection (c) states the seller's remedy if the letter of credit is repudiated or wrongfully dishonored: Assuming that the goods conform to the contract, the seller may require payment directly from the buyer. In short, the seller may recover the agreed price, see Section 2-822, even if the goods are still in transit or have not been inspected by the buyer. See Section 2-605, which states the rights of a financing agency that has honored a letter of credit or purchased a draft

presented with necessary documents. Note, however, that a buyer who wrongfully repudiates a letter of credit may still have a right to inspect and reject non-conforming goods.

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

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

Comment

1. **Source:** Derived from former Sections 2-319, 2-320, 2-321, 2-322, 2-324. Sections 2-319 through 2-324 of current Article 2 are out of date with commercial practice and have been repealed.

2. Revised Section 2-309 directs the courts to interpret shipping and delivery terms in the same manner as other contract terms, with particular reference to usage of trade, course of performance and course of dealing. The Incoterms of the International Chamber of Commerce, frequently used in international sales, may be relevant to the meaning of these terms.

3. There are new commercial delivery terms which have come into use, especially in international transactions, since the drafting of the original Article 2. These terms evolve over time, and a statutory definition cannot easily respond adequately to changes in commercial practice.

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

The I.C.C.'s Incoterms are often used in international transactions and have a more restricted meaning for FOB, so that it should be used only with water-borne contracts of carriage. Under Incoterms FOB commercial term, the seller is obligated to deliver the goods on board a ship arranged for and named by the buyer at a named port of shipment. Thus, the seller must bear the costs and risks of both inland transportation to the named port of shipment and loading the goods on the

ship. The seller has no obligation to arrange transportation or insurance, but does have a duty to notify the buyer at the time the goods have been delivered on ship. The risk of loss transfers to the buyer at the time the goods have passed the ship's rail. The seller must provide a commercial invoice, or its equivalent electronic message, an necessary export license, and usually a transport document that will allow the buyer to take delivery – or an equivalent electronic data interchange message. For a broader treatment, see John A. Spanogle, *Incoterms and UCC Article 2 – Conflicts and Confusions*, 31 The International Lawyer 111(1997).

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

SECTION 2-310. TERMINATION; SURVIVAL OF RIGHTS; NOTICE.

(a) On the termination of a contract, all obligations of both parties that are still executory are discharged, but any right based on a previous breach or performance survives.

(b) Except on the happening of an agreed event, such as the expiration of a stated duration, a party may not terminate a contract unless the other party receives notice of the termination. A termination is effective when a reasonable time after notice is received has expired.

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

Comment

1. Source: Former Section 2-309.

2. “Termination” means “to end a contract or a part thereof by an act by a party under a power created by agreement or law, or by operation of the terms of the agreement for a reason other than for breach by the other party.” Section 2-102(a)(39). Subsection (a) states the effect of a termination.

1 3. Subsection (b) follows former Section 2-309(3) with the following
2 clarifying revisions: (1) An “agreed event” includes a stated expiration term or date;
3 (2) A notice of termination must be received and must give the terminated party a
4 reasonable time before the termination is effective; and (3) The parties may agree to
5 standards for the nature and timing of notice if they are not manifestly unreasonable.

6 4. Section 2-310 operates as follows. Assuming that a party has power to
7 terminate the contract, Section 2-310(a) states when notice is a condition precedent
8 to termination and subsection (b) limits agreements attempting to dispense with the
9 notice requirement. See former Section 2-309(3). In short, the power to terminate
10 at will is conditioned upon the receipt by the other party of “notification” which
11 gives a reasonable time before the termination is effective. “Reasonable time,” in
12 turn, “depends on the nature, purpose and circumstances of such action.” Section
13 1-204(2).

14 There are three exceptions to this important default rule.

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

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

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

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

35 Without more, the exercise of an agreed power to terminate is also subject
36 to the duty of good faith, Section 1-203, which cannot be disclaimed by agreement.

1 Section 1-102(3). Many courts, however, have found good faith where the
2 terminating party follows the terms of an otherwise conscionable termination term.
3 Under this approach, the motive of the terminating party is irrelevant and the agreed
4 termination is effective if a reasonable notice is given. This does not, however,
5 foreclose proof of other conduct that amounts to bad faith in performance, such as
6 attempting to recapture opportunities that were foreclosed upon the making of the
7 contract. *See Sons of Thunder, Inc. v. Borden, Inc.*, 690 A.2d 575 (N.J. 1997),
8 which made the distinction between a good faith termination under the contract and
9 bad faith in performance prior to the termination.

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

11 **Cross References:** Section 2-306(b).

12 **Definitional Cross References:** “Termination”.

13 **SECTION 2-311. SALE BY AUCTION.**

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

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

20 (c) A sale by auction is subject to the seller’s power to withdraw the goods
21 unless at the time the goods are put up or during the course of the auction it is
22 announced in express terms that the power to withdraw the goods is not reserved.
23 In an auction in which power to withdraw the goods is reserved, the auctioneer may
24 withdraw the goods at any time until completion of the sale is announced. In an
25 auction in which power to withdraw the goods is not reserved, after the auctioneer

1 calls for bids on an article or lot, the article or lot may not be withdrawn unless no
2 bid is made within a reasonable time. In either case, a bidder may retract a bid until
3 the auctioneer's announcement of completion of the sale, but a bidder's retraction
4 does not revive any previous bid.

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

10 **Comment**

11 1. **Source:** Former Section 2-328. Updated and revised for style and
12 clarity

13 2. Section 2-310 makes three changes in former Section 2-328. First,
14 subsection (b) clarifies that the auctioneer's discretion to reopen the bidding applies
15 regardless of the method of completing the sale. Second, at the request of the
16 auction industry, the concept of "power to withdraw the goods" is substituted for
17 the phrase "with reserve" in subsection (c). The meaning of the latter phrase is
18 ambiguous. Finally, subsection (d) clarifies the meaning of a forced sale. There are
19 relatively few cases under former Section 2-328 and they reveal no significant
20 problems of interpretation. For a focused analysis, see Jorge Contreras, *The Art*
21 *Auctioneer: Duties and Assumptions*, 13 Hastings Comm./Ent. L. J. 717 (1991);
22 Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29
23 Wm. & Mary L. Rev. 501 (1988).

24 **3. Operation and effect.**

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

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

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

11 If it is announced in “express terms” that the auction is not subject to the
12 seller’s power to withdraw the goods, no contract is formed until some bid is made
13 within a reasonable time and not withdrawn by the bidder before the auctioneer
14 announces the completion of the sale. Both parties have some discretion (the
15 auctioneer’s is more limited) after the bid is made. This supports the conclusion that
16 the contract is formed at the place where the auctioneer accepts the bid, rather than
17 at the point where the bid is made, whether made by mail or through electronic
18 contracting.

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

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

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

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

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

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

23 **4. Auctions, warranties and disclaimers.**

24 In Part 4, Warranties, “Seller” is defined to include “an auctioneer or
25 liquidator that fails to disclose that it is acting on behalf of a principal.” Section
26 2-401(6). There is no requirement that the auctioneer disclose the name or names
27 of any principals before or after the sale.

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

32 Section 2-403 provides that express warranties may be made by a seller
33 (auctioneer or principal) to an immediate buyer (the bidder), both through
34 representations made at or just prior to the auction or in a “medium for
35 communication to the public, including advertising.” As a practical matter, implied
36 warranties are rarely made at auctions and, in any event, it is the usual practice of

- 1 the auction industry to offer goods “as is, where is” with no implied warranties made
2 by the auctioneer. This practice is validated in revised Section 2-406(b).
- 3 4. **International sales.** There is no comparable provision in CISG.

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PART 4
WARRANTIES

SECTION 2-401. DEFINITIONS. In this part:

- (1) “Damage” means all loss resulting from a breach under this part, including incidental and consequential damage.
- (2) “Goods” includes a component incorporated into other goods.
- (3) “Immediate buyer” means a buyer that has a contract with the seller.
- (4) “Remote buyer” means a buyer other than an immediate buyer.
- (5) “Representation” means a promise about the quality or performance of the goods to be delivered, a description of the goods, a sample or model of the goods, or an affirmation of fact about the goods.
- (6) “Seller” includes an auctioneer or liquidator that does not disclose that it is acting on behalf of a principal.

Comment

1. **Source:** New.

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

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

The first is the almost universal acceptance of the so-called “economic loss” rule. Under a common version of this judge-made doctrine, the law of torts does not apply if the non-conforming goods cause only disappointed expectations [economic loss] or damage to the goods sold. In these cases, it is the law of

1 contracts, represented by Article 2, that controls. *See, e.g., Alloway v. General*
2 *Marine Indus., L.P.*, 694 A.2d 264 (N.J. 1997); *Bocre Leasing Corp. v. General*
3 *Motors Corp.*, 645 N.E.2d 1195 (N.Y. 1995); American Law Institute, Restatement
4 of the Law Torts: Products Liability §§ 1, 21 (1998). Thus, the buyer of goods
5 manufactured by a remote seller but purchased from a retailer or dealer who suffers
6 economic loss from a non-conformity is limited by the Code's contract rules on
7 privity, notice, disclaimers and the statute of limitations unless it has sufficient
8 bargaining power to protect itself. In consumer contracts at least, many question
9 whether consumers have sufficient information and choice to adequately protect
10 their interest through bargaining with their seller.

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

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

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

31 **Goods.** "Goods" include a component incorporated "in substantially the
32 same condition into other goods." Unless otherwise provided in Part 4, goods
33 include both new and used goods.

34 **Immediate buyer.** An immediate buyer is in a contractual relationship with
35 the seller. Thus, express warranties, Section 2-403, and implied warranties,
36 Sections 2-404, 2-405, are made by sellers to immediate buyers but express
37 warranties under Section 2-408 are made by sellers to "remote buyers." Unless the

1 phrase “remote buyer” is used, use of the word “buyer” in Part 4 also means
2 “immediate buyer.”

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

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

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

17 A representation should be distinguished from a “remedial promise,” defined
18 as a promise by a seller to repair or replace the goods, or the like, or to refund the
19 price if the goods do not conform to the contract or a representation at the time of
20 delivery or if the goods conform at the time of delivery but fail thereafter to perform
21 as agreed or contain a defect” Section 2-102(a)(31). Remedial promises are
22 frequently made in connection with express and implied warranties and are part of
23 the package that a manufacturer or dealer might offer to an immediate buyer or pass
24 through to a remote buyer. The phrase is treated in Part 4 and other parts of Article
25 2, see Sections 2-103(a), 2-804, 2-814, 2-827. *See Flagg Energy Development*
26 *Corp. v. General Motors Corp.*, 709 A.2d 1075, 1080 (Conn. 1980).

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

33 **Seller.** In Part 4, “seller” includes an auctioneer or liquidator that “fails to
34 disclose that it is acting on behalf of a principal.” An auctioneer that discloses an
35 agency status at the time of the auction but does not disclose the name of the
36 principal does not make a warranty under Part 4. *See Jones v. Ballard*, 573 So.2d
37 783 (Miss. 1990).

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

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

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

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

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

15 (c) A warranty under this section may be disclaimed or modified only by
16 specific language or by circumstances that give the immediate buyer reason to know
17 that the person selling does not claim title or purports to sell only the right or title as
18 the seller or a third person may have or sells subject to any claims of infringement or
19 the like.

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

Comment

1. **Source:** Former Section 2-312. Subsection (a) extends the warranty to protect against “colorable claims” to the goods. Subsection (b) follows former Section 2-312(3) and subsection (c) follows former Section 2-312(2) without any change in substance. Subsection (d), which is new, identifies the applicable statute of limitations.

2. **Scope of warranty of title.** Unlike other warranties in Part 4, the warranty made by a seller in subsections (a) and (b) is standardized but can be disclaimed or modified under subsection (c).

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

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

3. **Warranty against infringement.** Subsection (b) continues the warranty against infringement in former Section 2-312(3). Unlike the warranty of title, the seller must be a merchant who “regularly deals in goods of the kind sold.” The warranty can be disclaimed or modified under subsection (c). See *Bonneau Co. v. AG Industries, Inc.*, 116 F.3d 155 (5th Cir. 1997), which holds that if the buyer furnishes specifications to a seller who follows them, there is no warranty against infringement under Section 2-312(3). In general, the warranty against infringement

1 is limited to uses of the goods by the buyer of which the seller knew or had reason
2 to know.

3 **4. Disclaimers.** Subsection (c) deals with the disclaimer or modification of
4 the warranty of title or against infringement. The first sentence, which follows
5 former Section 2-312(2), states the general standard that must be met to disclaim or
6 modify against an immediate buyer. The language need not be conspicuous or in a
7 record. The warranty against “infringement” can also be disclaimed under
8 subsection (c). There are no safe harbors for disclaimers under this section and no
9 special rules for electronic transactions. See Section 2-406(c).

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

16 **6. Statute of limitations.** Subsection (d) states that a cause of action for
17 breach of warranty of title or against infringement accrues for purposes of the
18 statute of limitations as determined under Section 2-814(c). The accrual time is
19 when the buyer “discovers or should have discovered the breach” not when the
20 goods are tendered. For warranties under Section 2-402(a) and (b), the buyer has
21 four years from that discovery to bring a law suit. Section 2-814(a). No tolling
22 period is imposed for warranties under Section 2-402(a). Thus, if the buyer should
23 have first discovered the breach of a warranty of title 10 years after delivery, the
24 cause of action accrues then and the buyer still has 4 years to bring suit. For the
25 warranty against infringement in Section 2-402(b), however, an eight year cap after
26 delivery is imposed by Section 2-814(c)(3). Thus, even though the buyer could not
27 have discovered the infringement until 10 years after delivery, the claim is barred
28 after the eighth year following tender of delivery.

29 Without subsection (d), a cause of action for breach of warranty under
30 subsection (a) would accrue when the breach occurred even though the plaintiff did
31 not have knowledge of the breach. Section 2-814(b)(1). Under the Uniform Sales
32 Act the statute ran from the time of delivery or when quiet possession was
33 disturbed. See *Menzel v. List*, 246 N.E.2d 742 (N.Y. 1969). Former Article 2 did
34 not impose a warranty of quiet possession. Thus, if the warranty was breached
35 upon tender of delivery but the owner did not replevy the goods until five years
36 later, the statute of limitations had run unless the seller made an express warranty
37 explicitly extending to future performance. Some courts have stretched to achieve
38 this result. See *Balog v. Center Art Gallery-Hawaii, Inc.*, 745 F. Supp. 1556
39 (D.Haw. 1990) (warranty that art work “genuine” explicitly extended to future

1 performance). Subsection (d) resolves this problem for breach of the warranty of
2 title.

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

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

15 (a) Any representation made by the seller to the immediate buyer, including
16 a representation made in any medium of communication to the public, such as
17 advertising, which relates to the goods and becomes part of the basis of the bargain
18 creates an express warranty that the goods will conform to the representation or,
19 with respect to a sample or model, that the whole of the goods will conform to the
20 sample or model.

21 (b) To create an express warranty, it is not necessary that the seller use
22 formal words such as “warranty” or “guaranty” or have a specific intention to make
23 a warranty. However, a representation merely of the value of the goods or an
24 affirmation purporting to be merely the seller’s opinion or commendation of the
25 goods does not create an express warranty under subsection (a).

26 (c) A representation under subsection (a) becomes part of the basis of the
27 bargain unless:

- 1 (1) the immediate buyer knew that the representation was not true;
- 2 (2) a reasonable person in the position of the immediate buyer would not
- 3 believe that the representation was part of the agreement; or
- 4 (3) in the case of a representation made in any medium of
- 5 communication to the public, including advertising, the immediate buyer did not
- 6 know of the representation at the time of the sale.
- 7 (d) A right of action for breach of warranty under this section accrues as
- 8 provided in Section 2-814(c).

9 **Comment**

10 1. **Source:** Former Section 2-313. Subsection (a) follows former Section

11 2-313(1). Subsection (b) follows former Section 2-313(2). Subsection (c), which

12 states when a representation becomes part of the basis of the bargain, is new.

13 Subsection (d), which is new, identifies the applicable statute of limitations.

14 2. **Representations.** Under subsection (a), express warranty obligations are

15 created through representations, including advertising, made by sellers to immediate

16 buyers that become part of the basis of the bargain. The assumption is that the

17 bargain between the parties is otherwise enforceable as a contract and is subject to

18 other requirements of this Article, such as the statute of frauds, Section 2-201, and

19 the parol evidence rule, Sections 2-202, 2-406(a). For the extent to which

20 representations protect others besides the immediate buyer, see Sections 2-408,

21 2-409.

22 The definition of representation in Section 2-401(5) includes a promise by

23 the seller about the quality or the performance of the goods. Thus, a seller may

24 either affirm to the buyer that the goods are X or may promise that the goods when

25 delivered will be X, or may promise that the goods will perform like X after

26 delivery. All are terms in the contract, but are treated as representations under Part

27 4.

28 3. **Puffing.** Subsection (b) follows Section 2-313(2) of current Article 2.

29 Although preserving the distinction between express warranty and puffing,

30 subsection (b) does not provide a test to distinguish the two. Presumably a buyer

31 must first be reasonable under the circumstances in believing that a representation

32 rather than puffing was made, and then argue that the representation became part of

1 the basis of the bargain. See Section 2-408(b) and (c). However, a representation
2 or affirmation that is “puffing” is not a representation under subsection (a) that can
3 become part of the basis of the bargain.

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

20 **4. Basis of the bargain.** The “part of the basis of the bargain” requirement
21 stated in former Section 2-313(1)(a) is retained in subsection (a). Unlike current
22 Section 2-313, however, subsection (c) states when a representation becomes part
23 of the basis of the bargain and clarifies what that phrase means. *See, e.g.*, Holdych
24 & Mann, *The Basis of the Bargain Requirement: A Market and Economic Based*
25 *Analysis of Express Warranties*, 45 De Paul L. Rev. 781 (1996).

26 **Burden of proof.** Subsection (c) follows the interpretation of former
27 Section 2-313 and the Comments that an affirmation of fact becomes part of the
28 basis of the bargain unless an unspecified exception is established, *see Buettner v.*
29 *R.W. Martin & Sons, Inc.*, 47 F.3d 116 (4th Cir. 1995) (Virginia law); *Tomie*
30 *Farms, Inc. v. J.R. Simplot, Inc.*, 862 P.2d 299 (Idaho 1993); *Torres v. Northwest*
31 *Engineering Co.*, 949 P.2d 1004 (Hawaii App. 1998); *Weng v. Allison*, 678 N.E.2d
32 1254 (Ill.App. 1997); *Keith v. Buchanan*, 220 Cal. Rptr. 392 (Cal. App. 1985), but
33 then states three possible grounds to exclude a representation from the bargain.
34 Beyond this, the section does not determine which party has what burden of proof,
35 i.e., what the buyer must plead and prove to shift the burden of persuasion to the
36 seller and what the seller must plead and prove to shift the ultimate risk of non-
37 persuasion back to the buyer.

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

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

10 Subsection (c)(2) states another defense, that a "reasonable person" in the
11 position of the immediate buyer would not believe that the representation was part
12 of the agreement. Thus, the buyer can know of and believe the representation but
13 still be unreasonable in that belief. For example, if the buyer brings its own expert to
14 the bargaining table and relies upon her judgment that the goods are of quality X, it
15 is unlikely that the buyer was influenced by or relied upon the seller's affirmation
16 that the quality was Y rather than X. Such an assertion or belief, under the
17 circumstances, would be unreasonable. Put differently, no such reasonable person
18 would have been influenced by or relied on the representation in entering the
19 contract or any modification thereof.

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

25 Section 2-403 should be given a practical construction where the knowledge
26 requirement is involved. For example, even though a remote buyer must know of a
27 representation in advertising at the time of the sale, that limitation should not
28 preclude recovery where a member of the household knows of the representation
29 and asks another member who does not know to purchase the goods. In these
30 cases, the remote buyer is either an agent for the household member who knows of
31 the representation or that knowledge should be attributed to the remote buyer.

32 **5. Temporal issues.** "Agreement" is defined as the "bargain of the parties
33 in fact." Section 1-201(3). So "basis of the bargain" is another way of saying "basis
34 of the agreement." Since agreements can be made both before and after a contract
35 is formed, there is no artificial time at which an express warranty must be made.
36 Thus, a representation, including those made by advertising, made before or after
37 contract formation can become part of the basis of the bargain. If a representation is
38 made after the contract is formed, the requirements for a modification in Section

1 2-209(a) must be satisfied. *See Downie v. Abex Corp.*, 741 F.2d 1235 (10th Cir.
2 1984).

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

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

12 **SECTION 2-404. IMPLIED WARRANTY OF MERCHANTABILITY.**

13 (a) Subject to Sections 2-406 and 2-407, a warranty that goods are
14 merchantable is implied in a contract for their sale if the seller is a merchant with
15 respect to goods of that kind. Under this section, the serving for value of food or
16 drink to be consumed on the premises or elsewhere is a sale.

17 (b) Goods, to be merchantable, at a minimum must:

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

19 (2) in the case of fungible goods, be of fair, average quality within the
20 description;

21 (3) be fit for the ordinary purposes for which goods of that description
22 are used;

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

(5) be adequately contained, packaged, and labeled as the agreement or circumstances may require; and

(6) conform to any representations made on the container or label.

(c) Subject to Section 2-406, other implied warranties may arise from course of dealing or usage of trade.

Comment

1. Source: Follows former Section 2-314.

2. **Scope.** Subsection (a) conforms to former Section 2-314(1). The seller must be a merchant “with respect to goods of that kind” before a warranty of merchantability is implied in a contract for sale. This is the most exacting definition of merchant. See Section 2-102(a)(27). The serving for value of food or drink for consumption on the premises or elsewhere is treated as a sale. Thus, both the patron in a restaurant and a buyer of “take out” food are protected by the implied warranty of merchantability.

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

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

Subsection (b) states the minimum standards of merchantability which are derived, in large part, from the agreed description of the goods. These standards supplement Section 2-403(a), where a description of the goods may be a representation that creates an express warranty. For example, suppose that the seller describes the goods as a “3 horse power lawn mower that will start on the first pull and cut grass up to five inches tall.” More than a core description is involved here. The seller represents the ease of starting and the capabilities of the mower.

1 On the other hand, suppose the agreed description is simply “power lawn mower”
2 and there are no other representations. If the power mower does not start on the
3 first pull or will only cut grass up to two inches tall, the buyer cannot rely on Section
4 2-403 for recovery and must fall back on Section 2-404. Note, however, that many
5 of the merchantability standards still overlap with representations that could be
6 express warranties under Section 2-403.

7 For the power mower to be merchantable:

8 (a) It must pass without objection in the trade under the contract
9 description. Sellers and buyers in the trade and familiar with trade descriptions
10 would probably not object to goods described as a power mower that would not
11 start on the first pull? *See Agoos Kid Co., Inc. v. Blumenthal Import Corp.*, 184
12 N.E. 279 (Mass. 1933) (trade description under Uniform Sales Act).

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

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

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

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

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

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

1 **4. Personal injuries.**

2 Suppose that an unmerchantable lawn mower caused personal injuries to the
3 buyer, who was operating the goods. Without more, the immediate buyer can sue
4 the seller for breach of the implied warranty of merchantability and recover for
5 injury to person or property “proximately resulting” from the breach. Section
6 2-806(2).

7 This opportunity does not resolve the tension between warranty law and tort law
8 where goods cause damage to person or property. The primary source of that
9 tension arises from disagreement over whether the concept of defect in tort and the
10 concept of merchantability in Article 2 are coextensive where personal injuries are
11 involved, i.e., if goods are merchantable under warranty law can they still be
12 defective under tort law and if goods are not defective under tort law can they be
13 unmerchantable under warranty law? The answer to both questions should be no,
14 and the tension between merchantability in warranty and defect in tort where
15 personal injuries or damage to property are involved should be resolved as follows:

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

19 **When, however, a claim for injury to person or property is based on an**
20 **implied warranty of fitness under Section 2-405 or an express warranty**
21 **under Section 2-403 or 2-408, this Article determines whether an implied**
22 **warranty of fitness or an express warranty was made and breached, as well**
23 **as what damages are recoverable under Section 2-806.**

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

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

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

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

20 **SECTION 2-406. DISCLAIMER OR MODIFICATION OF**
21 **WARRANTY.**

22 (a) Words or conduct relevant to the creation of an express warranty and
23 words or conduct tending to disclaim or modify warranty must be construed
24 wherever reasonable as consistent with each other. However, subject to Section
25 2-202, words or conduct disclaiming or modifying warranty are ineffective to the
26 extent that construction is unreasonable.

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

30 (1) The language must be in a record and be conspicuous.

1 (2) In a contract other than a consumer contract, the language is
2 sufficient if:
3 (A) in the case of an implied warranty of merchantability, it mentions
4 merchantability; and
5 (B) in the case of an implied warranty of fitness, the language states,
6 for example, “There are no warranties that extend beyond the description on the
7 face hereof.”
8 (3) In a consumer contract, the language must:
9 (A) in the case of an implied warranty of merchantability, state “The
10 seller makes no representations about and is not responsible for the quality of the
11 goods, except as otherwise provided in this contract”; and
12 (B) in the case of an implied warranty of fitness, state “The seller
13 makes no representations that the goods will be fit for any particular purpose for
14 which you may be buying these goods, except as otherwise provided in the
15 contract.”
16 (4) Language that is sufficient to disclaim or modify an implied warranty
17 under paragraph (3) is also sufficient to disclaim or modify an implied warranty
18 under paragraph (2).
19 (c) Unless the circumstances indicate otherwise, all implied warranties are
20 disclaimed by expressions such as “as is” or “with all faults” or similar language or
21 conduct that in common understanding make it clear to the buyer that the seller
22 assumes no responsibility for the quality or fitness of the goods. In a consumer

1 contract, the requirements of this subsection must be satisfied by conspicuous
2 language in a record.

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

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

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

12 **Comment**

13 1. **Source:** Derived from former Section 2-316, with changes in substance
14 and for clarity and style.

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

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

29 3. **Implied warranties.**

1 A. Subsection (b), which is derived from Section 2-316(2) and is subject to
2 subsection (c), states the requirements that must be met to disclaim or modify
3 implied warranties. Compliance with these requirements creates a safe harbor for
4 disclaimers. Failure to comply with subsection (b) does not invalidate the disclaimer
5 if the general requirements of subsection (c) are satisfied. Thus, a seller can miss the
6 safe harbor in subsection (b) but still bring the disclaimer ship into port under
7 subsection (c).

8 In all cases under subsection (b), the language of disclaimer must be in a
9 record and be conspicuous.

10 Paragraph 2 states the required content of the language for other than
11 consumer contracts.

12 Paragraph 3 states the required content of the language for consumer
13 contracts.

14 Paragraph 4 states that language in consumer contracts that satisfies
15 Paragraph 3 is sufficient to disclaim or modify an implied under paragraph 2.

16 B. Nevertheless, language of disclaimer which satisfies the more general
17 requirements of subsection (c) is effective even though the safe harbors in
18 subsection (b) are not satisfied. This is important in commercial contracts. Thus,
19 language or conduct that “make it clear to the buyer that the seller assumes no
20 responsibility for the quality or fitness of the goods” is effective under subsection (c)
21 even though the requirements in subsection (b) are not satisfied. In consumer
22 contracts, however, the language must be conspicuous and in a record.

23 C. Subsection (d) follows former Section 2-316(3)(c).

24 4. Subsection (e) follows Section 2-316(3)(b). This subsection applies to
25 examinations of the goods before the contract is made and does not apply to express
26 warranties. *See Maine Farmers Exchange v. McGillicuddy*, 697 A.2d 1266 (Me.
27 1997).

28 5. Subsection (f) follows Section 2-316(f). Article 2 draws a clear
29 distinction between terms that disclaim or limit liability and terms that vary or limit
30 the remedies for breach. See Section 2-808.

31 6. **International sales.** There is no provision comparable to Section 2-406
32 in CISG. Under Article 35, however, quality terms must be “required by the
33 contract.” Arguably, Section 2-406, which regulates disclaimers to require adequate

1 disclosure, involves the “validity of the contract,” a matter that is excluded from
2 CISG. Article 4(a).

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

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

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

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

12 (3) An express warranty displaces an inconsistent implied warranty other
13 than an implied warranty of fitness for a particular purpose.

14 **Comment**

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

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

25 In applying this section, care must be taken to avoid interpretations that
26 conflict with the policies protecting consumers against undisclosed or unclear
27 disclaimers of implied warranties in Section 2-406(c) and (d).

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

3 (a) In this section:

4 (1) “Goods” means new goods and goods sold or leased as new goods
5 in the sale to the remote buyer or in the lease to the remote lessee;

6 (2) “Remote lessee” means a lessee that leased good from an immediate
7 buyer or a person in the ordinary chain of distribution.

8 (b) If a seller makes a representation or a remedial promise in a record
9 packaged with or accompanying the goods and the seller reasonably expects the
10 record to be, and the record is, furnished to the remote buyer or a remote lessee, the
11 following rules apply:

12 (1) The seller has an obligation to the remote buyer or remote lessee
13 that the goods will conform to the representation or that it will perform any remedial
14 promise unless:

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

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

20 (2) The seller’s obligation to the remote buyer or remote lessee created
21 under paragraph (1) also extends to:

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

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

10 (c) If a seller makes a representation in a medium for communication to the
11 public, such as advertising, the seller has an obligation to the remote buyer or
12 remote lessee that the goods will conform to the representation and that the seller
13 will perform any accompanying remedial promise if:

14 (1) the remote buyer purchased or the remote lessee leased the goods
15 from a person in the normal chain of distribution with knowledge of the
16 representation and with the expectation that the goods will conform to the
17 representation;

18 (2) a reasonable person in the position of the remote buyer or the remote
19 lessee with knowledge of the representation would expect the goods to conform to
20 the representation; and

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

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

6 (e) An express warranty obligation under this section is breached if the
7 goods did not conform to the representation creating the express warranty
8 obligation when the goods left the seller's control. A right of action for breach of an
9 express warranty obligation under this section accrues as provided in Section 2-814.

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

13 (1) A seller under this section may modify or limit the remedies available
14 to persons to which an obligation is created, if the modification or limitation is
15 furnished to the remote buyer or remote lessee no later than the time of sale or lease
16 or with the record that makes the representation.

17 (2) Damages may be proved in any manner that is reasonable. Unless
18 special circumstances show proximate damages of a different amount, the measure
19 of damages if the goods do not conform to a representation is the value of the goods
20 as represented less the value of the goods as delivered, and the measure of damages
21 for breach of a remedial promise is the value of the promised remedial performance
22 less the value of any remedial performance completed.

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

Comment

1. **Source:** New.

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

Remote lessees. Section 2-408 also applies to remote lessees as that phrase is defined in subsection (a). For practical purposes, the assumption is that “remote buyer” includes “remote lessee” in this section.

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

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

1 remote buyer or other protected persons may pursue remedies under subsection (f)
2 directly against the seller.

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

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

16 If an obligation is created and breached or a remedial promise is breached,
17 RB’s remedies are set forth in subsection (f).

18 **Scope of protection.** Subsection (b)(2) states the extent to which S’s
19 obligation on a representation or remedial promise extends to persons other than
20 RB, who must be a remote consumer buyer. S, however, has power in the record
21 containing the representation to limit the scope of this extension provided that the
22 limitation is furnished to the remote consumer buyer “with the record that makes the
23 representation or at the time of the sale, whichever is later.”

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

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

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

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

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

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

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

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

16 The representation was puffing.

17 **Example.** M, a computer manufacturer, advertised that its Model #255 had
18 X megahertz and Y hard drive capacity. RB read the advertisement and, expecting
19 that Model #255 would conform to representations in the Ad, purchased a Model
20 #255 from D, a dealer. D made no express warranties and disclaimed all implied
21 warranties. Model #255 in fact did not have X megahertz. If the representation was
22 not “puffing” and a reasonable person would expect the goods to conform, M has
23 made and breached an obligation to RB. RB’s remedies are stated in subsection (f).

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

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

32 Subsection (f)(1) provides that a seller may modify or limit remedies
33 available for breach of the obligation under either subsection (b) or (c) but requires

1 that the limitation must be furnished with the representation “no later than at the
2 time of sale.” Thus, a limitation of remedies for breach of a “pass through”
3 representation that is contained in a record delivered by the dealer to a remote buyer
4 at the time of sale would be effective, provided that Section 2-810 was satisfied.

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

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

16 7. **Manufacturer’s implied warranty.**

17 The representations in Section 2-408, which include descriptions of the
18 goods, may include elements of quality normally associated with the implied
19 warranty of merchantability. Section 2-404. But goods that conform to the
20 description or pass without objection under the description may not be fit for the
21 ordinary purposes for which goods of that description are used. Section 2-408 does
22 not cover claims of that sort, which are left for the courts. *See, e.g., Beard*
23 *Plumbing & Heating, Inc. v. Thompson Plastics, Inc.*, 152 F.3d 286 (4th Cir. 1998)
24 (UCC Section 2-318 does not support recovery of consequential economic loss
25 without privity of contract).

26 **SECTION 2-409. EXTENSION OF EXPRESS OR IMPLIED** 27 **WARRANTY.**

28 (a) In a consumer contract, a seller’s express or implied warranty or a
29 remedial promise made to an immediate consumer buyer extends to any member of
30 the family or household or an invitee to the household of the immediate consumer
31 buyer or a transferee from the immediate consumer buyer who may reasonably be

1 expected to use, consume, or be affected by the goods and who suffers damage
2 other than injury to the person resulting from a breach of warranty or a remedial
3 promise. The seller may not disclaim, modify, or limit damages arising under this
4 section unless the seller has a substantial interest in having a warranty or a remedial
5 promise extend only to the immediate consumer buyer.

6 **Alternative A**

7 (b) A seller's warranty, whether express or implied extends to any individual
8 who is injured in person by breach of the warranty in the family or household of the
9 immediate buyer or who is a guest in the immediate buyer's home if it is reasonable
10 for the seller to expect that the individual may use, consume, or be affected by the
11 goods. A seller may not disclaim or limit the operation of this subsection.

12 **Alternative B**

13 (b) A seller's warranty whether express or implied extends to any individual
14 who may reasonably be expected to use, consume, or be affected by the goods and
15 who is injured in person by breach of the warranty. A seller may not disclaim or
16 limit the operation of this subsection.

17 **End of Alternatives**

18 (c) This article does not diminish the rights and remedies of any third-party
19 beneficiary or assignee under the law of contracts or of persons to which goods are
20 transferred by operation of law and does not displace any other law that extends a
21 warranty or remedial promise to or for the benefit of any other person.

(d) The scope of any warranty extended under this section to other than the immediate buyer and the remedies for breach may be limited by the enforceable terms of the contract between the seller and the immediate buyer. To the extent not limited:

(1) the scope of the warranty is determined by Sections 2-402, 2-403, 2-404, and 2-405; and

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

(e) A right of action for breach of warranty or breach of a remedial promise under this section accrues as provided in Section 2-814(b)(3) and (c).

Comment

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

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

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

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

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

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

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

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

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

20 2. Subsection (b), with the two Alternatives for state enactment, restates
21 Alternatives A and B of Section 2-318. Alternative A was enacted in ____ States and
22 Alternative B was enacted in ____ States.

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

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

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

10 3. Subsection (c) has been added to clarify that the rights and remedies of
11 protected persons under subsections (a) and (b) can be limited by enforceable terms
12 in the contract between the seller and the immediate buyer. Thus, a term
13 enforceable against the immediate buyer disclaiming the implied warranty of
14 merchantability or excluding all liability for consequential damages is effective
15 against protected persons. If there are no valid limitations, however, the scope of
16 warranties extended is determined by the warranty sections, Sections 2-402, 2-403,
17 404, and 405, and the remedies of the protected persons are determined by the
18 provisions of Section 2-408(f)(2) and (3). Thus, after it is determined that a
19 warranty is extended and breached under Section 2-409 and that remedies are not
20 limited by the contract between the seller and the immediate consumer buyer, the
21 protected person has the same remedies against the seller as a protected person
22 would have under Section 2-408(f).

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

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

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

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

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

8 The seller under CISG is also a seller under Article 2. Section 2-102(a)(36).
9 Apart from applicable conflict of laws principles, Article 2 is not limited to purely
10 domestic transactions. Furthermore, it is unlikely that international sales law
11 preempts domestic sales law in resale transactions in the chain of distribution. Thus,
12 Article 2 should govern the relationship, if any, between the Canadian seller and the
13 remote buyer from the New York buyer.

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

18 In most cases, CISG does not apply to sales of goods "bought for personal,
19 family or household use." Article 2(a). Thus, if the New York buyer was a
20 consumer buyer, CISG would not apply to the contract. Without more, Article 2
21 would apply, along with the potential for warranty extension under Section
22 2-409(a).

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

28 Finally, CISG is not concerned with the "validity of the contract or of any of
29 its provisions or of any usage." Arguably, controls imposed by Section 2-406 on the
30 validity of disclaimers or Section 2-810 on the validity of terms excluding liability
31 for consequential damages, including personal injuries, are not covered by CISG.
32 Again, they are covered by Article 2.

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

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

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

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

(1) Title to goods may not pass under a contract before their identification to the contract.

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

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

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

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

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

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

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

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

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

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

17 **Comment**

18 1. **Source:** Former Section 2-401, which has been revised for style and
19 clarity.

20 2. **Relevance of title.** Subsection (a) states that the location of title to or
21 possession of goods is irrelevant to the application of this article unless otherwise
22 provided in a particular section. Thus, title does not determine the risk of loss to
23 goods sold, Section 2-612, or whether the seller can recover the price upon breach
24 by the buyer, Section 2-822. Other commercial factors must be considered. On the
25 other hand, a sale of goods is the passage of title from the seller to the buyer for a
26 price and title is expressly made relevant under Section 2-504, dealing with power to

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

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

10 **2. When title passes.** Although the location of title to goods is not relevant
11 to most issues under Article 2, subsection (b) provides rules for when title passes.
12 In most cases, these rules apply unless “otherwise expressly agreed.” See Section
13 2-108.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) if the contract is for the sale of the unborn young of animals to be born within 12 months after contracting or the end of the normal period of gestation, which ever is longer, when the young are conceived.

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

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

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

Comment

1. **Source:** Former Section 2-501. Revised for style and clarity.

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

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

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

6 Seller has 10,000 bushels of #1 yellow corn in three silos. The buyer purchases
7 1,000 bushels of #1 yellow corn from any silo, to be delivered in 10 days. The
8 description of goods in bulk is sufficient, see Section 2-106(d), and the corn is
9 identified when the contract is made. Section 2-502(a)(2).

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

14 Seller, in March, agrees to sell Buyer 1,000 bushels of #1 yellow corn “to be
15 grown in my fields for October delivery.” When Seller plants the corn on May
16 15, the goods are identified to the contract.”

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

20 **2. Insurable interest.** The buyer obtains an insurable interest in goods
21 identified to the contract, subsection (b), and this does not impair any other
22 insurable interest recognized under “any other law, subsection (d). Although this
23 enables the buyer to insure the goods while in the seller’s possession, risk of loss
24 does not pass to the buyer upon identification unless otherwise agreed. In the
25 absence of agreement, the risk of loss to identified goods passes as stated in Section
26 2-612(b). For example, if the goods are in the seller’s possession and are not to be
27 shipped, the risk of loss passes upon receipt of the goods by the buyer. Section
28 2-612(b)(1).

29 A seller who retains a security interest in goods delivered to the buyer also
30 has an insurable interest in the goods. Subsection (c). Unless otherwise agreed,
31 however, upon delivery or shipment to the buyer the insurable interest protecting the
32 seller’s security interest will be in goods for which the buyer has the risk of loss.
33 Thus, where identified goods are lost or damaged during shipment, both parties can
34 purchase insurance to protect their respective interests in the goods.

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

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

10 (b) Upon identification, the buyer has, in addition to the remedy of specific
11 performance, a limited right to the goods as against a seller in possession and the
12 seller's creditors. See Sections 2-505(a), 2-807, 2-822, and 2-824.

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

15 Whether goods are identified or not is a factor in the power to sell, Sections
16 2-106, 2-107(b), tender of delivery by the seller, 2-305(b), 2-603(a), 2-604,
17 inspection, 2-609, risk of loss, 2-612(3), 2-506(b), casualty to goods, 2-714, and
18 various remedies upon breach, 2-805, 2-815(3), 2-817, 2-819, 2-822, and 2-823.

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

21 **SECTION 2-503. ASSIGNMENT OF RIGHTS; DELEGATION OF**
22 **DUTIES.**

23 (a) If the seller or buyer assigns rights under a contract, the following rules
24 apply:

25 (1) Subject to paragraph (3), all rights of either seller or buyer may be
26 assigned unless the assignment would materially change the duty of the other party,
27 materially increase the burden or risk imposed on that party by the contract, or
28 materially impair that party's likelihood of obtaining return performance. A right to

1 damages for breach of the whole contract or a right arising out of the assignor's due
2 performance of its whole obligation may be assigned despite an agreement
3 otherwise.

4 (2) The other party may treat an assignment that is a breach as creating
5 reasonable grounds for insecurity and may, without prejudice to the party's rights
6 against the assignor, demand adequate assurance of due performance from the
7 assignor.

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

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

21 (1) A party may delegate to another person its duty to perform a
22 contract for sale unless the other party to the original contract has a substantial

1 interest in having the original promisor perform or control the performance required
2 by the contract. A delegation of performance does not relieve the delegating party
3 of any duty to perform or any liability for breach of contract.

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

7 (3) The other party to the original contract may treat any delegation of a
8 duty to perform or transfer of a security interest under subsection (a)(3) as creating
9 reasonable grounds for insecurity and may, without prejudice to the party's rights
10 against the assignor, demand adequate assurance of due performance from the
11 assignee.

12 (4) A contractual term prohibiting the delegation of duties otherwise
13 delegable under paragraph (1) is enforceable, and an attempted delegation is not
14 effective. Unless the circumstances indicate otherwise, a prohibition of assignment
15 or transfer of "the contract" bars only the delegation to the assignee or transferee of
16 the assignor's duty to perform.

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

22 **Comment**

1 1. **Source:** Former Section 2-210. Revised for style and clarity and to
2 conform to Article 9.

3 2. **Assignment of Rights.** Subjection (a) treats the effect of an assignment
4 by either the seller or the buyer of rights but not the duties arising under the contract
5 for sale. These rights may be effectively assigned to a third person even if the
6 contract prohibits the assignment. Subsection (a)(2), which is subject to Section
7 9-406. Although the assignment to a third person is effective, between the parties
8 the assignment may be a breach for which damages can be recovered. See Section
9 2A-303. Moreover, the other party to the contract may demand adequate assurance
10 from the assignor of rights that the retained duties will be duly performed.

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

22 Subsection (a)(3) follows the conforming amendment to former Section
23 2-210, which is needed if revised Article 9 is enacted in a particular State and former
24 Article 2 is not revised.

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

26 **Example #1.** S and B enter a 3 year contract under which S is to
27 manufacture and deliver in installments 500 units of goods. B agrees to advance
28 part of the contract price at specified intervals to facilitate performance. The
29 contract contains a term prohibiting S from assigning its rights or delegating its duties
30 under the contract.

31 The term prohibiting the assignment of rights is not effective to prevent an
32 assignment of rights to a third person. Subsection (a)(2). See Restatement,
33 Second, Contracts § 322(2)(b). This restraint on alienation is subject to Section
34 9-406, particularly Section 9-406(d). The assignment, however, is a breach of
35 the prohibition term for which the buyer can recover damages or demand
36 adequate assurance of due performance.

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

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

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

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

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

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

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

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

8 **5. Article 9.** In general, Revised Article 9 applies to the sale of accounts,
9 chattel paper and payment intangibles. Section 9-109(a)(3). The transactions are
10 treated as creating security interests. The definitions of “account,” Section
11 9-102(a)(2), and “payment intangible”, Section 9-102(a)(61), are quite broad, and
12 cover most rights to payment arising under contracts for sale. To the extent that
13 these transactions are not excluded from Article 9 under Section 9-109(c), in a
14 contract for sale the effectiveness of the transfer is determined by Section
15 2-503(a)(3) and the effectiveness of a contractual restriction on transfer is
16 determined by Section 9-406(d). In either case, the purpose is to promote free
17 transfer 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**
20 **OF GOODS; ENTRUSTING.**

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

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

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;

1 (3) it was agreed that the transaction was to be a cash sale; or

2 (4) the delivery was procured through fraud punishable as a crime.

3 (c) Any entrusting of possession of goods to a merchant that deals in goods
4 of that kind gives the merchant power to transfer all of the entruster's rights to the
5 goods and to transfer the goods free of any interest of the entruster to a buyer in the
6 ordinary course of business.

7 (d) Entrusting by a person with title to or an interest in goods includes any
8 delivery and any acquiescence in retention of possession of the goods, regardless of
9 any condition expressed between the parties to the delivery or acquiescence or
10 whether the procurement of the entrusting or the possessor's disposition of the
11 goods was punishable as a crime.

12 **Comment**

13 1. **Source:** Former Section 2-403. Revised for style and clarity and to
14 conform to Article 9.

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

24 3. **Voidable title.** Subsection (b) states the so-called "voidable title"
25 exception to the common law rule. In the paradigm transaction, the owner intends
26 to sell the goods but is induced to transfer possession by the purported buyer's
27 fraud. In this case, the fraudulent buyer is given power, as a seller, to transfer good
28 title to a good faith purchaser for value to whom the goods have been delivered.
29 *See Johnson & Johnson Prod. v. Dal Int'l Trading*, 798 F.2d 100 (3d Cir. 1986).
30 See also Section 2-102(a)(16), defining delivery to mean the "transfer of physical

possession or control.” The terms “good faith,” “purchaser”, and “value” are defined in other parts of the UCC.

The line between “voidable” and “void” title, like the difference between “real” and “personal” defenses in the law of negotiable instruments, is often difficult to draw. In a paradigm case of “void” title, the owner delivers goods to another person relying on that person’s material misrepresentation that the record signed by both was a bailment rather than a sale. Here the risk is put on a good faith purchaser, even though the owner voluntarily transferred possession of the goods to a non-merchant. As between an owner deceived as to the nature of the transaction and the good faith purchaser for value, the owner prevailed at common law. Subsection (b) preserves that fragile distinction and states four borderline situations where possession is transferred that are treated as “voidable” title cases. In all voidable title cases, the goods must be delivered to the purported buyer by the seller. See *Inmi-Etti v. Aluisi*, 492 A.2d 917 (Md. 1985).

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

Subsection (c) also clarifies the protection that a buyer in the ordinary course would have from a security interest perfected by the entruster in the goods. Even though the biocob might not be protected under the relevant provisions of Article 9, subsection (c) provides that the biocob takes free of an interest in the goods created by an entruster in the goods who has a security interest in the goods entrusted.

Here are some problems that illustrate the basic principles.

Example #1. S owns a valuable, small sculpture by Rodin. T breaks into S’s house, avoids the security system, steals the Rodin and sells it to M, an art dealer, for \$50,000. M, in turn, sells the Rodin to B, a biocob, for \$75,000. S claims the Rodin. S wins under subsection (a). Neither subsection (b) nor (c) apply on these facts. The biocob is not protected.

Example #2. S wants to sell the Rodin. She consigns it to a man claiming to be Mr. Southby from London. The man, who is in fact a con artist named Joe Zilch from New Jersey, sells it to B, who is a GFP for value. If a consignment is a

1 “purchase of goods”, B wins over S under subsection (b)(1). If not, S wins under
2 subsection (a). The question is the meaning of purchase. If a broad meaning is
3 intended, almost any transaction where goods delivered for value is a “purchase of
4 goods.”

5 **Example #3.** S entrusts the Rodin to M, a dealer, for the purpose of
6 restoration. No power to sell is given. If M sells to a B who is a biocob, good title
7 is transferred under subsection (c). B is a buyer in the ordinary course of business
8 from a merchant to whom goods have been entrusted. Subsequent buyers from B
9 will take good title even though they are not biocobs.

10 **Example #4.** S sells the Rodin to B but retains title and possession as a
11 perfected security interest. S entrusts the Rodin to M for repairs. M sells the Rodin
12 to a biocob. The biocob takes good title and takes free of the security interest
13 created by S and B, even though the security interest was not created by the
14 biocob’s seller, M. See Section 9-320(a).

15 **Example #5.** S sells a used automobile to D, a dealer, and transfers the
16 certificate of title to D. D sells the car to B#1 who pays the price but does not take
17 the certificate of title and permits D to retain possession to replace a muffler. D
18 then sells the car to B#2 who pays and takes possession of the car and the certificate
19 of title. B#2 obtains a new certificate of title in its name.

20 On one level of analysis, as between B#1 and B#2, B#1 wins if the state
21 certificate of title law makes a certificate of title only presumptive evidence of title.
22 B#1 was first and has good title under Section 2-503(a). If state law makes a
23 certificate of title conclusive evidence of title, B#2 wins unless B#1 is a buyer in the
24 ordinary course of business who rights arose “before a certificate of title covering
25 the goods is effective in the name of any other buyer.” Section 2-104(a)(1).

26 On another level of analysis, even if B#1 prevails over B#2’s certificate of
27 title, B#1 has entrusted the car to D after the sale for repairs. Thus, if B#2 is a
28 buyer in the ordinary course of business, B#2 should prevail under Section 2-504(c).

29 **5. International sales.** There is no comparable provision in CISG, which is
30 not concerned with “the effect which the contract may have on the property in the
31 goods sold.” Article 4(b).

32 **SECTION 2-505. RIGHTS OF SELLER’S CREDITORS AGAINST**
33 **GOODS SOLD.**

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

(b) A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if, as against the creditor, a retention of possession or identification by the seller is fraudulent under any law of the State in which the goods are situated. However, the retention of possession in good faith and current course of trade by a merchant seller for a commercially reasonable time after a sale or identification is not fraudulent.

(c) Except as otherwise provided in subsection (a) and Section 2-504(c), this article does not impair rights of creditors of the seller:

(1) under Article 9; or

(2) if identification to the contract or delivery is not made in current course of trade but is made in satisfaction of or as security for a preexisting claim for money, security, or the like under circumstances that under any law of the State in which the goods are situated, apart from this article, would constitute a fraudulent transfer or voidable preference.

Comment

1. **Source:** Former Section 2-402. Revised in substance and for clarity and style.

2. **Rights of seller's creditors in goods retained.** Sellers frequently retain possession of goods after they are identified to the contract for sale. In some cases the goods conform to the contract and are "laid away" until the price is paid and in

1 other cases are retained the convenience the buyer In some
the may be the process being manufactured a buyer is making
advances. The are identified do not to the If the
4 seller breaches the buyer not perfected security interest the goods,
5 buyer's limited 2 rights the goods the seller stated in
2-807(a) performance), 2-822(b) for the 2-824(a) (pre-
7 paying buyer), 2-824(b) (replevin). ith the of Sections
and these sections the goods remedies of buyer in
9 original Article

10 Assuming buyer has to the against the , subsection
1 extends rights against creditors of seller "if buyer's rights vest
before creditor's claim in attaches to goods." "Creditor" defined in
Section 1-201 included unsecured secured creditors, creditors and
the trustee bankruptcy. is broader the phrase creditors" in
15 former Section

16 T illustrate, suppose a creditor the seller a judicial on
goods. If lien attaches the buyer's rights under any the four
18 listed sections, buyer is to the If the 's vest before
judicial attaches, the is entitled the goods the seller of the
20 judicial lien. , if security interest the seller's secured attaches
21 the buyer's right the buyer subject to security interest the
22 is in ordinary course business and free of security interest.
the 's vests first, buyer may the goods the seller of the
24 security interest the need comply with 9.

25 are two questions here. when do buyer's rights
to the Second, if creditor's right attaches the buyer's right
vests, when the earliest that the could be buyer in ordinary course
28 of business take free the attached

29 For under Section a revision current Section a
30 that pays or a of the of goods to the whether
not they been shipped, makes and good a of full
performance has right to them in civil action the seller the seller
33 repudiates or to deliver required by contract." The of this
34 paying and a who seeks replevin goods the seller
subsection "vest . . upon of the to the for sale
36 even if seller has then repudiated contract or to deliver required
37 the contract." (c). Thus, rights of seller under 2-824
upon identification though the is not in breach.

1 If the creditor interest attaches before vesting, a buyer in the ordinary course
2 of business may take free of that interest, particularly a security interest. How early
3 in the transaction may a buyer be in the ordinary course? Amended Section
4 1-201(9) provides: “Only a buyer that takes possession of the goods or has a right
5 to recover the goods from the seller under Article 2 may be a buyer in the ordinary
6 course of business.” A “right to recover,” however, is not the same as
7 identification. Thus, a buyer’s rights may vest earlier than the time when the buyer
8 can be in the ordinary course, usually when the right vests and the seller is in breach.

9 **3. When retention of goods by seller fraudulent.** Subsection (b) follows
10 former Section 2-401(2). Most retention of goods by a seller will satisfy the
11 requirements of the second sentence and not be fraudulent. A retention outside of
12 the protection of the second sentence may be void against creditors of the seller if
13 fraudulent “under any law of the state where the goods are situated.” There has
14 been little litigation of significance under this provision.

15 4. Subsection (c) emphasizes the limited role that this article plays in
16 determining the rights of the seller’s creditors under Article 9 or where fraudulent
17 conveyances or voidable preferences are involved.

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

19 **SECTION 2-506. SALE ON APPROVAL AND SALE OR RETURN;**
20 **SPECIAL INCIDENTS.**

21 (a) If the buyer can return conforming goods to the seller, the transaction is:

22 (1) a sale on approval, if the goods are delivered primarily for use; or

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

24 (b) Under a sale on approval:

25 (1) the risk of loss and the title to goods identified to the contract do not
26 pass to the buyer until acceptance;

27 (2) use of the goods consistent with the purpose of trial is not an
28 acceptance, but a failure seasonably to notify the seller of election to return the

1 goods is an acceptance, and acceptance of any part of conforming goods is an
2 acceptance of the whole; and

3 (3) after seasonable notice of election to return, the return is at the
4 seller's risk and expense, but a merchant buyer shall follow any reasonable
5 instructions.

6 (c) Under a sale or return:

7 (1) the option to return extends to the whole or any commercial unit of
8 the goods while substantially in their original condition, but the option must be
9 exercised seasonably; and

10 (2) after delivery, the risk of loss in on the buyer and the return is at the
11 buyer's risk and expense.

12 (d) An "or return" term of a contract for sale is treated as a separate
13 contract for sale under Section 2-201 and as contradicting the sale aspect of a
14 contract under Section 2-202.

15 (e) Goods held on approval are not subject to claims of a buyer's creditors
16 until acceptance. Goods held on sale or return are subject to those claims while in
17 the buyer's possession.

18 **Comment**

19 1. **Source:** Former Sections 2-326 and 2-327, which Section 2-506
20 integrates into one section. Revised for style and clarity.

21 2. **Definitions.** Subsection (a) , following former Section 2-326(1), defines
22 sale on "approval" and "sale or return." In both cases, there is a contract for sale
23 between a seller and buyer with a return condition. The reason for the return,
24 however, differs. The former goes to the buyer's satisfaction with the goods and the
25 latter goes to the buyer's ability to resell them.

1 **3. Sale on approval.** Subsection (b), which follows former Section
2 2-327(1), elaborates aspects of the sale on approval other than whether goods are
3 subject to claims of creditors of the buyer. See subsection (e). The question is
4 whether the buyer in possession elects to accept or return the goods. During the
5 period of inspection or trial, the risk of loss remains on the seller and if a timely
6 notice to return the goods is given the return is at the seller's risk and expense.
7 Upon acceptance of the goods, however, the return condition is discharged and the
8 normal principles apply.

9 Goods under a sale on approval are not subject to claims of the buyer's
10 creditors.

11 **4. Sale or return.** Subsection (c), which follows former Section 2-327(2),
12 elaborates aspects of the sale or return other than issues of creditor's rights. For
13 example, the option to return the goods must be exercised seasonably and in good
14 faith. See Section 2-307(b). Also, the return is at the buyer's risk and expense.

15 5. Subsection (d) follows Section 2-326(4). The return contract is a
16 separate contract for purposes of the statute of frauds, Section 2-201, and the parol
17 evidence rule, Section 2-202.

18 **5. Creditor's rights.** Subsection (e), which follows Section 2-326(2), deals
19 with creditor's rights against goods in the buyer's possession under an approval or
20 return condition. In the former, the goods are not subject to claims of the buyer's
21 creditors but in the latter they are "subject to those claims while in the buyer's
22 possession."

23 **6. Consignments.** In light of Article 9's expanded treatment of
24 consignments, former Section 2-326(3), which stated when consigned goods were
25 subject to creditors of the consignee, has been deleted. Treatment of the narrow
26 class of "true" consignments excluded from the Article 9 definition of consignment
27 is left to the common law or state legislation dealing with special types of
28 consignments, such as those by artisans or those where the value of the goods is less
29 than \$1,000. See Section 2-103(a)(3).

30 Consignment is defined in revised Section 9-102(a)(20) as follows:

31 "Consignment" means a transaction, regardless of its form, in which a
32 person delivers goods to a merchant for the purpose of sale and:

33 (A) the merchant:

34 (i) deals in goods of that kind under a name other than the name of the
35 person making delivery;

1 (ii) is not an auctioneer; and
2 (iii) is not generally known by its creditors to be substantially engaged in
3 selling the goods to others;
4 (B) with respect to each delivery, the aggregate value of the goods is \$1,000
5 or more at the time of delivery;
6 (C) the goods are not consumer goods immediately before delivery; and
7 (D) the transaction does not create a security interest that secures an
8 obligation.

9 **Example #1.** S sells a computer to B. A contract term gives B an option to
10 return the computer within 30 days if not satisfied with its operation. This is a “sale
11 on approval.” After three weeks B decides to return the goods but does not notify
12 S. On the 28th day after delivery, the goods are destroyed by fire without B’s fault
13 or negligence. B has accepted the goods if there was a “failure seasonably to notify
14 the seller of election to return the goods.” Section 2-506(b)(2). Upon acceptance,
15 risk of loss passes to B and the goods are subject to the claims of B’s creditors.

16 **Example #2.** S sells a used computer to B. B is to try to resell the
17 computer for S and, if successful, keep a small commission and account for the
18 balance of the price. This is a sale or return to which Section 2-506(c) applies. Risk
19 of loss is on B but the goods are subject to claims of B’s creditors.

20 **Example #3.** S delivers the used computer to C, a merchant, for the
21 purpose of sale. S is a consumer and the goods are worth \$750 at the time of
22 delivery. Without more, the transaction is neither a sale or return nor a consignment
23 as defined in Section 9-102(a)(20). Neither Article 2 nor Article 9 cover this
24 consignment. The transaction, however, may be covered by other state law on
25 consignments or the law of bailments. See Section 2-104(a).

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PART 6
PERFORMANCE

SECTION 2-601. GENERAL OBLIGATION. The parties shall perform in
accordance with the contract.

Comment

- 1. **Source:** Former Section 2-301.
- 2. **Comparison with former Article 2.** This section continues and broadens the rule from former Section 2-301.

General obligations of the parties. This section is derived from former Section 2-301 which provided that the seller was obligated to transfer and deliver the goods and that the buyer was obligated to accept and pay for the goods in accordance with the contract. This section was rephrased to apply to all of the parties’ obligations under the contract. This change recognizes commercial practices in contracting which often couple non-goods related obligations with obligations related to delivery and payment for the goods. Such contracts and obligations may fall within the scope of Article 2 under a jurisdiction’s application of the predominant purpose test or other tests for determining the scope of Article 2’s application to “transactions in goods.” Section 2-103.

3. **Contract defines the parties’ obligations.** To determine the parties’ obligations under the contract requires an inquiry into the parties’ agreement, defined in Section 1-201(3), applicable sections of the U.C.C. and other applicable rules of law. Section 1-201(11). Determination of the parties’ contractual obligations thus includes usage of trade, course of dealing and performance and the general background of circumstances in order to determine the meaning of words the parties may have used to set forth any conditions or duties. See Section 2-202.

4. **“Default rules” of this Article may determine parties’ obligations.** This article contains many provisions that can be used to determine the parties’ obligations under the contract if the parties do not agree otherwise. For example, Section 2-606 provides that the seller’s obligation to tender delivery is a condition to the buyer’s duty to accept and pay for the goods. The buyer’s tender of payment must take place after the seller’s tender of its performance. Section 2-607. See, e.g., Section 2-303 (open price term); Section 2-305 (absence of specification of place for delivery).

1 **5. International Sales.** Compare CISG Article 30 (seller must deliver
2 goods and documents as required by contract and convention) and Article 53 (buyer
3 must pay price and take delivery as required by contract and convention);
4 UNIDROIT Article 7.1.1 (defining non-performance as a “failure by a party to
5 perform any of its obligations under the contract, including defective performance or
6 late performance.”)

7 **Cross References:**

8 **Definitional Cross References:**

9 **SECTION 2-602. SELLER’S TENDER OF DELIVERY.**

10 (a) Tender of delivery requires that the seller put and hold conforming
11 goods at the buyer’s disposal and give the buyer any notice reasonably necessary to
12 enable the buyer to take delivery. The agreement and this article determine the
13 manner, time, and place for tender. In particular:

14 (1) tender must be at a reasonable hour;

15 (2) a tender of goods must be kept available for the period reasonably
16 necessary to enable the buyer to take delivery of the goods; and

17 (3) the buyer shall furnish facilities reasonably suited to receive the
18 goods.

19 (b) If the seller is required or authorized to send the goods to the buyer, the
20 following rules apply:

21 (1) If the agreement does not require delivery at a particular destination,
22 tender requires that the seller deliver conforming goods to the carrier and comply
23 with Section 2-603. The seller need not deliver at a particular destination unless
24 required by an express agreement or by the understanding of the terms used by the

1 parties as interpreted in light of applicable usage of trade and any course of
2 performance or course of dealing between the parties.

3 (2) If the agreement requires the seller to deliver at a particular
4 destination, tender requires compliance with subsection (a) and, in an appropriate
5 case, the tender of a document of title pursuant to subsections (c) and (d).

6 (c) If conforming goods of a seller are in the possession of a bailee and are
7 to be delivered to a buyer without being moved, the following rules apply:

8 (1) Tender requires the seller to tender a negotiable document of title
9 covering the goods or to procure an acknowledgment by the bailee to the buyer of
10 the buyer's right to possession of the goods.

11 (2) Tender to the buyer of a nonnegotiable document of title or a record
12 directing the bailee to deliver is sufficient tender unless the buyer seasonably objects.
13 However, risk of loss of the goods and of any failure by the bailee to honor the
14 nonnegotiable document of title or to obey the direction remains on the seller until
15 the buyer has had a reasonable time to present the document of title or direction. A
16 refusal by the bailee to honor the document of title or to obey the direction defeats
17 the tender. Except as otherwise provided in Article 9, receipt by the bailee of notice
18 of the buyer's rights fixes those rights as against the bailee and all third parties.

19 (d) If a contract requires a seller to deliver a document of title, the following
20 rules apply:

21 (1) The required document of title must be tendered in correct form.

1 (2) Tender through customary banking channels is sufficient, and
2 dishonor of a draft or other demand for payment accompanying the document of
3 title constitutes nonacceptance or rejection.

4 **Comment**

5 1. **Source:** Former Section 2-503.

6 2. **Comparison with former Article 2.** This section continues the rules on
7 tender of delivery from former Section 2-503 with the following substantive
8 changes. First, subsection (b)(1) provides that a destination contract is a contract
9 where the parties' agreement requires delivery to a particular destination. This
10 agreement can be evidenced by specific provisions or by the commercial
11 understanding of the shipment terms used in the agreement. See Section 2-309.
12 Thus, this section continues the presumption under former Section 2-503 that the
13 parties intend a shipment contract in the absence of a specific agreement to a
14 destination contract. Second, subsection (c)(1) provides that the bailee's
15 acknowledgment must be to the buyer. *See Jason's Foods, Inc. v. Peter Eckrick &*
16 *Sons, Inc.*, 774 F.2d 214 (7th Cir. 1985). Third, subsection (c)(2) provides an
17 exception to when mere notification fixes rights as to third parties to bring this
18 subsection in line with the recent revisions to Article 9, Section 9-313. Finally,
19 former Section 2-503(5)(a) provided that documents must be in correct form except
20 as provided regarding bills of lading in a set in former Section 2-323. That
21 exception has been deleted to accord with the deletion of provisions governing
22 shipping terms in Article 2. See Comment to Section 2-309. There is no intent to
23 change the commercial practices regarding bills of lading in a set as forth in former
24 Section 2-323.

25 3. **Consequences of tender of delivery.** Tender of delivery has several
26 important consequences. First, tender of delivery is a necessary condition to the
27 buyer's duty to accept and pay for the goods unless the parties agree otherwise.
28 Section 2-606. Unless the buyer has waived the right to inspect the goods prior to
29 payment, see Section 2-608 and Section 2-609, the buyer has a right to inspect the
30 goods prior to payment as provided in Section 2-609 and the seller must allow such
31 inspection to avoid impairing the tender of delivery. Second, tender of delivery is
32 relevant to determining the passage of the risk of loss under Section 2-612 when
33 goods are shipped by carrier or are in the hands of a bailee. An adequate tender of
34 delivery under this section in all respects, except as to conformity of the goods to
35 the contract, is necessary to pass the risk of loss to the buyer under Section 2-612 if
36 the goods are shipped by carrier or in the hands of a bailee to be delivered without
37 being moved. See Comment to Section 2-612. Third, tender of delivery is the time
38 for testing whether the goods conform to the contract for purposes of the buyer's

1 right of rejection under Section 2-703 and for accrual of a claim for breach of
2 warranty in a sale to an immediate buyer as provided in Section 2-814(c)(1), which
3 provides that a cause of action accrues for a breach of warranty at the time
4 nonconforming goods are tendered unless the warranty expressly extends to the
5 performance of the goods after delivery, Section 2-814(c)(4). The seller's
6 performance of its agreement to install or assemble the goods may be necessary in
7 particular cases in order for the buyer to inspect the goods to determine if the goods
8 conform to the contract. That factor may determine the reasonable time for
9 rejection under Section 2-703 and the reasonable time for inspection under Section
10 2-609. If the seller has agreed to install or assemble the goods, the buyer's cause of
11 action for breach of warranty does not begin to accrue until the seller has completed
12 that installation or assembly.

13 **4. Basic tender of delivery obligation.** Subsection (a) restates the rules
14 from former Section 2-503(1). The requirement that the seller put and hold the
15 conforming goods for the buyer means that the goods must conform to the contract
16 throughout the reasonable time that the seller is holding the goods for the buyer to
17 take possession or control. The seller's tender of delivery requires that the seller
18 have the ability to perform and offer to do so. A seller may make an appropriate
19 tender under subsection (a) by tendering documents of title which give the buyer
20 complete control of the goods. Usage of trade, course of performance, and course
21 of dealing, as well as the other circumstances of the particular case, are relevant to
22 determining the reasonableness of the tender and the notice to the buyer that enables
23 the buyer to take delivery. Delivery is defined in Section 2-102(a) as the "transfer of
24 physical possession or control of the goods." If the seller's tender complies with the
25 requirements of this section, the buyer must proceed in some manner or be in breach
26 of contract. The buyer's obligation to provide suitable facilities is not part of the
27 seller's tender but part of the buyer's obligation to cooperate with the seller in
28 making the tender of delivery. See Section 2-307. A buyer's failure to furnish
29 suitable facilities to receive the goods in an appropriate case may constitute a breach
30 of contract by the buyer. If the seller's tender does not comply with the
31 requirements of this section, then the seller has breached the contract. Of course,
32 the parties are free to agree to terms different than what is provided in this section
33 regarding how tender of delivery should be made.

34 **5. Tender of delivery when seller is required or authorized to send**
35 **goods.** Subsection (b) continues the rules from former Section 2-503(2) and (3) and
36 the presumption that the parties intend a shipment contract unless they specifically
37 agree otherwise. Subsection (b)(1) specifies a test for determining when the parties
38 have agreed to a destination contract that follows Comment 5 to former Section
39 2-503.

1 **6. Tender of delivery through a bailee.** Subsection (c) continues the rules
2 from former Section 2-503(4) making it clear that the bailee’s acknowledgment
3 must be to the buyer and that a notification to the bailee fixes rights as against the
4 bailee and third parties except as provided in Article 9.

5 **7. Tender of delivery through documents of title.** Subsection (d)
6 continues the rules from former Section 2-503(5) except that no exception is stated
7 for bills of lading in a set. Subsection (d) applies only when documents are required
8 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’
10 agreement as well as usage of trade, course of performance, course of dealing and
11 other circumstances will determine whether the documents are in the correct form.
12 If a prescribed document cannot be procured, the provisions of this article on
13 substitute performance should be consulted to determine whether the agreed manner
14 of delivery is commercially impracticable or whether a substitute manner of delivery
15 is commercially reasonable. Sections 2-715 and 2-716. Note that Article 5 governs
16 the rights and obligations of a person that presents or receives documents under a
17 letter of credit. See Section 2-104. A letter of credit issuer’s acceptance or
18 rejection of the documents does not constitute the buyer’s acceptance or rejection of
19 the documents.

20 **8. International Sales.** Under CISG Article 30, the seller must “deliver the
21 goods, hand over any documents relating to them and transfer the property in the
22 goods, as required by the contract and this Convention.” Articles 31-34 then state
23 when and how this is to be done, with Article 31 the counterpart of Section 2-602
24 and Article 32 the counterpart of Section 2-603.

25 Article 31(b) deals with the case where no carriage of the goods is involved
26 and the “contract relates to specific goods, or unidentified goods to be drawn from a
27 specific stock or to be manufactured or produced, and at the time of the conclusion
28 of the contract the parties knew that the goods were at, or were to be manufactured
29 or produced at, a particular place.” Here the delivery obligation is satisfied by
30 “placing the goods at the buyer’s disposal at that place,” whether it be a place
31 controlled by the seller but not its place of business or by a bailee. Where that place
32 is controlled by the seller, the same result can be reached through Sections 2-305(a)
33 and 2-602(a).

34 **Cross References:**

35 **Definitional Cross References:**

36 **SECTION 2-603. SHIPMENT BY SELLER.**

1 (a) If a seller is required or authorized to send the goods to the buyer and
2 the contract does not require delivery at a particular destination, the following rules
3 apply:

4 (1) The seller shall put the goods in the possession of a carrier and make
5 a contract for the transportation of the goods as may be reasonable having regard to
6 the nature of the goods and other circumstances of the case.

7 (2) The seller shall obtain and promptly deliver or tender in due form
8 any documents of title necessary to enable the buyer to obtain possession of the
9 goods or otherwise required by the agreement or by usage of trade.

10 (3) The seller shall promptly notify the buyer of the shipment.

11 (b) A seller's failure to notify the buyer of the shipment or to make a proper
12 contract for transportation is a ground for rejection only if material delay or loss
13 results.

14 **Comment**

15 1. **Source:** Former Section 2-504.

16 2. **Comparison with former Article 2.** This section continues the rules
17 from former Section 2-504 without substantive change.

18 **Seller's obligation in shipment contracts.** This section addresses the
19 seller's obligation for carriage in a shipment contract. The seller is obligated to
20 make a reasonable contract and to promptly obtain and to deliver the documents of
21 title. This section requires the seller to notify the buyer of the shipment.

22 This section applies to shipment contracts, not destination contracts.
23 Whether a contract is a shipment or destination contract depends upon whether the
24 parties have specifically agreed or the commercial understanding of the terms is such
25 that agreement requires the seller to deliver to the particular destination. See
26 Section 2-602 and Section 2-309. Proper tender of delivery in a shipment contract
27 means that the seller must also comply with the requirements of this section.

1 Section 2-602(b)(2). Compliance with this section is also a necessary step in
2 passing the risk of loss to the buyer in a shipment contract. Section 2-612(b)(2)(A).

3 **3. Proper shipping arrangements.** Under subsection (a), the parties may
4 agree to shipment terms subject to any substitution necessary under Section 2-715.
5 The parties' agreement as to shipment both as to the contract for transportation and
6 the obligation to obtain and deliver documents must be read in light of commercial
7 understanding. In the absence of an express agreement otherwise, the
8 reasonableness of any contract of transportation including choice of carrier and
9 routing is determined by the nature of the goods and the circumstances of the case.
10 Regardless of whether the shipment is at the buyer's or seller's expense, the seller
11 must make any arrangements reasonable under the circumstances in light of the
12 nature of the goods. These arrangements could include refrigeration or heating,
13 specialized containers, or sending necessary personnel to tend to the goods. The
14 seller acts unreasonably if the seller agrees to a valuation below the true valuation of
15 the goods which cuts off the buyer's ability to recover from the carrier in the event
16 of a loss given that the risk of loss will pass upon delivery to the carrier in the usual
17 shipment contract. Section 2-612(b)(2)(A). The seller's obligation to obtain and to
18 deliver documents may be in addition to the seller's obligation to arrange a
19 reasonable contract for transportation.

20 **4. Notice of shipping.** Subsection (a)(3) requires the seller to promptly
21 notify the buyer of shipment. The consequence of failure to notify is provided in
22 subsection (b) in the absence of agreement otherwise. The parties may agree that
23 the failure to notify is a ground for rejection in all cases, not just in the case of
24 material delay or loss. See Section 1-201 on definition of notify. The parties may
25 also agree on the manner of notice of shipment. In the absence of agreement
26 otherwise, the manner of notice must be reasonable under the circumstances.

27 **5. Buyer's ability to reject for seller's breach of obligation under this**
28 **section.** Under subsection (b), the buyer may reject the goods if the seller's failure
29 to notify or make a proper contract for shipping is in fact followed by material delay
30 or damage. The seller has the burden to establish that the seller's failure to follow
31 the requirements of this section have not been followed by events which justify
32 rejection of the goods.

33 **6. International Sales.** Many international contracts for sale involve
34 "carriage of the goods." In the absence of agreed delivery terms, such as the
35 Incoterms 1990 of the International Chamber of Commerce, CISG Articles 31(a)
36 and 32 determine what the seller must do to deliver the goods. In the absence of
37 agreement to deliver at "any other particular place," delivery consists of "handing
38 the goods over to the first carrier for transmission to the buyer." Article 31(a). If
39 the goods are "clearly identified to the contract" the seller need **not** notify the buyer

1 of the “consignment.” Article 32(1). More to the point, unless the seller is “bound
2 to arrange for carriage of the goods” it need not make any contracts for carriage.
3 Article 32(2). Even if the seller is not bound to obtain insurance on the carriage, it
4 must “at the buyer’s request, provide . . . all available information necessary to
5 enable [the buyer] to effect such insurance.” Article 32(3).

6 **Cross References:**

7 **Definitional Cross References:**

8 **SECTION 2-604. SELLER’S SHIPMENT UNDER RESERVATION.**

9 (a) If a seller has identified goods to the contract by the time of shipment,
10 the following rules apply:

11 (1) The seller’s procurement of a negotiable bill of lading reserves in the
12 seller a security interest in the goods. The seller’s procurement of the bill to the
13 order of a financing agency or the buyer indicates in addition only the seller’s
14 expectation of transferring that interest to the person named.

15 (2) The seller’s procurement of a nonnegotiable bill of lading to the
16 seller or its nominee reserves possession of the goods as security. However, except
17 in a case of conditional delivery, a nonnegotiable bill of lading naming the buyer as
18 consignee does not reserve a security interest, even if the seller retains possession of
19 the bill of lading.

20 (b) If a seller breaches a contract for sale by shipment with reservation of a
21 security interest, the shipment constitutes an improper contract for transportation
22 under Section 2-603. However, the shipment does not impair the rights given to the

1 buyer by shipment and identification of the goods to the contract or the seller's
2 powers as a holder of a negotiable document of title.

3 **Comment**

4 1. **Source:** Former Section 2-505.

5 2. **Comparison with former Article 2.** This section continues the rules
6 from former Section 2-505 without substantive change.

7 **Relationship between this section and other sections of this Article.**

8 This section states the effect of the seller's procurement of either a negotiable bill of
9 lading or a nonnegotiable bill of lading unless otherwise agreed by the parties to the
10 contract for sale. This section does not address whether the seller can ship under
11 reservation, when payment is due, or the buyer's ability to inspect the goods. Those
12 matters are addressed in Section 2-611. This section also does not address when
13 title to the goods passes from the seller to the buyer, see Section 2-501, or passage
14 of the risk of loss for the goods, see Section 2-612. This section also does not
15 address the rights or obligations of the carrier who issued the bill of lading. See
16 Article 7 on Documents of Title.

17 3. **Reservation of a security interest.** If goods are identified to the
18 contract and the seller obtains a negotiable bill of lading, the seller has reserved a
19 security interest in the goods. The security interest created in this manner is a
20 mechanism for the seller to enforce its rights under the sales contract against the
21 buyer and is not effected by the passage of title. Section 2-501. The parties'
22 agreement on passage of title does not alter the operation of this section. The
23 security interest is a security interest arising under Article 2 and is governed by
24 Article 9, Section 9-110.

25 4. **Nonnegotiable bill of lading.** A nonnegotiable bill of lading to the seller
26 or its nominee means that the seller has possession of the goods as security for
27 performance of the sales contract. If the seller seeks to withhold the goods
28 improperly, the buyer may tender its obligations under the sales contract and recover
29 the goods. Unless there is a conditional delivery under Section 2-606, if the seller
30 obtains a nonnegotiable bill of lading naming the buyer as the consignee, the seller
31 does not have either a security interest under this section or possession of the goods
32 as the seller has relinquished its control over the goods except in those situations
33 where the seller has a right to stop delivery. Sections 2-816 and 2-818. In the case
34 of a conditional delivery under Section 2-606, the seller has the right to demand
35 payment upon delivery of the goods or documents and the seller has the right to
36 withhold delivery until paid or reclaim the goods as provided in Sections 2-816 and
37 2-818. Conditional delivery does not prevent the buyer from transferring good title

1 to a purchaser under Section 2-504. The buyer has a right to inspect before
2 payment as provided in Section 2-609. Section 2-611(b).

3 **5. Seller's breach of contract.** Unless otherwise agreed, the seller's
4 reservation of a security interest in the goods is not a breach of contract. See
5 Section 2-611(b). Under subsection (b), however, the seller's reservation of a
6 security interest does not allow the seller whose reservation of a security interest is a
7 breach of the sales contract to obtain more than the seller is due under the sales
8 contract. However, the fact that the seller's reservation of a security interest
9 breached the sales contract does not impair the seller's rights as a holder of a
10 negotiable document of title.

11 **6. International Sales.** There is no comparable provision in CISG. Article
12 58(1) and (2), however, permits a seller in cases where documents are involved to
13 make payment a condition for handing over the goods or the documents.
14 Nevertheless, the buyer may still examine the goods before payment unless
15 otherwise agreed. Article 58(3).

16 **Cross References:**

17 **Definitional Cross References:**

18 **SECTION 2-605. RIGHTS OF FINANCING AGENCY.**

19 (a) Except as otherwise provided in Article 5, a financing agency, by paying
20 or purchasing for value a draft that relates to a shipment of goods, acquires to the
21 extent of the payment or purchase and in addition to its own rights under the draft
22 and any document of title securing it, any rights of the shipper in the goods,
23 including the right to stop delivery and the shipper's right to have the draft honored
24 by the buyer.

25 (b) Except as otherwise provided in Article 5, the right to reimbursement of
26 a financing agency that in good faith has honored or purchased a draft under

commitment to or authority from the buyer is not impaired by subsequent discovery of defects in any relevant document of title which was apparently regular on its face.

Comment

1. **Source:** Former Section 2-506.

2. **Comparison with former Article 2.** This section is the same in substance as former Section 2-506 except for the provision that Article 5 is paramount if it provides a contrary rule. See Section 5-108.

3. **Rights acquired by paying or purchasing a draft.** Subsection (a) provides that the financing agency acquires the shipper's rights to the goods in addition to the financing agency's own rights under a draft or document of title when the financing agency purchases or pays a draft. Paying includes any situation where the financing agency, by arrangement with the buyer or other consignee, pays a draft for the price of the goods regardless of whether it is drawn on that party, whether it is a sight or time draft, or whether the payment is viewed as conditional or absolute. Purchasing for value is similarly broad and does not recognize any distinction between a purchase, discount, or advance against collection or similar situations. The financing agency's right to have the draft honored is against the buyer and not other parties unless another party has a separate obligation to the financing agency. The draft must relate to a shipment of goods and includes drafts against invoices or delivery orders. After shipment, the shipper's rights in the goods are rights that secure payment for the goods and are subject to the buyer's right to force delivery upon payment of the price. Those rights may be limited if the goods are covered by a document of title and that document has been transferred or negotiated to a third party. See Article 7 on rights of transferees and holders of documents of title. Similarly, the financing agency has only the rights of the shipper to stop delivery as provided in Section 2-818. A financing agency under a letter of credit has rights as provided in Article 5.

4. **Defects in documents of title.** Subsection (b) addresses the rights of a financing agency in the situation where the documents of title have defects that were not on the face of the documents. This rule parallels the rule found in Article 5, Section 5-109(a).

5. **International Sales.** CISG does not have a provision dealing with the rights of financing agencies.

Cross References:

Definitional Cross References:

**SECTION 2-606. EFFECT OF SELLER'S TENDER; DELIVERY ON
CONDITION.**

(a) A seller's tender of delivery is a condition to the buyer's duty to accept and to pay for the goods. The seller shall tender first, but need not complete delivery until the buyer has tendered payment. However, if the seller has agreed to assemble or install the tendered goods, completion of that performance is also a condition to the buyer's duty to accept and pay for the goods.

(b) Subject to Section 2-816, if payment is due and demanded on the delivery to the buyer of goods or of a document of title, a buyer's right against the seller to retain or to dispose of them is conditional upon the buyer's making of the payment due.

Comment

1. Source: Former Section 2-507.

2. **Comparison to former Article 2.** This section makes two substantive changes to former Section 2-507. First, this section addresses the seller's obligation to assemble or to install the goods if the seller has agreed to do so as an additional condition to the buyer's obligation to accept and to pay for the goods. Second, this section provides a default rule that requires the seller to tender its delivery first.

3. Conditions to buyer's obligation to accept or to pay for the goods. Under this section, the seller's tender of delivery is a condition to the buyer's duty to accept and to pay for the goods. Even though the conditions of tender of delivery and tender of payment are presumed to be concurrent conditions, the seller should tender delivery first. If the seller agreed to install or assemble the goods, performance of that promise is an additional condition to the buyer's duty to accept and to pay for the goods. The seller's tender of delivery in accord with section 2-602 and performance of the seller's agreed installation and assembly entitles the seller to the buyer's acceptance of and payment for the goods according to the terms of the contract which includes the parties' agreement and applicable law such as provisions on failure of agreed manner of payment. See Section 2-715. Even if

1 payment is due and demanded upon tender of delivery of the goods, the buyer still
2 has the right to inspect the goods as provided in Section 2-609. The parties are free
3 to agree that performance and payment take place differently than as provided in this
4 section.

5 **4. Conditional delivery.** Subsection (b) addresses the conditional delivery
6 of goods when payment is due and demanded upon delivery of the goods.
7 Conditional delivery does not prevent the passage of title as provided in Section
8 2-501. Sections 2-504 and 2-816 protect the rights of third parties who obtain
9 rights in the goods from the buyer. The seller's right in the goods delivered in a
10 conditional delivery is in the nature of a lien and the seller's right to reclaim the
11 goods from the buyer's possession is determined under Section 2-816. A seller may
12 waive rights granted by this section, Section 2-209, or be precluded from exercising
13 its rights under this section by estoppel or ratification of the buyer's right to keep
14 the goods without payment. Section 1-103.

15 **5. International Sales.** CISG Article 58(1), in accord, provides that if the
16 buyer is "not bound to pay the price at any other specific time, he must pay it when
17 the seller places either the goods or documents controlling their disposition at the
18 buyer's disposal in accordance with the contract and this Convention." If, however,
19 the buyer must pay "on the date fixed by or determinable from the contract and this
20 Convention," it must pay "without the need for any request or compliance with any
21 formality on the part of the seller." Thus, if no time is fixed to pay the seller must
22 tender first. But if a time for payment is fixed, the buyer must pay at that time
23 whether the seller tenders or not.

24 **Cross References:**

25 **Definitional Cross References:**

26 **SECTION 2-607. TENDER OF PAYMENT BY BUYER.**

27 (a) Subject to Section 2-606(a), the buyer's tender of payment is a condition
28 to the seller's duty to complete delivery.

29 (b) Tender of payment by a buyer is sufficient if made by any means or in
30 any manner acceptable in the ordinary course of business unless the seller demands

1 payment in money and gives any extension of time reasonably necessary to procure
2 it.

3 **Comment**

4 1. **Source:** Former Section 2-511.

5 2. **Comparison with former Article 2.** This section continues the rules
6 from former Section 2-511 with two substantive changes. First, subsection (a)
7 provides that the buyer's tender of payment is not due until the seller has tendered
8 delivery, but the buyer must tender payment before the seller has to complete
9 delivery. Second, subsection (3) of former Section 2-511 is omitted as unnecessary.
10 Section 3-310 provides the effect of dishonor of a check on the underlying
11 obligation to pay for the goods.

12 3. **Relationship to other sections in this Article.** The parties may agree to
13 a different timing for tender of delivery and tender of payment than provided in this
14 section and Section 2-606. See Section 2-611 on when and where payment is due,
15 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
17 payment is due will not apply. This section should also be read in light of the
18 provisions on the buyer's right to inspect. A buyer has a right to inspect the goods
19 prior to payment unless the contract requires payment before inspection. Sections
20 2-608 and 2-609. Inspection may reasonably take place after the seller's installation
21 and assembly of the goods. In an installment contract, where delivery of the goods
22 is in separate lots to be separately accepted, Section 2-710, payment may be
23 appropriate after each delivery. Section 2-302. Finally, even before delivery, the
24 buyer should not impair the seller's expectation of receiving payment in due course.
25 Section 2-711.

26 4. **Payment demanded in money.** Subsection (b) follows the rule from
27 former Section 2-511(2) that the buyer may tender payment in the ordinary course
28 of business. The seller may demand money, Section 1-201(24). If the seller
29 demands payment in money, the seller must give a reasonable extension of time to
30 procure the money. This provision avoids undue surprise of the buyer. A party may
31 satisfy the obligation to pay with money by making a funds transfer under Article
32 4A, Section 4A-406(b). Section 2-715 on substituted performance addresses the
33 situation where money may not be available in the commercial community.

34 5. **Payment by drafts.** Payment by drafts, including checks, is a
35 commercially reasonable and ordinary manner of payment for goods. Making a
36 payment by a non-post dated check is a conditional payment as between the parties
37 that is treated as a cash transaction. If the check is subsequently dishonored, the

1 payment for the goods has been defeated as provided in Section 3-310 and the seller
2 may proceed on its rights on the check as well as its rights under this article. See
3 Section 2-816(b)(2) regarding the seller's right to reclaim the goods if a conditional
4 payment fails. A post dated check is a credit transaction as to third parties and the
5 seller's right to reclaim is governed by the provisions of Section 2-816(b)(1).

6 **6. International Sales.** CISG Article 53 provides that the buyer "must pay
7 the price for the goods . . . as required by the contract and this Convention." It is
8 frequently agreed that payment shall be by a letter of credit, a method of payment
9 not within the scope of the Convention. In the absence of contrary agreement,
10 questions about the time of payment are answered in Articles 58 and 59. If a time
11 for payment has not been fixed, the duty to pay arises when the seller tenders
12 delivery. Article 58(1) and (2). If a time for payment is fixed, the buyer must pay at
13 the time "without the need for any request or compliance with any formality on the
14 part of the seller."

15 **Cross References:**

16 **Definitional Cross References:**

17 **SECTION 2-608. PAYMENT BY BUYER BEFORE INSPECTION.**

18 (a) If a contract requires payment before inspection, nonconformity of the
19 goods does not excuse the buyer from so making payment unless:

20 (1) the nonconformity appears without inspection; or

21 (2) despite tender of the required documents of title, the circumstances
22 would justify injunction against honor under Article 5.

23 (b) Payment under subsection (a) is not an acceptance of goods and does
24 not impair the buyer's right to inspect or other remedies of the buyer.

25 **Comment**

26 1. **Source:** Former Section 2-512.

27 2. **Comparison with former Article 2.** Section 2-608 continues the rules
28 from former Section 2-512 without substantive change.

1 **3. Payment before inspection, if required, excused.** Subsection (a)
2 provides a limited right of the buyer to refuse to make payment prior to inspection
3 of the goods in the situation where the contract requires payment prior to
4 inspection. If the contract provides that the buyer is to pay before inspection, the
5 buyer takes the risk of paying first and litigating later as to any defects in the goods.
6 Inspection in this section means an inspection in a manner reasonable for detecting
7 nonconformities in goods whose surface appearance is satisfactory. Subsection
8 (a)(1) states an exception to that general rule, that if the nonconformity is apparent
9 upon taking delivery, the buyer need not pay prior to inspection. Subsection (a)(2)
10 provides an analogous rule for defects in the required documents of title.

11 **4. Effect of payment before inspection.** Subsection (b) states the rule that
12 if payment is required before inspection, that payment is not an acceptance of the
13 goods under Section 2-706, does not alter the buyer's right to inspect the goods
14 under Section 2-609 in any other way, and does not preclude the exercise of any of
15 the buyer's remedies for the seller's breach, Section 2-823. If payment is required
16 prior to inspection, the buyer need not comply with the provision on reservation of
17 rights, Section 1-207, in making payment in order to assert its rights as to any
18 nonconformity in the goods discovered upon inspection.

19 **5. Inspection before payment or acceptance the usual rule.** This section
20 should be read in conjunction with Section 2-609 which states the usual rule that the
21 buyer may inspect the goods prior to payment or acceptance of the goods unless the
22 contract provides otherwise. The parties may agree expressly to require payment
23 before inspection or may use delivery terms that in commercial usage preclude
24 inspection prior to payment. Section 2-609(c). As to the relationship between
25 inspection, acceptance of the goods, payment, passage of title, and risk of loss, see
26 the Comment to Section 2-609.

27 **6. International Sales.** CISG Article 58(3) protects the buyer's right to
28 examine the goods before paying the price "unless the procedures for delivery or
29 payment agreed upon by the parties are inconsistent with his having such an
30 opportunity." Assuming such agreement, there is no provision comparable to
31 Section 2-608.

32 **Cross References:**

33 **Definitional Cross References:**

34 **SECTION 2-609. BUYER'S RIGHT TO INSPECT GOODS.**

1 (a) Subject to subsection (c), if goods are tendered, delivered, or identified
2 to the contract for sale, the buyer, before payment or acceptance, may inspect them
3 at any reasonable place and time and in any reasonable manner. If the seller is
4 required or authorized to send the goods to the buyer, the inspection may be after
5 their arrival.

6 (b) Expenses of inspection must be borne by the buyer but may be
7 recovered as incidental damages if the buyer is entitled to those damages for breach
8 of contract.

9 (c) The buyer is not entitled to inspect the goods before payment of the
10 price if the contract provides for:

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

14 (2) payment upon tender of required documents of title, unless payment
15 is due only after the goods become available for inspection.

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

1 **Comment**

2 1. **Source:** Former Section 2-513.

3 2. **Comparison with former Article 2.** Section 2-609 continues the rules
4 from former Section 2-513 with three substantive changes. First, subsection (b)
5 allows recovery of expenses of inspection anytime the buyer is entitled to recover
6 incidental damages, not just when the buyer rejected the goods as under former
7 Section 2-513(2). Second, with the deletion of delivery terms from Article 2, the
8 determination of whether the contract provides that the buyer will make payment
9 prior to inspection depends upon the commercial interpretation of the shipping terms
10 used as provided in Section 2-309. Third, complying with a standard of inspection
11 as a condition to further performance of the contract has been added to subsection
12 (d). Just as with the place or method of inspection, the parties may intend that the
13 standard of inspection is an indispensable condition of the contract.

14 3. **Reasonable inspection.** In the case where the contract does not require
15 the buyer to pay before inspection, the buyer has a right to inspect the goods as
16 provided in subsection (a). That inspection need not take place at the point at which
17 the seller tenders delivery under Section 2-602 in a shipment contract but may be
18 after arrival of the goods at the buyer's destination. See Section 2-611(b). If
19 payment is due when the buyer receives the goods under Section 2-611(a), this
20 section allows the buyer to inspect prior to making payment. The buyer's right to
21 inspect must be exercised in a reasonable manner and at a reasonable place and time.
22 The reasonableness of each of these factors is determined by trade usage, course of
23 dealing, course of performance and other relevant circumstances. Reasonable
24 inspection under this section may take place after the seller performs an agreement
25 to install or assemble the goods.

26 4. **Inspection and acceptance of the goods.** Acceptance of the goods
27 under Section 2-706 does not take place until the buyer has a reasonable
28 opportunity to inspect the goods unless the buyer does an unreasonable act
29 inconsistent with the seller's ownership or inconsistent with the buyer's claim of
30 rejection or revocation of acceptance which act is ratified by the seller as an
31 acceptance. Compare Section 2-706. Reasonable use of the goods for inspection
32 purposes should not be treated as an acceptance of the goods under Section 2-706.
33 As stated in Section 2-608, in a contract where the buyer has agreed to payment
34 before inspection, payment is not an acceptance of the goods. If the buyer has not
35 agreed to payment before inspection, payment does not waive the right to inspect
36 before acceptance of the goods as the rule of subsection (a) applies to give the buyer
37 a right to inspect "before payment or acceptance."

38 5. **Inspection, title passage, and risk of loss.** The buyer's right to inspect
39 in subsection (a) is unaffected by passage of title under Section 2-501 or by passage

1 of the risk of loss under Section 2-612. As provided in subsection (d), unless the
2 parties expressly agree otherwise, title passes to the buyer as provided in Section
3 2-501 and the risk of loss passes to the buyer under Section 2-612 regardless of the
4 buyer's right to inspect under this section.

5 **6. Purpose of inspection.** Inspection under this section is inspection
6 designed to determine whether the seller has complied with the contract
7 requirements regarding the goods and should not be confused with the buyer's
8 examination of the goods prior to formation of the contract under Section 2-406(e)
9 in regard to implied warranties.

10 **7. Expenses of inspection.** Subsection (b) provides that inspection
11 expenses are normally expenses of the buyer unless the parties otherwise agree. The
12 buyer has a right to recover inspection expenses as incidental damages in the event
13 of seller's breach. Section 2-823 and Section 2-805.

14 **8. When buyer presumed to agree to pay before inspection.** Subsection
15 (c) provides for circumstances in which the commercial understanding is that the
16 buyer has agreed to postpone its right to inspect until after payment. A
17 documentary transaction falls within the exception to subsection (c)(2) providing for
18 payment after the goods become available for inspection in situations where the
19 parties agree that the payment is to await arrival of the goods, where the parties
20 agree that the documents are to be held until arrival, or where payment is to be
21 made against storage documents or delivery orders.

22 **9. Place, method or standard of inspection as indispensable condition.**
23 Under subsection (d), the question of whether the place, method or standard of
24 inspection was an indispensable condition of the contract is one of the parties'
25 intent. If the parties agree to a place of inspection, the buyer's failure to inspect
26 may be a waiver of the right to inspect and thus an acceptance of the goods with
27 such defects as an inspection would have revealed. Sections 2-209 and 2-702.
28 Agreements on the time allowed for inspection of the goods must be a reasonable
29 time. Section 2-306. A standard of inspection as an express condition to
30 performance is not the same as a promise or warranty that the goods will perform up
31 to the standard.

32 **10. International Sales.** Unless otherwise agreed, the buyer has a right to
33 examine the goods upon tender and before payment. CISG Article 58(3). If
34 carriage of the goods is involved, examination "may be deferred until after the goods
35 have arrived at their destination." Article 38(2). A special rule applies when the
36 goods are redirected or redispached in transit. Article 38(2). The buyer must act
37 fast to examine the goods, Article 38(1), and may lose the right to rely upon a non-
38 conformity if timely notice, as defined in Article 39, is not given. The buyer,

1 however, is protected from the rigors of Articles 38 and 39 if the seller knew “or
2 could not have been unaware of” the non-conformity and did not disclose it, Article
3 40, and is entitled to damages if “he has a reasonable excuse for his failure to give
4 the required notice.” Article 44.

5 **Cross References:**

6 **Definitional Cross References:**

7 **SECTION 2-610. WHEN DOCUMENTS OF TITLE DELIVERABLE ON**

8 **ACCEPTANCE OR PAYMENT.** Except as otherwise provided in Article 5,
9 documents of title against which a draft is drawn must be delivered to the drawee
10 that honors the draft on acceptance of the draft if the draft is payable more than
11 three days after presentment. Otherwise, delivery of the documents of title is
12 required only on payment.

13 **Comment**

14 1. **Source:** Former Section 2-514.

15 2. **Comparison with former Article 2.** This section continues the rule
16 from former Section 2-514 without substantive change except to make clear that if
17 Article 5 provides a contrary rule, the Article 5 rule governs.

18 3. **When documents must be released.** This section states a presumption
19 as to when documents of title must be released to the drawee of the draft and
20 parallels the rules found in Section 4-503. Acceptance of the draft means
21 acceptance as defined in Section 3-409.

22 4. **International Sales.** CISG has no comparable provision.

23 **Cross References:**

24 **Definitional Cross References:**

1 **4. Shipment under reservation.** Subsection (b) protects the seller in the
2 case where a credit sale is not contemplated by allowing the seller to ship under
3 reservation as provided in Section 2-604 so that the seller need not give up the
4 goods until paid, but the buyer may still inspect the goods prior to payment unless
5 the parties have agreed otherwise. Section 2-609.

6 **5. Tender by delivery of documents of title.** Subsection (c) must also be
7 read in light of the buyer's inspection right. Under Section 2-609(c)(2), agreeing to
8 pay upon tender of documents of title waives the buyer's right to inspect prior to
9 payment unless the parties have agreed that payment will wait until after the goods
10 are available for inspection.

11 **6. Credit sales.** Subsection (d) is based upon the commercial
12 understanding that an agreed credit period runs from the time of shipment. An
13 invoice usually represents the date of shipment. Delay in sending the invoice or in
14 post-dating the invoice deprives the buyer of notice of the time in which the buyer
15 should be prepared to make payment.

16 **7. International Sales.** CISG Article 57 provides that the buyer must pay
17 the price at the seller's place of business or where documents are handed over.
18 Article 58 provides that the buyer must pay the price when the goods or documents
19 are at the buyer's disposal. The seller may condition delivery of either goods or
20 documents on paying the price. The buyer has a right to inspect prior to paying the
21 price. All of the above are subject to contrary agreement of the parties.

22 **Cross References:**

23 **Definitional Cross References:**

24 **SECTION 2-612. RISK OF LOSS.**

25 (a) This section is subject to Section 2-506(b) and (c).

26 (b) Except as otherwise provided in subsection (c), risk of loss passes to the
27 buyer regardless of the conformity of the goods to the contract as follows:

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

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

3 (A) If the contract does not require delivery at a particular
4 destination, the risk of loss passes to the buyer when the goods are delivered to the
5 carrier and the seller complies with Sections 2-602 and 2-603, even if the shipment
6 is under reservation.

7 (B) If the contract requires delivery at a particular destination and
8 the goods arrive there in the possession of the carrier, the risk of loss passes to the
9 buyer when the goods are tendered in the manner required by Section 2-602.

10 (3) If the goods are held by a bailee to be delivered without being
11 moved, the risk of loss passes to the buyer:

12 (A) on the buyer's receipt of a negotiable document of title covering
13 the goods with any required indorsement;

14 (B) on acknowledgment by the bailee to the buyer of the buyer's
15 right to possession of the goods; or

16 (C) after the buyer's receipt of a nonnegotiable document of title or
17 record directing delivery as provided in Section 2-602(c)(2).

18 (c) A breach of contract by either party affects risk of loss only in the
19 following cases:

20 (1) If the buyer rightfully rejects the goods or justifiably revokes
21 acceptance of the goods, the seller has the risk of loss from the time the rejection or
22 revocation is effective.

(2) If the seller has tendered nonconforming goods so that the buyer would have the right to reject the goods or revoke acceptance of the goods, the goods are damaged or lost before the buyer effectively rejects or revokes acceptance, and the risk of loss would have otherwise passed to the buyer under subsection (a) or (b), the seller has the risk of loss to the extent the nonconformity of the goods caused the damage or loss.

(3) If conforming goods are identified to the contract when the buyer repudiates or is otherwise in breach and the risk of loss has not otherwise passed to the buyer, the buyer has the risk of loss for those goods for a commercially reasonable time after the breach or repudiation.

Comment

1. Source: Former Sections 2-509 and 2-510.

2. Comparison with former Article 2. This section is derived from former Sections 2-509 and 2-510 but has made several substantive changes in the rules regarding passage from the seller to the buyer of the risk of loss for the goods. The underlying theory of this section is that risk of loss passes to the buyer at a stated point in time based upon assumptions about who is in the best position to prevent the harm to the goods or to insure against that harm regardless of who has title to the goods or who has a property interest in the goods and regardless of whether either party is in breach of contract except for the limited circumstances in subsection (c). Thus the conformity or nonconformity of the goods to the contract is not relevant to the passage of the risk of loss for the goods except as provided in subsection (c). Whether one or both parties have insured against the loss is not relevant to determine who has the risk of loss for the goods.

The effect of the seller having the risk of loss for the goods is that if the goods are lost or damaged, the seller must still deliver goods conforming to the contract or answer in damages for breach of contract. Similarly, if the buyer has the risk of loss for the goods, the buyer must perform its obligations under the contract or answer in damages for breach of contract. Of course, the obligations of either the buyer or the seller may be excused in an appropriate case under Sections 2-714 through 2-717 on excuse. As under former law, the parties may agree to passage of

1 the risk of loss at a time different than what is provided in this section. Section
2 2-108; Section 1-201(3) on the meaning of agreement which includes course of
3 dealing, course of performance and usage of trade.

4 **3. Risk of loss in sales on approval or sales and return.** Subsection (a)
5 continues the rule that the risk of loss rules in this section are subject to the rules on
6 risk of loss found in Section 2-506 for sale on approval or sale and return.

7 **4. Risk of loss passage upon buyer's receipt of goods.** Subsection (b)(1)
8 changes the previous rule that provided that risk of loss passed upon tender of
9 delivery in case of a nonmerchant seller, instead adopting the rule that formerly
10 applied only to merchant sellers, that risk of loss passes upon buyer's receipt of the
11 goods, as the appropriate rule for both merchant and nonmerchant sales. Receipt is
12 defined in Section 2-102 as taking delivery of the goods and delivery is defined in
13 Section 2-102 as transfer of physical possession or control of the goods. If the
14 buyer does not intend to take possession, then risk of loss will pass when the buyer
15 takes control of the goods. This rule that passes risk of loss to the buyer upon
16 physical possession or control of the goods applies when the goods are not shipped
17 by carrier as authorized or required under the contract, when the goods are not held
18 by a bailee to be delivered without being moved, and when none of the
19 circumstances in subsection (c) apply.

20 The goods need not be conforming goods for the buyer to have the risk of
21 loss under this section. Assume the seller tenders nonconforming goods and the
22 buyer takes possession of the goods. At this point the risk of loss for the goods is
23 on the buyer under subsection (b)(1). If the goods are destroyed before the buyer
24 has accepted the goods or rejected the goods, the buyer has the risk of loss unless
25 the destruction of the goods was caused by the nonconformity, subsection (c)(2).

26 **5. Risk of loss in shipment and destination contracts.** Subsection (b)(2)
27 continues the rules regarding passage of the risk of loss in shipment and destination
28 contracts as under former law with only one change, that is, the goods need not be
29 conforming at the point of delivery to the carrier in the case of a shipment contract
30 or delivery by the carrier in the case of a destination contract, for the risk of loss to
31 pass to the buyer. In every other respect except as to the conformity of the goods,
32 however, the seller or carrier, as the case may be, must comply with the sections on
33 tender of delivery and obligations in the case of a carrier contract, Section 2-602 and
34 2-603, in order for the risk of loss to pass at the point stated in subsection (b)(2).
35 Thus in the case of a shipment contract, the seller must make a reasonable contract
36 under Section 2-603 in order for the risk of loss to pass to the buyer at the time the
37 goods are placed in the possession of the carrier. As under former law, if the goods
38 are already in transit when the contract for sale is made, the risk of loss cannot pass

1 until the goods are identified to the contract and absent special agreement passage
2 of the risk of loss should not be made retroactive to the time of shipment.

3 A carrier within the meaning of this section is generally an entity that is
4 separate from the seller and not controlled by the seller.

5 **6. Risk of loss when goods in hands of bailee.** Subsection (b)(3)
6 continues the rules from former law regarding risk of loss for goods in the hands of
7 a bailee with two subsequent clarifications; first the risk of loss passes when the
8 negotiable documents are indorsed if an indorsement is required for negotiation and
9 second, the acknowledgment must be to the buyer in accord with the changes to the
10 tender of delivery rules in Section 2-602.

11 Under current law, controversy has arisen whether a seller who continues to
12 hold possession of the goods after sale is a bailee under the rules in subsection
13 (b)(3). In the usual case, if the continued possession after sale made the seller a
14 bailee, the general rule of subsection (b)(1) would be undermined and thus in the
15 usual case, the seller should not be a bailee within the meaning of this subsection.
16 *See Silver v. Wycombe, Meyer & Co., Inc.*, 477 N.Y.S.2d 288 (Civil Court, City of
17 N.Y. 1984). In some cases, however, the seller may qualify as a bailee if the seller
18 and the buyer have entered into a separate agreement for bailment.

19 **7. Risk of loss in the event of rightful rejection or justifiable revocation**
20 **of acceptance.** Subsection (c) addresses three situations where the risk of loss
21 depends not only upon who has possession of the goods but also on whether the
22 contract has been breached. In all cases, regardless of who has the risk of loss for
23 the goods, the aggrieved party has an action against the breaching party for breach
24 of contract. Subsection (c)(1) has a limited rule to pass the risk of loss back to the
25 seller after an effective and rightful rejection of the goods or justifiable revocation of
26 acceptance of the goods. This makes the risk of loss rule compatible with the rules
27 on the buyer's obligation to take reasonable care of the goods in Section 2-704. If
28 the goods are destroyed while in buyer's possession after the buyer has effectively
29 and rightfully rejected the goods or justifiably revoked acceptance of the goods, the
30 buyer is liable to the seller only if the buyer has failed to take reasonable care of the
31 goods, Section 2-704, or failed to take an action required under Section 2-705.
32 Passing the risk of loss back to the seller in this situation encourages the seller to
33 take action to regain possession of the goods.

34 **8. Risk of loss in the event goods damaged prior to rightful rejection or**
35 **justifiable revocation of acceptance.** If the goods are destroyed prior to the
36 rightful and effective rejection or revocation of acceptance, the seller has the risk of
37 loss only to the extent the nonconformity caused the destruction. Subsection (c)(2).
38 If the nonconformity did not cause the destruction, the buyer has the risk of loss for

1 the goods prior to the rejection or revocation of acceptance and also a cause of
2 action against the seller for the nonconformity that operates as an offset for the
3 liability caused by having to bear the risk of loss.

4 **9. Buyer's liability for the price.** If the seller tenders conforming goods,
5 the buyer takes possession of the goods, the buyer wrongfully but effectively rejects
6 those goods, and then the goods are destroyed, the buyer retains the risk of loss and
7 is liable for the price under Section 2-822(a)(2). If in that case, the seller took
8 possession of the goods back from the buyer and then the goods were destroyed, the
9 buyer may also be liable for the price if the destruction took place within a
10 commercially reasonable time after the seller repossessed the goods. Section
11 2-822(a)(2). If the destruction of the goods takes place outside the commercially
12 reasonable time, the seller still has a cause of action for breach against the buyer
13 based upon the wrongful rejection, but in effect the risk of loss for the goods has
14 passed back to the seller as the buyer is no longer liable for the price.

15 **10. Risk of loss in event of buyer's breach.** Subsection (c)(3) allows the
16 risk of loss to be placed on the buyer if the buyer has repudiated or breached the
17 contract after conforming goods are identified to the contract in order to protect the
18 seller in the case of a surprise breach and allow the seller time to adequately protect
19 the goods. The primary effect of this subsection is to entitle the seller to the price
20 under Section 2-822(a)(2) if the goods are destroyed within the commercially
21 reasonable time provided in subsection (c)(3). The seller still has a cause of action
22 for breach of contract against the buyer even if the buyer does not have the risk of
23 loss under this subsection.

24 **11. International Sales.** "Passing of Risk" is treated in CISG Articles
25 66-70. Article 67(1), dealing with "carriage of the goods," is comparable to Section
26 2-612(b)(2). The distinction between "origin" and "destination" contracts, however,
27 is not made. The question is whether the seller agreed to deliver to a carrier at a
28 "particular" place. The answer may come from Incoterms used by the parties.
29 Article 68, dealing with goods sold in transit, has no exact counterpart in Section
30 2-612, the closest provision being Section 2-612(b)(2). Furthermore, there is no
31 provision like Section 2-612(b)(3), which treats goods in the possession of a bailee.
32 Cases not otherwise covered are picked up in Article 69, which is CISG's equivalent
33 to old Section 2-509(3). Even between commercial parties, the buyer, in some
34 cases, may have the risk of loss before taking possession of the goods. See Article
35 69(2).

36 Breach of contract is relevant to passage of risk under CISG. For example,
37 if risk has passed to the buyer and the goods are lost or damaged thereafter, the
38 obligation to pay the price is discharged if "the loss or damage is due to an act or
39 omission of the seller." Article 66. Also, under Article 69(1) risk passes to the

1 buyer before possession is transferred regardless of any deficiency in insurance
2 coverage if the buyer “commits a breach of contract by failing to take delivery.” But
3 a breach by the seller apparently does not prevent or reallocate the passage of risk.
4 Rather, risk passes if the conditions of Articles 67-69 are satisfied but the “remedies
5 available to the buyer on account of the breach” are not impaired. Article 70.

1 **PART 7**

2 **BREACH, REPUDIATION, AND EXCUSE**

3 **SECTION 2-701. BREACH OF CONTRACT GENERALLY;**
4 **SUBSTANTIAL IMPAIRMENT.**

5 (a) Whether a party is in breach of contract is determined by the contract.

6 (b) A breach of contract occurs in the following circumstances, among
7 others:

8 (1) The seller is in breach if it wrongfully fails to deliver or to perform a
9 contractual obligation, makes a nonconforming tender of performance, or repudiates
10 the contract.

11 (2) The buyer is in breach if it wrongfully rejects a tender of delivery,
12 wrongfully attempts to revoke acceptance, repudiates the contract, does not make a
13 required payment, or wrongfully fails to perform a contractual obligation.

14 (c) To determine whether the value of an installment or the whole contract
15 has been substantially impaired by a breach of contract under Sections 2-708, 2-710,
16 or 2-712, the court may consider the following factors, among others:

17 (1) the extent to which the aggrieved party has been deprived of the
18 benefit that it reasonably expected under the contract;

19 (2) the extent to which the aggrieved party will be compensated for the
20 benefit of which it has been deprived;

21 (3) whether cure of the breach is likely;

22 (4) whether adequate assurance of due performance has been given;

1 (5) whether the party in breach acted in good faith; and

2 (6) whether the party in breach will suffer a forfeiture.

3 (d) The cumulative effect of individual, insubstantial breaches of contract
4 may substantially impair the value of the whole contract to the other party.

5 **Comment**

6 1. **Source:** Former Sections 2-703 and 2-711; Restatement (Second) of
7 Contracts § 241.

8 2. **Comparison with former Article 2.** Section 2-701 is a new section that
9 is derived, in part, from former Sections 2-703 and 2-711 which described different
10 types of breaches and from the Restatement (Second) of Contracts § 241 statement
11 of factors used to determine material breach.

12 3. **Definition of breach of contract.** Subsection (a) corresponds to the
13 statement of the parties' obligation in Section 2-601 which provides that the parties
14 are obligated to perform in accord with the requirements of the contract.
15 Subsection (a) provides that if a party does not perform in accord with the contract
16 requirements, the party has breached the contract. The contract's requirements are
17 the total legal obligation of the parties, Section 1-201(11), which includes the
18 parties' agreement, Section 1-201(3), and the provisions of applicable law including
19 the provisions of this Article.

20 Section 2-701(b) identifies those events that are usually breaches of contract
21 and correspond to those breaches identified in former Sections 2-703 and 2-711.
22 The buyer's breach includes failure to pay after delivery as well as "payment due on
23 or before delivery" as provided in former Section 2-703. If the failure to pay after
24 acceptance of the goods is a default under a security agreement, Article 9 would
25 govern enforcement of the security interest. Subsection (b) identifies that the failure
26 to perform any obligation under the contract is a breach. Section 2-815 (seller's
27 remedies) and Section 2-823 (buyer's remedies) merely index the remedies that
28 either the seller or buyer is entitled to exercise if there is a breach of contract. This
29 Article rejects any doctrine of election of remedies as a fundamental policy and thus
30 the remedies indexed in Section 2-815 and Section 2-823 are cumulative in nature.
31 Whether the pursuit of one remedy bars another depends entirely on the facts of the
32 individual case. This section defining breach must be read in light of the sections on
33 excuse of an obligation to perform (Sections 2-714 through 2-717), on cure
34 (Section 2-709), and on waiver (Section 2-702).

1 **4. Substantial impairment.** Subsection (c) is a new section based upon
2 Restatement (Second) of Contracts § 241 which defines material breach. *See*
3 *Midwest Mobile Diagnostic Imaging v. Dynamics Corp. of America*, 965 F. Supp.
4 1003, 1012 (W.D. Mich 1997). The substantial impairment concept is relevant only
5 to the installment contract situation (Section 2-712), the anticipatory repudiation
6 situation (Section 2-710) and the revocation of acceptance situation (Section
7 2-708). In those circumstances, the question of whether the rights of the aggrieved
8 party are substantially impaired can be determined by the factors listed in this
9 subsection or other factors relevant to the particular case.

10 Subsection (d) adopts the position of the cases which hold that substantial
11 impairment of the value of the whole contract may be the result of the cumulative
12 effect of insubstantial breaches. *See Oberg v. Phillips*, 615 P.2d 1022 (Ct. App.
13 Okla. 1980).

14 **5. International Sales.** Compare CISG Article 45 and Article 61. An
15 aggrieved party may exercise rights and claim damages if the other party “fails to
16 perform any of his obligations under the contract or this Convention.”

17 **Cross References:**

18 **Definitional Cross References:**

19 **SECTION 2-702. WAIVER OF BREACH; PARTICULARIZATION OF**
20 **NONCONFORMITY.**

21 (a) Except as otherwise provided in subsection (c) and Section 2-707(c)(1),
22 if a party knows the other party’s performance constitutes a breach of contract but
23 accepts that performance, the following rules apply:

24 (1) The nonbreaching party that accepted performance is precluded from
25 relying on the breach to cancel the contract if it fails within a reasonable time to
26 object to the breach.

27 (2) The nonbreaching party’s acceptance of the performance and failure
28 to object does not preclude a claim for damages unless the party in breach has

1 reasonably and in good faith changed its position in reliance on the nonbreaching
2 party's inaction.

3 (b) A party's failure to object under subsection (a) to a nonconforming
4 performance does not preclude its objection to the same or similar breach of the
5 contract in future performances of like kind unless the nonbreaching party expressly
6 so states. A statement waiving future performance may be retracted by seasonable
7 notice received by the other party stating that strict performance will be required
8 unless retraction would be unjust in view of a material change of position in reliance
9 on the waiver.

10 (c) A party is precluded from relying on a nonconforming performance as
11 follows:

12 (1) Buyer's payment upon tender of a document of title to the buyer
13 made without reservation of rights waives the right to assert defects apparent on the
14 face of the document of title.

15 (2) The buyer's failure to state, in connection with a rejection under
16 Section 2-703, a particular nonconformity that is ascertainable by reasonable
17 inspection precludes reliance on the unstated nonconformity to justify rejection if:

18 (A) the seller, upon a seasonable particularization, had a right to cure
19 under Section 2-709 and could have cured the nonconformity; or

20 (B) between merchants, the seller after rejection made a request in a
21 record for a full and final statement of all nonconformities on which the buyer
22 proposes to rely.

1 (3) The buyer's failure to state, in connection with a revocation of
2 acceptance under Section 2-708, a known nonconformity that justifies the
3 revocation precludes the buyer from relying on that nonconformity to justify the
4 revocation if the seller had a right to cure under Section 2-709 and could have cured
5 that nonconformity.

6 **Comment**

7 1. **Source:** Former Section 2-605.

8 2. **Comparison with former Article 2.** Subsections (a) and (b) are new
9 and state rules regarding waivers of breach of contract. See also Section 1-107.
10 Subsection (c) continues the rules from former Section 2-605 with the following
11 substantive changes. First, subsection (c)(1) has been revised to make clear that the
12 buyer who makes payment upon presentation of the documents to the buyer may
13 waive defects, but that a person who is not the buyer, such as an issuer of a letter of
14 credit, who pays as against documents is not waiving the buyer's right to assert
15 defects in the documents as against the seller. Second, the buyer's failure to
16 particularize the nonconformity under subsection (c)(2) does not waive all remedies
17 for breach, only the right to rely on the unstated nonconformity to justify rejection.
18 Third, subsection (c)(2)(A) requires the seller has to have a right to cure the breach
19 under Section 2-709. Fourth, subsection (c)(3) is a new section dealing with the
20 buyer's failure to specify the known nonconformity that justifies revocation of
21 acceptance of the goods when the seller had a right to cure the nonconformity and
22 could have done so.

23 3. **Relationship of this section to common law principles of waiver.**

24 Both this section and Section 2-209(c) do not operate on a clean slate in terms of
25 determining when there is a waiver and what the effect of a waiver is on the parties'
26 rights and obligations. Under Section 1-103 principles of waiver as developed at
27 common law operate to supplement Article 2 provisions. It is unrealistic to preclude
28 completely common law principles of waiver by attempting a complete and full
29 statement of waiver principles within Article 2. Rather the approach taken in this
30 section and Section 2-209(c) is to clarify particular effects of application of the
31 waiver concept without defining what is a waiver for all cases.

32 Section 2-209(c) clarifies that a party may waive an express condition to its
33 own performance obligation. The effect of that waiver of an express condition is
34 that the performance obligation arises even if the condition does not come to pass.
35 If that condition is not also a performance obligation of the party, the failure of the

1 condition is not a breach of contract. Restatement (Second) Contracts § 225. Often
2 it is difficult to tell whether the contract term is merely a condition to performance
3 of the other party or whether it is also a performance obligation of that first party.

4 For example, S agrees to sell goods to B for \$5,000 with delivery on May 1.
5 Is delivery May 1 a condition to B's duty to pay or is delivery May 1 a promise that
6 S will deliver on May 1? If, in the unlikely event the term is interpreted to be a
7 condition, then if S does not deliver on May 1, B has no duty to perform its
8 obligation to pay. S, however, has not breached the contract. B's conduct or
9 words, however, may have indicated that B waived the condition of delivery May 1.
10 In that case, because the condition is waived, B's obligation to pay arises, even if
11 delivery is not by May 1. B has no cause of action for breach against S because the
12 condition was not a performance obligation of S.

13 Assume, however, that the delivery term is a promise to perform by
14 delivering on May 1. S's promise to perform is assumed to be dependent upon B's
15 promise to perform and vis versa. Restatement (Second) of Contracts § 232. If S
16 does not deliver on May 1, S has breached the contract. B would be able to pursue
17 its remedies for breach against S, including canceling the contract and damages for
18 breach. If B, by B's conduct or words, waives performance of the promise to
19 deliver on May 1, at common law, the effect of the waiver is that B could not cancel
20 the contract, but could recover damages for S's breach by failing to deliver on May
21 1. See Restatement (Second) of Contracts § 246.

22 Unless it is very clear that a term is only an express condition to performance
23 and not a performance obligation, courts should employ the presumption that terms
24 in a contract are performance obligations and not mere conditions. See Restatement
25 (Second) of Contracts § 227.

26 **4. Waiver of remedies.** Subsection (a) implements the common law rule
27 that a party may waive a performance obligation and by doing so lose the right to
28 cancel the contract but not the right to recover damages unless the other party
29 detrimentally relies on the failure to object. To illustrate the operation of this
30 section, assume that S agrees to sell goods to B, with payment on May 1. B
31 communicates to S that B can pay on May 5, but cannot pay on May 1. The
32 contract does not include a no oral modification or an anti-waiver clause. S accepts
33 payment on May 5 and does not object. Payment on May 1 should be presumed to
34 be a promise, not a mere condition to S's performance obligation, unless the
35 contract clearly provides otherwise. B's failure to pay on May 1 is a breach of B's
36 performance obligation. S's acceptance of B's performance and failure to object to
37 B's late payment means that S cannot cancel the contract, but may pursue S's claim
38 for damages caused by B's late payment, unless B has detrimentally relied on S's
39 failure to object. If S is the party in breach and B has accepted goods, B's

1 obligation to give notice of the breach is governed by Section 2-707(c). In an
2 installment contract, the party who receives nonconforming performance but who
3 accepts that performance should object to the nonconformity in order to preserve
4 the right to use that nonconformity to assert a substantial impairment of the value of
5 the whole contract. Section 2-710(c).

6 **5. Waiver effect on future performance.** Subsection (b) addresses the
7 effect of a waiver of a previous performance obligation on future performance
8 obligations. Assume that S agreed to deliver goods the first of every month for 6
9 months. S's first delivery is late and not delivered until May 5. B accepts the
10 delivery and does not object to its lateness. S's obligation to deliver the next
11 month's installment on time on the first of June is intact. B's failure to object to the
12 first late delivery is not a waiver of future timely deliveries under subsection (b) nor
13 does it preclude an ability to request adequate assurance of performance. Section
14 2-711. Assume, however, that B accepts the late delivery on May 5 and tells S that
15 as long as the deliveries are made before the 5th of every month, B will take the
16 deliveries. That may be a statement waiving future performance of timely deliveries.
17 In order to retract that waiver of future performance, B would have to give
18 seasonable notice to S before S relied on the waiver to S's detriment. If both B and
19 S agreed to a new delivery date of the 5th of the month, that agreement could be a
20 modification under Section 2-209.

21 **6. Waiver of defects in documents.** Subsection (c) states three situations
22 where failure to object waives the right to take some action based upon the
23 particular nonconforming performance. Subsections (c)(1) and (c)(2) are from
24 former Section 2-605. As under prior law, if payment is required against
25 documents, the documents will be inspected prior to payment and payment
26 constitutes acceptance of the documents and waiver of the right to assert defects in
27 the documents that are apparent on the face of the documents. Acceptance of the
28 documents, however, is not acceptance of the goods. See Section 2-609. A buyer
29 should not be precluded from asserting defects in the documents as against the seller
30 when the issuer of a letter of credit accepts the documents as the issuer is not acting
31 on behalf of the buyer within the meaning of this section as regards the documents.
32 The issuer's payment of the letter of credit does not constitute an acceptance of the
33 documents by the buyer.

34 **Waiver of right to reject.** Subsection (c)(2) is the same as former Section
35 2-605(1) with two substantive changes. First, the requirement of particularization
36 that this section requires only affects the buyer's right to reject, not the buyer's right
37 to establish breach. Waiver of the right to damages for breach is governed by
38 subsection (a) or Section 2-707(c) as the case may be. Second, this section requires
39 the seller to have had a right to cure under Section 2-709 for the principle in
40 subsection (c)(2)(A) to operate, a concept perhaps implicit in the former Section

1 2-605(1)(a). As under former law, the policy is to allow the buyer to give informal
2 notice of defects without penalizing the buyer for failure to state all defects and at
3 the same time protect the seller in those situations where the failure to state a defect
4 misleads the seller. Thus if the defect is one that could be cured under Section
5 2-709, the buyer will have waived that defect so as to allow rejection of the goods if
6 the buyer does not state the defect with sufficient particularity to facilitate the
7 seller's exercise of its right to cure as provided in Section 2-709.

8 **Waiver of right to revoke acceptance.** Subsection (c)(3) is a new section
9 included to dovetail with the expansion of the right to cure in the post-revocation
10 situation under Section 2-709. The limitation to nonconformities ascertainable by
11 reasonable inspection contained in subsection (c)(2) does not make sense in the
12 revocation situation as the only situation where the seller has a right to cure after
13 revocation is when the defect is not easily discoverable. Thus, subsection (c)(3) is
14 narrowly drawn to require a particularization of the defects justifying revocation that
15 the seller had a right to cure under Section 2-709 and could have been cured.
16 Subsection (c)(3) thus parallels subsection (c)(2)(A).

17 **Notice in the case of accepted goods.** Not listed in subsection (c) is the
18 effect of the failure to particularize in the notice of breach in the case of the
19 accepted goods under Section 2-707(c)(1). That omission is intentional. A
20 particularization requirement would not facilitate a statutory cure as the seller has no
21 statutory right to cure under Section 2-709 when the goods are accepted and
22 acceptance is not revoked. A deemed waiver by failure to particularize would be
23 inconsistent with the prejudice standard in Section 2-707 where notice itself is
24 excused unless there is prejudice by failure to notify.

25 **7. Examples.** To illustrate the operation of subsection (c), assume that S
26 agreed to deliver goods that conformed to an express warranty on May 1. S
27 delivered the goods on May 1 but the goods did not conform to the warranty. B
28 timely rejects the goods under Section 2-703. Under subsection (a), B has objected
29 by its rejection to the nonconforming performance. Under subsection (c)(2), if the
30 nonconformity is ascertainable by reasonable inspection and the seller had the right
31 to cure the breach under Section 2-709 and could have cured, then B has to
32 particularize the nonconformity or is barred from asserting the nonconformity to
33 justify the rejection. If the nonconformity is not ascertainable by reasonable
34 inspection, B need not particularize the defect and will not suffer any adverse
35 consequences from failing to particularize unless B knows of the defect when it
36 accepts S's performance. In that case, subsection (a) will operate to preclude a
37 cancellation and perhaps damages if the second sentence of subsection (a) applies.

38 Assume the same facts but that B did not reject, but accepted. B then timely
39 and properly revoked acceptance under Section 2-708(a)(2). B's timely and proper

1 revocation should satisfy the objection required under subsection (a). If S has a
2 right to cure under Section 2-709 and could have cured, then B must particularize
3 those known defects justifying revocation or not be allowed to assert those defects
4 to justify revocation. As to nonconformities not sufficient to justify revocation that
5 B knows about, subsection (a) would operate to determine B's rights.

6 Assume the same facts but that B accepted the goods and did not revoke
7 acceptance. If S's performance is not in conformity with the contract requirements,
8 B must give notice of breach under Section 2-707(c).

9 **8. International Sales.** CISG Article 39(1) provides that the buyer "loses
10 the right to rely on a lack of conformity of the goods if he does not give notice to
11 the seller specifying the nature of the lack of conformity within a reasonable time
12 after he has discovered it or ought to have discovered it." Presumably, this failure
13 to specify bars the use of that alleged non-conformity for all remedial purposes.
14 Article 40 provides that the seller is "not entitled to rely on the provisions of Articles
15 38 and 39 if the lack of conformity relates to facts of which he knew or could not
16 have been unaware and which he did not disclose to the buyer." Other related
17 Articles include Article 39(2) and Article 44.

18 **Cross References:**

19 **Definitional Cross References:**

20 **SECTION 2-703. BUYER'S RIGHTS ON NONCONFORMING**
21 **DELIVERY; RIGHTFUL REJECTION.**

22 (a) Subject to Sections 2-603(b), 2-710, 2-809, and 2-810, if goods or a
23 tender of delivery fails in any respect to conform to the contract, the buyer may:

24 (1) reject the whole;

25 (2) accept the whole; or

26 (3) accept any commercial units and reject the rest.

27 (b) Rejection of goods must be within a reasonable time after their delivery
28 or tender and is not effective unless the buyer seasonably notifies the seller.

1 **Comment**

2 1. **Source:** Former Sections 2-601 and 2-602(1).

3 2. **Comparison with former Article 2.** Section 2-703 continues the
4 perfect tender rule from former Section 2-601 with only one substantive change to
5 subsection (a) which is the addition of a cross reference to Section 2-603(b)
6 regarding the ability to reject when required to give notice in a shipment contract
7 and material loss or delay results. This does not change the current law as it relates
8 to the right to reject, it only makes the rejection rule from that section visible
9 (former Section 2-504). Subsection (b) continues the rule from former Section
10 2-602(1) without substantive change.

11 3. **Right to reject depends upon conformity to contract obligations.**
12 Under subsection (a), the buyer's right to reject is determined by whether the goods
13 or tender of delivery fail to conform to the contract, the parties' total legal
14 obligation, which includes the parties' bargain in fact, applicable course of
15 performance, course of dealing and usage of trade, as well as terms incorporated
16 from the U.C.C. and other applicable law. Section 1-201(11). The buyer's right to
17 reject must be exercised in good faith. Section 1-203. A rejection made in bad faith
18 is wrongful. Rejection of the goods is not a rescission of the contract. As under
19 current law, the buyer's remedies are presumed to be cumulative unless the contract
20 expressly limits those remedies. Section 2-810. Thus preclusion of the right to
21 reject the goods must be clearly expressed.

22 **Rejection and the right to cure.** Even if the buyer rightfully rejects, the
23 buyer's ability to cancel the contract or pursue other remedies is tempered by the
24 seller's right to cure in Section 2-709. If the seller has the right to cure under
25 Section 2-709, the buyer has an obligation to allow the seller to make the cure. If
26 the seller properly cures, the buyer's ability to force the goods back on the seller
27 through rejection is defeated.

28 **Rejection and the right to inspect.** Generally, a buyer will have the right
29 to inspect the goods prior to making the decision whether to accept or reject the
30 goods. Sections 2-609 and 2-706. Reasonable use of the goods as part of a
31 reasonable inspection is not an acceptance of the goods.

32 **Acceptance of goods and pursuit of remedies.** Acceptance of the goods
33 or a tender that does not conform to the contract does not by itself preclude the
34 buyer from pursuing the seller for a remedy for breach of contract. Section
35 2-707(b). See section 2-701(b) on breach and Section 2-823 for an index of buyer's
36 remedies. The buyer, however, should comply with Section 2-702 and Section
37 2-707 so as to avoid losing remedies for breach.

1 **Rejection and care of the goods.** If a buyer rejects the goods, the buyer's
2 obligation in regard to care of the goods is addressed in Sections 2-704 and 2-705.
3 Actions taken with respect to the goods as allowed in those sections is not an
4 acceptance of the goods.

5 **Partial acceptance.** Partial acceptance of commercial units is permitted
6 whether the part of the goods accepted conforms or not. The obligation of good
7 faith in acceptance or rejection requires that a partial acceptance not unreasonably
8 impair the value of the remaining portion of the goods. If a partial acceptance
9 occurs and the price can be apportioned, Section 2-302, the buyer is obligated to
10 pay the price for the goods accepted. Section 2-707.

11 **Acceptance and rejection.** Once the buyer accepts the goods under
12 Section 2-706, the buyer may no longer reject the goods. The buyer may, however,
13 notify the seller that the goods are rejected and then later retract that rejection if the
14 seller still has the tender of the goods open. If the buyer has possession of the
15 goods and has retracted the rejection, the seller has the ability to treat actions of the
16 buyer that are inconsistent with the claimed rejection as an acceptance, Sections
17 2-704 and 2-706.

18 **4. Notice of rejection.** Subsection (b) follows former Section 2-602(1)
19 without substantive change. The reasonable time for rejection and the reasonable
20 notice to the seller of the rejection must be read in light of the buyer's reasonable
21 time to inspect the goods. Section 2-609. The parties may agree as to the time
22 periods for rejection and notice. Section 1-204. A rejection not permitted under
23 subsection (a) is wrongful and a breach of contract by the buyer even if the buyer
24 gives prompt notice under subsection (b). Thus a rejection may be effective but
25 wrongful. Section 2-701(b)(1). A rejection may be rightful under the standard of
26 subsection (a) but ineffective under subsection (b). A rightful but ineffective
27 rejection may be an acceptance under Section 2-706. This dichotomy follows
28 current law.

29 **5. International Sales.** Under CISG, buyer remedies are triggered when
30 the seller "fails to perform any of his obligations under the contract," Article 45(1),
31 and preserved when proper notice of the nonconformity is given under Article 39(1).
32 There is no rejection remedy, however, and the buyer is required to pay the price as
33 agreed unless the contract can be avoided for a "fundamental" breach. See Article
34 25. Upon finding non-conforming goods, the buyer's remedial options include
35 requiring the seller to deliver substitute goods or repair them under Article 46, fixing
36 an additional length of time for the seller to perform under Article 47 and avoiding
37 the contract for "fundamental breach" under Article 49. In addition, the seller has
38 broad power to "cure" under Article 48 unless the buyer can avoid the contract
39 under Article 49. Thus, although a minor non-conformity may be a breach for

1 which rights and remedies are provided, the buyer cannot buy replacement goods
2 (cover) under Article 75 unless the contract is avoided for fundamental breach.

3 **Cross References:**

4 **Definitional Cross References:**

5 **SECTION 2-704. EFFECT OF EFFECTIVE REJECTION AND**
6 **JUSTIFIABLE REVOCATION OF ACCEPTANCE.**

7 (a) Subject to Sections 2-705 and 2-829(b), after an effective rejection or
8 justifiable revocation of acceptance, a buyer in physical possession of the goods shall
9 hold the goods with reasonable care at the seller's disposition for a sufficient time to
10 permit the seller to remove them. The buyer has no further obligation with regard to
11 goods rightfully rejected or to which an acceptance has been justifiably revoked.

12 (b) If a buyer uses the goods after an effective rejection or justifiable
13 revocation of acceptance, the following rules apply:

14 (1) Any use by the buyer which is unreasonable under the circumstances
15 and which is either inconsistent with the seller's ownership or inconsistent with the
16 buyer's claim of rejection or justifiable revocation of acceptance is an acceptance
17 only if ratified by the seller.

18 (2) If the buyer wrongfully rejected the goods, any use of the goods by
19 the buyer which is inconsistent with the seller's ownership or inconsistent with the
20 buyer's claim of rejection is unreasonable.

21 (3) If use of the goods is reasonable under the circumstances, the use is
22 not an acceptance, but the buyer, upon returning or disposing of the goods, shall pay

1 the seller the value of the reasonable use to the buyer, unless requiring the buyer to
2 do so would be unjust under the circumstances. The use value must be deducted
3 from the amount paid to be refunded to the buyer, if any, and from any damages to
4 which the buyer is otherwise entitled under this article.

5 **Comment**

6 1. **Source:** Former Sections 2-602 and 2-608(3).

7 2. **Comparison with former Article 2.** Section 2-704 is derived from
8 former Sections 2-602 and 2-608(3) but makes several substantive changes. First,
9 the obligation to take reasonable care of the goods also applies in the case of an
10 effective but wrongful rejection. Second, the effect of the buyer's use of the goods
11 after an effective rejection or justifiable revocation of acceptance is explicitly
12 addressed in subsection (b). Third, the concept of "wrongful use as against a seller"
13 from former law has been abandoned so as to better coordinate this section with the
14 section on acceptance of the goods, Section 2-706.

15 3. **Effective rejection.** This section addresses the buyer's obligations as to
16 the goods after an effective rejection and a justifiable revocation of acceptance.
17 Under Section 2-703, a buyer may effectively reject the goods by giving notice of a
18 rejection within a reasonable time. That rejection may be rightful as the goods or
19 the tender did not conform to the requirements of the contract. That rejection is
20 wrongful if the goods and the tender of delivery conformed to the requirements of
21 the contract but nonetheless effective if the notice of rejection is given within the
22 appropriate time. Thus a rejection can be either rightful or wrongful but nonetheless
23 effective if the buyer complies with the notice requirement in Section 2-703(b). A
24 wrongful but effective rejection is a breach of contract by the buyer. Section 2-701.
25 If the buyer rightfully rejects the goods, of course, the seller has breached the
26 contract by making a nonconforming tender. Section 2-701.

27 **Justifiable revocation.** A buyer who has grounds to revoke acceptance
28 under Section 2-708 must give the notice required under that section in order to
29 effect the revocation. If the buyer has grounds for revocation, but has not yet given
30 the required notice of revocation, the buyer has not undone its acceptance of the
31 goods. If the buyer attempts to revoke acceptance wrongfully by giving a notice of
32 revocation, the acceptance has not been undone and there is no revocation of
33 acceptance. Thus this section speaks of a justifiable revocation which presumes that
34 the buyer has given the required notice in a case in which the buyer is justified in
35 revoking acceptance under Section 2-708. In either case where the buyer has not
36 given notice of a justifiable revocation or where the buyer has given notice of an

1 unjustifiable revocation, the acceptance has not been undone, the goods are the
2 buyer's goods and this section does not apply. An attempt to revoke acceptance
3 when revocation is not justifiable under Section 2-708 may be a breach of contract
4 by the buyer. Section 2-701. If the buyer has not given notice of a justifiable
5 revocation, the seller may be in breach of contract for tendering nonconforming
6 goods. Section 2-701.

7 **4. Obligation of reasonable care.** Subsection (a) states the rule that the
8 buyer who possess the goods after an effective rejection or a justifiable revocation
9 of acceptance must exercise reasonable care in taking care of the goods. That
10 effective rejection may be either rightful or wrongful. If the rejection is rightful or
11 the revocation of acceptance is justified, the buyer's obligation as to the goods is
12 determined by this section and the requirements of Section 2-705 and Section
13 2-829(b). If the rejection is wrongful but nonetheless effective, the buyer may have
14 the risk of loss as to the goods as provided under Section 2-612 in addition to the
15 obligations stated in subsection (a). If the attempt to revoke acceptance is
16 unjustified, the buyer has not undone the acceptance and this section does not apply.

17 **5. Use of goods after effective rejection or justifiable revocation.**
18 Subsection (b) is derived from former Section 2-602(b)(1) but has been revised to
19 deal with the problem of post rejection or revocation use of the goods. The courts
20 have developed several alternative approaches. Under former Article 2, a buyer's
21 post rejection or revocation use of the goods could be treated as an acceptance thus
22 undoing the rejection or revocation, could be a violation of the buyer's obligation of
23 reasonable care, or could be neither an acceptance or a violation of the reasonable
24 care obligation but rather a reasonable use for which the buyer must compensate the
25 seller. Subsection (b) adopts the third approach. If the buyer's use after an effective
26 rejection or a justified revocation of acceptance is both unreasonable under the
27 circumstances and is inconsistent with the rightful rejection, justified revocation of
28 acceptance, or the seller's ownership, the seller has the option to treat the buyer's
29 use as an acceptance of the goods. If the buyer's use is reasonable, however, the
30 buyer's actions cannot be an acceptance and the buyer must compensate the seller
31 for the value of the use to the buyer, unless that requirement would be unjust under
32 the circumstances. If the buyer wrongfully but effectively rejected the goods, the
33 buyer's use inconsistent with the seller's ownership is unreasonable and may be an
34 acceptance of the goods if the seller chooses to treat the use as an acceptance. If
35 the seller does not treat the unreasonable use as an acceptance, the seller may have
36 non-code remedies for conversion.

37 **Reasonable use.** Factors that are relevant to whether the buyer's use of the
38 goods is reasonable under this section include whether the seller has given
39 instructions to the buyer about what to do with the goods, including whether the
40 seller has requested that the buyer not use the goods, the hardship the buyer would

suffer if the buyer did not use the goods, whether use of the goods mitigates harm resulting from the seller's breach, the prejudice the seller suffers as a result of the buyer's use of the goods, whether the seller has offered to cure or provide compensation to the buyer for the seller's breach, and the parties' good faith. *See Wilk Paving, Inc. v. Southworth-Milton, Inc.*, 649 A.2d 778, 27 UCC Rep. Serv. 2d 130 (Vt. 1994). These factors may also be relevant to whether it would be unjust in the circumstances to require the buyer to compensate the seller for the use of the goods.

6. **International Sales.** Under CISG Article 86, if a buyer has received and intends to reject goods, he must take reasonable steps to preserve the goods. If the goods shipped to the buyer are at the buyer's disposal at the destination, unless a seller's agent is present at the destination, the buyer must take possession if that can be done without paying the price or incurring unreasonable inconvenience or expense.

Cross References:

Definitional Cross References:

**SECTION 2-705. MERCHANT BUYER'S DUTIES; BUYER'S
OPTIONS AS TO SALVAGE.**

(a) Subject to the buyer's security interest under Section 2-829(b), if the seller does not have an agent or place of business at the market where goods were rejected or acceptance was revoked, a merchant buyer, after an effective rejection or justifiable revocation of acceptance of goods in the buyer's possession or control, shall follow any reasonable instructions received from the seller with respect to the goods. In the absence of the instructions, a merchant buyer shall make a reasonable effort to sell or otherwise dispose of the goods for the seller's account if they are perishable or threaten to decline speedily in value. In the case of a rightful rejection

1 or a justifiable revocation of acceptance, instructions are not reasonable if on-
2 demand indemnity for expenses is not forthcoming.

3 (b) In the case of a rightful rejection or a justifiable revocation of
4 acceptance, the following rules apply:

5 (1) A merchant buyer that sells goods under subsection (a) is entitled to
6 reimbursement from the seller or out of the proceeds for the reasonable expenses of
7 caring for and selling them.

8 (2) If the expenses under paragraph (1) do not include a sales
9 commission, the buyer is entitled to a commission usual in the trade or, if there is
10 none, to a reasonable sum not exceeding 10 percent of the gross proceeds.

11 (c) Except as otherwise provided in subsection (a), after an effective
12 rejection or a justified revocation of acceptance, a buyer may store the rejected
13 goods for the seller's account, reship them to the seller, or resell them for the
14 seller's account, with reimbursement in the case of a rightful rejection or a justifiable
15 revocation of acceptance in the manner provided in subsection (b).

16 (d) In complying with this section, a buyer shall act in good faith. Conduct
17 in good faith under this section does not constitute acceptance or conversion and
18 may not be the basis of a claim for damages.

19 **Comment**

20 1. **Source:** Former Sections 2-603 and 2-604.

21 2. **Comparison with former Article 2.** Section 2-705 continues the rules
22 from former Sections 2-603 and 2-604 with one substantive change designed to
23 broaden its applicability. This section applies not only in the case of a rightful

1 effective rejection and a justifiable revocation of acceptance as under former law but
2 also to a wrongful effective rejection.

3 **3. Merchant buyer's obligation.** Subsection (a) continues the rule that
4 imposes duties on the merchant buyer to take action as regards to the goods in the
5 buyer's possession or control only if the seller has no agent or place of business in
6 the market where the goods were located when rejected or when acceptance was
7 justifiably revoked. The merchant buyer's duties in that case are to follow
8 reasonable instructions or if no reasonable instructions are given to sell the goods if
9 the goods are perishable or threaten to decline in value quickly. If no reasonable
10 instructions are forthcoming and the goods are not perishable or declining quickly in
11 value, the merchant buyer has no obligation to sell the goods for the seller's
12 account. In that case, the merchant buyer need only take reasonable care of the
13 goods under Section 2-704 and may take action as to the goods under subsection
14 (c) of this section.

15 As under former Article 2, the merchant buyer has the ability to demand
16 indemnity for expenses the buyer will incur in performing its obligation under this
17 section. This ability to demand indemnity is limited to the cases of a rightful
18 rejection or a justified revocation of acceptance. A merchant buyer who has
19 wrongfully rejected, has the obligation to act under subsection (a), but not the right
20 to get up front indemnity for the expenses.

21 A financing agency acting on behalf of the seller in the relevant market is
22 sufficiently the seller's agent to free the merchant buyer from its duties under this
23 subsection. A merchant buyer who has an obligation to act under this section but
24 who fails to do so may be liable for damages that result from its failure to take the
25 required action.

26 **Nonmerchant buyer's obligation.** Nonmerchant buyers have no
27 obligations under subsection (a) but a privilege to act as regards the goods under
28 subsection (c).

29 **4. Expenses and commissions.** Subsection (b) follows former Article 2,
30 allowing the merchant buyer to be reimbursed or collect from the proceeds of sale
31 the expenses of caring for the goods and the sale of the goods as well as providing
32 for a usual commission in the case of a rightful rejection or justified revocation of
33 acceptance.

34 **5. Buyer's actions not mandatory.** Subsection (c) follows former Section
35 2-604 which allows any buyer, merchant or non-merchant, to take action as regards
36 the goods to store, reship or resell the goods on the seller's account. These are
37 options given to a buyer, not duties imposed upon a buyer. This section applies to

1 merchant buyers who are not required to take action under subsection (a) and to
2 non-merchant buyers in any case. A buyer acting under subsection (c) has the ability
3 to be reimbursed for its expenses either from the seller or from the proceeds of sale
4 as provided in subsection (b).

5 **6. Effect of actions taken under this section.** Subsection (d) requires a
6 buyer to act in good faith in making the decisions as to what to do with the goods
7 after an effective rejection or a justifiable revocation of acceptance. If the buyer acts
8 in good faith, the buyer's actions are not an acceptance of the goods and do not
9 constitute a conversion of the goods. This section must be read in light of Section
10 2-704. In the usual case, the buyer who takes action under this section will also be
11 taking reasonable care of the goods under Section 2-704 as the obligation of good
12 faith under this section includes acting in light of reasonable commercial standards
13 of fair dealing. Section 2-102. In some instances, however, action taken pursuant
14 to this section may violate the buyer's obligation to take reasonable care for the
15 goods even if the buyer acts in good faith. Section 2-704 imposes a separate
16 obligation on the buyer to take reasonable care of the goods and subsection (d) does
17 not preclude the seller from pursuing remedies against the buyer based upon the
18 buyer's actions under Section 2-704.

19 **7. International Sales.** CISG Article 87 allows a buyer who has taken
20 possession of the goods under Article 86 (see note under Section 2-704) to store the
21 goods at the expense of the other party as long as that expense is not unreasonable.
22 Under Article 88, the buyer may sell the goods if the seller unreasonably delays in
23 regaining possession of the goods or providing for the expense of preserving the
24 goods. If goods will decline speedily in value or will be unreasonably expensive to
25 preserve, the buyer must sell the goods. A party selling the goods may deduct from
26 the proceeds the expenses of preserving and selling the goods and account to the
27 other party for the balance.

28 **Cross References:**

29 **Definitional Cross References:**

30 **SECTION 2-706. WHAT CONSTITUTES ACCEPTANCE OF GOODS.**

31 (a) Goods are accepted when the buyer:

(1) after a reasonable opportunity to inspect the goods, signifies to the seller that the goods conform or will be taken or retained despite their nonconformity;

(2) after a reasonable opportunity to inspect the goods, does not make an effective rejection; or

(3) except as otherwise provided in Section 2-704, does any unreasonable act that is inconsistent with the seller's ownership or with the buyer's claim of rejection or justifiable revocation of acceptance, and the act is ratified by the seller as an acceptance.

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

Comment

1. Source: Former Section 2-606.

2. **Comparison with former Article 2.** Section 2-706 continues the rules from former Section 2-606 with one substantive change. Subsection (a)(3) is redrafted to dovetail with the rights of a buyer who uses the goods post rejection or revocation. Section 2-704.

3. Acceptance and rejection. As under former law, acceptance of the goods under this section is completely separate from passage of title to the goods under Section 2-501. Although acceptance of the goods precludes rejection, acceptance of the goods does not preclude the buyer from exercising any other remedies for breach of contract if the goods or the tender of delivery do not conform to the contract's requirements. Sections 2-707 and 2-702. Of course, if the goods and the tender of delivery conform to the contract, the buyer is obligated to accept the goods or the buyer will have breached the contract. Section 2-701. If the buyer has rejected the goods, the buyer can still accept the goods thereafter if the seller has indicated that the tender is still open to acceptance. See Comment to Section 2-703.

1 **4. Signifying acceptance.** Subsection (a)(1) follows former law that allows
2 the buyer a reasonable opportunity to inspect the goods before deciding whether to
3 accept the goods. The buyer's acceptance in this instance may be by conduct after
4 the reasonable time to inspect has expired. Section 2-609. If the buyer has not
5 agreed to make payment prior to inspection, payment may be one circumstance to
6 consider in determining whether the buyer has accepted the goods but is not
7 conclusive. If the buyer has waived its right to inspect prior to payment, payment is
8 not an acceptance of the goods under this section, Section 2-608(b), the buyer still
9 has a reasonable time to inspect the goods before the buyer's conduct should be
10 construed to constitute an acceptance. A conditional communication of acceptance
11 is of course subject to the expressed conditions.

12 **5. Failure to effectively reject.** Subsection (a)(2) follows former law that a
13 buyer who fails to make an effective rejection within the time stated in Section
14 2-703(b) will have accepted the goods. The reasonable time for rejection should be
15 construed in light of the buyer's reasonable time for inspection under Section 2-609.

16 **6. Buyer's use of goods.** Subsection (a)(3) dovetails with Section 2-704
17 concerning the buyer's actions with regard to the goods that are inconsistent with
18 the seller's ownership or inconsistent with the buyer's claim of rejection or
19 justifiable revocation of acceptance. The buyer's actions may be either before or
20 after the claim of rejection or justifiable revocation and if inconsistent with the
21 seller's ownership rights or with the buyer's claim of rejection or revocation and
22 unreasonable, the seller has the ability to treat those actions as an acceptance. The
23 seller may choose to not treat those unreasonable actions as an acceptance, in which
24 case, the seller may have an action for damages against the buyer for violation of the
25 buyer's obligation of reasonable care for the goods or for conversion of the goods.
26 Section 2-704, Section 2-501(d). Reasonable actions, even though inconsistent with
27 the seller's ownership or with the buyer's claim of rejection or justifiable revocation
28 of acceptance are not an acceptance. Section 2-704. The buyer's actions pursuant
29 to Section 2-705 are not an acceptance of the goods. Reasonable use of the goods
30 for inspection purposes is also not an acceptance.

31 **7. Commercial unit.** Subsection (b) follows the rule from former Section
32 2-606(2) that acceptance or rejection must be by commercial unit. Section 2-703.

33 **8. International Sales.** Under CISG, the remedies of the buyer for breach
34 by the seller do not depend upon whether the buyer has accepted the goods.

35 **Cross References:**

36 **Definitional Cross References:**

1 **SECTION 2-707. EFFECT OF ACCEPTANCE; NOTICE OF BREACH;**
2 **BURDEN OF ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE**
3 **OF CLAIM OR LITIGATION TO PERSON ANSWERABLE OVER.**

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

5 (b) Acceptance of goods by the buyer precludes rejection of the goods
6 accepted but does not by itself impair any other remedy provided by this article for
7 nonconformity.

8 (c) If a tender of delivery has been accepted, the following rules apply:

9 (1) The buyer or a person entitled to enforce a warranty or warranty
10 obligation shall notify the party claimed against of the breach of contract, warranty,
11 or warranty obligation within a reasonable time after the breach was discovered or
12 should have been discovered. However, a failure to give timely notice bars the
13 person required to notify the party claimed against from a remedy only to the extent
14 that the party entitled to notice establishes that it was prejudiced by the failure.

15 (2) If a claim for infringement or the like is made against a buyer for
16 which a seller is answerable over and the buyer is sued as a result of the claim, the
17 buyer shall notify the seller within a reasonable time after receiving notice of the
18 litigation or be barred from any remedy over for liability established by the litigation.

19 (d) The buyer has the burden of establishing a breach of contract with
20 respect to goods accepted. A person entitled to enforce a warranty obligation under
21 Section 2-408 or a warranty under Section 2-409 has the burden of establishing that
22 the warranty obligation or warranty was breached.

1 (e) In a claim for indemnity, breach of a warranty, or other obligation
2 against the buyer for which another party is answerable over, the following rules
3 apply:

4 (1) The buyer may give notice of the litigation to the other party in a
5 record, and the person notified may then give similar notice to any other person that
6 is answerable over. If the notice invites the person notified to intervene in the
7 litigation and defend and states that failure to do so will bind the person notified in
8 any action later brought by the buyer as to any determination of fact common to the
9 two actions, the person notified is so bound unless, after seasonable receipt of the
10 notice, the person notified intervenes in the litigation and defends.

11 (2) If the claim is one for infringement or the like, the original seller may
12 demand in a record that its buyer turn over control of the litigation, including
13 settlement, or otherwise be barred from any remedy over. If the seller also agrees to
14 bear all expense and to satisfy any adverse judgment, the buyer is so barred unless,
15 after seasonable receipt of the demand, control is turned over to the seller.

16 (f) Subsections (c), (d), and (e) also apply to an obligation of a buyer to
17 hold the seller harmless against infringement or the like.

18 **Comment**

19 1. **Source:** Former Section 2-607.

20 2. **Comparison with former Article 2.** Section 2-707 continues the rules
21 from former Section 2-607 except for the following substantive changes. First,
22 subsection (c)(1) provides that a failure to give notice bars a buyer from a remedy
23 for breach of contract only if the party who was entitled to notice suffers prejudice
24 due to the failure to notify. The requirement that the party claimed against establish
25 prejudice is a middle position between stating that the failure to give notice is an

1 absolute bar to recovery and requiring proof of material prejudice. See Restatement
2 (Second) of Contracts § 229, excusing a condition where the failure is not material
3 and implementation would result in disproportionate forfeiture. This also follows
4 those cases that have held that in order to determine whether notice was given
5 within a reasonable time, the prejudice to the seller entitled to notice must be
6 evaluated. Second, the notice must be given to the “person claimed against” not
7 “the seller” as under current law. “A person entitled to enforce a warranty or
8 warranty obligation” language in subsections (c)(1) and (d) also adapts the rule for
9 persons who are entitled to enforce warranties under part 4 but who are not buyers.
10 This change accommodates the notice requirement to the nonprivity situations
11 contemplated in Part 4 of this article. Third, the vouching in procedure in
12 subsection (e) has been expanded to include indemnity actions and persons other
13 than the seller who are answerable over. As under former Article 2, all the
14 provisions of this section are subject to any explicit reservation of rights. Section
15 1-207.

16 **3. Payment of price.** Subsection (a) provides that the buyer must pay at
17 the contract rate for goods accepted. In the case of a partial acceptance, Sections
18 2-703 and 2-706, the price of the portion accepted should be apportioned based
19 upon the contract rate. See Section 2-302.

20 **4. Effect of acceptance on remedies for breach.** Subsection (b) makes
21 clear that the buyer’s acceptance of the goods by itself does not impair any of the
22 buyer’s rights upon a seller’s breach of contract except for the right to reject. After
23 acceptance, if the buyer wants to force the goods back to the seller, the buyer must
24 comply with the provision on revocation of acceptance. Section 2-708. A buyer
25 that has accepted goods and wants to preserve its rights fully should comply with
26 Section 2-702 and Section 2-707(c). In an installment contract, the buyer’s retains
27 its right to insist on conforming future installments even if it has accepted past non-
28 conforming installments. Section 2-702(b).

29 **5. Notice of breach.** Subsection (c)(1) continues the rule that the buyer
30 must notify the party claimed against of any breach of contract and also applies that
31 rule to persons that are not buyers but that are entitled to enforce a warranty or
32 warranty obligation that arises under Part 4 of this Article. The requirement that
33 there be notice of a breach means that the notice must indicate that problems have
34 arisen with regard to the goods and does not require any particular form of notice.
35 The notification that preserves remedies for breach need only be such that informs
36 the person claimed against that the transaction is claimed to involve a breach and
37 need not be a full particularization of all deficiencies in the goods or the tender of
38 delivery. This notice can be informal, such as a telephone call, or formal, such as
39 initiating a lawsuit. The time for sending the notice should be judged by taking into
40 account not only the nature of the transaction but also the status of the buyer or

1 person who is asserting a claim and the relationship with the party claimed against.
2 The focus of requiring notice is to avoid bad faith assertions of breach, not to
3 deprive a person acting in good faith of a remedy. In line with that philosophy, if
4 the notice is untimely, the person who failed to give timely notice is not barred from
5 obtaining a remedy for breach unless the party claimed against demonstrates the
6 failure to timely notify resulted in prejudice to that party. For example, prejudice
7 could be demonstrated if the delay in giving notice prevented the party claimed
8 against from collecting evidence relevant to the breach. The party who is alleged to
9 have breached the contract or warranty is ultimately protected from stale claims by
10 the statute of limitations. Section 2-814.

11 **6. Notice of infringement claim.** Subsection (c)(2) continues the rule that
12 the buyer must notify the seller within a reasonable time of being sued on a claim for
13 infringement for which the seller is answerable over in order to give the seller an
14 opportunity to defend against the infringement. This notification obligation works
15 hand in hand with the right conferred on the seller in subsection (e)(2) to control the
16 infringement litigation.

17 **7. Burden to establish breach.** Subsection (d) continues current law that
18 the buyer or person asserting the breach has the burden to establish the party
19 claimed against breached the contract, warranty, or warranty obligation.

20 **8. Vouching in.** Subsection (e)(1) continues the codification of the
21 vouching in process for parties who are answerable over for claims that have been
22 asserted against a buyer. Vouching in does not confer a right on the party notified
23 to intervene, does not confer jurisdiction of any kind on the court over the person
24 answerable over, and does not create a duty to defend on the part of the person
25 answerable over. Those matters continue to be governed by the applicable rules of
26 civil procedure and substantive law outside this section. Vouching in is based upon
27 the principle that the person answerable over is liable for its contractual obligations
28 regarding the quality or title to the goods which the buyer is being forced to defend.

29 **9. Buyer's infringement.** Subsection (f) continues the rule that if the buyer
30 is liable to the seller for infringement under Section 2-402, the provisions of
31 subsections (c), (d), and (e) apply to the seller's claim against the buyer.

32 **10. International Sales.** Under CISG, although the buyer is obligated to
33 take delivery and pay the price "as required by the contract and this Convention,"
34 Article 53, the concept of acceptance is irrelevant to the obligations of either party.
35 Thus, there is no need to state the "effect" of acceptance.

36 **Cross References:**

1 **Definitional Cross References:**

2 **SECTION 2-708. REVOCATION OF ACCEPTANCE.**

3 (a) The buyer may revoke acceptance of a lot or commercial unit whose
4 nonconformity substantially impairs its value to the buyer if the lot or unit was
5 accepted:

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

8 (2) without discovery of the nonconformity if acceptance was reasonably
9 induced either by the difficulty of discovery before acceptance or by the seller's
10 assurances.

11 (b) The buyer's acceptance must be revoked under subsection (a) within a
12 reasonable time after the buyer discovers or should have discovered the ground for
13 the revocation and before any substantial change in the condition of the goods which
14 is not caused by their own defects. The revocation is not effective until the buyer
15 notifies the seller of it.

16 (c) A buyer that justifiably revokes acceptance has the same rights and
17 duties under Sections 2-704 and 2-705 with regard to the goods as if they had been
18 rejected.

19 **Comment**

20 1. **Source:** Former Section 2-608.

21 2. **Comparison with former Article 2.** Section 2-708 continues the rules
22 from former Section 2-608 without substantive change. As under former law,
23 revocation of acceptance does not prevent the buyer from exercising other remedies

1 for the seller's breach of contract and is not a rescission or cancellation of the
2 contract, although an aggrieved buyer may also cancel a contract as part of the
3 buyer's available remedies for breach. Sections 2-808 and 2-823. As with rejection,
4 revocation of acceptance is by lot or commercial unit. Revocation of acceptance is
5 as against the seller who sold the goods to the buyer and not as to parties not in
6 privity with the buyer. Rights of a remote buyer to return goods to a seller who has
7 created a warranty obligation under Section 2-408 is governed by that section.

8 **3. Substantial impairment.** Subsection (a) continues the policy of the
9 former law that the test is whether the value of the goods to the buyer is in fact
10 substantially impaired by the nonconformity of the goods to the contract not
11 whether the seller knew in advance about the buyer's particular circumstances.

12 **Nonconformity.** Nonconformity of the goods to the contract requirements
13 is essential to the ability of the buyer to revoke acceptance of the goods. Thus the
14 contract of the parties must be evaluated to determine how the lot or commercial
15 unit failed to conform to the contract's requirements. Section 1-201(11) definition
16 of contract and Section 2-102 definition of conforming.

17 **Assumption of a cure.** The reasonable assumption of cure under subsection
18 (a)(1) is not based upon the seller's right to cure under Section 2-709 but rather on
19 communications or other circumstances which lead a buyer to reasonably assume
20 that the seller will cure the nonconformity within a reasonable time. If the seller
21 then fails to do so, the buyer ought not to be forced to keep the goods if the value of
22 the goods to the buyer is substantially impaired.

23 **Failure to discover nonconformity.** Subsection (a)(2) allows the buyer to
24 revoke acceptance if the nonconformities are difficult to discover or the seller has
25 offered assurances that induce the buyer to delay discovery of the nonconformities.
26 Those assurances may be part of the contract or circumstances at the time of
27 delivery. Explicit assurances may be actionable as fraudulent based upon law other
28 than this Article and the buyer should have the remedies available under this article.
29 Section 2-811.

30 **4. Notice of revocation.** Subsection (b) continues the rule that a buyer must
31 notify a seller to make an effective revocation and that a revocation must be within a
32 reasonable time after discovery. Since this remedy will be generally resorted to only
33 after attempts at adjustment have failed, the reasonable time period should extend in
34 most cases beyond the time for notification of breach, Section 2-707, beyond the
35 time for discovery of nonconformity after acceptance, Section 2-702, and beyond
36 the time for rejection after tender, Section 2-703. The parties may provide in their
37 agreement the time periods for revocation subject to Section 1-204. Except as
38 provided in Section 2-702(c)(3), the contents of the notice must be determined

1 based upon considerations of good faith, prevention of surprise and reasonable
2 adjustment. More is required than mere notice of a breach under Section 2-707.
3 Section 2-702(c)(3) operates in the circumstance where the seller has a right to cure
4 under Section 2-709 after a revocation of acceptance pursuant to subsection (a)(2).
5 The requirements for notification should be applied less stringently in the case of a
6 non merchant buyer.

7 **Deterioration of the goods.** The buyer's ability to revoke is limited to
8 those circumstances where the goods have not materially deteriorated unless that
9 deterioration is caused by the nonconformity of the goods. Worthless goods,
10 however, need not be offered back and minor defects in the goods should be
11 ignored.

12 **5. Care of the goods.** Subsection (c) provides that, consistent with
13 Sections 2-704 and 2-705, the buyer who justifiably revokes acceptance under this
14 section must comply with those sections in regard to the care of the goods after the
15 revocation. A buyer who is not justified in its revocation under subsection (a) or
16 who does not act effectively under subsection (b) to revoke acceptance has not
17 undone the acceptance and thus may do what it wants with the goods and is not
18 subject to the provisions of Sections 2-704 and 2-705.

19 **6. International Sales.** Under CISG, the buyer may declare the contract
20 avoided for a fundamental breach. Article 49. The buyer cannot declare the
21 contract avoided unless he can make restitution of the goods in substantially the
22 same condition as he received them unless restitution is rendered impossible not due
23 to an act or omission of the buyer, the goods have deteriorated due to the inspection
24 allowed by Article 38, or the goods are sold, consumed or transformed in the
25 buyer's normal course before he discovered or should have discovered the
26 nonconformity. Article 82.

27 **Cross References:**

28 **Definitional Cross References:**

29 **SECTION 2-709. CURE.**

30 (a) If the buyer rightfully and effectively rejects goods or a tender of
31 delivery under Section 2-703 or justifiably revokes an acceptance under Section
32 2-708(a)(2) and the agreed time for performance has not expired, the seller, upon

seasonable notice to the buyer and at its own expense, may cure the breach of contract by making a conforming tender of delivery within the agreed time. The seller shall compensate the buyer for all of the buyer's reasonable and necessary expenses caused by the nonconforming tender and subsequent cure.

(b) If the buyer rightfully and effectively rejects goods or a tender of delivery under Section 2-703 or justifiably revokes an acceptance under Section 2-708(a)(2) and the agreed time for performance has expired, the seller, upon reasonable notice to the buyer and at its own expense, may cure the breach of contract, if the cure is appropriate and timely under the circumstances, by making a tender of conforming goods. The seller shall compensate the buyer for all of the buyer's reasonable and necessary expenses caused by the nonconforming tender and subsequent cure.

Comment

1. **Source:** Former Section 2-508; UNIDROIT Principles, Article 7.1.4; CISG Article 37, Article 48.

2. Comparison with former Article 2. Section 2-709 makes many substantive changes from former Section 2-508 and has been substantially influenced by the UNIDROIT Principles and CISG provisions. The seller’s right to cure has been expanded in two ways. First, if the buyer has revoked acceptance under Section 2-708(a)(2), the seller may cure. The revocation, however, must be because of nondiscovery of the nonconformity under Section 2-708(a)(2) and not because of a failure to cure under Section 2-708(a)(1). To allow a further cure under this section after revocation of acceptance because of a failure to cure would give the seller two opportunities to cure. Second, if the time for contract performance has expired, the requirement under former Section 2-508(2) that the seller have reasonable grounds to believe that the nonconforming tender would be acceptable has been deleted. Instead, the test is whether the cure is “appropriate and timely under the circumstances.”

1 The seller's right to cure has been restricted in the following ways. The
2 section makes explicit that the cure is at the seller's expense and the cure must either
3 be a conforming tender (subsection (a)) or of conforming goods (subsection (b)). In
4 addition, the seller has a statutory obligation to compensate the buyer for the
5 buyer's reasonable expenses in both subsections (a) and (b). This obligation is not
6 part of the action required to have an effective cure under this section but rather
7 imposed on the seller in order to compensate the buyer for harm the seller's breach
8 and cure may cause. If the seller has a right to cure and has given timely notice of
9 cure, the buyer may not cancel within the time period for cure. See Section 2-808.
10 Cure as allowed under this section is one method for the seller to attempt to mitigate
11 harm caused by its own nonconforming performance.

12 **3. Cure within the time for contract performance.** Subsection (a) allows
13 the seller to cure a nonconformity in the goods or the tender of delivery if the buyer
14 has rightfully rejected or justifiable revoked acceptance under Section 2-708(a)(2).
15 This presumes that the buyer has effectively rejected or revoked acceptance through
16 timely notification to the seller. The time for performance in which the seller may
17 still make a conforming tender of delivery is determined by the contract of the
18 parties, including any agreed modifications. The seller's notice of an intent to cure
19 must be seasonable. Section 1-204. The closer to the end of the time for the
20 seller's performance, the more prompt the seller must be in notifying the buyer of
21 the seller's intention to cure. A conforming tender requires an offer and a present
22 ability to perform and putting conforming goods at the buyer's disposal within the
23 time for performance as determined by the requirements of the contract.

24 **4. Cure after the expiration of the time for contract performance.**
25 Subsection (b) expands the seller's right to cure after the time for performance has
26 expired. As under subsection (a), the buyer's rightful rejection or justifiable
27 revocation of acceptance under Section 2-708(a)(2) trigger the seller's right to cure.
28 This presumes that the buyer has effectively rejected or revoked acceptance through
29 timely notification to the seller. Former Section 2-508(2) was directed toward
30 preventing surprise rejections by requiring the seller to have "reasonable grounds to
31 believe" the nonconforming tender was acceptable. The concept of "appropriate
32 and timely" is broad enough to deal with the case of surprise rejection as well as
33 with the "shaken faith" cases and the just in time manufacturing mode of doing
34 business. If the seller has tried to cure a breach and not succeeded, at some point,
35 the buyer need not allow further attempts to cure and thus the seller's continuing
36 offers to cure are no longer timely. The seller does not have an unlimited number of
37 opportunities to cure, but merely a reasonable time to effect a cure. If the buyer
38 needs to procure substitute goods from another supplier in order to keep the buyer's
39 process moving, the cure would not be timely. If the seller knows from the
40 circumstances that strict compliance with the contract obligations is expected, the
41 seller's cure would not be appropriate. Whether the cure is appropriate and timely

1 should be tested based upon the circumstances and needs of the buyer. Seasonable
2 notice to the buyer and timely cure incorporate the idea that the notice and offered
3 cure would be untimely if the buyer has reasonably changed its position in good faith
4 reliance on the non-conforming tender.

5 The seller's cure must be of conforming goods. Conforming goods includes
6 not only conformity to the contracted for quality but also as to quantity or
7 assortment or other similar obligations under the contract. Since the time for
8 performance has expired, however, the seller's tender of conforming goods required
9 to effect a cure under this section could not conform to the contracted time for
10 performance. Again, as under subsection (a), the seller has an obligation to
11 compensate the buyer for expenses caused by the non-conforming tender and
12 subsequent cure. This compensation would include compensation for harm caused
13 by the delay in making a tender of conforming goods.

14 **5. Repair as cure.** Under former Section 2-508, there was some
15 controversy about whether the goods may be made conforming by repair. Whether
16 repair is an acceptable way to cure a breach depends upon whether the repair results
17 in conforming goods, as that is the hallmark of an effective cure under this section.

18 **6. Compensation of buyer's expenses.** Similarly, the seller's
19 compensation of the buyer's expenses provided in both subsections (a) and (b) is not
20 controlled by remedy limitations that the parties may have agreed to as provided in
21 Section 2-810. A remedy limitation under Section 2-810 is based upon
22 compensation to the aggrieved party for a breach. The reasonable expenses
23 contemplated under this section are designed to cure the breach in conjunction with
24 the seller's provision of a conforming tender or conforming goods. If the seller is
25 not attempting to cure its breach, a remedy limitation agreed to by the parties under
26 Section 2-810 is an effective way to provide compensation for breach.

27 **7. International Sales.** Under CISG, the buyer has no remedy of rejection
28 for a nonconforming tender and cannot "avoid" the contract unless the seller has
29 committed a "fundamental breach," see Article 49(1)(a) and Article 25. Article 37
30 deals with Seller's cure where nonconforming goods are delivered "before the date
31 for delivery." Seller may cure "up to that date" if the "exercise of this right does not
32 cause the buyer unreasonable inconvenience or unreasonable expense." Buyer
33 retains any right to claim damages. Article 48(1), which does not apply if the
34 contract is avoided for fundamental breach under Article 49, gives a right to cure
35 "even after the date for delivery." Seller may "remedy at his own expense any
36 failure to perform his obligations, if he can do so without unreasonable delay and
37 without causing the buyer unreasonable inconvenience or uncertainty or
38 reimbursement by the seller of expenses advanced by the buyer." Again, Buyer

1 retains any right to claim damages. The UNIDROIT Principle on cure provides in
2 Article 7.1.4:

- 3 (1) The non-performing party may, at its own expense, cure any non-
4 performance, provided that
5 (a) without due delay, it gives notice indicating the proposed manner and
6 timing of the cure;
7 (b) cure is appropriate in the circumstances;
8 (c) the aggrieved party has no legitimate interest in refusing cure; and
9 (d) cure is effected promptly.
10 (2) The right to cure is not precluded by notice of termination.
11 (3) Upon effective notice of cure, rights of the aggrieved party that are
12 inconsistent with the non-performing party's performance are suspended until the
13 time for cure has expired.
14 (4) The aggrieved party may withhold performance pending cure.
15 (5) Notwithstanding cure, the aggrieved party retains the right to claim
16 damages for delay as well as for any harm caused or not prevented by the cure.

17 **Cross References:**

18 **Definitional Cross References:**

19 **SECTION 2-710. INSTALLMENT CONTRACT; BREACH.**

20 (a) In an installment contract, the buyer may reject any nonconforming
21 tender of delivery of an installment if the nonconformity substantially impairs the
22 value of that installment to the buyer or if the nonconformity is a defect in the
23 required documents of title.

24 (b) If a nonconformity or breach with respect to one or more installments in
25 an installment contract is a substantial impairment of the value to the aggrieved
26 party of the whole contract, there is a breach of the whole contract, and the
27 aggrieved party may reject any nonconforming, unaccepted installment and cancel
28 the contract. If the aggrieved party accepts a nonconforming installment without

1 seasonably giving notice of cancellation, brings an action with respect to only past
2 installments, or demands performance as to future installments, the contract has not
3 been canceled.

4 **Comment**

5 1. **Source:** Former Section 2-612.

6 2. **Comparison with former Article 2.** This section continues the rules
7 from former Section 2-612 with the following substantive changes. First, the
8 definition of installment contract has been clarified to include when “circumstances
9 permit” the finding of an installment contract and to distinguish installment deliveries
10 of goods from installment payments and has been moved to the definition section,
11 Section 2-102. Second, the buyer’s ability to reject the installment has been keyed
12 to the substantial impairment of the installment to the buyer. Third, the buyer’s
13 ability to reject the installment depends upon the application of the factors defining
14 substantial impairment, Section 2-701, and not solely on the seller’s ability to cure
15 the nonconformity. Fourth, the aggrieved party’s ability to cancel the contract and
16 reject installments in the case of a breach of the whole contract has been clarified.

17 3. **Definition of installment contract.** Section 2-102 defines an installment
18 contract and adds language that makes clear that how payment is to be made does
19 not determine whether a contract is an installment contract but rather the focus is on
20 the delivery of the goods in lots to be separately accepted. Section 2-302 governs
21 the apportionment of the price for installments. As under former law, an installment
22 contract includes installment deliveries tacitly authorized by the circumstances or by
23 the option of either party. See Section 2-302. The definition of installment contract
24 also continues the policy of former law that clauses that attempt to provide that each
25 delivery is to be considered a separate contract should not be given their literal
26 effect. Consistent with good faith and commercial standards, such clauses should
27 not be permitted to operate contrary to the commercial sense of the situation, that
28 each delivery is an installment under a single contract.

29 4. **Rejection of nonconforming installment.** Subsection (a) allows the
30 buyer to reject a nonconforming installment if the value to the buyer of that
31 installment is substantially impaired. Section 2-701(c). The test for substantial
32 impairment based upon the value to the buyer follows the test used in the revocation
33 of acceptance section. Section 2-708. An installment contract may require accurate
34 conformity as a condition to acceptance either by express provision or by the
35 circumstances. The effect of such a requirement is to define what amounts to a
36 substantial impairment. Such a condition to acceptance must have a basis in reason
37 to avoid surprise or hardship and may be waived. Section 2-209. Substantial

1 impairment of the value of an installment may turn on quality, timeliness, quantity,
2 assortment or the like and should be judged similarly to the test under Section
3 2-708. Trivial defects generally do not result in substantial impairment. Defects in
4 the required documents of title are not subject to a substantial impairment test but if
5 appropriate documents of title are obtainable, the defects in the tender of documents
6 may be cured.

7 Section 2-709 does not apply to the cure contemplated by the definition of
8 substantial impairment in Section 2-701 as Section 2-709 depends first upon a
9 rightful rejection or a justifiable revocation. In this section, the ability to cure the
10 nonconformity in the goods is relevant to whether the value of the installment is
11 substantially impaired. If the nonconformity is curable or the seller gives adequate
12 assurance of cure, the likelihood that there is a substantial impairment of the value of
13 the installment to the buyer is minimal. See Section 2-701(c). Cure may be
14 afforded in any reasonable manner and the court should be guided by the other
15 requirements of Section 2-709 in determining whether a cure is sufficient to prevent
16 substantial impairment of the value of the installment to the buyer so as to preclude
17 the buyer from rejecting the installment. Even if the offered cure results in
18 precluding the buyer from rejecting the installment, however, if the tender of the
19 installment is not in conformity with the contract requirements, the seller may still
20 have breached the contract and the buyer is entitled to damages for the
21 nonconformity. Sections 2-823 and 2-827. Adequate assurance of a cure under
22 Section 2-701 should be measured by the same standard applicable in Section 2-711.
23 A buyer need not accept a nonconforming, unaccepted installment if the value of the
24 whole contract has been substantially impaired as provided in subsection (b) even if
25 that installment itself does not have a nonconformity that substantially impairs the
26 installment's value to the buyer.

27 **5. Breach of the whole contract.** Subsection (b) follows the policy of
28 former law that a party may cancel an installment contract only if the nonconformity
29 of the installments substantially impairs the value of the entire contract. The first
30 sentence makes explicit what was implicit in the former section, that if there is a
31 substantial impairment, the aggrieved party may cancel the contract. In addition, if
32 the value of the whole contract is substantially impaired, the buyer may reject a
33 nonconforming and unaccepted installment even if the value of that installment is not
34 substantially impaired. The second sentence then provides that if the aggrieved
35 party takes one of three actions the contract has not been canceled. This limitation
36 on the right to cancel is consistent with Section 2-702(a) on waivers that prevent
37 cancellation. Subsection (b) applies to a buyer's breach as well as a seller's breach
38 of an installment contract.

39 Whether the nonconformity as to any installment results in substantial
40 impairment of the value of the whole contract depends upon more than the

aggrieved party's security as to whether the party in breach of contract will perform adequately in future installments. Section 2-711 provides a mechanism for the aggrieved party to get assurances about future performance. Nonconformities in performance are cumulative in effect, Section 2-701(d), so that acceptance of prior nonconforming installments does not preclude an aggrieved party from using those prior nonconformities to justify a cancellation based upon substantial impairment of the value of the whole contract. A party who accepts nonconforming installments should give the notice required under Sections 2-702 and 2-707 in order to fully preserve its rights.

6. Right to cancel. The right to cancel is governed further by Section 2-808. A reasonable time for an aggrieved party to notify the party in breach of a cancellation should take into account any reasonable time the aggrieved party waits for the party in breach to cure nonconformities in its performance and any time devoted to good faith negotiations to resolve the dispute.

7. International Sales. CISG Article 73 governs a contract for "for delivery of goods by installments." Either party may avoid either a particular installment or the entire contract in defined cases of fundamental breach. See Article 25. The concept is consistent with Section 2-710 but the terminology is somewhat different.

Cross References:

Definitional Cross References:

SECTION 2-711. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.

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

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

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

(d) After receipt of a justified demand under subsection (a), failure to provide within a reasonable time, not exceeding 30 days, assurance of due performance that is adequate under the circumstances of the particular case is a repudiation of the contract under Section 2-712(a).

Comment

1. Source: Former Section 2-609.

2. Comparison with former Article 2. This section continues the rules from former Section 2-609 with only two substantive changes, substituting “record” for “written” notice and requiring the demand for assurance to be justified before failure to provide adequate assurance in a timely manner constitutes a rejection.

3. **Purpose of section.** This section recognizes that commercial parties bargain for actual performance and provides a process for ascertaining whether the promised performance will be forthcoming. If either party's ability to perform materially deteriorates after contracting and the other party's security and reliance on the promised performance is compromised, this section provides a mechanism for obtaining assurances that the promised performance will be forthcoming. This section should not be used to adjust for risks that were known or apparent at the time the contract was formed.

Effect of parties' agreement. The parties may agree in their contract to terms that seek to provide a process when insecurity arises. Such clauses may be effective to increase the protection given under this section, to fix the reasonable time for responding to a request for assurances, or to define the adequacy of the assurances. Such clauses, however, cannot set up arbitrary standards for such actions. Of course, the obligation of both parties to act in good faith permeates the operation of this section.

4. **Reasonable grounds for insecurity.** Under subsection (a), a party must have reasonable grounds for insecurity in order to have a right to demand adequate

1 assurance of due performance. A party that is already in breach of the contract
2 cannot demand assurances from the other party regarding performance. Between
3 merchants, what constitutes reasonable grounds for insecurity should be determined
4 by commercial standards. Subsection (b). Such grounds for insecurity need not
5 arise from the contract at issue or from circumstances surrounding that contract but
6 could result from a party's performance under a different contract with the same
7 party or with other parties. Reasonable insecurity may arise based upon trustworthy
8 information from third parties. Assignment of rights or delegations of duties under a
9 contract may also create reasonable grounds for insecurity. Section 2-503. A party
10 who attempts to assert grounds for insecurity based upon facts that the party had
11 notice of prior to contracting should not constitute reasonable grounds for insecurity
12 that justifies the demand for assurance unless new circumstances come to light that
13 in combination with the previously known circumstances make it reasonable for the
14 party to be insecure about the other's performance.

15 **Adequate assurance.** Adequate assurance in each case depends upon the
16 factual circumstances and between merchants, on reasonable commercial standards.
17 Subsection (b). If the other party is trustworthy and has a good reputation, a
18 promise of renewed attention may suffice. In other circumstances, such a promise
19 may be insufficient. Adequate assurance, however, does not depend upon the
20 subjective satisfaction of the party assured but must depend upon objective
21 evidence, reasonable commercial standards and good faith. Of course, if there are
22 repeated delinquencies in performance, the quantum of assurance necessary in order
23 to be an adequate assurance will rise. Similarly, if there are repeated demands for
24 assurance, the basis for such demands must be increasingly obvious.

25 **Suspension of performance.** When a party has made a justified demand for
26 assurance, the party who demanded such assurance may suspend performance of its
27 own obligation if such suspension is commercially reasonable. Suspension of
28 performance or actions preparatory to such performance may occur while awaiting
29 the requested assurance. The right to suspend performance given under this section
30 are analogous to the right of the seller to stop or withhold delivery except for cash
31 in the event of the buyer's insolvency, a circumstance that may impair the seller's
32 reasonable expectation of receiving the buyer's performance. Section 2-818.

33 **5. Future performance.** Subsection (c) continues the rule that accepting a
34 defective performance does not preclude a party from requesting assurances about
35 future performance. This principle is also reflected in Section 2-702(b).

36 **6. Effect of failure to provide adequate assurance after justified**
37 **demand.** Subsection (d) provides that after a justified demand for assurance, the
38 failure to provide adequate assurance within a reasonable time not to exceed 30 days

1 is a repudiation. Upon a repudiation, the aggrieved party has the rights as provided
2 in Section 2-712. A party may retract a repudiation as provided in Section 2-713.

3 **7. International Sales.** See CISG Article 71(a), which recognizes a more
4 limited principle of performance insecurity. A party suspending performance under
5 Article 71(a) must notify the other party “immediately” and must continue with
6 performance “if the other party provides adequate assurance of his performance.”
7 Article 71(3).

8 **Cross References:**

9 **Definitional Cross References:**

10 **SECTION 2-712. ANTICIPATORY REPUDIATION.**

11 (a) If either party to a contract repudiates a performance not yet due and the
12 loss of the performance will substantially impair the value of the contract to the
13 other party, the aggrieved party may:

14 (1) await performance by the repudiating party for a commercially
15 reasonable time;

16 (2) resort to any remedy for breach of contract, even if it has urged the
17 repudiating party to retract the repudiation or has notified the repudiating party that
18 it would await the agreed performance; and

19 (3) in either case, suspend its own performance or, if a seller, proceed in
20 accordance with Section 2-817.

21 (b) Repudiation includes language that the party reasonably interprets to
22 mean that the first party will not or cannot make a performance still due under the
23 contract or voluntary, affirmative conduct that reasonably appears to the other party
24 to make a future performance impossible.

1 **Comment**

2 1. **Source:** Former Section 2-610.

3 2. **Comparison with former Article 2.** Section 2-712 continues the rules
4 from former Section 2-610 with two substantive changes. First, subsection (a)
5 refers to repudiating a “performance” rather than the former section’s reference to
6 repudiating a “contract” as a more precise statement of the parties’ actions in
7 repudiating. Second, subsection (b) is new and provides guidance on when a party
8 has repudiated its performance obligation.

9 3. **Aggrieved party’s rights when faced with a repudiation.** Subsection
10 (a) allows an aggrieved party faced with a party’s repudiation of its obligation to
11 perform to either await performance or resort to any remedy for breach as well as in
12 either case to stop its own performance. A party faced with a repudiation of
13 performance may take these actions if the repudiation substantially impairs the value
14 of the contract to that party. Section 2-701(c) addresses the factors to be used in
15 determining substantial impairment. This is the same test as used in the installment
16 contract for breach of the whole contract. Section 2-710(c). An aggrieved party’s
17 actions under this section must be taken in good faith but do not require notice to
18 the repudiating party, unless the aggrieved party has taken some positive action
19 which in good faith requires notice to the other party before pursuing a remedy. An
20 aggrieved party’s market price based damages for breach in the case of a repudiation
21 are addressed in Sections 2-821 and 2-826.

22 4. **Definition of repudiation.** Subsection (b) provides guidance on when a
23 party can be considered to have repudiated a performance obligation based upon the
24 Restatement (Second) of Contracts § 250 and does not purport to be an exclusive
25 statement of when a repudiation has occurred. As under prior law, repudiation
26 centers upon an overt communication of intention, actions which render
27 performance impossible, or a demonstration of a clear determination not to perform.
28 Repudiation does not require that performance be made utterly impossible, rather,
29 actions which reasonably indicate rejection of the performance obligation suffice.
30 Failure to provide adequate assurance of due performance under Section 2-711 also
31 operates as a repudiation. A demand for more than is required under the contract
32 and that is not justified under Section 2-711 is not a repudiation unless it amounts to
33 a statement of intention to not perform except on conditions which go beyond the
34 contract requirements.

35 5. **International Sales.** CISG Article 72(1) states that if “prior to the date
36 for performance of the contract it is clear that one of the parties will commit a
37 fundamental breach of contract, the other party may declare the contract avoided.”
38 Unless that party has “declared that he will not perform his obligations,” Article
39 72(3), however, the other must give reasonable notice of an intention to avoid the

1 contract in order to permit that party “to provide adequate assurance of his
2 performance.” Article 72(3). Adequate assurance presumably requires more than
3 just a simple retraction of the repudiation.

4 **Cross References:**

5 **Definitional Cross References:**

6 **SECTION 2-713. RETRACTION OF ANTICIPATORY REPUDIATION.**

7 (a) A repudiating party may retract its repudiation until its next performance
8 is due unless the aggrieved party, after the repudiation, has canceled the contract,
9 materially changed its position, or otherwise indicated that the repudiation is
10 considered to be final.

11 (b) A retraction may be by any method that clearly indicates to the
12 aggrieved party that the repudiating party intends to perform the contract.
13 However, a retraction must contain any assurance justifiably demanded under
14 Section 2-711.

15 (c) Retraction reinstates a repudiating party’s rights under the contract with
16 due excuse and allowance to the aggrieved party for any delay caused by the
17 repudiation.

18 **Comment**

19 1. **Source:** Former Section 2-611.

20 2. **Comparison with former Article 2.** Section 2-713 continues the rules
21 from former Section 2-611 without substantive change.

22 3. **When retraction is possible.** A repudiating party’s ability to retract the
23 repudiation depends upon the retraction taking place before the aggrieved party has
24 taken action on the repudiation. Subsection (a). That action need not be action in

1 reliance on the repudiation but may include action that indicates the aggrieved party
2 considers the repudiation to be final, such as by canceling the contract.

3 **4. Method of retraction.** A repudiation gives an aggrieved party
4 reasonable grounds for insecurity under Section 2-711 and the aggrieved party may
5 demand adequate assurances of performance as part of the conditions of accepting
6 the retraction. Subsection (b). A retraction may be indicated by language or
7 conduct that unambiguously indicates to a reasonable person the intent to continue
8 with contract performance. After an unambiguous and timely retraction, the
9 aggrieved party should allow a reasonable time for the assurances to be worked out
10 before proceeding to any remedies for breach of contract.

11 **5. Effect of retraction.** Subsection (c) makes clear that the aggrieved party
12 may take some time to adjust to the repudiating party's intention to continue
13 performance under the contract.

14 **6. International Sales.** There is no comparable provision in CISG. Under
15 Articles 71 and 72, however, a party suspending performance for an apparent
16 inability of the other to perform a substantial part of the contract, Article 71(3), or
17 intending to declare the contract avoided for a repudiation, Article 72(2), must give
18 immediate notice to the other. At that point, the other has the chance to provide
19 adequate assurance of performance. Presumably that adequate assurance will
20 include a retraction.

21 **Cross References:**

22 **Definitional Cross References:**

23 **SECTION 2-714. CASUALTY TO IDENTIFIED GOODS.** If the contract
24 requires for its performance goods identified when the contract is made and the
25 goods suffer casualty without the fault of either party before the risk of loss passes
26 to the buyer, the following rules apply:

27 (1) The seller shall seasonably notify the buyer of the nature and extent of
28 the loss.

29 (2) If the loss is total, the contract is terminated.

(3) If the loss is partial or the goods no longer conform to the contract, the buyer may nevertheless demand inspection and may treat the contract as terminated or accept the goods with due allowance from the contract price for the partial loss or the nonconformity but without further right against the seller.

Comment

1. **Source:** Former Section 2-613.

2. **Comparison with former Article 2.** Section 2-714 continues the rules from former Section 2-613 two substantive changes. First, the reference to “no arrival, no sale” terms has been deleted in accordance with the decision to not include shipping terms definitions within revised Article 2. Second, the revision requires the seller to give notice to the buyer of the nature and extent of the loss in a seasonable manner. This change is designed to bring this section within the notice requirement of Section 2-717. The seller should be obligated to notify the buyer seasonably in order to take advantage of the excuse provided in this section.

3. **Contract requires identified goods for performance.** This section operates when the seller has the risk of loss (Section 2-612), the parties assume the particular goods identified when the contract is made will continue to exist, the buyer has contracted for those particular goods, and the seller has undertaken the responsibility for the continued existence and condition of the particular identified goods through the time of tender of delivery. It is in those situations where the contract “requires” the goods for its performance. Because the contract is the total legal obligation of the parties, Section 1-201(11), a determination must be made as to that obligation in order to determine whether the contract requires the goods for its performance. Thus, trade usage, course of performance and course of dealing are important in making this determination. Another factor relevant to this inquiry of the parties’ intent regarding whether the particular identified goods are required for performance of the contract is whether a commercially reasonable substitute is available. Identification of the goods at the time the contract is formed is an essential element of excuse under this section. Identification of a fungible bulk of goods is sufficient identification of the goods. Sections 2-502, 2-106.

Without fault. This section excuses the seller’s performance when the goods suffer casualty without the fault of either party when the risk of loss has not yet passed to the buyer. Fault in this context includes negligence not just willful conduct.

1 **Effect of application of the section.** If the goods are totally destroyed or
2 damaged, the seller is excused from performing as the contract is terminated. If the
3 destruction is partial, the buyer has the choice as to whether to treat the contract as
4 terminated and thus excuse the seller's performance or whether to accept the goods
5 and have an allowance against the price for the value of the harm to the goods
6 without any further remedy against the seller. If this section does not apply, Section
7 2-715 or 2-716 governs excuse from performance obligations.

8 **4. Notice to the buyer.** This section requires the seller to give notice to the
9 buyer of the nature and extent of the loss. The effect of the seller giving the notice
10 is to provide a time limit on the buyer's response to the notice under Section
11 2-717(b).

12 **5. International Sales.** CISG Article 79(1) provides that a "party is not
13 liable for a failure to perform any of his obligations if he proved that the failure was
14 due to an impediment beyond his control and that he could not reasonably be
15 expected to have taken the impediment into account at the time of the conclusion of
16 the contract or to have avoided or overcome it or its consequences." Article 79(2)
17 also provides limited excuse where a party's failure is "due to the failure by a third
18 person." Arguably, this provision provides as much excuse from performance as
19 does Section 2-714 (formerly Section 2-613).

20 **Cross References:**

21 **Definitional Cross References:**

22 **SECTION 2-715. SUBSTITUTED PERFORMANCE.**

23 (a) A party may be excused from performance if, without the fault of either
24 party, agreed berthing, loading, or unloading facilities or an agreed type of carrier
25 becomes unavailable, or an agreed manner of delivery otherwise becomes
26 commercially impracticable and a commercially reasonable substitute is not
27 available. If a commercially reasonable substitute is available, it must be tendered
28 and accepted.

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

Comment

1. **Source:** Former Section 2-614.

2. **Comparison with former Article 2.** Section 2-715 continues the rules from former Section 2-614 with only one substantive change. Subsection (a) provides that if a commercially reasonable substitute is not available, the performance may be excused under Section 2-716.

3. **Method of delivery.** Subsection (a) distinguishes shipping and other delivery obligations where a reasonable substitute if available must be tendered and accepted from performance that goes to the heart of the contract where commercial impracticability will excuse performance. The substitution allowed under this section operates as between buyer and seller and not as against a financing agency or an issuer of a letter of credit entitled to exercise rights under Article 5. The substitution allowed under this section does not allow the seller to pass the costs of the substituted shipping arrangement to the buyer. The parties are free to agree to provision for substitute means of delivery other than as provided in this section.

4. **Means or manner of payment.** Subsection (b) allows the seller to not deliver unless the buyer obtains a commercial reasonable substitute for the agreed means or manner of payment contemplated in the contract but which has failed due to government regulation. However, if the buyer has taken delivery, the seller must take the payment in the means or manner specified in the regulation unless the regulation is discriminatory, oppressive or predatory.

Subsection (b) may have increased importance when the European Union implements on January 1, 2002, the EURO as the common and exclusive currency for those members that have been approved to participate. Under the continental doctrine of *lex monetae*, the EURO would be treated as the currency of the country

1 whose currency was displaced. There would be no interruption in the continuity of
2 a contract originally expressed to pay in French Francs just because the currency of
3 France was now the EURO. Subsection (b) would normally reach the same result in
4 a less direct manner. Suppose that the conversion from francs to the EURO has
5 occurred and the seller has not delivered the goods. The seller can stop delivery
6 until the buyer “provides a means or manner of payment which is commercially a
7 substantial equivalent.” Clearly, tender of the EURO would satisfy this test. But
8 suppose that the buyer decides not to tender anything and claims excuse from the
9 contract. Subsection (b) does not address this problem. Rather, the excuse
10 question must be answered under either Section 2-716(a) or the common law: Did
11 both parties assume at the time of contracting that the conversion would not happen
12 and, if so, does the conversion make performance as agreed impracticable? Again,
13 the answer is probably no to one or both questions, but there is some uncertainty.
14 See Michael Gruson, *The Introduction of the Euro and its Implications for*
15 *Obligations Denominated in Currencies Replaced by the Euro*, 21 Fordham Int’l
16 L.J. 65 (1997).

17 Three States, New York, Illinois, and California, have enacted legislation
18 that preempts Article 2 and declares that in the case of substitution or replacement
19 the EURO will be a commercially reasonable substitute and the replacement will not
20 have the effect of discharging or excusing performance under any contract. See
21 N.Y. General Obligations Law, §§ 5-1601 et seq. (1997); Illinois Statutes, Ch. 815,
22 §§ 617.1 et seq. (1997); Civil Code of California § 1663, 1998 Cal. Stat. 62, § 2
23 (1998).

24 **5. International Sales.** CISG has no comparable provision.

25 **Cross References:**

26 **Definitional Cross References:**

27 **SECTION 2-716. EXCUSE BY FAILURE OF PRESUPPOSED**
28 **CONDITIONS.**

29 (a) Subject to subsection (b) and Section 2-715, delay in performance or
30 nonperformance by a seller is not a breach of contract if the seller’s performance as
31 agreed has been made impracticable by:

(1) the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made; or

(2) compliance in good faith with any applicable foreign or domestic governmental statute, regulation, or order, whether or not it later proves to be invalid.

(b) A party claiming excuse under subsection (a) shall seasonably notify the other party that there will be nonperformance or delay in performance. If the claimed excuse affects only a part of the seller's capacity to perform, the seller shall allocate production and deliveries among its customers in a manner that is fair and reasonable and notify the buyer of the estimated quota made available. In allocating production and deliveries, the seller may include regular customers not then under contract as well as its own requirements for further manufacture.

Comment

1. Source: Former Section 2-615.

2. Comparison with former Article 2. Section 2-716 continues the rules for excuse from performance from former Section 2-615 with two substantive changes. First, the concept of excuse from “delivery” obligations has been broadened to excuse from “performance” in recognition that the seller’s obligations may include more than delivery of the goods. Second, the phrase “except so far as the seller may have assumed a greater obligation” has been eliminated. The parties should be able to agree to either a lesser or greater obligation than what is provided in this default rule. This section governs excuse in situations not within the ambit of Section 2-714 on destruction of specific goods and not governed by Section 2-715 on substituted performance.

3. **Basic assumption of the contract.** In determining whether the nonoccurrence of a contingency was a basic assumption of the contract, consideration should be made of the risks foreshadowed at the time of contracting sufficiently to be regarded as within the business risks assumed in contracts of the type at issue. Notably, increased cost of performance, changes in the market, or

1 continuation of the usual source of supply are typical business risks that should be
2 contemplated. Severe shortages due to war, embargo or the like, however, may not
3 be reasonably contemplated. An evaluation of whether excuse from performance is
4 justified under this section must be made depending upon the circumstances which
5 existed at the time the contract was formed. At its core, the principle of this section
6 is based upon consideration of how the risk of the contingency was allocated in the
7 contracting process. The more remote the contingency the less likely the parties
8 contemplated an allocation of the risk and the more likely this section should be
9 used to reallocate the risk. Excuse from performance under this section requires
10 that the events which justify excuse be beyond the parties' control.

11 **4. Sole source of supply.** If the parties expressly agree or the
12 circumstances demonstrate that the parties contemplated a sole source of supply, if
13 that source fails due to circumstances beyond the seller's control and the seller has
14 employed all due measures to assure that the source will not fail, the seller may be
15 excused under this section as the existence of the sole source may be a basic
16 assumption of the contract, especially if failure of the sole source was not
17 foreseeable at the time of contracting. If the seller seeks excuse under this section,
18 the seller should turn over its rights as against the supplier to the buyer to the extent
19 of the buyer's rights under the contract.

20 **5. Effect of parties' agreement.** Of course, the parties are free to
21 expressly agree to provisions that allocate the risk of subsequent events occurring in
22 a manner different than provided in this section. In that circumstance, excuse from
23 performance will be determined by the parties' agreement and not this section.

24 **6. Buyer's excuse.** Although the section is phrased in terms of the seller
25 seeking to be excused from performance, as under prior law, the buyer may in
26 appropriate circumstances seek to be excused from its performance obligation where
27 both parties contemplate that the reason for the sale to the buyer is the buyer's
28 further use or sale of the goods in a specific venture and that venture collapses or
29 other circumstances which justify excusing the buyer from its performance
30 obligations.

31 **7. Compliance with government action.** If the seller is complying in good
32 faith with a government regulation, statute or order, the seller is excused to the
33 extent the compliance makes the seller's performance commercially impracticable
34 beyond the seller's assumption of the risk of the government action. Of course,
35 good faith would preclude reliance on this provision for an excuse if the seller
36 induced the government action.

37 **8. Procedure upon claiming excuse.** A party that seeks to use an excuse
38 under this section must notify the other party. Subsection (b). As under the former

1 section, the seller must allocate in a fair and reasonable manner any production
2 among both existing and regular customers, both as to contracts in existence at the
3 time of the occurrence of the contingency and ones later in time. The seller's
4 allocation decision must be made in good faith. This section seeks to leave every
5 reasonable commercial leeway to the seller.

6 **9. International Sales.** See CISG Article 79(1), which grants excuse for an
7 “impediment beyond his control and that he could not reasonably be expected to
8 have taken . . . into account at the time of the conclusion of the contract or to have
9 avoided or overcome” This language is consistent with the law interpreting
10 Force Majeure clauses. “Impediment” suggests external interference with the
11 capacity to perform rather than changes affecting the incentive to perform. Thus, an
12 unexpected labor dispute may impede the buyer's duty to take delivery of the goods
13 but a severe drop in market prices would not impede the buyer's duty to pay for
14 goods taken.

15 **Cross References:**

16 **Definitional Cross References:**

17 **SECTION 2-717. PROCEDURE ON NOTICE CLAIMING EXCUSE.**

18 (a) A party that receives notice of a material or indefinite delay in
19 performance or an allocation permitted under Section 2-714 or 2-716 as to any
20 delivery concerned, or if there is a breach of the whole contract under Section
21 2-710(c), as to the whole, by notice in a record, may:

22 (1) terminate and thereby discharge any unexecuted portion of the
23 contract; or

24 (2) modify the contract by agreeing to take the available allocation in
25 substitution under Section 2-716 or by accepting the goods with due allowance as
26 provided in Section 2-714.

1 (b) If, after receipt of notice under Section 2-714 or 2-716, a party does not
2 modify the contract within a reasonable time not exceeding 30 days, the contract is
3 terminated with respect to any performance affected.

4 (c) This section may be varied by agreement only to the extent that the
5 parties have assumed an obligation different from that provided under Sections
6 2-714 and 2-716.

7 **Comment**

8 1. **Source:** Former Section 2-616.

9 2. **Comparison with former Article 2.** Section 2-717 continues the rules
10 from former Section 2-616 with the following substantive changes. First, the
11 notification procedure is made applicable to the excuse provision of Section 2-714.
12 Second, subsection (c) is redrafted to allow a different process for notice if the
13 parties assume an obligation other than the obligation provided in the default rules
14 of Sections 2-714 and 2-716. If the default rules govern excuse from performance,
15 the parties cannot modify the rules of this section.

16 3. **Responses to notice.** This section provides a process for the person
17 notified to respond to the notice of excuse under either Section 2-714 or Section
18 2-716. The person notified may either agree to modify the contract as provided or
19 terminate the contract. Subsection (a). No consideration is necessary to support
20 such a modification. If the party fails to respond within the reasonable time not
21 exceeding thirty days, the contract is terminated. Subsection (b).

22 4. **Variance by agreement.** Subsection (c) allows the parties to agree to a
23 different process for responding to notice of claimed excuse if the parties have
24 allocated the risks of contingencies differently than the way the risks are allocated in
25 Section 2-714 or Section 2-716. This change is not meant to allow the parties to
26 enforce a contract clause in advance of trouble to require the buyer to stand ready to
27 take deliveries even if the seller is excused from performing.

28 5. **International Sales.** There is no comparable provision in CISG. Article
29 79(4), however, requires that the party who fails to perform “must give notice to the
30 other party of the impediment and its effect on his ability to perform.” The penalty
31 for failure to notify is damages. Also, Article 79(3) provides that the excuse or
32 exemption provided by Article 79(1) “has effect for the period during which the

impediment exists.” These requirements provide a framework within which the parties can negotiate over allocations and adjustments.

Cross References:

Definitional Cross References:

SECTION 2-718. PRESERVING EVIDENCE OF GOODS IN DISPUTE.

To further the adjustment of a claim or dispute, the following rules apply:

(1) Either party to a contract, on reasonable notice to the other party, has a right to inspect, test, and sample the goods for the purpose of ascertaining the facts and preserving evidence. This right extends to goods that are in the possession or control of the other party.

(2) Parties to a contract may agree to an inspection or survey by a third party to determine the conformity or condition of the goods and may agree that the findings will be binding upon them in any later litigation or adjustment.

Comment

1. Source: Former Section 2-515.

2. **Comparison with former Article 2.** Section 2-718 continues the rules from former Section 2-515 without substantive change and is intended to provide a method for aiding the parties in settlement of disputes.

3. Effect of this section on parties' rights provided in this article. This section should not interfere with the seller's right to resell the goods in the event of buyer's breach, Section 2-819, or the buyer's right to sell the goods to enforce its security interest, Section 2-829. Rather, the parties who desire to use this section to preserve evidence or ascertain the facts should act promptly to do so. The parties' actions under this section should be taken in good faith. This section does not change the parties' rights as to inspection before payment or acceptance as provided in Section 2-608 or 2-609. Normally this section will be used after the buyer has inspected and determined that the goods do not conform to the contract and before

1 litigation is commenced. Any agreement to preclude the right to inspect under this
2 section must be clearly expressed.

3 **4. Effect of inspection or survey.** In subsection (2), conformity of the
4 goods means conformity of the goods to the contract requirements whereas
5 condition of the goods refers to their deterioration or damage. The scope and effect
6 of the inspection or survey by a third party depends upon the parties' agreement as
7 to those matters and the admissibility of any report generated depends upon the
8 applicable rules of evidence in any proceeding where it is relevant.

9 **5. International Sales.** CISG does not contain a comparable provision
10 although Articles 85 through 88 address preservation of the goods similar to the
11 provisions of this article's provisions in Sections 2-704 and 2-705.

12 **Cross References:**

13 **Definitional Cross References:**

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PART 8
REMEDIES

[SUBPART A. GENERAL]

SECTION 2-801. SUBJECT TO GENERAL LIMITATIONS. The remedies of a seller, buyer, or other protected person under this article are subject to the general limitations and principles stated in Sections 2-802 through 2-814.

Comment

1. **Source:** New.

2. **Structure of Part 8.** This section is new and sets out the remedial hierarchy of Part 8. Subpart A (Sections 2-801 through 2-814) contain sections that are applicable to buyers, sellers and other persons entitled to enforce obligations under this article. Persons other than buyers and sellers who are able to enforce obligations under this article include those persons who may enforce warranties or warranty obligations under Part 4 of this article. Subpart A sets forth remedial policies that control the application of the more specific remedial rules in Subpart B (seller’s remedies are set forth in Sections 2-815 through 2-822) and Subpart C (buyer’s remedies are set forth in Sections 2-823 through 2-829). Part 8 follows the organizational structure used in Article 2A, Part 5.

3. **International Sales.** Revised Part 8 is consistent with the remedial structure in CISG. Chapter II states the obligations of the seller (Articles 30-44) and the remedies of the buyer upon breach of contract by the seller. Article 45. Buyer’s remedies include the “rights” provided in Articles 46-52, which are unique to the buyer, and “damages” claimed under Articles 74-77, which are common to the buyer and the seller. Similarly, Chapter III states the obligations of the buyer (Articles 53-59) and the remedies of the seller upon breach by the buyer. Article 61. Seller’s remedies include the “rights” provided in Articles 62-65, which are unique to the seller, and “damages” claimed under Articles 74-77, which are common to both parties. In general, the prefers specific performance over damages and states applicable damage principles in general terms.

Cross References:

Definitional Cross References:

SECTION 2-802. BREACH OF CONTRACT; PROCEDURES. If a party is in breach of a contract, the party seeking enforcement:

(1) has the rights and remedies under this article and, except as limited by this part, under the agreement;

(2) may reduce its claim to judgment or otherwise enforce the contract by any available administrative or judicial procedure, or the like, including arbitration or other dispute-resolution procedure if agreed to by the parties; and

(3) may enforce the rights granted by and remedies available under other law.

Comment

1. **Source:** Section 2A-501.

2. **Available remedies.** This section has no counterpart in current Article 2 and is based on Section 2A-501. This section provides a summary of the aggrieved party's general remedial rights upon a breach of contract. Whether a party is in breach of contract depends upon the principles in Part 7. The rights and remedies under this article are cumulative and this article rejects any doctrine of election of remedies as a fundamental principle. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case and is governed by the general principles stated in Subpart A.

3. Effect of parties' agreement and other law. Both this article and the parties' agreement should be consulted to determine what remedies are available to an aggrieved party in the event of breach. An agreement may provide for a dispute resolution process. In addition, an aggrieved party may use administrative or judicial process to enforce rights. Finally, this article does not preempt other rights and remedies available under law outside this article. Section 1-103.

4. **International Sales.** CISG Articles 45 and 61 provide that the aggrieved party may exercise rights under the conventions and is entitled to damages as provided under the convention in the event of the other party's breach.

Cross References:

Definitional Cross References:

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1 **4. Mitigation principle.** Subsection (b) contains a statement of the
2 mitigation principle derived from the Restatement (Second) of Contracts, Section
3 350. An aggrieved buyer who has not accepted the goods has two alternative
4 measures of damages, the cover price minus the contract price (Section 2-825) or
5 the market price minus the contract price (Section 2-826). The aggrieved buyer is
6 not required to cover although the statement of the mitigation principle in subsection
7 (b) may preclude the recovery of loss that could have been prevented if the
8 aggrieved buyer could have reasonably avoided that loss by making a cover
9 transaction. If the buyer covers under Section 2-825 by reasonably and in good
10 faith making a purchase in substitution for the goods from the seller without undue
11 delay, the buyer has appropriately mitigated under the principle of this section and
12 may recover its damages based upon the cover price even if the market price based
13 measurement would result in a smaller damage award.

14 An aggrieved seller has three alternative damage measurements, the contract
15 price minus the resale price (Section 2-819), the contract price minus the market
16 price (Section 2-821(a)) or lost profit and reliance expenditures (Section 2-821(b)).
17 The seller is not required to resell goods. Again, the mitigation principle of
18 subsection (b) may prevent the seller from recovering the part of the loss that could
19 have been prevented if the seller could have reasonably sold the goods. If the seller
20 does resell and complies with the requirements of Section 2-819, the seller has
21 appropriately mitigated the loss and may recover its damages based upon the resale
22 price even if the market price based measurement would result in a smaller damage
23 award.

24 **5. Cumulative remedies.** Subsection (c) declares that the rights and
25 remedies are cumulative. This statement accords with the former Article 2's
26 rejection of a policy of an election of remedies subject to a preclusion of double
27 recovery for the same harm. See Comment to Section 2-802. As stated in the
28 Comment to Section 2-802, whether the exercise of one remedy may preclude use
29 of another remedy depends upon whether the use of both remedies violates the
30 principles stated in Subpart A, including the principles of this section. Any choice
31 among remedial options must be made in good faith.

32 Under former Article 2, if the buyer had covered by buying goods in
33 substitution of the ones due the seller in good faith, reasonably and without
34 unreasonable delay, the buyer must use the cover section to measure its damages
35 and may not use the section on market price to measure damages. *See*
36 *Commonwealth Edison C. v. Allied Chemical Nuclear Products Inc.*, 684 F. Supp.
37 1434, 1435 (N. D. Ill. 1984) ("Official comment 5 to Section 2-713 indicates that
38 when a party covers, his damages are measured by Section 2-712, not Section
39 2-713."); *Dickson v. Dehli Seed Co.*, 760 S.W. 2d 382, 389 (Ct. App. Ark. 1988)
40 ("Because appellee chose to purchase substitute goods its remedy was limited to

1 that of Section 2-712 unless the purchase did not constitute ‘cover.’”); *Neibert v.*
2 *Schwenn Agri-Production Corp.*, 579 N.E.2d 389, 393 (Ill. Ct. App. 1991) (Section
3 2-713 “only applies when and to the extent the buyer has not covered.”); James J.
4 White & Robert S. Summers, Uniform Commercial Code § 6.4, subsection c (4th
5 ed. 1995) (advocating that a cover that qualifies under Section 2-712 should
6 preclude the buyer from recovering a greater amount by using the market price
7 formula of Section 2-713). Similarly, if the seller resold the goods in compliance
8 with the section on recovering damages based upon the resale, some courts have
9 precluded the seller from obtaining damages based upon the market price
10 measurement. *See Sharp Electronics Corp. v. Lodgistix, Inc.*, 802 F. Supp. 370,
11 380-81 (D. Kan. 1992) (In that case, seller could not use market price damages
12 when it had resold the goods); White & Summers, Uniform Commercial Code, § 7-7
13 (4th ed. 1995) (advocating that a resale complying with the requirements of Section
14 2-706 should preclude seller from recovering a larger amount by using the market
15 price formula of Section 2-708(1)). This section does not change the results of
16 these cases under former Article 2.

17 **6. Collateral or ancillary promises or obligations.** Subsection (d) is the
18 same as former Section 2-701.

19 **7. International Sales.** CISG Articles 74 through 77 contain statements
20 applicable to damage recoveries of a seller and a buyer. Of note is the endorsement
21 of the expectancy interest, Article 74, the preference for using the substitute
22 transaction as the measure for damages, Article 75, and a statement of a mitigation
23 principle, Article 77.

24 **Cross References:**

25 **Definitional Cross References:**

26 **SECTION 2-804. MEASUREMENT OF DAMAGES IN GENERAL.**

27 Subject to Section 2-803, if a breach of contract occurs, the aggrieved party may
28 recover compensation for the loss resulting in the ordinary course from the breach
29 as determined under Sections 2-815 through 2-829 or as determined in any other
30 reasonable manner, together with incidental damages and consequential damages,
31 less expenses saved as a result of the breach.

1 **Comment**

2 1. **Source:** New.

3 2. **Purpose of section.** Section 2-804 provides a general statement of a
4 measurement rule that can be used if the specific measurement rules are not
5 sufficient to compensate the aggrieved party's expectancy interest under the
6 principle of Section 2-803(a). Although compensation of the expectancy interest of
7 the aggrieved party is the general rule, a party may also use this measurement to
8 compensate the aggrieved party's reliance or restitution interests. See Restatement
9 (Second) of Contracts, §§ 349 and 371. For example, assume a buyer is unable to
10 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
12 in preparing to perform its part of the contract. The buyer is able to use this section
13 to recover its reliance expenses.

14 Even if an aggrieved party cannot establish any general or direct damages, an
15 aggrieved party may recover incidental and consequential damages resulting from
16 the breach. Reliance based expenses that do not fall into the category of incidental
17 or consequential damages but could also be recovered under this section. Of
18 course, recovery under this section is subject to the general principles stated in
19 Section 2-803.

20 3. **Expectancy interest as a limit on recovery.** An aggrieved party should
21 not be able to use Section 2-804 to recover damages based upon its reliance or
22 restitutionary interests when those interests are greater than its expectancy interest.
23 Recovery based upon the reliance or restitution interest that exceeds the expectancy
24 interest of the aggrieved party should not be allowed when the aggrieved party
25 enters into a losing contract.

26 4. **International Sales.** CISG recognizes the restitutionary interest when a
27 contract is avoided. Article 81.

28 **Cross References:**

29 **Definitional Cross References:**

30 **SECTION 2-805. INCIDENTAL DAMAGES.** Incidental damages resulting
31 from breach of contract include compensation for any commercially reasonable
32 charges, expenses, or commissions incurred with respect to:

1 (1) inspection, receipt, transportation, care, and custody of identified goods
2 that are the subject of the breach;

3 (2) stopping delivery or shipment;

4 (3) effecting cover, return, or resale of the goods;

5 (4) reasonable efforts otherwise to minimize or avoid the consequences of
6 breach; and

7 (5) effectuating other remedies after the breach or otherwise dealing with the
8 goods.

9 **Comment**

10 1. **Source:** Former Sections 2-715(1) and 2-710.

11 2. **Comparison with former Article 2.** Section 2-805 continues the rules
12 from former Section 2-710 and former Section 2-715(1) with the following
13 substantive changes. First, incidental damages are integrated into one section for
14 both aggrieved buyers and sellers. Second, the recovery of incidental damages
15 under subsection (1) is not limited for an aggrieved buyer to goods rightfully
16 rejected. This limitation under former law had been criticized as more restrictive
17 than the common law rule and as encouraging rejection in the marginal case. See
18 also Section 2-609(b).

19 3. **Purpose of section.** An aggrieved party should be able to recover
20 damages based on this section for expenses that are incurred in dealing with the
21 goods after a breach, in mitigation of the consequence of the breach, or in exercising
22 other remedies for the breach. The incurring of charges or other expenses must be
23 commercially reasonable to be recovered. Compensating an aggrieved party for its
24 incidental damages is part of placing the aggrieved party in the position it would
25 have been in if the contract had been fully performed. Section 2-803(a).

26 4. **International Sales.** CISG does not use the concept of incidental
27 damages.

28 **SECTION 2-806. CONSEQUENTIAL DAMAGES.**

1 (a) Consequential damages resulting from a breach of contract include
2 compensation for:

3 (1) any loss resulting from the aggrieved party's general or particular
4 requirements and needs of which at the time of contracting the party in breach had
5 reason to know and which could not reasonably be prevented; and

6 (2) injury to person or property proximately resulting from any breach of
7 warranty.

8 (b) Unless otherwise agreed, in a consumer contract a seller may not
9 recover consequential damages from a consumer.

10 **Comment**

11 1. **Source:** Former Section 2-715(2).

12 2. **Comparison with former Article 2.** Section 2-806 continues the rules
13 from former Section 2-715(2) with the following substantive change. The section
14 has been rephrased to govern both the seller and buyer as the aggrieved party. This
15 change rejects the position under former Article 2 that a seller should not be entitled
16 to consequential damages for a buyer's breach of contract. However, a seller under
17 a consumer contract is not entitled to consequential damages from a consumer buyer
18 unless there is agreement otherwise.

19 3. **Requirements for recovery of consequential damages.** Compensating
20 an aggrieved party for consequential loss is part of placing the aggrieved party in the
21 position it would have occupied but for the breach of contract. Section 2-803(a).
22 Assuming the contract does not contain an enforceable exclusion of consequential
23 damages (Section 2-810), the aggrieved party must satisfy four conditions to
24 recover:

25 (a) **Causation.** The loss must result from (be caused by) the breach. This
26 cause-in-fact requirement is common to all breach of contract claims, but may be
27 more difficult to establish when the loss is remote from the breach.

28 (b) **Foreseeable losses.** The loss recoverable under subsection (a)(1) must
29 result from general or particular requirements of the aggrieved party of which the
30 breaching party had reason to know at the time of contracting. This statement of

1 the foreseeability test rejects the tacit agreement test for recover of consequential
2 damages. The party in breach need not have consciously accepted this liability nor is
3 liability limited to situations where the party in breach fails to act in good faith. The
4 aggrieved party's particular needs must be made known to the party in breach but
5 the general needs must rarely be made known to charge the party in breach with
6 knowledge. Where the sale is to buyer in the business of reselling, resale is one of
7 the requirements of which a seller would have reason to know.
8 The proximate cause test under subsection (a)(2) turns on whether it was reasonable
9 for the person to use the goods without an inspection that would have revealed the
10 defect on which the breach of warranty is based. If it was unreasonable to use the
11 goods without such an inspection or the defect was in fact discovered prior to use,
12 the personal injury or damage to other property is not a proximate result of the
13 breach of warranty. Whether a person is entitled to enforce a breach of warranty
14 which has resulted in personal injury or damage to other property depends upon
15 other provisions of this article. See Part 4 of this article.

16 (c) **Mitigation principle.** An otherwise foreseeable loss is not recoverable
17 if it could have been reasonably prevented by either the aggrieved or the breaching
18 party. This limitation is a specific application of the mitigation principle of Section
19 2-803(b). Normally, the breaching party must establish that the aggrieved party
20 failed to mitigate. See Section 2-803(b). In cases where both parties could have
21 avoided the loss by the same or similar acts and it is "equally reasonable" to expect
22 the breaching party to minimize damages, the breaching party is in no position to
23 contend that the aggrieved party failed to mitigate. *See, e.g., Nezperce Storage Co.*
24 *v. Zenner*, 670 P.2d 871 (Id. 1983). Decisions about actions taken to mitigate harm
25 must be made in good faith. Factors that may be relevant to determining whether
26 the aggrieved party has appropriately mitigated its consequential losses are the
27 financial circumstances of the aggrieved party, the breaching party's assurances to
28 the aggrieved party, and the ability of the aggrieved party to obtain substitute
29 performance.

30 (d) **Certainty.** The plaintiff must prove the loss with reasonable certainty.
31 This limitation controls loss in complex cases of remote or speculative damage,
32 (e.g., loss of good will, new businesses). This does not require the aggrieved party
33 to demonstrate mathematical precision in the proof of loss. Loss may be determined
34 in any manner which is reasonable under the circumstances.

35 4. **Disproportionate compensation.** Some courts have used the
36 Restatement (Second) of Contracts § 351(3) to limit consequential damages if under
37 the circumstances "justice so requires in order to avoid disproportionate
38 compensation." *See Perini Corp. v. Great Bay Hotel & Casino, Inc.*, 610 A.2d 364,
39 381-83 (N. J. 1992) (disproportion between loss suffered by aggrieved party and
40 price charged by breaching party); *International Ore & Fertilizer Corp. v. SGS*

1 *Control Services, Inc.*, 743 F. Supp. 250 (S.D.N.Y. 1990) (same). The essence of
2 the principle is that in some cases the consequential damages sought may be
3 significantly greater than the risk the party in breach assumed under the contract.
4 That principle may be appropriate to apply in some cases under this article.

5 **5. International Sales.** Both buyer and seller can recover foreseeable
6 consequential damages. CISG Article 74.

7 **SECTION 2-807. SPECIFIC PERFORMANCE.**

8 (a) The court may enter a decree for specific performance if the goods or
9 the agreed performance of the party in breach of contract are unique or in other
10 proper circumstances. In a contract other than a consumer contract, the court may
11 enter a decree for specific performance if the parties have agreed to that remedy.
12 However, even if the parties agree to specific performance, the court may not enter
13 a decree for specific performance if the breaching party's sole remaining contractual
14 obligation is the payment of money.

15 (b) The decree for specific performance under this section may include
16 terms and conditions as to payment of the price, damages, or other relief the court
17 considers just.

18 **Comment**

19 1. **Source:** Former Sections 2-716(1) and (2), 2A-521.

20 2. **Comparison with former Article 2.** Section 2-807 continues the rules
21 from former Section 2-716(1) and (2) with the following substantive changes. First,
22 either the buyer or the seller may seek specific performance in an appropriate case.
23 Second, this section recognizes and encourages the court to enter a specific
24 performance remedy when the parties have agreed to that remedy. This recognition
25 of agreed specific performance is coupled with a protection for a party whose sole
26 remaining obligation is to pay money so that a specific performance remedy should
27 not be used to enforce that obligation. A party who is owed money, such as a seller

1 who is owed the price, must use other remedies such as an action for the price or
2 damages under this article.

3 **3. Basis of specific performance decree.** Subsection (a) recognizes that
4 unique goods or unique performance as well as other circumstances that are not
5 based upon uniqueness may be the basis for a specific performance decree.
6 Uniqueness should be determined in light of the total circumstances of the contract
7 and is not limited to goods identified when the contract is formed. Evidence of
8 other circumstances in which it might be appropriate to order specific performance
9 include when a buyer is unable to cover or in the case of a requirements or outputs
10 contract.

11 **4. Agreed specific performance.** This section recognizes that the parties
12 may agree to specific performance. This agreement to specific performance is
13 symbolized by the “take and pay” contracts in the oil and gas industry where the
14 buyer has agreed to accept and pay for goods under the contract and to specific
15 performance of that obligation to accept the goods. The parties’ agreement to
16 specific performance could be enforced even if legal remedies are entirely adequate.
17 Enforcing an agreement to specific performance has been limited to commercial
18 cases to avoid having a consumer buyer be forced to take and pay for goods that the
19 consumer may not want. Even in a commercial contract, the third sentence of
20 subsection (a) prevents the aggrieved party from getting specific performance if the
21 party in breach is only obligated to pay money. Thus if the buyer is obligated to pay
22 the price, that obligation should not be enforced by an action for specific
23 performance. The seller’s right to be paid the price should be enforced through an
24 action for the price. Section 2-822.

25 **5. Court discretion.** Nothing in this section constrains the court’s exercise
26 of its equitable discretion in deciding whether to enter a decree for specific
27 performance or in determining the conditions or terms of such a decree. This
28 section assumes that the decree for specific performance will condition the decree
29 on full performance by the party who seeks the other party’s specific performance of
30 its obligation. Thus, a seller seeking to enforce a “take and pay” term should be
31 required to tender goods that conform to the contract requirements.

32 **6. International Sales.** Specific performance is the preferred remedy for
33 sellers and buyers under the CISG. See Articles 46 and 62. Article 28 provides,
34 however, that if under CISG “one party is entitled to require performance of any
35 obligation by the other party, a court is not bound to enter a judgment for specific
36 performance unless the court would do so under its own law in respect of similar
37 contracts of sale not governed by this Convention.”

38 **Cross References:**

1 breach. Cancellation of a contract as a remedy for breach generally affects only
2 future performance of the contract and is not a rescission of the contract.
3 Performances accepted prior to cancellation need not be returned to the other party
4 as cancellation does not operate as a rescission of the contract.

5 Subsection (a) makes clear that the right to cancel depends upon a breach of
6 contract. The index of seller's remedies (Section 2-815) and the index of buyer's
7 remedies (Section 2-823) both list cancellation as a remedy for breach of contract.
8 A party may not cancel the contract if they have waived the right to cancel under
9 Section 2-702(a). A buyer may not cancel the contract if the seller has a right to
10 cure under Section 2-709. A seller's right to cure depends in part upon sending
11 timely notice of the intent to cure to the buyer. If the buyer does not receive notice
12 of the seller's intent to offer a cure that satisfies Section 2-709 within the reasonable
13 time for notice, the buyer may cancel the contract.

14 **4. Notice of cancellation.** The first sentence of subsection (b) is new and
15 resolves a controversy under current law about whether an aggrieved party needs to
16 notify the other party of the cancellation. See the definition of notify in Section
17 1-201(26).

18 The notice of cancellation under this section has its primary effect when
19 there are obligations that are executory on both sides and is unimportant in the
20 situation where the parties have no more executory obligations under the contract.
21 For example, in a non installment contract in which the seller has delivered goods to
22 the buyer and the buyer exercises its right to reject the goods as nonconforming to
23 the contract requirements, the buyer must communicate the rejection to the seller in
24 order to have effectively rejected the goods. A notice of cancellation in addition to
25 the required notice of rejection in that simple situation has no meaningful effect
26 when there are no longer any obligations that are executory on both sides because
27 the exercise of the right to cancel has no effect on the parties' rights. Assume,
28 however, that the seller in a noninstallment contract informs the buyer that the
29 goods will be late. If the buyer decides to exercise its remedies for breach of
30 contract, the buyer may give notice of cancellation so as to inform the seller that the
31 buyer no longer desires to purchase the goods. The seller's obligation to deliver the
32 goods would be discharged and the buyer would retain its remedies for damages for
33 the seller's breach of contract.

34 **5. Effect of cancellation.** Subsection (b) continues the rule from former
35 Section 2-106(4) that upon cancellation, all obligations that are executory on both
36 sides are discharged. If the parties have already rendered their performance so that
37 obligations are not executory on both sides, then cancellation is a meaningless
38 remedy. Assume in a non-installment contract that the seller has delivered non-
39 conforming goods and the buyer has accepted those goods. The buyer cancels due

1 to the non-conformity of the goods. The buyer is still liable for the price under
2 Section 2-707(a) and has a counterclaim for damages under Section 2-827 unless
3 buyer can revoke acceptance under Section 2-708. The buyer's cancellation does
4 not affect the buyer's obligation to pay for the goods nor give the buyer the ability
5 to return the goods to the seller outside of the revocation right. If the seller has
6 delivered a nonconforming installment of goods and the nonconforming installment
7 results in a breach of the whole contract, the buyer may cancel the contract. Section
8 2-710(c). When the buyer cancels, the buyer can not return the accepted
9 nonconforming installments to the seller unless entitled to revoke acceptance, but
10 has the right to obtain damages due to the nonconformity of those past installments.
11 The cancellation means that the seller need not deliver any of the remaining
12 installments but the seller is liable for breach of the whole contract.

13 **6. Rights surviving cancellation.** Subsection (b) provides that the rights
14 that survived cancellation of the contract are rights based on a prior breach or
15 performance and rights for remedy of breach of the whole contract or an
16 unperformed balance as under former Article 2.

17 Subsection (c) is the same as former Section 2-720. A party's use of the
18 term cancellation or rescission should not result in an impairment or waiver of a
19 right to a remedy for breach of a contract that has occurred unless there is a clear
20 statement that the canceling party intends to so waive those rights.

21 **7. International Sales.** CISG's equivalent to "cancellation" is "avoidance"
22 for a fundamental breach of contract. See Articles 25, 49(1), and 64(1). The effects
23 of a proper avoidance are stated in Articles 81-84. In general, it is more difficult to
24 avoid the contract under CISG than it is to cancel under Article 2. Moreover, the
25 seller's remedies of contract-market price damages or resale and the buyer's
26 remedies of contract-market price damages and "cover" depend upon avoidance.
27 Articles 75 and 76.

28 **Cross References:**

29 **Definitional Cross References:**

30 **SECTION 2-809. LIQUIDATION OF DAMAGES; DEPOSITS.**

31 (a) Damages for breach of contract by either party may be liquidated in the
32 agreement but only at an amount that is reasonable in the light of the difficulties of
33 proof of loss in the event of breach, either the actual loss caused by the breach or

1 the loss anticipated at the time of the agreement that would be caused by the breach,
2 and in a consumer contract, the inconvenience or nonfeasibility of otherwise
3 obtaining an adequate remedy. If a term liquidating damages is unenforceable under
4 this subsection, the aggrieved party may pursue the remedies provided in this article.
5 Section 2-810 determines the enforceability of a term that limits but does not
6 liquidate damages.

7 (b) If a seller justifiably withholds delivery of goods or stops performance
8 because of the buyer's breach of contract or insolvency, the buyer is entitled to
9 restitution for any amount by which the sum of payments exceeds the amount to
10 which the seller is entitled under a term liquidating damages in accordance with
11 subsection (a).

12 (c) The buyer's right to restitution under subsection (b) is subject to setoff
13 to the extent that the seller establishes a right to recover damages under the
14 provisions of this article other than subsection (a) and to the extent of the amount or
15 value of any benefits received by the buyer directly or indirectly by reason of the
16 contract.

17 (d) If the seller has received payment in goods, their reasonable value or the
18 proceeds of their resale are payments for the purposes of subsection (b). However,
19 if the seller has notice of the buyer's breach before reselling goods received in part
20 performance, the resale is subject to the requirements of Section 2-819.

21 **Comment**

22 1. **Source:** Former Section 2-718.

1 **2. Comparison with former Article 2.** Section 2-809 continues the rules
2 from former Section 2-718 with several substantive changes. First, in subsection (a)
3 the tests of inconvenience or non-feasibility of obtaining an adequate remedy have
4 been eliminated in commercial contracts. In commercial contracts, the enforceability
5 of a liquidated damages clause is determined by looking at the anticipated difficulties
6 of proving loss and either the actual loss or the loss as anticipated at the time the
7 agreement was formed. In consumer contracts, the enforceability of a liquidated
8 damages clause is determined by the same test as under former law. Second, the
9 provision from former law stating that an unreasonably large liquidated damages
10 clause is void as a penalty has been eliminated as unnecessary. If the liquidated
11 damages term is reasonable in light of the test of subsection (a), the term should be
12 enforceable and the penalty language of the former law is unnecessary. Similarly, if
13 a liquidated damages clause is unreasonably small under the test of subsection (a), it
14 would be unenforceable. Third, the second sentence of subsection (a) is new and
15 states what was implicit in the former rule, that if a liquidated damages clause is
16 unenforceable, the remedies of the Article become available to the aggrieved party.
17 Fourth, the last sentence of subsection (a) is new. If the parties have not attempted
18 to liquidate damages in light of these factors set forth in subsection (a), a term
19 limiting the amount of the damages would be tested under the section on limited
20 remedies. Section 2-810. Fifth, subsection (b) continues the rules from former
21 Section 2-718(2) allowing for restitution of the payments the buyer has already
22 made but expands the situations in which restitution might be available to any
23 situation where the seller stops performance on account of the buyer's breach or
24 insolvency. See Sections 2-816(a) and 2-818. Sixth, the statutory liquidated
25 damages provision found in former Section 2-718(b)(2) has been deleted as an
26 unwarranted penalty.

27 **3. Agreement to liquidate damages.** A valid liquidated damages clause
28 may liquidate the amount of all damages, including consequential and incidental
29 damages. As under former law, liquidated damages clauses should be enforced if
30 the amount is reasonable in light of the factors provided in subsection (a). This
31 section thus respects the parties' ability to contract for damages while providing
32 some control of reasonableness based upon the circumstances of the particular case.

33 **4. Buyer's restitution.** Under subsection (b) only the buyer's payments
34 that are more than the amount of an enforceable liquidated damages term need be
35 returned to the buyer. If the buyer has made payment by virtue of a trade in or other
36 goods deposited with the seller, subsection (d) provides that the reasonable value of
37 such goods or their resale price should be used to determine what the buyer has
38 paid, not the value the seller allowed the buyer in the trade in. To assure that the
39 seller obtains a reasonable price for the goods so deposited, the seller must comply
40 with the resale provisions of Section 2-819 if the seller knows of the buyer's breach
41 before it has resold the goods deposited with the seller. Subsection (c) continues

1 the rule from former law without change. If there is no enforceable liquidated
2 damages clause, the buyer is entitled to restitution under subsection (b) subject to a
3 set off of the seller for any damages it is otherwise entitled to under this Article.

4 5. **International Sales.** There is no provision dealing with liquidated
5 damages. Restitution claims are permitted in certain cases of avoidance for
6 fundamental breach. See CISG Articles 81(2), 82 and 84.

7 **Cross References:**

8 **Definitional Cross References:**

9 **SECTION 2-810. CONTRACTUAL MODIFICATION OF REMEDY.**

10 (a) Subject to subsections (b) and (c) and Section 2-809, the following rules
11 apply:

12 (1) An agreement may provide for remedies in addition to or in
13 substitution for those provided in this article and may limit or alter the measure of
14 damages recoverable under this article, such as by limiting the buyer's remedies to
15 return of the goods and repayment of the price or to repair and replacement of
16 nonconforming goods or parts.

17 (2) Resort to an agreed remedy under paragraph (1) is optional.
18 However, if the parties expressly agree that the agreed remedy is exclusive, it is the
19 sole remedy.

20 (3) An agreed remedy under this section may create a remedial promise.

21 (b) If circumstances cause an exclusive or limited remedy to fail of its
22 essential purpose, the following rules apply:

(1) In a contract other than a consumer contract, the aggrieved party may pursue all remedies available under this article. However, an agreement expressly providing that consequential damages are excluded, including those resulting from the failure to provide the exclusive or limited remedy, is enforceable to the extent permitted under subsection (c).

(2) In a consumer contract, the aggrieved party may reject the goods or revoke acceptance and may pursue all remedies available under this article including the right to recover consequential damages, despite any term purporting to exclude or limit consequential damages.

(c) Subject to subsection (b), consequential damages may be limited or excluded by agreement unless the operation of the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of a consumer contract is prima facie unconscionable, but limitation of damages for a commercial loss is not.

Comment

1. Source: Former Section 2-719.

2. Comparison with former Article 2. Section 2-810 continues the rules from former Section 2-719 with the following substantive changes. First, subsection (a) incorporates the new concept of remedial promise. Second, subsection (b) retains the concept of limited or exclusive remedies failing of its essential purpose while dealing with the troublesome issue of the effect of such a failure on a clause excluding consequential damages. Third, subsection (c) provides that an exclusion of consequential damages for personal injury is unconscionable in a consumer contract instead of in the case of consumer goods as under former law.

3. **Minimum adequate remedy.** Subsection (a) allows parties to shape their remedies to their particular requirements and reasonable agreements limiting or modifying those remedies are given effect. However, it is of the very essence of a

1 sales contract that at least minimum adequate remedies be available. If the parties
2 intend to conclude a contract for sale within this Article they must accept the legal
3 consequence that there be at least a fair quantum of remedy for breach of the
4 obligations or duties outlined in the contract. For example, a nonnegotiated term in
5 a consumer contract would not provide an adequate minimum remedy if the term
6 required the consumer to incur a cost to exercise a remedy that is grossly
7 disproportionate to the value of the remedy such as by requiring a refrigerator to be
8 returned to the seller in order to effect repair where the consumer's cost of returning
9 the goods is grossly out of proportion to the value of the repair needed. Similarly, a
10 nonnegotiated term in a consumer contract would not provide an adequate minimum
11 remedy if the term imposed barriers to the exercise of a remedy that are manifestly
12 unreasonable under the circumstances such as by requiring the consumer to produce
13 an original receipt in order to receive a remedy when the seller's records clearly
14 demonstrate that the consumer is the purchaser of the goods and the person entitled
15 to the remedy. Thus any clause purporting to modify or limit the remedial
16 provisions in an unconscionable manner so as to deny a party an adequate minimum
17 remedy is subject to deletion and in that event the remedies made available by this
18 Article are applicable as if the stricken clause had never existed.

19 **Cumulative remedies.** Subsection (a) presumes that remedy terms in an
20 agreement are intended to be cumulative and if the parties intend the remedy term to
21 be an exclusive, that intention must be clearly expressed. Subsection (a) also
22 provides that a limited or exclusive remedy may create a remedial promise that is an
23 enforceable obligation separate from the warranty obligation under Part 4 of this
24 Article.

25 **4. Failure of essential purpose.** Subsection (b) is based upon the principle
26 that a fair and reasonable term in a contract may because of circumstances fail in its
27 purpose or operate under the circumstances to deprive a party of the substantial
28 value of its bargain. If that happens, the aggrieved party should be able to resort to
29 remedies under this Article. Subsection (b) also addresses the troublesome issue of
30 what to do with a consequential damage excluder in the event the exclusive agreed
31 remedy fails to achieve its purpose. This issue is frequently litigated. In these cases,
32 the seller, either directly or through a dealer, obtains an agreement with the buyer
33 that may: (1) Make a limited express warranty; (2) Exclude or limit implied
34 warranties; (3) Promise, on breach of express warranty, to repair, replace parts or
35 otherwise cure the breach for a stated period of time; and (4) Exclude liability for
36 consequential damages. These clauses, typically, are well drafted and are stated to
37 be "exclusive." The test adopted in subsection (b) provides clear results in both
38 commercial cases and consumer cases without resorting to complicated factual
39 analysis that has been used by some courts to determine the enforceability of the
40 consequential damage excluder in these types of cases. Thus in a commercial
41 contract, the parties may expressly provide that the consequential damage excluder

will be enforced even if the exclusive or limited remedy has failed in its essential purpose. In that case, the consequential damages are excluded by the agreement as long as the excluder is enforceable under subsection (c). In a consumer contract, the consequential damage excluder is unenforceable if the limited or exclusive remedy fails of its essential purpose no matter what a term of the contract may provide in that event. This dichotomy between the commercial and consumer contracts in regard to the enforcement of the consequential damage excluder in this circumstance follows the majority of the court's approach to this problem.

5. Exclusion of consequential damages. Subsection (c) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. This principle is made subject to subsection (b) in recognition that a consequential damage excluder that is conscionable under subsection (c) may be unenforceable under the rule of subsection (b). In a consumer contract (defined in Section 2-102), a seller may not exclude consequential damages for personal injury as such an exclusion is presumed to be unconscionable. This continues the policy of former law that a seller who sells goods to a consumer should be liable for that personal injury harm under this article if the seller has given a warranty which has been breached proximately resulting in personal injury. Section 2-806(2). A seller may, however, choose to disclaim a warranty for the quality of the goods without violating this section. Section 2-406.

6. **International Sales.** CISG provides that the parties may derogate from or vary the effect of any of its provisions. Article 6. Presumably this applies to the provisions on remedies for breach and damages.

Cross References:

Definitional Cross References:

SECTION 2-811. REMEDIES FOR MISREPRESENTATION OR

FRAUD. Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach of contract. Rescission or a claim for rescission of a contract for sale or rejection or return of the goods does not bar and is not inconsistent with a claim for damages or other remedy.

Comment

1. Source: Former Section 2-721.

1 **2. Comparison with former Article 2.** This section is the same in
2 substance as former Section 2-721.

3 **3. Remedies for misrepresentation or fraud.** This section continues the
4 policy that the remedies for material misrepresentation or fraud should be construed
5 in light of the policy of this Article that remedies are designed to place the aggrieved
6 party in the position that it would have been in if the contract had been performed.
7 Thus a party who claims fraud but affirms the contract should be entitled to
8 damages based upon its expectation interest. Similarly, a party claiming to rescind
9 the contract and seeking to return the goods to the seller should also be able to
10 enforce its remedies under this article in light of that same principle of compensation
11 of its expectancy interest. Section 2-803. A return of the goods to the seller or a
12 claim of rescission does not preclude remedies for fraud or rights under other law.
13 Rejection and revocation of an acceptance are not a rescission of the contract and
14 do not result in a cancellation of a contract. Cancellation is an additional remedy for
15 breach of contract. Sections 2-815 and 2-823.

16 **4. International Sales.** The Convention uses the concept of “avoidance for
17 fundamental breach” which functions in effect as a cancellation and not a rescission
18 of the contract as it does not alter the ability to recover for damages. Article 25,
19 Article 26, Article 70, Article 81.

20 **Cross References:**

21 **Definitional Cross References:**

22 **SECTION 2-812. PROOF OF MARKET PRICE.**

23 (a) If evidence of a price prevailing at a time or place described in this
24 article is not readily available, the following rules apply:

25 (1) The price prevailing within any reasonable time before or after the
26 time described may be used.

27 (2) The price prevailing at any other place that in commercial judgment
28 or usage of trade is a reasonable substitute for the one described may be used,

1 making proper allowance for any cost of transporting the goods to or from the other
2 place.

3 (3) Evidence offered by one party of a relevant price prevailing at a time
4 or place other than one described in this article is not admissible unless the party has
5 given the other party sufficient notice to prevent unfair surprise.

6 (b) If the prevailing price or value of any goods regularly bought and sold in
7 any established commodity market is in dispute, reports in official publications or
8 trade journals or in newspapers, periodicals, or other means of communication in
9 general circulation and published as the reports of that market are admissible in
10 evidence. The circumstances of the preparation of the report may affect the weight
11 of the evidence but not its admissibility.

12 **Comment**

13 1. **Source:** Former Sections 2-723(2) and (3), 2-724.

14 2. **Comparison with former Article 2.** This section continues the rules
15 from former Article 2 Sections 2-723(2) and (3) and 2-724 without substantive
16 change.

17 3. **Measurement of market price.** Subsection (a) provides guidance on
18 where and when to measure market price. The court may allow a party to submit
19 other times and places to measure market price if that is reasonable in the
20 circumstances of the case subject to protection of the other party from unfair
21 surprise. Subsection (b) allows reports of market prices to be admissible while
22 providing flexibility for a determination of the weight of the evidence offered. An
23 “established market” under this section requires a market where transactions in the
24 commodity are frequent and open enough to make a market established by usage in
25 which one price can be expected to affect another and in which an informed report
26 of the range and trend of prices can be assumed to be reasonably accurate. This
27 section is not meant to prevent admission of other types of relevant evidence on
28 market price under any other rule of evidence.

4. International Sales. CISG Article 76 addresses measurement of the current price in a similar manner.

Cross References:

Definitional Cross References:

SECTION 2-813. LIABILITY OF THIRD PERSONS FOR INJURY TO GOODS. If a third person deals with goods identified to a contract for sale and causes actionable injury to the goods, the parties to the contract have the following rights and remedies:

(1) A party with title to, or a security interest, special property interest, or insurable interest in, the goods has a right of action against the third person.

(2) If the goods have been destroyed or converted by a third person, the party that had the risk of loss under the contract for sale, or since the injury has assumed that risk as against the other party, also has a right of action against the third person.

(3) If at the time of the injury the plaintiff does not have the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, subject to the plaintiff's interest, the plaintiff's right of action or settlement is as a fiduciary for the other party to the contract.

(4) Either party, with the consent of the other, may maintain an action for the benefit of a concerned party.

Comment

1. Source: Former Section 2-722.

1 2. **Comparison with former Article 2.** Section 2-813 continues the rules
2 of former Section 2-722 with no substantive change.

3 3. **Purpose of section.** This provision is a procedural rule that details who
4 has standing to pursue an action for damages for harm to the goods. The injury to
5 the goods is usually actionable under law other than Article 2. This section
6 concerns who has a right of action for injury to the goods after identification of the
7 goods to the contract, Section 2-502, as before that time, the seller will have the
8 right of action for such injury. During the period after identification of the goods to
9 the contract and before the buyer has finally accepted the goods, both parties may
10 have a right of action against third persons for harm to the goods. A seller may
11 have a right of action even after the buyer's acceptance due to the seller retaining an
12 interest in the goods. See Section 2-501.

13 4. **International Sales.** CISG does not contain a comparable provision.

14 **Cross References:**

15 **Definitional Cross References:**

16 **SECTION 2-814. STATUTE OF LIMITATIONS.**

17 (a) An action for breach of a contract or other obligation under this article
18 must be commenced within the later of four years after the right of action has
19 accrued under subsection (b) or (c) or one year after the breach was or should have
20 been discovered, but no longer than five years after the right of action accrued. The
21 original agreement may not extend the period of limitation but may reduce the
22 period of limitation to not less than one year. However, in a consumer contract, the
23 period of limitation may not be reduced.

24 (b) Except as otherwise provided in subsection (c), the follow rules apply:

1 (1) Except as otherwise provided in this subsection, a right of action
2 accrues for breach of contract when the breach occurs, even if the aggrieved party
3 did not have knowledge of the breach.

4 (2) For breach of a contract by repudiation under Section 2-712, a right
5 of action accrues at the earlier of when the aggrieved party elects to treat the
6 repudiation as a breach or when a commercially reasonable time for awaiting
7 performance has expired.

8 (3) For breach of a remedial promise, a right of action accrues when the
9 remedial promise is not performed when due.

10 (4) In an action by a buyer against a person that is answerable over to
11 the buyer for a claim asserted against the buyer, the buyer's right of action against
12 the person answerable over accrues at the time the claim was originally asserted
13 against the buyer.

14 (c) If a breach of warranty is claimed, the definitions in Section 2-401 and
15 the following rules apply:

16 (1) Except as otherwise provided in paragraph (4), a right of action
17 accrues for breach of a warranty that arises under Section 2-403, 2-404, 2-405, or
18 2-409 when a seller has tendered delivery of nonconforming goods to the immediate
19 buyer and has completed performance of any agreed installation or assembly of the
20 goods.

21 (2) Except as otherwise provided in paragraph (4), a right of action
22 accrues for a breach of an express warranty obligation arising under Section 2-408

1 when the remote buyer or remote lessee receives the new goods or goods sold or
2 leased as new goods.

3 (3) For a breach of the warranty arising under Section 2-402, a right of
4 action accrues when the aggrieved party discovers or should have discovered the
5 breach. However, an action for breach of the warranty of noninfringement may not
6 be commenced more than eight years after tender of delivery of the goods to the
7 aggrieved party.

8 (4) If the seller has made a representation about the performance or
9 quality of the goods which extends to the performance or quality of the goods after
10 delivery and that representation creates a warranty under Section 2-403 or a
11 warranty obligation under Section 2-408, a right of action accrues when the
12 immediate buyer under Section 2-403 or remote buyer or remote lessee under
13 Section 2-408(b) discovers or should have discovered that the goods did not
14 conform to that representation.

15 (d) If an action for breach of contract or other obligation commenced within
16 the applicable period of limitation is terminated but a remedy by another action for
17 the same breach is available, the other action may be commenced after the expiration
18 of the period of limitation and within six months after the termination of the first
19 action unless the termination resulted from voluntary discontinuance or from
20 dismissal for failure or neglect to prosecute.

(e) This section does not alter the law on tolling of a statute of limitations and does not apply to a right of action that accrued before the effective date of this article.

Comment

1. **Source:** Former Section 2-725.

2. **Comparison with former Article 2.** Section 2-814 continues the rules from former Section 2-725 with several substantive changes. First, subsection (a) provides a limited one year discovery period with a five year cap after accrual of the cause of action. Second, subsection (a) prevents shortening of the limitations period in a consumer contract. Third, subsection (b) sets forth accrual rules to address the accrual of causes of action for breach of contract other than for breach of warranty and specifically addresses accrual of a cause of action in the case of anticipatory repudiation, breach of a remedial promise, and actions against parties who are answerable over for claims. Fourth, subsection (c) sets forth specific accrual rules for breach of warranties created under Part 4 of this article and addresses issues of accrual of the cause of action when the seller has agreed to install or assemble the goods, when a warranty obligation under Section 2-408 is breached, when a title or noninfringement warranty is breached, and when a warranty extends to the future performance of the goods.

3. **Limitations period.** Subsection (a) continues the four year limitation period but provides for a possible one year extension to accommodate a discovery of the breach late in the four year period after accrual. The four year period under this article is shorter than many other statute of limitations for breach of contract and provides a period which is appropriate given the nature of the contracts under this article and modern business practices. This four year period governs all obligations under this article even if not technically part of a contract for sale of the goods, such as the obligations created under Section 2-408. As under prior law, the period of limitations can be reduced to one year by an agreement in a commercial contract. That reduction of the period for suit allows commercial parties to control the time for suit but is not appropriate in the context of consumer contracts where such a reduction is less likely to be a product of an explicitly bargained for exchange.

4. **Accrual rules for other than breach of warranty.** Subsections (b) and (c) provide rules for accrual of various types of actions that this Article allows. Certainty of commercial relationships is advanced when the rules for when a cause of action can be brought are clearly set forth. Subsection (b) treats accrual rules for actions other than for breach of a warranty claims while subsection (c) treats the

1 accrual rules for the various types of warranty claims that can be asserted pursuant
2 to the provisions of Part 4 of this Article.

3 Subsection (b)(1) states the general rule from prior law that a right of action
4 for breach of contract accrues when the breach occurs without regard to the
5 aggrieved party's knowledge of the breach. This general rule is then subject to the
6 three more explicit rules in subsection (b) and the rules for breach of warranty stated
7 in subsection (c).

8 Subsection (b)(2) provides an explicit rule about repudiation cases. In a
9 repudiation, the aggrieved party may await performance for a commercially
10 reasonable time or resort to any remedy for breach. Section 2-712. The accrual
11 rule for breach of contract in a repudiation case is keyed to the earlier of those two
12 time periods.

13 Subsection (b)(3) addresses the accrual of a cause of action for breach of a
14 remedial promise. Section 2-102. If a seller has promised to take remedial action
15 with respect to the goods, the cause of action accrues whenever the promised action
16 is not taken. The seller's obligation to take remedial action is governed in the first
17 instance by the seller's promise to do so. The terms of that promise will determine
18 when the remedial action should be taken, in other words, when that performance is
19 due. This explicit accrual rule for remedial promises addresses the problem in the
20 cases where the courts have mistakenly held that a cause of action for failure to
21 follow through on a promised remedy accrues when the warranty concerning the
22 quality of goods is breached. The warranty and the remedial promise represent two
23 separate obligations, each with their own accrual rule for breach of those
24 obligations. A breach of a remedial promise does not revive an expired limitations
25 period for breach of a warranty. Similarly, damages for breach of a remedial
26 promise are not measured by the damages for breach of a warranty. Section 2-827.
27 For example, assume the seller has made the implied warranty of merchantability and
28 has promised to repair or replace any parts that become defective within 90 days of
29 purchase. A cause of action for breach of the implied warranty of merchantability
30 accrues upon tender of delivery of the goods. Subsection (c)(1). A part becomes
31 defective 60 days after purchase and the seller refuses to repair or replace the
32 defective part. The seller has breached its remedial promise and the buyer's cause of
33 action for that breach of the remedial promise accrues upon the seller's refusal to
34 perform its promise. Damages for breach of that remedial promise would be
35 measured by the value of the promise to repair or replace the defective part. Section
36 2-827.

37 Subsection (b)(4) addresses the problem that has arisen in the cases when an
38 intermediary party is sued for a breach of obligation for which its seller or another
39 person is answerable over, but the limitations period in the upstream lawsuit has

1 already expired. This subsection allows a party four years, or if reduced in the
2 agreement, not less than one year, from when the claim is asserted against the buyer
3 for the buyer to sue the person who is answerable over to the buyer. Whether a
4 party is in fact answerable over to the buyer is not addressed in this section.

5 **5. Accrual rules for warranty claims.** Subsection (c) addresses the
6 accrual rules for breach of warranty or warranty obligations that arise based upon
7 the provisions of Part 4 of this article. The accrual rules should be read in light of
8 the definitions of terms in Part 4. Subsection (c)(1) continues the general rule that
9 an action for breach of warranty accrues in the case of an express or implied
10 warranty upon completion of tender of delivery of nonconforming goods to the
11 immediate buyer and upon the completion of assembly or installation, if the seller
12 has agreed to install or assemble the goods. If the seller has not agreed to install or
13 assemble the goods, then the cause of action would accrue upon tender of delivery
14 of the goods. This extension of the time of accrual in the case of installation or
15 assembly applies only in the case of the seller promising to install or assemble and
16 not in the case of a third party, independent of the seller, undertaking that action.
17 This accrual rule governs even when that warranty is extended to persons other than
18 the immediate buyer under Section 2-409. A cause of action of a person to whom a
19 warranty is extended under Section 2-409 accrues upon tender of delivery of the
20 goods to the immediate buyer.

21 Subsection (c)(2) addresses the accrual of the cause of action for breach of a
22 warranty obligation to the remote buyer or remote lessee that is governed by
23 Section 2-408. In that case, the cause of action accrues when the remote buyer or
24 remote lessee receives the new goods or the goods sold or leased as new goods in
25 the transaction with that remote buyer or remote lessee. That time period governs
26 even if that warranty is extended to other persons under Section 2-408. This accrual
27 rule balances the rights of the remote buyer or remote lessee to be able to have a
28 cause of action based upon the warranty obligation the seller has created against the
29 rights of the seller to have some limit on the length of time the seller is liable.

30 Both of these accrual rules are subject to an exception for representations
31 about the performance or quality of the goods after delivery in subsection (c)(4). If
32 the seller makes a representation such as “these goods will be defect free for five
33 years,” the seller is warranting that for five years the goods will not have defects. If
34 anytime within that five years, the goods have or develop a defect, the cause of
35 action accrues when the buyer discovers or should have discovered the defect. In
36 order to take advantage of this accrual rule, the representation must be a warranty
37 that arises under Section 2-403 or Section 2-408. Representations that are tied to
38 time periods or dates in the future would certainly qualify as representations about
39 future performance but are not necessary in order to qualify as an representation
40 about future performance.

1 While subsection (c)(4) is limited to representations about future
2 performance that arise in express warranties under Section 2-403 or warranty
3 obligations under Section 2-408, concern has been expressed that a similar concept
4 should apply in the case of implied representations in the circumstances such as with
5 building products where the usual useful life of the good is much longer than four
6 years and defects in the goods may not become apparent in the first four years after
7 tender of delivery. A State may in the exercise of its public policy decide that such a
8 rule would be appropriate. In that case subsection (c)(4) could be amended to
9 include implied warranties under Section 2-404.

10 Subsection (c)(3) allows a cause of action to accrue upon discovery of the
11 breach of warranty of title or of noninfringement when the aggrieved party discovers
12 or should have discovered the breach. In a typical case, the aggrieved party will not
13 discover the breach of warranty until it is sued by a party asserting title to the goods
14 or an infringement which could be many years after the buyer acquired the goods.
15 This accrual rule allows the aggrieved party appropriate leeway to then bring a claim
16 against the person who made the warranty of title or the warranty of
17 noninfringement. In recognition of a need to have a time of repose in an
18 infringement case, a party may not bring an action based upon a warranty of
19 noninfringement more than eight years after tender of delivery.

20 **6. Savings provision.** Subsection (d) continues the rule from former
21 Article 2 to allow a short period for bringing an action where suits begun within the
22 statute of limitations are terminated and the aggrieved party still has a remedy for
23 breach.

24 **7. Tolling.** Subsection (e) does not prescribe any rules for tolling the
25 running of the statute of limitations. If the seller has a right to cure a
26 nonconforming tender of delivery under Section 2-709, the time in which the seller
27 is effecting a cure may be an appropriate time period for tolling the running of the
28 statute of limitations in order to not prejudice the buyer's rights.

29 **8. International Sales.** CISG does not contain a comparable provision,
30 however, the Convention on the Limitation Period in the International Sale of
31 Goods may apply. Under that Convention, the limitations period is four years,
32 Article 8, and commences on the date the claim accrues, Article 9. Breach of
33 contract claims accrue upon the occurrence of the breach, claims of defect or
34 nonconformity accrue when the goods are handed over to the buyer or the buyer
35 refuses their tender, and claims for fraud accrue when the fraud is or should have
36 been discovered. Article 10. If a seller makes an express undertaking which is
37 stated to have effect for a certain period of time, the limitation period commences
38 on the date the buyer notifies the seller of the facts on which the claim is based as
39 long as that notice is within the time period of the seller's undertaking. Article 11.

1 In the case of a termination of a contract before performance is due, the limitations
2 period starts on the date of termination. Article 12(1). In an installment contract,
3 the limitation period commences on the date each performance obligation is
4 breached, or if terminated, on the date of notice of termination. Article 12(2). The
5 Convention also addresses tolling of the statute of limitations, Articles 13-21, and
6 has a repose period of 10 years from the time the limitations period initially started
7 to run, Article 23. The Convention does not allow the parties to reduce the
8 limitations time period but they may extend it. Article 22.

9 **Cross References:**

10 **Definitional Cross References:**

11 [SUBPART B. SELLER'S REMEDIES]

12 **SECTION 2-815. INDEX OF SELLER'S REMEDIES.**

13 (a) If the buyer is in breach of contract under Section 2-701, or in breach of
14 the whole contract under Section 2-710(c), the seller, as provided in the following
15 sections, may:

16 (1) withhold delivery of the goods under Section 2-816(a);

17 (2) stop delivery of the goods under Section 2-818(b);

18 (3) proceed with respect to goods still unidentified to the contract or
19 unfinished under Section 2-817;

20 (4) reclaim the goods under Section 2-816(b)(2);

21 (5) obtain specific performance under Section 2-807 or recover the price
22 under Section 2-822;

23 (6) resell the goods and recover damages under Section 2-819;

- 1 (7) recover damages for repudiation or nonacceptance under Section
2 2-821;
- 3 (8) recover incidental and consequential damages under Sections 2-805
4 and 2-806;
- 5 (9) cancel the contract under Section 2-808;
- 6 (10) recover liquidated damages under Section 2-809;
- 7 (11) enforce limited remedies under Section 2-810; or
- 8 (12) recover damages under Section 2-804.
- 9 (b) If a buyer becomes insolvent but is not in breach of contract, the seller
10 may:
- 11 (1) withhold or stop delivery of the goods under Section 2-818; or
- 12 (2) reclaim the goods under Section 2-816(b)(1).

13 **Comment**

14 1. **Source:** Former Section 2-703.

15 2. **Comparison with former Article 2.** Section 2-815 is derived from
16 former Section 2-703 but makes the following substantive changes. First, breach is
17 defined in Section 2-701 or Section 2-710(c). Second, this provision is not intended
18 to have substantive effect but functions merely as an index of the seller's available
19 remedies.

20 3. **Ability to exercise remedies.** The seller's remedies indexed in this
21 section indicate the remedies the seller may pursue subject to the principles stated in
22 Subpart A of this Part 8 and subject to the requirements of the individual sections in
23 Subpart B. The seller's ability to exercise its remedies listed in subsection (a)
24 depends upon whether the buyer has breached the contract. The remedies available
25 to the seller upon the buyer's insolvency are listed in subsection (b) and are fairly
26 limited to withholding delivery, stopping delivery and reclamation in a credit sale.
27 Not all of the remedies listed are available to the seller in every case but depend
28 upon application of the principles of full compensation to the aggrieved party
29 developed in Subpart A, notably Section 2-803. Whether the buyer has breached

1 the contract is determined under Section 2-701 and Section 2-710(c). In the case of
2 an installment contract where the breach is as to one or more installments but
3 substantial enough to be a breach of the whole contract, the principle of full
4 compensation to the aggrieved party should allow recovery of damages for the
5 partial breach.

6 4. **International Sales.** Compare CISG Article 61.

7 **Cross References:**

8 **Definitional Cross References:**

9 **SECTION 2-816. SELLER'S RIGHT TO WITHHOLD DELIVERY OF**
10 **GOODS OR TO RECLAIM GOODS AFTER DELIVERY TO BUYER.**

11 (a) If the buyer is in breach of contract under Section 2-701, the seller may
12 withhold delivery of the goods that are the subject of the breached contract. In an
13 installment contract, if the breach is of the whole contract under Section 2-710(c),
14 the seller may withhold delivery of any undelivered balance.

15 (b) The seller may reclaim goods delivered to the buyer under a contract for
16 sale only in the following circumstances:

17 (1) A seller that discovers that the buyer has received goods on credit
18 while insolvent may reclaim the goods upon a demand made within a reasonable
19 time after the buyer's receipt of the goods.

20 (2) If payment is due and demanded on delivery to the buyer, the seller
21 may reclaim the goods delivered upon a demand made within a reasonable time after
22 the seller discovers or should have discovered that payment was not made.

(c) Reclamation under subsection (b) is subject to the rights under this article of a buyer in ordinary course of business or other good-faith purchaser for value that vest before the seller takes possession under a timely demand for reclamation. Successful reclamation of the goods under subsection (b)(1) precludes all other remedies with respect to them.

Comment

1. **Source:** Former Sections 2-507(2), 2-702, 2-703(a).

2. **Comparison with former Article 2.** This section continues the rules from former Sections 2-507(2), 2-702, and 2-703(a) with the following substantive changes. First, the seller's right to reclaim in a credit sale under subsection (b)(1) is revised to allow reclamation upon a demand made within a reasonable time rather than only within 10 days after the buyer's receipt of goods. Second, the cash sale right to reclaim implied under former Section 2-507(2) is codified in subsection (b)(2). Third, the priority of the seller's right to reclaim as against parties who are buyers in the ordinary course or good faith purchasers from a buyer is addressed under a first in time principle that is keyed to the time the seller actually takes possession pursuant to the timely demand for reclamation.

3. **Withholding delivery.** Subsection (a) is a statement of the principle in former Section 2-703(a). Section 2-701 provides different means by which a buyer may breach a contract. The seller need not continue on with delivery of the goods if the buyer has breached. Section 2-701. In an installment contract, however, the breach must be of a magnitude to be a breach of the whole contract under Section 2-710(c) before the seller can withhold its future performance. Under principles of nemo dat, the buyer's creditors can assert no greater rights to the goods than the buyer could assert and thus the buyer's creditors are subject to the seller's right to withhold the goods under this section. Section 2-504(a).

4. **Right to reclaim the goods.** Subsection (b) provides for the seller's ability to reclaim goods that have been delivered to a buyer. Having a right to reclaim, however, is not an authorization for a seller to reclaim the goods through self help without the buyer's consent. If the buyer does not consent to the exercise of the right of reclamation, the seller may enforce that right through the appropriate civil action. This right to reclamation exists in a credit sale if the delivery is made when the buyer is insolvent. The basis of this right is the assumption that a buyer who receives goods on credit is making a tacit representation of solvency and receipt when insolvent is fraudulent against the seller. This section has been

1 changed from prior law to eliminate artificial barriers to the seller's right to reclaim
2 in a credit sale. In a cash sale, the buyer may tender a payment that later fails, such
3 as a bounced check. In that case, subsection (b)(2) governs the seller's right to
4 reclaim. This rule codifies the result in PEB Commentary 1. A seller should note,
5 however, that if the buyer enters bankruptcy, compliance with this section and with
6 11 U.S.C. § 546(c) is necessary in order to have the reclamation claim recognized in
7 bankruptcy. If the seller does not have the right to reclaim under this section, the
8 seller's rights to recover the goods delivered to the buyer depend upon the seller's
9 compliance with Article 9 in obtaining a security interest in the goods.

10 **5. Priority of right to reclaim as against third parties.** Subsection (c)
11 addresses the priority of the seller's right to reclaim under subsection (b) against
12 other persons' claims to the goods. In order for the seller's reclamation right to
13 triumph over the rights of a buyer in the ordinary course of business or a good faith
14 purchaser for value, the seller must actually take possession of the goods back from
15 the buyer pursuant to a demand for reclamation that is timely under subsection (b)
16 before the rights of the other persons vest. Vesting means when a person has
17 fulfilled all necessary conditions to becoming a buyer in the ordinary course, Section
18 1-201(9), or becoming a good faith purchaser for value, Section 1-201(32). For
19 example, assume a buyer's secured party's security interest attaches to the goods
20 pursuant to an after acquired property clause under Article 9. That attachment of
21 the security interest would be the vesting of the secured party's rights in the goods.
22 Unless the secured party has not acted in good faith, the secured party's right as a
23 good faith purchaser for value will triumph over the seller who seeks to reclaim as
24 the attachment of the security interest normally will be prior in time to the seller's
25 repossession of the goods under the timely reclamation demand.

26 As under prior law, successful reclamation based upon the buyer's
27 insolvency precludes the exercise of other remedies as to the goods involved. This
28 preclusion is not appropriate to apply in the cash sale reclamation as the cash sale
29 reclamation also involves a breach of contract for which the seller should have
30 available the remedies for breach as provided in this article in accordance with the
31 general policy against an election of remedies. *Burk v. Emmick*, 637 F.2d 1172 (8th
32 Cir. 1980).

33 **6. Right to proceeds.** The right to reclaim extends only to the goods
34 involved and does not extend to any proceeds of the goods.

35 **7. International Sales.** Under the CISG, a seller who avoids a contract for
36 fundamental breach can reclaim delivered goods from the buyer. Although goods
37 delivered either for cash or on credit can be reclaimed, there are no express
38 limitations on the time or method of reclamation. See Articles 64(1), 81(2), and
39 84(2).

1 **Cross References:**

2 **Definitional Cross References:**

3 **SECTION 2-817. SELLER’S RIGHT TO IDENTIFY GOODS TO**
4 **CONTRACT DESPITE BREACH OR TO SALVAGE UNFINISHED**
5 **GOODS.**

6 (a) If the buyer is in breach of contract, an aggrieved seller may:

7 (1) identify to the contract conforming goods not already identified if
8 they are in the seller’s possession or control at the time the seller learned of the
9 breach of contract; and

10 (2) resell goods that are shown to have been intended for the particular
11 contract, even if those goods are unfinished.

12 (b) If goods are unfinished at the time of breach of contract, an aggrieved
13 seller, in the exercise of reasonable commercial judgment for the purposes of
14 avoiding loss and of effective realization, may complete the manufacture and wholly
15 identify the goods to the contract, cease manufacture and resell for scrap or salvage
16 value, or proceed in any other reasonable manner.

17 **Comment**

18 1. **Source:** Former Section 2-704.

19 2. **Comparison with former Article 2.** Section 2-817 continues the rules
20 from former Section 2-704 without substantive change.

21 3. **Purpose of section.** Subsection (a) allows a seller to identify goods to
22 the contract that have not already been identified in order to allow the seller to resell
23 the goods under Section 2-819 or to obtain the price in the appropriate case when
24 resale is not practicable under Section 2-822. Subsection (b) allows the seller to

1 take action as to unfinished goods in order to minimize loss. The burden is on the
2 buyer to demonstrate that any action taken to finish the goods is commercially
3 unreasonable. The seller's exercise of these options is of course subject to the
4 principles stated in Subpart A, including the mitigation obligation stated in Section
5 2-803, and the obligation of good faith. The reasonableness of the seller's actions
6 under this section should be judged in light of the circumstances available to the
7 seller at the time the seller acted and not evaluated with hindsight.

8 4. **International Sales.** CISG has no comparable provision.

9 **Cross References:**

10 **Definitional Cross References:**

11 **SECTION 2-818. SELLER'S REFUSAL TO DELIVER BECAUSE OF**
12 **BUYER'S INSOLVENCY; STOPPAGE IN TRANSIT OR OTHERWISE.**

13 (a) A seller that discovers that the buyer is insolvent may refuse to make
14 delivery except for cash, including payment for all goods previously delivered under
15 the contract.

16 (b) Subject to subsection (d), the seller may stop delivery of goods in the
17 possession of a carrier or other bailee if the buyer is insolvent or repudiates or does
18 not make a payment due before delivery or if, for any other reason, the seller has a
19 right to withhold or reclaim the goods.

20 (c) Under subsection (b), as against a buyer, the seller may stop delivery
21 until:

22 (1) receipt of the goods by the buyer;

23 (2) acknowledgment to the buyer by any bailee of the goods, other than a
24 carrier, that the bailee holds the goods for the buyer;

(3) acknowledgment to the buyer by a carrier by reshipment or as warehouseman that the carrier holds the goods for the buyer; or

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

(d) If notice to stop delivery has been given, the following rules apply:

(1) The notice must afford the carrier or bailee a reasonable opportunity to prevent delivery of the goods.

(2) After notice, the carrier or bailee shall hold and deliver the goods according to the directions of the seller. The seller is liable to the bailee or carrier for any resulting charges or damages. A carrier or bailee need not stop delivery if the seller does not provide indemnity for charges or damages upon demand of the carrier or bailee.

(3) If a negotiable document of title has been issued for goods, the carrier or bailee need not obey a notice to stop until surrender of the document.

(4) A carrier or bailee that has issued a nonnegotiable document of title need not obey a notice to stop received from a person other than the person named in the document as the person from which the goods have been received for shipment or storage.

Comment

1. Source: Former Sections 2-702(1) and 2-705.

2. Comparison with former Article 2. This section continues the rules from former Sections 2-702(1) and 2-705 with the following substantive changes. First, subsection (b) eliminates the restriction on the right of stoppage in transit to “carload, truckload, planeload or larger shipments” as incompatible with current

1 shipping capabilities. Second, the carrier or bailee is protected against harm from
2 the stoppage in transit by requiring the seller to provide indemnity for charges or
3 damages upon demand of the carrier or bailee.

4 **3. Right to withhold delivery upon buyer's insolvency.** Subsection (a)
5 allows a seller to withhold delivery except for cash for that delivery and all previous
6 deliveries upon discovering the buyer's insolvency as provided in former Section
7 2-702(1).

8 **4. Right to stop delivery.** Subsection (b) allows a seller to stop delivery
9 when the buyer is insolvent, the buyer has breached the contract, or the seller
10 otherwise has a right to stop performance such as in the case of insecurity, see
11 Section 2-711. Where a stoppage occurs for insecurity under Section 2-711, if the
12 assurances are forthcoming, delivery must be resumed. If the seller has no right to
13 stop delivery, the seller's actions may be a breach of contract if it results in an
14 interference with the buyer's right to a tender of delivery of the goods. Section
15 2-701, Section 2-602. A bailee or a carrier who obeys an unjustified stop order may
16 have liability to the buyer under Article 7 for which the bailee or carrier may demand
17 indemnity against the seller under subsection (d)(2). After an effective stoppage of
18 delivery, the seller's rights in the goods are the same as if the seller had never made
19 a delivery.

20 The right to stop delivery is no longer limited to when the buyer has a right
21 to stop an entire "carload, truckload, planeload or larger shipments of express or
22 freight." This language is out of date in light of changing shipping methods and
23 practices which now allows individual tracking of goods in shipment. The carrier or
24 bailee is protected from harm by the on demand indemnity provision added to
25 subsection (d)(2). The right to stop delivery under subsection (b) is subject to the
26 rules under subsection (d).

27 The buyer's receipt of goods under subsection (b)(1) includes receipt by a
28 subpurchaser when the seller makes shipment directly to the subpurchaser. In that
29 case, the subpurchaser's receipt of the goods is receipt of the goods by the buyer so
30 as to preclude the seller's right to stop delivery.

31 **5. Time for exercising right to stop delivery.** Subsection (c) restates the
32 rules from former Section 2-705(2) on when the seller has the right to stop the
33 goods in terms of when it is too late for the seller to effectively exercise its rights
34 under subsection (b) as against the buyer. Under subsection (c)(3), as under former
35 law, a diversion of shipment which is merely an incident to the original contract of
36 transportation or a change in name of the person named in the document is not a
37 reshipment. Acknowledgment by a carrier as warehouseman requires a contract

1 different from the original shipment whereby the carrier does not merely extend the
2 transit but undertakes to store the goods.

3 **6. Rights of carrier or bailee.** Subsection (d) is concerned with the rights
4 of the carrier or bailee to whom the seller is communicating its right to stop delivery
5 as against the buyer and seeks to provide reasonable rules for the protection of the
6 carrier or bailee.

7 **7. Creditor's rights.** As with the right to withhold delivery under Section
8 2-816(a), the buyer's creditors are subject to the seller's rights under this section to
9 withhold or stop delivery. Section 2-504(a).

10 **8. International Sales.** CISG Article 71(1) states when a party may
11 suspend performance of obligations and Article 71(2) carries that right over to cases
12 where the goods have been "dispatched." These provisions have little detail.
13 Article 71(2) provides that delivery can be suspended even if the buyer has a
14 document entitling the buyer to obtain the goods. The Article 2 rule in subsection
15 (c)(3) is to the contrary. Article 71(3), however, requires the party suspending
16 performance to give immediate notice of suspension to the other and to continue
17 performance if the other provides adequate assurance of his performance. These
18 latter requirements are not found in Article 2.

19 **Cross References:**

20 **Definitional Cross References:**

21 **SECTION 2-819. SELLER'S RESALE.**

22 (a) If the buyer is in breach of contract, the seller may resell the goods
23 concerned that are in the seller's possession or control. If the resale is made in good
24 faith, within a commercially reasonable time, and in a commercially reasonable
25 manner, the seller may recover the contract price less the resale price together with
26 any consequential and incidental damages, less expenses saved as a result of the
27 breach.

28 (b) A resale:

1 (1) may be at a public auction or at a private sale, including a private
2 auction, a sale by one or more contracts to sell, or an identification to an existing
3 contract of the seller;

4 (2) may be as a unit or in parcels and at any time and place and on any
5 terms, but every aspect of the sale, including the method, manner, time, place, and
6 terms, must be commercially reasonable; and

7 (3) must be reasonably identified as referring to the breached contract,
8 but the goods need not be in existence or have been identified to the contract before
9 the breach.

10 (c) If a resale is at a public auction, the following rules apply:

11 (1) Only identified goods may be sold unless there is a recognized
12 market for the public sale of futures in goods of the kind.

13 (2) The resale must be made at a usual place or market for public sale if
14 one is reasonably available. Except in the case of goods that are perishable or
15 threaten to decline in value speedily, the seller shall give the buyer reasonable notice
16 of the time and place of the resale.

17 (3) If the goods are not to be within the view of persons attending the
18 sale, the notice of sale must state the place where the goods are located and provide
19 for their reasonable inspection by prospective bidders.

20 (4) The seller may buy the goods.

21 (d) A good-faith purchaser at a resale takes the goods free of any rights of
22 the original buyer, even if the seller fails to comply with this section.

(e) The seller is not accountable to the buyer for any profit made on a resale. However, a person in the position of a seller or a buyer which has rightfully rejected or justifiably revoked acceptance shall account for any excess over the amount of the claim secured by the security interest provided in Section 2-829(b).

(f) A seller that does not resell in the manner required under this section is not barred from any other remedy.

Comment

1. **Source:** Former Section 2-706.

2. **Comparison with former Article 2.** This section continues the rules from former Article 2 with three substantive changes. First, the seller is no longer required to give notice to the buyer in the case of a private resale. Second, subsection (f) is new. Third, the seller is entitled to recover consequential damages.

3. **Seller's right to resell.** Subsection (a) allows the seller to resell the goods after a buyer's breach of contract if the seller has possession or control of the goods. See Section 2-701 on buyer's breach of contract. The seller may have possession or control of the goods at the time of the breach or may have regained possession of the goods under Section 2-716(b)(2) or upon the buyer's wrongful rejection. If the seller has regained possession of the goods pursuant to its rights under Article 9 after delivery to the buyer, Article 9 controls the seller's rights of resale.

4. **Resale price as basis for damages.** If the seller resells the goods in compliance with this section, the seller may then use the resale price in determining its damages for breach of contract. A seller who has resold the goods pursuant to the requirements of this section has mitigated its harm in compliance with the principle of Section 2-803(b).

5. **Conducting the sale.** Subsection (b) prescribes the requirements for a resale under this section. A seller may sell at a public auction or a private sale as long as the choice is commercially reasonable. A public auction is one in which members of the public are admitted. All auctions are not public auctions. A private sale may be by auction or by solicitation directly or through a broker. Sales by public auction have further requirements stated in subsection (c) which requirements follow former law. The requirement of notice in a private sale as under former law is deleted.

1 The seller's resale must be in good faith, made at a commercially reasonable
2 time and made in a commercially reasonable manner. Commercially reasonable
3 practices are allowed in order to realize as high a price as possible under the
4 circumstances. What is a reasonable time depends upon the nature of the goods, the
5 conditions of the market and other circumstances of the case. If the seller receives a
6 demand from the buyer for inspection of the goods, Section 2-718, the time may be
7 appropriately lengthened. The seller need not resale at the place for delivery of the
8 goods if that place is not commercially reasonable. The seller may resell on different
9 terms and conditions other than the breached contract if such action is commercially
10 reasonable.

11 The seller may identify goods to the contract after the breach, Section 2-817,
12 but must identify the goods being sold as pertaining to the breached contract.

13 **6. Resale by public auction.** Subsection (c) states requirements for resale
14 by public auction which operate in addition to the requirements of subsection (b)
15 which pertain to all resales under this section. Subsection (c)(1) allows goods not
16 identified to the contract to be sold only if there is a recognized market for public
17 sales of futures in that type of good. Subsection (c)(2) is designed to allow for
18 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
20 where prospective bidders may reasonably be expected to attend. If such a market
21 is not reasonably available, a duly advertised public auction may be held at another
22 place where prospective bidders may reasonably be expected to attend even if it is
23 not a "usual" place. A buyer is entitled to notice of a public sale, except in the cases
24 noted, in order to give the buyer an opportunity to bid or secure the attendance of
25 other bidders. Subsection (c)(3) is designed to permit intelligent bidding.
26 Subsection (c)(4) allows the seller to buy the goods which may work to the benefit
27 of the buyer by allowing a higher price to be obtained than would otherwise.

28 **7. Purchaser's rights.** Subsection (d) allows a purchaser to take the goods
29 free of the rights of the buyer even if the seller has not complied with this section.
30 The policy of resolving any doubts in favor of the resale purchaser operates to the
31 benefit of the buyer by increasing the price the purchaser should be willing to pay.

32 **8. Obligations of a person in position of seller or buyer who is selling**
33 **goods in enforcement of security interest.** Subsection (e) recognizes that when
34 the seller is entitled to resell under this article, the goods are the seller's goods and
35 the purpose of resale under this section is to set the seller's damages as against the
36 buyer. A person in the position of the seller or a buyer asserting a security interest
37 in the goods under Section 2-829(b) has only a limited right in the goods and so
38 must account to the seller for any excess over the limited amount necessary to
39 satisfy those rights.

9. Relation to other remedies. Subsection (f) parallels the provision in the cover section, Section 2-825. A seller who fails to comply with the requirements of this section may recover damages under Section 2-821. A seller's damages under Section 2-821 may be affected by the mitigation principle stated in Section 2-803. In addition, a seller may recover both incidental and consequential damages under Sections 2-805 and 2-806 assuming the seller's damages have not been liquidated under Section 2-809 or limited under Section 2-810.

10. **International Sales.** CISG Article 75 permits the seller to resell the goods after the contract has been avoided for fundamental breach, but contains none of the detail in Section 2-819. If the seller resells, damages are measured by the “difference between the contract price and the price in the substitute transaction.” Furthermore, if the seller resells, damages measured by the difference between the contract price and the market price are not available. Article 76.

Cross References:

Definitional Cross References:

SECTION 2-820. PERSON IN POSITION OF SELLER.

(a) A “person in the position of a seller” includes, as against a principal, an agent that has paid or become responsible for the price of goods on behalf of the principal or any person that otherwise holds a security interest or other right in goods similar to that of a seller.

(b) A person in the position of a seller has the same remedies as a seller under this article.

Comment

1. Source: Former Section 2-707.

2. Comparison with former Article 2. Section 2-820 restates the rules from former Section 2-707 with one substantive change. A person in the position of the seller gets all of the seller's remedies. Former Section 2-707 appeared to limit the remedies to withholding or stopping delivery, reselling and incidental damages for no apparent reason.

1 3. **International Sales.** CISG has no comparable provision.

2 **Cross References:**

3 **Definitional Cross References:**

4 **SECTION 2-821. SELLER’S DAMAGES FOR BREACH BASED ON**
5 **MARKET PRICE, LOST PROFIT, OR RELIANCE.**

6 (a) If the buyer is in breach of contract, the seller may recover damages
7 based upon the contract price less the market price of comparable goods, together
8 with any incidental and consequential damages, less expenses saved as a result of the
9 breach, as follows:

10 (1) Except as otherwise provided in paragraph (2), the market price of
11 comparable goods is determined at the time and place for tender of delivery.

12 (2) In the case of a repudiation governed by Section 2-712, the market
13 price of comparable goods is determined at the place for tender of delivery and at
14 the expiration of a commercially reasonable period after the seller learned of the
15 repudiation, but no later than the time stated in paragraph (1). The period includes a
16 commercially reasonable period for awaiting performance under Section 2-712 and
17 any further commercially reasonable period for obtaining any substitute
18 performance.

19 (b) If the measure of damages under subsection (a) or Section 2-819 is
20 inadequate to put the seller in as good a position as if the other party had fully

1 performed, the seller may recover, together with incidental and consequential
2 damages:

3 (1) lost profits, including reasonable overhead, resulting from the breach
4 of contract determined in any reasonable manner; and

5 (2) reasonable expenditures made in preparing for or performing the
6 contract.

7 **Comment**

8 1. **Source:** Former Sections 2-708 and 2-723(1).

9 2. **Comparison with former Article 2.** This section continues the rules
10 from former Sections 2-708 and 2-723(1) with the following substantive changes.
11 First, subsection (a) makes clear that the seller may recover the difference between
12 the contract price and the market price, not the unpaid contract price and the market
13 price. Section 2-809 addresses the buyer's right to restitution when the buyer is in
14 breach of contract. Second, subsection (a)(2) resolves the issue of when the market
15 price should be measured in the case of an anticipatory repudiation. Third,
16 subsection (b) is redrafted to allow for the seller to recover lost profits and reliance
17 expenditures in an appropriate case. Fourth, the seller is entitled to recover
18 consequential damages.

19 3. **Market price measurement.** Subsection (a) provides for the seller to
20 recover damages based upon the market price when the buyer has breached the
21 contract. Section 2-701 and Section 2-710(c). This recovery should be given in
22 light of the general principles of Section 2-803, including the mitigation principle.
23 Subsection (a)(1) follows former law in using the time and place for tender as the
24 appropriate time and place for measuring market price in the case of the buyer's
25 breach other than by repudiation. The provisions of this Article on proving the
26 market price are relevant to determining the market price in order to measure the
27 seller's damages. Section 2-812. The time and place of tender of delivery is
28 determined under Section 2-602.

29 Subsection (a)(2) addresses the question troublesome under former law on
30 the time when the market price should be measured in the case of an anticipatory
31 repudiation by the buyer. This section provides that the market price should be
32 measured in a repudiation case at the end of the time for awaiting performance
33 under Section 2-712 and any further time that the seller would have needed to
34 obtain substitute performance. This time is designed to approximate the market

1 price at the time the seller would have resold the goods, even though the seller has
2 not done so under Section 2-819, and is designed to attempt to put the seller in the
3 position the seller would have been in if the buyer had performed, Section 2-803, by
4 approximating the harm the seller has suffered without allowing the seller an
5 unreasonable time to speculate on the market at the buyer's expense. This rule on
6 measuring the time for measuring market price in a repudiation case is a particular
7 application of the mitigation principle incorporated in Section 2-803. This time for
8 measuring market price in the repudiation case cannot extend beyond the time for
9 tender of delivery.

10 **Contract price.** The price term in a long term contract may or may not
11 have an escalation clause. The time for determining the contract price in a long term
12 contract should not necessarily be tied to the time for measuring the market price in
13 the repudiation situation. What is the appropriate contract price should be
14 determined in light of the general principle of full compensation for the aggrieved
15 party under Section 2-803(a).

16 **4. Lost profits or reliance based damages.** Subsection (b) is a revision of
17 the rule from former Section 2-708(2) that had been interpreted by the courts to
18 allow sellers to recover lost profits and reliance expenditures. The former
19 subsection (2) was used in the cases of uncompleted goods, jobbers or middlemen,
20 or lost volume sellers. This remedy is an alternative to the remedy under Section
21 2-819 or 2-821(a) and is available when the damages based upon resale of the goods
22 or market price of the goods does not achieve the goal of full compensation for
23 harm caused by the buyer's breach. Section 2-803. No effort has been made to
24 state how lost profits should be calculated given the variety of situations in which
25 this measurement may be appropriate and the variety of ways in which courts have
26 measured lost profits. If a seller can recoup its reliance expenditures by salvage,
27 resale or other reasonable measures, the mitigation principle in Section 2-803 would
28 operate to prevent the seller from recovering those expenditures from the buyer.

29 **5. Incidental and consequential damages.** The seller may recover
30 incidental and consequential damages, Sections 2-805 and 2-806, assuming that
31 there is no agreement limiting the seller's ability to recover those damages. Section
32 2-809 and Section 2-810.

33 **6. International Sales.** If the contract is avoided and the aggrieved seller
34 has not resold the goods under CISG Article 75, Article 76 allows for contract
35 damages to be measured by the difference between the contract price and the
36 current price.

37 **Cross References:**

1 **Definitional Cross References:**

2 **SECTION 2-822. ACTION FOR PRICE.**

3 (a) If the buyer fails to pay the price as it becomes due, the seller may
4 recover, together with any incidental and consequential damages, the price of:

5 (1) goods accepted;

6 (2) conforming goods lost or damaged after risk of their loss has passed
7 to the buyer, but, if the seller has retained or regained control of the goods, the
8 seller may recover the price only if the loss or damage has occurred within a
9 commercially reasonable time after the risk of loss has passed to the buyer; and

10 (3) goods identified to the contract, if the seller is unable after a
11 reasonable effort to resell them at a reasonable price or the circumstances reasonably
12 indicate that the effort would be unavailing.

13 (b) A seller that remains in control of the goods and sues for the price shall
14 hold for the buyer any goods identified to the contract. If the seller is entitled to the
15 price and resale becomes possible, the seller may resell the goods under Section
16 2-819 at any time before the collection of the judgment. The net proceeds of the
17 resale must be credited to the buyer. Payment of the judgment entitles the buyer to
18 any goods not resold.

19 (c) If the buyer is in breach of contract, a seller that has sued for but is held
20 not to be entitled to the price under this section may still obtain damages under
21 Section 2-821.

1 **Comment**

2 1. **Source:** Former Section 2-709.

3 2. **Comparison with former Article 2.** This section continues the rules
4 from former Article 2 with the following substantive changes. First, subsection
5 (a)(2) clarifies that the limitation on recovering the price when the goods are
6 destroyed after the risk of loss has passed to the buyer applies only if the seller had
7 regained control of the goods. Second, subsection (b) clarifies former law that the
8 seller's resale must comply with the requirements of Section 2-819. Third, the seller
9 may recover consequential damages.

10 3. **Seller's right to the price.** Subsection (a) allows the seller to recover
11 the price in the same three situations as under former law. As under former law, this
12 section is exhaustive in its enumeration of cases where an action for the price is
13 allowed. Goods accepted under subsection (a)(1) include only goods as to which
14 there has been no justified revocation of acceptance under Section 2-708.
15 Subsection (a)(2) allows the seller to recover the price if the goods were conforming
16 and if the buyer has the risk of loss at the time the goods were lost or damaged.
17 Section 2-612. In the circumstance where the buyer has wrongfully forced
18 conforming goods back on the seller so that the seller is in possession or control of
19 the goods, the seller may still obtain the price for the goods if the loss or damage to
20 the goods takes place within a commercially reasonable time after the risk of loss
21 has passed to the buyer. If the loss or destruction of the goods takes place after that
22 commercially reasonable time, the seller may have an action against the buyer for
23 breach of its obligations under the contract under other sections of this article but
24 can no longer recover the price. In effect the risk of loss for the goods has passed
25 back to the seller. Subsection (a)(3) allows a seller to obtain the price of identified
26 goods if the seller cannot resell the goods. The goods may be identified to the
27 contract after the breach. Section 2-817.

28 4. **Buyer's rights to the goods and seller's resale.** Subsection (b) requires
29 that the seller who sues for the price shall hold goods for the buyer if the seller has
30 control of the goods. If a resale becomes possible, the seller may resale the goods
31 under Section 2-819 and credit the proceeds against any judgment for the price.

32 5. **Relation to other remedies.** Subsection (c) allows a seller to recover
33 damages for the buyer's breach in the same lawsuit in the event the seller is not
34 entitled to the price under this section. In addition to recovery under this section,
35 the seller may recover incidental and consequential damages, Sections 2-805 and
36 2-806, assuming that there is no agreement limiting the seller's ability to recover
37 those damages. Section 2-809 and Section 2-810.

6. **International Sales.** Under CISG Article 62, the seller may “require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.” There are no conditions, such as those found in Section 2-822, and there is no specific provision permitting recovery of the price.

Cross References:

Definitional Cross References:

[SUBPART C. BUYER'S REMEDIES]

SECTION 2-823. INDEX OF BUYER’S REMEDIES. If the seller is in breach of contract under Section 2-701, or in breach of the whole contract under Section 2-710(c), the buyer, as provided in the following sections, may:

(1) recover the price paid under Section 2-829(a) or deduct damages from price unpaid under Section 2-828;

(2) cancel the contract under Section 2-808;

(3) cover and obtain damages under Section 2-825;

(4) recover damages based on market price under Section 2-826;

(5) recover damages for breach with regard to accepted goods under Section 2-827;

(6) recover identified goods under Section 2-824;

(7) obtain specific performance under Section 2-807;

(8) enforce a security interest under Section 2-829(b);

- 1 (9) recover incidental and consequential damages under Sections 2-805 and
2 2-806;
3 (10) recover liquidated damages under Section 2-809;
4 (11) enforce limited remedies under Section 2-810; or
5 (12) recover damages under Section 2-804.

6 **Comment**

7 1. **Source:** Former Section 2-711(1) and (2).

8 2. **Comparison with former Article 2.** Section 2-823 is derived from
9 former Section 2-711(1) and (2) but makes the following substantive changes. First,
10 breach is defined in Section 2-701 or Section 2-710(c). Second, this provision is not
11 intended to have substantive effect but functions merely as an index of the buyer's
12 available remedies.

13 3. **Ability to exercise remedies.** Consistent with the revisions to the
14 seller's index section, this section indexes the aggrieved buyer's remedies. The
15 buyer's ability to exercise its remedies depends upon whether the seller has breached
16 the contract. A seller's cure of its breach under Section 2-709 may preclude the
17 buyer's ability to resort to any remedy. Whether the seller has breached the contract
18 is determined under Section 2-701 or 2-710. In the case of an installment contract,
19 where the breach is as to one or more installments but not substantial enough to be a
20 breach of the whole contract, the principle of full compensation to the aggrieved
21 party should allow recovery of damages for the partial breach. Whether a buyer is in
22 fact entitled to any particular remedy depends upon the requirements of each
23 particular section in Subpart C and the principles of Subpart A, including Section
24 2-803.

25 4. **International Sales.** Compare CISG Article 45.

26 **Cross References:**

27 **Definitional Cross References:**

28 **SECTION 2-824. BUYER'S RIGHT TO GOODS.**

(a) A buyer that pays all or a part of the price of goods identified to the contract, whether or not they have been shipped, and makes and keeps open a tender of full performance has a right to recover the goods from the seller if the seller repudiates or does not deliver as required by the contract.

(b) The buyer may recover from the seller by [replevin, detinue, sequestration, claims and delivery, or the like] goods identified to a contract if:

(1) after reasonable efforts, the buyer is unable to effect cover for the goods or the circumstances reasonably indicate that an effort to obtain cover would be unavailing and the buyer tenders full performance of its obligation under the contract; or

(2) the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

(c) A buyer's right vests under subsection (a) or (b) upon identification of the goods to the contract for sale even if the seller has not then repudiated the contract or failed to deliver as required by the contract.

Legislative Note: States should insert the appropriate name for their civil action for replevin, claim and delivery, detinue, sequestration or the like in subsection (b).

Comment

1. **Source:** Former Sections 2-502 and 2-716(3).

2. Comparison with former Article 2. This section continues the rules from former Sections 2-502 and 2-716(3) with the following substantive changes. First, the prepaying buyer's right to recover the goods is no longer limited to cases of the seller's insolvency and is not limited to conforming goods. Second, subsection (c) is new and provides a rule for determining priority of interests in the goods in conjunction with Section 2-505.

1 **3. Prepaying buyer's rights to the goods.** Subsection (a) expands the
2 ability of a prepaying buyer to recover the goods from the seller. Thus the right is
3 no longer limited to cases of seller's insolvency and the goods need only be
4 identified and need not be conforming. There is significant doubt whether a right to
5 the goods that is triggered by insolvency is enforceable in a seller's bankruptcy. See
6 11 U.S.C. § 545; *In re G. Paoletti, Inc.*, 205 B.R. 251, 262-64 (Bankr. N.D. Cal.
7 1997). The buyer's right under this section to recover the goods by making and
8 keeping a tender of full performance allows the buyer a mechanism for obtaining the
9 goods from the seller even if the buyer could obtain substitute goods elsewhere.
10 This protects the prepaying buyer's deposit for the goods. This section does not
11 create a right to buyer's self help to the goods but rather a right to bring an action to
12 obtain the goods from the seller. As under former law, a financing buyer should
13 comply with the requirements of Article 9 for taking a security interest in the goods
14 in order to fully protect its rights to the goods.

15 **4. Buyer's right to obtain goods by replevin or similar right.**
16 Subsection (b) continues the rule allowing for replevin or similar legal remedy when
17 the buyer is unable to obtain cover for identified goods. Although similar to
18 subsection (a), this right is available even when the buyer has not paid any of the
19 price for the goods and under state procedural rules governing replevin or similar
20 rights may create a right to obtain the goods prior to judgment on the merits. The
21 buyer's right to obtain the goods under this section depends upon the buyer
22 tendering its full performance under the contract or if the seller has shipped under
23 reservation, the buyer must tender payment of the security interest created. Section
24 2-604. Because a shipment under reservation may be a breach of the contract for
25 sale, the buyer need not tender full performance of its obligations, but need only
26 satisfy the security interest created by such shipment.

27 **5. Priority of the buyer's rights as against other parties.** Subsection (c)
28 is a new section designed to bolster the priority rule in Section 2-505(a) to allow the
29 buyer who has the right to obtain the goods to also prevail against creditors of the
30 seller in certain situations as defined in Section 2-505. Subsections (a) and (b)
31 govern the rights of the buyer as against the seller. Subsection (c) and Section
32 2-505 operate to govern the rights of the buyer as against the seller's creditors. See
33 Comment to Section 2-505.

34 **6. International Sales.** CISG has no provision dealing with a buyer's right
35 to goods on the seller's insolvency and, in general, does not deal with the claims of
36 the seller's creditors to those goods. But see Articles 41-43. Article 46(1),
37 however, states that the "buyer may require performance by the seller of his
38 obligations" without regard to whether the buyer has prepaid the price. Revised
39 Section 2-824 is now closer to Article 46(1) in granting the buyer what amounts to
40 specific performance. See CISG Article 28, which states that a court is not "bound"

1 to specifically enforce a contract under CISG “unless the court would do so under
2 its own law in respect of similar contracts of sale not governed by this Convention.”

3 **Cross References:**

4 **Definitional Cross References:**

5 **SECTION 2-825. COVER; BUYER’S PURCHASE OF SUBSTITUTE**
6 **GOODS.**

7 (a) If the seller is in breach of contract, the buyer may cover by making in
8 good faith and without unreasonable delay any reasonable purchase of, contract to
9 purchase, or arrangement to procure comparable goods to substitute for those due
10 from the seller.

11 (b) A buyer that covers in the manner required by subsection (a) may
12 recover damages measured by the cost of covering less the contract price, together
13 with any incidental or consequential damages, less expenses saved as a result of the
14 seller’s breach of contract.

15 (c) A buyer that does not cover in a manner required under subsection (a) is
16 not barred from any other remedy.

17 **Comment**

18 1. **Source:** Former Section 2-712.

19 2. **Comparison with former Article 2.** This section continues the rules
20 from former Section 2-712 with the following substantive change. Subsection (a)
21 recognizes that the buyer may cover by making an arrangement other than purchase
22 to procure comparable goods.

23 3. **Purpose of section.** Under this section, a buyer may obtain the needed
24 goods and use that cover price to measure damages for breach of contract. The

1 cover based damage remedy is the equivalent of the seller's right to resell the goods
2 under Section 2-819 and obtain damages based upon the resale price.

3 **4. Cover transaction.** Subsection (a) defines cover which could consist of
4 a series of contracts or a single contract for sale. Goods purchased for cover need
5 not be identical to those goods that are the subject of the breached contract but
6 could be commercially reasonable as substitutes under the circumstances of the case.
7 Contracts made as a cover transaction need not be on the same credit or delivery
8 terms but must be reasonable under the circumstances. The reasonableness of a
9 cover transaction and the good faith of the buyer in making a cover transaction must
10 be determined based upon circumstances present when the buyer acts and should not
11 be judged in hindsight. A cover may be a reasonable cover even if it later proves
12 that the cover transaction was not the cheapest or most effective cover. The
13 reasonable time in which to make a cover transaction must take into account the
14 time the buyer needs to look around and decide as to how to best cover. Both
15 merchants and non-merchant buyers may pursue cover under this section as long as
16 the buyer acts in good faith and the cover transaction is reasonable. The standards
17 of reasonableness and good faith will vary, however, depending upon whether the
18 buyer is a merchant.

19 **5. Use of cover price to measure damages.** Subsection (b) allows a buyer
20 who has appropriately covered to measure its damages by the difference between
21 the cover price and the contract price.

22 **6. Relation to other remedies.** Subsection (c) continues the policy from
23 former law that a buyer who does not cover as provided in subsection (a) may still
24 pursue other remedies under this Article. This subsection must be read in
25 conjunction with the mitigation principle expressed in Section 2-803. A buyer who
26 has appropriately covered under this section has effectively mitigated its losses. A
27 buyer who has not covered may find its market price damages limited by virtue of
28 the mitigation principle of Section 2-803. In addition, the buyer is entitled to
29 incidental and consequential damages, Sections 2-805 and 2-806, assuming that
30 there is no agreement limiting the buyer's ability to recover those damages. Section
31 2-809 and Section 2-810. If the buyer has accepted goods and not justifiably
32 revoked acceptance, the measure of the buyer's damages for the seller's breach
33 should be determined under Section 2-827.

34 **7. International Sales.** Under CISG Article 75, if the contract is avoided
35 and the buyer has "bought goods in replacement," damages are measured by the
36 "difference between the contract price and the price in the substitute transaction" as
37 well as any further damages under Article 74. If the buyer has made a purchase
38 under Article 75, damages under Article 76 are not available.

1 **Cross References:**

2 **Definitional Cross References:**

3 **SECTION 2-826. BUYER'S DAMAGES FOR BREACH BASED ON**
4 **MARKET PRICE.**

5 (a) If the seller is in breach of contract, the buyer may recover damages
6 based upon the market price of comparable goods, less the contract price, together
7 with any incidental and consequential damages, less expenses saved as a result of the
8 breach, as follows:

9 (1) Except as otherwise provided in paragraph (2), the market price for
10 comparable goods is determined at the time for tender of delivery or when the buyer
11 learned that the tender of delivery did not occur, whichever is later.

12 (2) In the case of a repudiation governed by Section 2-712, the market
13 price of comparable goods is determined at the expiration of a commercially
14 reasonable period after the buyer learned of the repudiation, but no later than the
15 time stated in paragraph (1). The period includes the commercially reasonable time
16 for awaiting performance under Section 2-712 and any further commercially
17 reasonable period for obtaining substitute performance.

18 (b) Market price is determined at the place for tender of delivery. However,
19 in a case of rejection after arrival or revocation of acceptance, market price is
20 determined at the place of arrival.

21 **Comment**

22 1. **Source:** Former Sections 2-713 and 2-723(1).

1 **2. Comparison with former Article 2.** This section continues the rules
2 from former Sections 2-713 and 2-723(1) with the following changes. First,
3 subsection (a)(1) clarifies the meaning of the phrase in former law “when the buyer
4 learned of the breach” by providing that the market price is measured either at the
5 time for tender of delivery or when the buyer learned the tender did not occur,
6 whichever is later. Second, subsection (a)(2) provides a rule to provide for
7 measurement of market price in the case of an anticipatory repudiation.

8 **3. Time and place for measuring market price.** Unless the buyer has
9 accepted the goods so that damages should be measured under Section 2-827,
10 subsection (a) allows a buyer to recover damages based upon the market price when
11 the seller has breached the contract. Section 2-701 and Section 2-710(c).

12 Subsection (a)(1) provides that the time for measuring market price is when
13 the tender of delivery should have occurred or at the time the buyer should have
14 learned that the tender did not occur. Subsection (b) follows former law on the
15 place for measuring market price which is based upon measuring market price in the
16 market the buyer would have obtained cover. Thus, the place of tender of delivery
17 is determined under Section 2-602. If the goods are rightfully rejected, Section
18 2-703, or an acceptance is justifiably revoked, Section 2-708, the place for
19 measuring the market price is where the goods are. The market price is of
20 comparable goods to the ones involved in the breached contract. The provisions of
21 this Article on proving the market price are relevant to determining the market price
22 in order to measure the buyer’s damages. Section 2-812.

23 Subsection (a)(2) determines the time for measuring the market price when
24 the seller has repudiated the contract in the same manner as provided in Section
25 2-821(a)(2). This time is designed to approximate the time in which the buyer
26 would have engaged in a cover transaction, even if the buyer has not done so
27 pursuant to Section 2-825, and is designed to put the buyer in the position the buyer
28 would have been in if the seller had performed the contract, Section 2-803, by
29 approximating the harm the buyer has suffered without allowing the buyer an
30 unreasonable time to speculate on the market at the seller’s expense. This rule is a
31 particular application of the mitigation principle from Section 2-803. The time for
32 measuring market price cannot extend beyond the time for tender of delivery.

33 **Contract price.** The price term in a long term contract may or may not
34 have an escalation clause. The time for determining the contract price in a long term
35 contract should not necessarily be tied to the time for measuring the market price in
36 the repudiation situation. What is the appropriate contract price should be
37 determined in light of the general principle of full compensation for the aggrieved
38 party under Section 2-803(a).

1 **4. Relation to other remedies.** This section is subject to the general
2 principles in Section 2-803. In addition, the buyer is entitled to incidental and
3 consequential damages, Sections 2-805 and 2-806, assuming that there is no
4 agreement limiting the buyer's ability to recover those damages. Section 2-809 and
5 Section 2-810.

6 **5. International Sales.** Under CISG Article 76, if the contract has been
7 avoided and there has been no "purchase" under Article 75, the buyer may recover
8 the difference between the contract price and "current price at the time of avoidance
9 as well as any further damages recoverable under Article 74."

10 **Cross References:**

11 **Definitional Cross References:**

12 **SECTION 2-827. BUYER'S DAMAGES FOR BREACH REGARDING**
13 **ACCEPTED GOODS.**

14 (a) A buyer that has accepted goods and not justifiably revoked acceptance
15 and that has given any notice required pursuant to Section 2-707(c)(1) may recover
16 as damages for any nonconforming tender the loss resulting in the ordinary course of
17 events from the seller's breach of contract as determined in any reasonable manner.

18 (b) Damages for breach of a warranty of quality may be measured by the
19 value of the goods as warranted, less the value of the goods accepted at the time
20 and place of acceptance, unless special circumstances show proximate damages of a
21 different amount.

22 (c) Damages for breach of a remedial promise may be measured by the value
23 of the promised remedial performance, less the value of any remedial performance
24 made.

(d) In the case of accepted goods, a buyer may also recover incidental and consequential damages.

Comment

1. **Source:** Former Section 2-714.

2. **Comparison with former Article 2.** This section continues the rules from former Section 2-714 with the following substantive changes. First, subsection (a) makes clear that this remedy applies only in the case of an acceptance that has not been justifiably revoked. Second, subsection (b) is rephrased to make clear that this is one measure of damages for breach of warranty of quality. Damages for a breach of the warranty of title or against infringement should be measured under subsection (a). Third, subsection (c) is a new provision for measuring damages for breach of a remedial promise.

3. **Availability of the remedy for accepted goods.** Section 2-827 continues the rules from former Section 2-714 for recovery of damages in the case of accepted goods where there is a nonconformity with the contract requirements. Subsection (a) requires an acceptance that has not been justifiably revoked, Section 2-708, and a notice of breach if required under Section 2-707(c)(1) in order to recover damages under this section. Damages may be measured in any reasonable manner for losses which result from the breach of contract. Losses recoverable under this section may be based upon a seller's delay in performance, the seller's breach of warranty of title or against infringement under Section 2-402, or the seller's failure to perform another obligation under the contract.

4. **Damages for breach of warranty.** Subsection (b) states a rule for measuring damages for breach of a warranty of quality governed by Part 4 of this Article. The value of the goods as warranted is based upon the market value of the goods if the goods had conformed to the warranty of quality made. The contract price may be evidence of that value but is not conclusive. The value of the goods accepted is keyed to the market value at the time and place the buyer accepted the goods, Section 2-706, not the time or place for tender of delivery. In some cases, the difference between the value as accepted and the value as warranted may be demonstrated by the cost of repair if the repair would result in goods that conform to the contract.

Damages for breach of remedial promise. Subsection (c) states a general rule for measuring damages for breach of a remedial promise. Remedial promise is defined in Section 2-102. A remedial promise is a separate obligation from a warranty regarding the quality of goods. For example, assume the seller has promised to repair goods if the goods are defective. The seller fails to repair the

good. The damages for breach of the promise to repair are measured by the value of the repair promise minus the value of any performance the seller rendered in attempting to repair the goods.

5. Relation to other remedies. The measurement of damages under this section should be determined in light of the remedial principles in Section 2-803. A buyer who has accepted goods and not justifiably revoked acceptance recovers damages under this section and not under the sections which base damages on the cover price or the market price. Sections 2-825 and 2-826. In addition, the buyer is entitled to incidental and consequential damages, Sections 2-805 and 2-806, assuming that there is no agreement limiting the buyer's ability to recover those damages. Section 2-809 and Section 2-810.

6. **International Sales.** Under the Convention, a buyer has more power to “require” the seller to perform and the seller has more power to “cure” non-conformities than under Article 2 but does not have a provision that parallels this section. After delivery where the seller has failed to cure, however, CISG Article 50 provides that if the goods “do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at that time.”

Cross References:

Definitional Cross References:

SECTION 2-828. DEDUCTION OF DAMAGES FROM PRICE. The buyer, after notifying the seller of its intent to do so, may deduct all or any part of the damages resulting from a breach of contract from any part of the contract price still due under the same contract.

Comment

1. Source: Former Section 2-717.

2. **Comparison with former Article 2.** Section 2-828 makes no substantive changes to former Section 2-717. This section permits the buyer to deduct its damages as determined under the provisions of this article from the price if some or all of the price is still due under the same contract. A buyer's notification

need only be any language which reasonably indicates the buyer's reason for not paying.

3. **International sales.** CISG Article 50 allows reduction from the price the amount as determined under that section. See Comment 6 to Section 2-827.

Cross References:

Definitional Cross References:

SECTION 2-829. RECOVERY OF PRICE; BUYER'S SECURITY INTEREST.

(a) If the seller is in breach of contract, the buyer may recover any payments made on the price of goods that are not accepted.

(b) On rightful rejection or justifiable revocation of acceptance, the buyer has a security interest in goods in the buyer's possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care, and custody. The buyer may hold the goods and resell them in the manner provided for an aggrieved seller under Section 2-819, but the buyer shall give the seller reasonable notice of the intended resale and must account to the seller for any excess of the proceeds of resale over the amount of the security interest created by this subsection.

Comment

1. **Source:** Former Section 2-711.

2. Comparison with former Article 2. This section makes no substantive changes to the buyer's rights found in former Section 2-711.

3. **Buyer's right to refund of the price.** Subsection (a) allows the buyer to get the price back for any goods the buyer has not accepted if the seller has

1 breached the contract. Sections 2-701 and 2-710. A buyer who has rightfully
2 rejected the goods or justifiably revoked acceptance of the goods is not liable for the
3 price of the goods and is entitled to a refund to the extent the buyer has paid any of
4 the price to the seller. A buyer's ability to get the price refunded if the rejection is
5 wrongful is determined under Section 2-809.

6 **4. Buyer's security interest.** Subsection (b) continues the right of the
7 buyer to retain goods in the case of a rightful rejection or justifiable revocation in
8 order to enforce a security interest to recover the price paid or the types of
9 incidental expenses listed. The buyer's resale should comply with Section 2-819 and
10 the buyer should give notice to the seller, even if the resale is a private resale. The
11 buyer also must account for any proceeds that exceed the amount of the security
12 interest the buyer is entitled to assert under this section. This is a security interest
13 arising under Article 2 and is also governed by Article 9, Section 9-110. The
14 assertion of a security interest under this section does not preclude the buyer from
15 pursuing other remedies such as market price based damages, Section 2-826, or
16 cover based damages, Section 2-825, but the buyer may not use a security interest
17 under this section to collect those other damages. A buyer asserting rights under
18 this section has not accepted the goods nor converted the goods and has not
19 violated the buyer's obligations under Section 2-704 or 2-705.

20 **5. International Sales.** Under CISG, the seller may be required to refund
21 the price in the case of a fundamental breach. Article 81. CISG has no comparable
22 provision to the buyer's security interest under this section.

23 **Cross References:**

24 **Definitional Cross References:**