D R A F T

FOR DISCUSSION ONLY

REVISION OF UNIFORM COMMERCIAL CODE ARTICLE 2 – SALES

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REVISION OF UNIFORM COMMERCIAL CODE ARTICLE 2 – SALES

WITH COMMENTS

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REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 2 – SALES

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REVISION OF UNIFORM COMMERCIAL CODE
ARTICLE 2 – SALES

PART 1
GENERAL PROVISIONS

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

SECTION 2-102. DEFINITIONS.

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

(1) "Authenticate means to sign, or to execute or adopt a symbol, or encrypt a record i
with present intent to identify the authenticating party, or to adopt or accept a record or term, or to e
of a record or term that contains the authentication or to which a record containing the authenticatio
[SOURCE: Section 2B-102(a)(2) (May, 1997)]

(2) "Between merchants , with respect to a transaction, means between parties both of
chargeable with the knowledge or skill of merchants. **[SOURCE: Section 2-104(3)]**

(3) "Buyer means a person that buys or contracts to buy goods. **[Section 2-103(1)(a)]**

(4) "Cancellation means an act by either party which ends a contract because of a brea
party. **[See Section 2-106(4)]**

(5) "Commercial unit means a unit of goods which by commercial usage is a single wh
sale and whose division materially impairs its character or value in the relevant market or in use. A
a single article, such as a machine; a set of articles, such as a suite of furniture or a line of machiner
gross or carload; or any other unit treated in use or in the relevant market as a single whole. **[Sectio**

2A-103(1)(c). See Section 2-105(6).]

(6) "Conforming goods or performance under a contract for sale means goods or perfo accordance with the obligations under the contract. **[Section 2-106(2)]**

(7) "Conspicuous means so displayed or presented that a reasonable person against wh ought to have noticed it or, in the case of an electronic message intended to evoke a response witho an individual, in a form that would enable a reasonably configured electronic agent to take it into ac without review of the message by an individual. **[Compare Section 1-210(11) (April, 1997), Section 2B-102(6). See end notes.]**

(8) "Consumer means an individual who buys or contracts to buy goods that, at the tim are intended by the individual to be used primarily for personal, family, or household use. The tern individual who buys or contracts to buy goods that, at the time of contracting, are intended by the in primarily for professional or commercial purposes. **[See Section 2B-102(a)(7)]**

(9) "Consumer contract means a contract for sale between a seller regularly engaged in selling and a consumer.

(10) "Contract for sale means a present sale or a contract to sell at a future date, wheth are future goods.

(11) "Delivery means the transfer of physical possession or control of goods.

(12) "Electronic agent means a computer program or other automated means used, sele programmed by a party to initiate or respond to electronic messages or performances in whole or in an individual. **[Section 2B-102(a)(12)]**

(13) "Electronic means electrical, digital, magnetic, optical, electromagnetic, or any ot propagation, or by any other technology that entails capabilities similar to those technologies. **[Sec 2B-102(a)(12)]**

(14) "Electronic message means a record that, for purposes of communication to anoth
generated, or transmitted by electronic, optical, or similar means. The term includes electronic data
or voice mail, facsimile, telex, telecopying, scanning, and similar communications. **[Section 2B-10**

(15) "Electronic transaction means a transaction formed by electronic messages in whi
one or both parties will not be reviewed by an individual as a routine step in forming the contract. **[**
2B-102(a)(14)]

(16) "Financing agency means a bank, finance company, or other person that, in the ordina
business, makes advances against goods or documents of title, or that by arrangement with either th
intervenes in the ordinary course of business to make or collect payment due or claimed under a co
purchasing or paying the seller's draft, making advances against it, or merely taking it for collection
documents of title accompany the draft. The term includes a bank or other person that similarly in
in the position of seller and buyer with respect to the goods. **[Section 2-104(2)]**

(17) "Foreign exchange transaction means a transaction in which one party agrees to d
a specified money or unit of account in consideration of the other party's agreement to deliver anot
money or unit of account either currently or at a future date, if delivery is to be through funds trans
accounting, or other form of payment order, or other agreed means to transfer a credit balance. The
transaction of this type involving multiple moneys and spot, forward, option, or other products deri
moneys and any combination of these transactions. The term does not include a transaction involvi
which one or both of the parties is obligated to make physical delivery, at the time of contracting or
banknotes, coins, or other form of legal tender or specie.

(18) "Future goods means goods that at the time of contracting are neither existing nor
[Section 2-105(2)]

(19) "Good faith means honesty in fact and the observance of reasonable commercial s

dealing. **[Section 2B-102(a)(16)]**

(20) "Goods means all things, including specially manufactured goods, that are movab identification to a contract for sale or, unless the context otherwise requires, future goods. The tern young of animals, growing crops, and other identified things attached to realty in Section 2-108. Th money in which the price is to be paid, the subject of foreign exchange transactions, documents, let information, instruments, investment property, accounts, chattel paper, deposit accounts, general in intangibles.

(21) "Letter of credit means an irrevocable letter of credit as defined in Section 5-102 financing agency of good repute and, if the shipment is overseas, of good international repute. **[See 2-325(3), 5-102(a)(10)]**

(22) "Lot means a parcel or single article that is the subject matter of a separate sale or or not it is sufficient to perform the contract. **[Section 2A-103(1)(s)]**

(23) "Merchant means a person that deals in goods of the kind involved in the transact by occupation purports to have knowledge or skill peculiar to the practices or goods involved in the to which knowledge or skill may be attributed by the person's employment of an agent or broker or purports to have the knowledge or skill. **[Sections 2-104(1), 2B-102(a)(26)]**

(24) "Present sale means a sale that is accomplished by the making of a contract. **[Sec 2-106(1)]**

(25) "Receipt :

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

(B) with respect to an electronic record, means when it enters an information proces form capable of being processed by a system of that type and the recipient uses or has designated th of receiving records or information. "Receive has an analogous meaning. **[Sections 2-103(1)(c),**

2B-102(a)(29)]

(26) "Record means information that is inscribed on a tangible medium, or that is store or other medium and is retrievable in perceivable form. **[Sections 5-102(a)(14), 2B-102(a)(30)]**

(27) "Sale means the passing of title to goods from a seller to a buyer for a price. **[Sec 2-106(1)]**

(28) "Seller means a person that sells or contracts to sell goods. **[Section 2-103(1)(d)]**

(29) "Terminate means to end a contract or a part thereof by an act by a party under a p agreement or law, or by operation of the terms of the agreement for a reason other than for breach b **[Section 2-106(3), Conformed to Section 2A-103(1)(z). See Section 2B-102(a)(37).]**

(b) Other definitions applying to this Article and the sections in which they appear are:

"Acceptance of goods. Section 2-706

"Agreed letter of credit. Section 2-308(a).

"Assignment. Section 2-503(a).

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

"Breach of contract. Sections 2-701(a), 2-815(a).

"Consequential damages. Section 2-806.

"Cover. Section 2-825(a).

"Delegation. Section 2-503(b).

"Entrusting. Section 2-504(c).

"Incidental damages. Section 2-805.

"Identification. Section 2-502.

"Immediate buyer. Section 2-401(a).

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

"Insurable interest. Section 2-502.

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

"Remote purchaser. Section 2-401(a).

"Repudiation. Section 2-712(b).

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

"Sale or return. Section 2-506(a).

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

"Waiver. Sections 2-210, 2-702.

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

"Check. Section 3-104(e).

"Dishonor. Section 3-502.

"Draft. Section 3-104(e).

"Information. Section 2B-102(a)(18).

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

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

(c) In addition, Article 1 contains general definitions and principles of construction that apply t

SOURCES: Sales (July, 1996); Licenses (May, 1997).

Notes

1. Definitional sources are stated in brackets at the end of each definition.

2. **Issues relating to specific definitions.**

(a) **Conspicuous.** The last sentence in the July, 1996 definition of "conspicuous has been ground that the listed circumstances should be regarded as factors to be considered rather than as co safe harbor. Unlike Section 1-201(10), the definition does not state that the decision is for a court a Depending on the circumstances, the decision is for the trier of fact. The definition does not confor

2B-102(a)(6) (May, 1997).

The policy questions are whether (1) compliance with any one of the "factors in the last se constitute a "safe harbor and (2) the court or jury should decide the question. What ever is agreed ultimately be in Article 1. See Section 1-201(11) (April, 1997).

(b) **Court.** Article 2B-102(a)(9a) defines "court to include an "arbitrator or other dispute official. A tighter definition would state an "arbitrator or other person authorized to adjudicate a d the definition could include a mediator.

(c) **Delivery.** "Delivery means the transfer of either "physical possession or control of goo this Article, "control includes goods that are delivered to an agent of the seller or buyer or are subj title.

(d) **Electronic contracting.** Article 2 follows Article 2B in the definition of terms relating electronic contracting. See Section 2-102(a)(13-16).

(e) **Good faith.** The definition in Section 2-102(a)(20) was adopted at the July, 1996 meeti Conference and conforms to Article 2B but not to Article 5-102(a)(7), which states that good faith m the conduct or transaction concerned.

(f) **Goods.** Section 2-102(a)(21) states what "goods are and what they are not. For purpos goods include "future goods, i.e., goods that at the time of contracting are "neither existing nor ide 2-102(a)(19). Excluded from the definition are the "subject of foreign exchange transactions, see and certain types of Article 9 collateral, including new collateral types proposed in revised Article 9 accounts and "payment intangibles.

Suppose Party A owns a deposit account in Bank and "sells it for value to Party B. Under revision of Article 9, this transaction is not treated as a secured transaction. See Section 9-112(a)(3 2-102(a)(21), the interest transferred is not treated as goods. What law, then, governs this transfer?

(g) **Standard forms and standard terms.** The July, 1996 Draft contained four new, important definitions: Standard form, standard term, manifest assent and opportunity to review. Th deleted from the July, 1997 Draft of Article 2.

SECTION 2-103. SCOPE.

(a) This article applies to transactions in goods.

(b) If a transaction involves both information and goods, this article applies to the aspects o which involve the goods and their performance and rights in the goods other than the physical medi information, its packaging, and its documentation. However, this article applies to a sale of a comp

not developed specifically for a particular transaction and that is embedded in goods other than a co

information processing machine, if the program was not the subject of a separate license with the bu

2B-103(c) and (d)(3)]

(c) Except as otherwise provided in subsection (b), to the extent that another article of this

transaction in goods, this article does not apply to the part of the transaction governed by the other a

2B-103(b)]

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

Notes

1. Article 2 covers "transactions in goods. The phrase "unless the context otherwise requi
Normally this transaction is a contract for sale and many sections in Article 2 are expressly limited
Although a "pure service contract is not covered, the courts have applied Article 2 to mixed transa
services if the sale of goods "predominates and, occasionally, they have applied Article 2 to dispu
"gravaman of the complaint involves the quality of goods furnished in a transaction where service

2. Subsection (a)(3) in the July, 1996 Draft stated that Article 2 applied to a common type o
where the seller, not a third person, agreed to install, service and repair goods sold at or after the tim
Standards for measuring the seller's obligation in these contracts and appropriate remedies were pro
2-602. Subsection (a)(3) and Section 2-602 were deleted at the November, 1996 meeting of the Dra

3. Although not stated in Section 2-103, courts may extend Article 2 by analogy to transacti
scope if the extension is relevant in principle and appropriate in the circumstances. See *Barco Auto*
Corp. v. PSI Cosmetics, Inc., 478 N.Y.S.2d 505 (N. Y. Civ. Ct. 1984) (explores theory of extension
analogy). Also, by including "transactions in goods in subsection (a), courts may apply Article 2 t
not sales unless the particular sections that apply are limited to contracts for sale.

4. **Embedded software.** Subsection (b) deals with transactions where both goods and info
licensed under Article 2B are involved. See Section 2B-103 on the scope of Article 2B. Presumabl
disputes over "licenses of information and software contracts and "related support and maintenan
2B-103(a). Article 2, however, may apply to transactions excluded from Article 2B under Section 2
or lease of a copy of a computer program that was not developed specifically for a particular transac
"embedded in goods is excluded by Section 2B-103(d)(3) and is governed by Article 2.

Further coordination with Article 2B is needed on embedded software.

5. Subsection (c), which is subject to subsection (b), delineates the line between Article 2 a
the UCC, without attempting to define it. It follows Section 2B-103(b).

More precision may be required. For example, a transaction may involve both a contract fo

9 security agreement. If the buyer, who is also a debtor, is a consumer, to what part of the transacti
apply? Arguably, Section 2-206(a) covers terms in the record dealing with the sale but not terms rel
agreement. But there may be overlaps in terms, particularly those involving payment.

6. Foreign exchange contracts, defined in Section 2-102(a)(17), are excluded from Article 2
the exclusion are based upon a recommendation by the Federal Reserve Bank of New York. Excep
moneys exclusion where the contract requires the delivery of tangible forms of money, the transac
general contract principles and Article 4A.

To illustrate:

(a) An agreement to exchange goods for a $1,000 bill is a contract for sale, but the $1,000 b
because it is "money in which the price is to be paid. Section 2-102(a)(20). However, if goods ar
rare coin worth $1,000, the coin should be treated as goods and, in effect, there is a swap of goods f
applies and both parties are a seller and a buyer of goods.

(b) An agreement to exchange $1,000 for 1,500 German marks, without more, is a swap of
Under the definition of "foreign exchange transaction, however, Article 2 does not apply unless th
"multiple moneys in which one or both of the parties is obligated to make physical delivery, at the t
the future, of banknotes, coins, or other form of legal tender of specie. If, however, the exchange i
transfer of credits through the banking system, Article 2 does not apply.

SOURCES: Section 2B-103 (May, 1997); Sales (October, 1995).

SECTION 2-104. TRANSACTION SUBJECT TO OTHER LAW.

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

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

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

(3) any other law of this State to which the subject matter of this article is subject, such a
the sale of agricultural products, the transfer of blood, blood products, human tissues and organs, t
transfer by artists of works of art or fine prints, distribution agreements, franchises and other relatio
goods are sold, liability for products which cause injury to person or property, the making and disc
misbranding or adulteration of foods products and drugs, and dealers in particular products, such as

wheelchairs, agricultural equipment and hearing aids.

(b) Except for the rights of a buyer in the ordinary course of business in subsection (a)(1), i

conflict between this article and a statute or decision referred to in subsection (a), the statute or dec

(c) With respect to this [Act], failure to comply with the laws referred to in subsection (a) h

specified therein.

SOURCES: Section 2A-104(3). See Section 2B-104.

Notes

1. Section 2-104 determines what other law of "this state governs a contract for sale other of the Article 2. It is a more particularized application of the displacement principle in Section 1-1 the law of "another state governs is determined by applicable choice of law principles, see Section choice of law clause. See Section 2B-107. Article 2 does not deal with choice of law or choice of

Article 2 takes no position on the following questions: (1) To what extent can the parties ag not apply even though the transaction is a contract for sale, see CISG Article 6; (2) To what extent Article 2 applies to a transaction that is not a contract for sale, see Section 2B-105; and (3) To what extend Article 2 by analogy to a transaction that is not a sale, see Section 2A-102, Comment. Some under consideration by the Article 1 Drafting Committee.

2. Section 2-104(a)(1) states that a transaction covered by Article two is subject to any appl title statute of this state. Thus, if the applicable CTA provided a different rule than Section 2-501 title, the CTA would apply. Given the complexity and un-uniformity of various CTAs, the policy q Article 2 should provide the uniform, preemptive rule and, if so, whether Sections 2-501 and 2-504

At the January, 1997 meeting of the Drafting Committee approved an exception for a buyer course of business whose rights arise before a certificate of title covering the goods is effective in h Thus, Article 2 protects a BIOCB of a new motor vehicle from a dealer to whom a certificate or ori a BIOCB of a used motor vehicle from a dealer, regardless of whether the vehicle's certificate of tit another person.

3. Subsection (a)(1) in the July, 1996 Draft provided that Article 2 was subject to any appli the extent it governs the rights of parties to, and third parties affected by, the transaction. This wa the obvious: federal law either preempts or it does not, although the preemption line is not always c

For example, the line between the United Nations Convention on Contracts for the Internati which is federal law, and Article 2, which is state law, will be clear in most cases. Under Article 1, "contracts of sale of goods between parties whose places of business are in different states: (a) whe Contracting States. Canada and the United States are contracting states. Thus, if a Canadian selle buyer in the Southern District of New York, CISG rather than Article 2 would apply even though fe based upon diversity of citizenship. See *Filanto, S.p.A. v. Chilewich Intern. Corp.*, 789 F. Supp. 12

(S.D.N.Y. 1992), appeal denied, 984 F.2d 58 (2d Cir. 1993). Article 2, in short, is preempted by fe

There are exceptions based upon CISG's more limited scope. CISG would not apply if the
consumer, Article 2(a), or the subject of the sales was an "aircraft or "electricity. Article 2(d) and
applies to these transactions. In addition, CISG does not apply to certain aspects of a sale otherwise
"not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) t
contract may have on the property in the goods sold , Article 4, and "does not apply to the liability
personal injury caused by the goods to any person. Article 5. Article 2 applies to "validity dispu
unconscionability, Section 2-105, claims for personal injury resulting from a breach of warranty, Se
disputes over title. Finally, CISG applies only to disputes between the parties to a contract for sale.
privity is a defense in a suit under CISG. Under Article 2, however, a remote buyer may be able to
warranty. Lack of contractual privity, in these cases, is not a defense. See Sections 2-404 and 2-30
does not define "seller to exclude a seller under CISG, to the extent that lack of privity is not a def
States buyer of imported goods presumably can sue a Canadian seller for breach of warranty under

4. Subsection (a)(2) was changed at the March, 1997 meeting of the Drafting Committee to
of final consumer protection laws, whether legislative, administrative or judicial, is not limited to th
the revision is enacted.

5. Subsection (a)(3) gives a partial, illustrative list of representative statutes that regulate ei
contract for sale or the subject matter. In farm states, for example, legislation may protect the farm
control the quality of farm products and regulate the labeling of seeds and other products. Similarly
contracts that purport to sell or transfer blood or blood products are frequently treated as contracts f
sales. Some of these laws are enacted as non-uniform provisions of Article 2 and others are contain
legislation.

Digital signature statutes. Careful analysis is required to discover the extent to which thes
other statutes either supplement or preempt the uniform text of Article 2. For example, several stat
signature laws which are broader and more complex than the definition of "authenticate in Section
purports to preempt these statutes relying upon Article 2B's definition of authentication. See Sectio
2-104(b), by limiting the statutes to which Article 2 is subject to those listed in Section 2-104(a)(3),
achieve the Article 2B preemption result. Some commentators disagree with Article 2B's preempti

The choices for Article 2 are: (1) Follow Article 2B; (2) Add digital signature statutes to tho
subsection (a)(3) to which Article 2 is subject; or (3) Prepare a legislative note which identifies the
state a choice. The latter choice will probably be made.

6. Although Article 2 assumes that a court will adjudicate the dispute, the parties may selec
agreement or agree that the dispute will be adjudicated in arbitration. Unless otherwise stated, the u
Article 2 includes alternative tribunals or persons which are empowered by agreement or otherwise
See the broader definition of "court in Section 2B-102(a)(9b).

SECTION 2-105. UNCONSCIONABLE CONTRACT OR TERM.

(a) If a court finds as a matter of law that a contract or a term of the contract was unconscio

contract was made or was induced by unconscionable conduct, the court may refuse to enforce the c

remainder of the contract without the term, or so limit the application of the term to avoid an uncon

(b) Before making a finding of unconscionability under subsection (a), the court, on motion

motion, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpo

contract or term thereof or of the conduct.

SOURCE: Sales, Section 2-302 (December, 1994).

Notes

1. Except for the language "induced by unconscionable conduct , Section 2-105 is essentia
Section 2-302 in the 1990 Official Text. Section 2-105 does not adopt the broader language of Sec
to conform original Section 2-302 to Section 2A-108(2) and (3) was rejected by the Drafting Comm
1993 meeting. The phrase "induced by unconscionable conduct, taken from Section 2A-108(2), w
at the Annual Meeting of the Conference in July, 1996. The "induced phrase, however, does not a
(May, 1997). See Section 2A-108, Comments, and Uniform Consumer Credit Code 5.108, Comme

What is "unconscionable conduct that induces a contract that is otherwise appears to be co
essence, unfair practices that induce the contract, such as taking advantage of a consumer's inability
interest, or contracting with knowledge that the consumer is unable to receive a substantial benefit f
unreasonable delay and pressure in concluding the contract, or making misleading statements of op
consumer was likely to rely. See National Consumer Law Center, Unfair and Deceptive Acts and P
1991, Supp. 1996). Put differently, they are contracts or terms that are not otherwise unconscionab
been entered into if unconscionable means had not been employed to induce the agreement to the c
5.108(1)(a), Comment 1.

2. The expanded treatment of consumer contracts in Article 2 is a particularized application
concepts. See, e.g., Sections 2-206 and 2-316. Nevertheless, Section 2-105 may still apply to a dis
requirements of those particular sections have been satisfied. Thus, a disclaimer of warranty that sa
of Section 2-316(b) or a standard form to which a commercial party has manifested assent, Section
unconscionable on other grounds. Those grounds, however, are limited to cases where there was lit
the market to find needed goods with different terms and where the terms offered were unreasonabl
or seller. These cases are few and far between. See, e.g., *Martin v. Joseph Harris Co., Inc.*, 767 F.
(6th Cir. 1985).

3. The Drafting Committee limited unconscionability to the time of contracting and conclu
should be avoidance or limitation of the contract or clause rather than damages. Moreover, the cou
than a jury determines whether a "contract or any clause thereof is unconscionable. The decision t
court rather than the jury has been attacked as unsound and inconsistent with the fundamental right

There are very few cases in the last 10 years where the courts have found a contract or claus
under former Section 2-302. Of the fourteen cases that granted some relief, only nine involved Arti

the enforceability of agreed limitations on warranties and remedies. These cases, however, do not i
arising under Section 2-207 where findings of unfair surprise excluded terms from the apparent agr

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

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

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

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

(d) An undivided share in a described bulk of fungible goods is sufficiently identified to be
quantity of the bulk is not determined. Any proportion of the bulk or quantity agreed upon by numb
measure, to the extent of the seller's interest in the bulk, may be sold to the buyer. The buyer is an

SOURCE: Sales, Section 2-105 (Oct. 1995).

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

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

(b) A contract for the sale, apart from an interest in real property, of growing crops, timber
things attached to real property and capable of severance without material harm to the real property
described in subsection (a), is a contract for the sale of goods, whether the thing is to be severed by
even if it forms part of the real property at the time of contracting. The parties may effect a present
identification of the goods.

(c) The rights of a buyer and seller under this section are subject to rights of third parties un

to records of real property. A contract for sale may be executed and recorded as a document transfe

property. The recording constitutes notice to third parties of the buyer's rights under the contract fo

SOURCE: Sales, Section 2-107 (December, 1994).

Notes

1. Section 2-107 implements a suggestion by the California State Bar Committee that there consistency in terminology. Thus, the phrase "real property is substituted for the terms "realty an assumption that all mean the same thing. Similarly, the undefined phrase "contract to sell [found i was replaced by the defined phrase "contract for sale, which includes a contract for the sale of futu "contract for the sale of future goods is proposed to replace "contract to sell.

2. After the 1996 Annual Meeting of the Conference, subsection (a) was revised to clarify t gas, or similar things are to be "extracted from the real property and structures are to be "removed some states, underground mineral deposits may be called structures. Also, it is clear that water is a gas. Article 2 applies to the sale of water after it is extracted not to the sale of the right to extract.

3. **Oil and gas.** The phrase "oil and gas was added to subsection (a) in 1972 to clarify tha were part of the real property if to be severed by the buyer to whom a working interest in the land h the owner. Article 2 does not apply in this case.

On the other hand, it is clear that if the seller is to extract the oil and sell it to the buyer for a interest is transferred) or if the buyer extracts the oil and then sells it to a third party, Article 2 appli raise more complicated scope problems. For example, suppose the lessee is to extract the oil and pa royalty based upon a stated value of the oil. Real estate law applies here because a working interest buyer was to extract and a cash royalty is paid. In cases where the lessee is to extract the oil and pa kind or exercise an option to pay a cash royalty, however, Article 2 may apply if the lessor conveys lessee but reserves title to the oil until extracted. After extraction, the lessee is in possession of oil and the lessor is now in position to sell the oil to the lessee for either an in kind payment or cash. In owns the oil extracted by the lessee. Since the extracted oil is now goods, the lessor is a seller subj UCC.

4. What about long-term sale and leaseback of buildings and structures? In typical cases, a or unimproved land will convey it and then take a leaseback for a term of years. At some point in t (formerly the owner) has a right to remove and, presumably, sell structures on the land. In general, to this transaction even though the owner has a right to sever and sell. If, however, the owner actua a third person and reserves the right to sever, that transaction is covered by Section 2-107.

SECTION 2-108. EFFECT OF AGREEMENT.

(a) Except as otherwise provided in Section 1-102 and this article, the effect of any provisio

agreement.

(b) The absence of a phrase such as "unless otherwise agreed does not by itself preclude th varying the provision by agreement.

(c) Whenever this article allocates a risk or imposes a burden as between the parties, an agr allocation and apportion the risk or burden.

Notes

1. Section 2-108 retains the general principle of Section 2-109(a) of the July, 1996 Draft bu (b), which purported to list those sections which could not be limited or varied by agreement. In th Committee, subsection (b) duplicated the principle of variance in Section 1-102(3) and posed an un unintended under and over inclusion in the drafting. Compare Section 2B-114.

2. Without purporting to make an exclusive statement, the Comments will identify the secti specifically prohibit variation. See, e.g., Section 1-203 and Sections 2-102(a)(18), 2-105, 2-202(b), 2-407, 2-810, 2-809. In addition, each section which cannot be varied by agreement will explicitly

PART 2

FORMATION, TERMS, AND READJUSTMENT OF CONTRACT

SECTION 2-201. FORMAL REQUIREMENTS.

(a) Except as otherwise provided in this section, a claim for breach of contract for sale in th more is not enforceable by way of action or defense against a person that denies that an agreement v a record authenticated by the person against which the claim is asserted as the record of that person to indicate that a contract was made. A record is not insufficient merely because it omits or incorre including a quantity term. If the record contains a quantity term, the claim is not enforceable beyon

(b) If an authenticated record in confirmation of a contract is sufficient against the sender a reasonable time to the other party, the record is sufficient against the other party who is a merchant, sends a notice of objection to the record within 10 days after the record is received.

(c) A claim for breach of an otherwise valid contract which is barred under subsection (a) is

(1) the goods are to be specially manufactured or processed for the buyer, the seller sub manufactures or processes or makes commitments for the procurement of the goods in performanc in good faith to exist, and the seller cannot resell the goods at a reasonable price;

(2) the conduct of both parties in performing the agreement recognizes that a contract w

(3) reliance by one party on representations or an agreement under law outside of this [A party from raising the lack of a sufficient authenticated record as a defense; or

(4) the party against whom enforcement is sought, in pleading or testimony in court or o oath, admits facts from which a contract for sale can be found.

(d) A claim for breach of contract enforceable under this section is not unenforceable on th capable of being performed within one year or any other applicable period after its making.

SOURCE: Sections 2-201 and 2-203 (October, 1995).

Notes

1. **History.** Section 2-201(a) in the July, 1996 draft abolished the statute of frauds for Artic
was strongly recommended by the PEB Study Group and was approved by the Drafting Committee
motion to restore the statute of frauds was rejected by a voice vote of the Commissioners at the 199
Meeting of NCCUSL.

However, at the November, 1996 meeting, the Drafting Committee decided to restore "some
statute of frauds. Section 2-201 of the November, 1996 Draft, based upon the able draft by Profess
clarified the text without making it harder to satisfy the statute.

At the January, 1997 meeting of the Drafting Committee, a further revision that makes it eas
statute was submitted by Curtis Reitz was approved in principle and appeared in the March, 1997 d
were made at the March and May, 1997 meetings of the Drafting Committee.

At the May, 1997 meeting of the American Law Institute, a motion to retain the statute of fr
1 margin. A motion to delete subsection (d), however, was defeated.

2. Subsection (a) follows original Section 2-201(1), with some differences:

The diminimus amount is $10,000 rather than $500. This amount was approved at the ALI mee

The statutes of frauds defense cannot be raised under subsection (a) unless the person against w
is asserted denies that an agreement was made. Subsection (a) provides no procedures to test th

A record is sufficient if it is authenticated.

A record is not insufficient because it omits a quantity term. Although there is no Article 2 "ga
the term may be established by relevant evidence, including trade usage and course of dealing.
term is included in the record the claims is not enforceable beyond the quantity stated. Note, ho
longer a quantity limitation where there is conduct by both parties establishing an agreement or
in court or under oath. See subsection (c).

3. Subsection (b) retains the confirmation principle in Section 2-201(2) with the following

The text states that only the recipient of the confirmation must be a merchant. The text does no
may or may not include a farmer. The conclusion that farmers can never be a merchant, howev
Section 2-201 (1995), Comment 2, paragraph 2, which states that the merchant concept under S
"on normal business practices which are or ought to be typical of and familiar to any person in b

4. Subsection (c) states when a claim under an otherwise enforceable contract which is barr
(a) or (b) is "nonetheless enforceable.

Subsection (c)(1) is revised for clarity. The party seeking to avoid the statute of frauds, howeve
faith belief in the existence of a contract.

Subsection (c)(2) expands the "part performance exception in Section 2-201(3)(c) (1995). Co including part performance, takes the case out of the statute. To illustrate, suppose S claims the alleged oral contract to supply the buyer's requirements over a 5 year period. After six months, seller delivers and the buyer accepts requirements for that period. Later the buyer repudiates an frauds defense. Assuming that the defense is proper under subsection (a), the conduct of both p contract and the defense is no longer available. In short, the seller's claim of a five year contrac fact.

Subsection (c)(3) recognizes that reliance on representations or an agreement by one party "may raising the statute of frauds defense. Whether estoppel exists depends upon principles of law ou Section 1-102(b) (April, 1997). Presumably, the court will be guided by Restatement (Second) factor of which is the extent to which the reliance "corroborates evidence of the making and ter the making and terms are otherwise established by clear and convincing evidence. See subsect

Subsection (c)(4) restores subsection 3(b) of former UCC Section 2-201, but clarifies that the ac court or "otherwise under oath and must admit facts from which a contract may be found.

5. Subsection (d), which is new, survived a motion to delete at the ALI meeting in May, 19 2-201(a) (Nov. 1996). The phrase "any other applicable period recognizes that some state statutes than one year.

To illustrate, suppose S and B enter an oral contract on February 1, 1996 to deliver goods on the price of $7,500. The oral agreement is not within the scope of Section 2-201(a) because the pri but, since it is not performable within a year from its making, the agreement would be subject to a s under the so-called "one year clause. Subsection (d) eliminates this defense.

6. Subsection (f) in the March, 1997 Draft (former Section 2-203 on sealed records) has bee 2-204(b).

SECTION 2-202. PAROL OR EXTRINSIC EVIDENCE. Terms on which confirmatory records of the parties agree, or which are otherwise set forth in a record intended by th expression of their agreement with respect to the included terms, may not be contradicted by evider agreement or contemporaneous oral agreement. However, terms in a record may be explained by a may be supplemented by evidence of:

(1) course of performance, usage of trade, or course of dealing; and

(2) noncontradictory additional terms unless:

(A) The terms if agreed upon by the parties would certainly have been included in the r

(B) The court finds that the record was intended as a complete and exclusive statement

agreement.

SOURCE: Sales, Section 2-202 (March, 1995).

Notes

1. The operation of the so-called parol evidence rule depends upon the intention of the parti intend that the record be a final expression of their agreement with respect to some or all of the tern Otherwise, all evidence relevant to the terms of the agreement is admissible under the usual evident

2. If the court concludes that the parties intended a partially integrated writing (some terms 2-202 then states what terms allegedly agreed to in negotiations prior to or contemporaneously with from a course of dealing, course of performance or usage of trade are admissible.

In a partial integration, terms allegedly agreed to prior to or contemporaneously with the rec they contradict terms in the record. However, the terms in the record may be supplemented by evid performance, course of dealing or usage of trade and noncontradictory additional terms, unless the a to "would certainly have been included in the record. The "would certainly language, taken from original Section 2-202, replaces the phrase "consistent additional terms.

In a total integration, normally manifested by a merger clause, noncontradictory additional t admissible. However, terms in the record may still be supplemented by evidence of course of perfo and course of dealing unless that evidence is specifically negated or excluded in the record. The po Comment 2 to the original Section 2-202, therefore, is followed, i.e., that the special status of this e related to pre-contract negotiations) and the assumption that the parties intended to include it unless requires more than a general merger clause to exclude. See, e.g., *Nanakuli Paving & Rock Co. v. Sh Oil Co., Inc.*, 664 F.2d 772 (9th Cir. 1981).

The effect of a totally integrated record is that both contradictory and non-contradictory add excluded. The best evidence of a total integration is a so-called "merger clause. The last sentence the May, 1994 Draft stated that a merger clause does not create a conclusive presumption of a total this sentence was consistent with the case law, see, e.g., *ARB, Inc. v. E-Systems, Inc.*, 663 F.2d 189, (D.C. Cir. 1980), it was removed at the March, 1995 meeting of the Drafting Committee. As a prac clause creates a presumption that both parties intended a total integration and puts a difficult burden the contrary. At the September, 1996 meeting, the Drafting Committee voted to include Section 2-2 effect of the presumption to contracts other than consumer contracts. At the March, 1997 meeting o Committee, subsection (b) of the March, 1997 Draft was deleted. A motion to restore the second se defeated by a close vote.

3. **Interpretation.** In the case of either a partial or a total integration, terms in the record m "explained by relevant evidence and by "course of dealing or usage of trade or by course of perfor 2-202(1). Evidence intended to explain a term in a record involves contract interpretation to which does not apply. Evidence intended to supplement a term in a record poses in different language the additional terms are contradictory or not. But unless the record clearly excludes or contracts out of

of dealing or performance, both Section 1-205(3) and Section 2-202(a)(1) support admissibility to s it may also appear to vary or contradict that term.

Subsection (c) of the May, 1994 Draft, which stated that before extrinsic evidence was admi contract the court must find that the contract was ambiguous, was deleted at the March, 1995 meeti Committee. Subsection (c), which sparked controversy, was inconsistent with the policy of the 199 2-202, Comment 1(c), the Restatement, Second of Contracts, see §§ 200-203, and the approach of m *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968) (Traynor, Chief Justice).

At the October, 1995 meeting of the Drafting Committee, the scope of the court's power to integrated writing was discussed. Concern was expressed lest the phrase "terms may be explained would be limited to the sources listed in (1) and (2) and that the dreaded "plain meaning rule migh save the phrase passed, however, [9-8, 7-0] with the expectation that the Comments would state tha for contract interpretation are broader than those indicated in subsection (a). See CISG Article 8(3)

4. **Preliminary hearing on intention.** Despite a contrary recommendation by the Coordination Committee, the Article 2 Drafting Committee voted (September, 1996) to retain subs required the court to conduct a preliminary hearing on whether the parties intended to integrate the dealing with type of evidence relevant to the intention question, however, was deleted at the Noven Subsection (b) of the January, 1997 Draft then excluded commercial contracts with a merger clause a hearing. Subsection (b) of the May, 1997 Draft simply stated: "The court shall consider all evider intention of the parties to integrate the record. The July, 1997 Draft deletes entirely subsection (b)

SECTION 2-203. FORMATION IN GENERAL.

(a) A contract may be made in any manner sufficient to show agreement, including by offer conduct of both parties which recognizes the existence of a contract.

(b) A contract may be found if the parties intend to form a contract, even if the time that the made cannot be determined, one or more terms are left open or to be agreed upon, the records of the establish a contract, or one party reserves the right to modify terms.

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

(d) Conspicuous language in a record which expressly conditions the intention of the propo only upon agreement by the other party to terms proposed in the record is effective to prevent contr

SOURCE: Sales, Section 2-204.

Notes

1. In transactions where terms in the records of one or both parties appear to prevent agreem contract formation is treated in Sections 2-203(b) and 2-205(a)(1) rather than former Section 2-207 determine whether a contract has been formed. If some contract is formed, the question of what ter included in the agreement is treated in new Section 2-206 where consumer contracts are involved a

The last clause in Section 2-203(b) deals with contract formation where the parties intend to varying terms in their records do not otherwise establish (or might prevent the formation of) a contr from the first sentence of the original Section 2-207(3). Thus, if there is conduct by both parties wh existence of a contract but terms in their records do not agree, a contract is still made under Section

2. Under basic contract law, either party can condition the formation of a contract upon agr party to terms proposed. See Section 2-207(1) (1995 Official Text). Subsection (d) deals with the offeror or the person purporting to accept an offer expresses that condition in a record: The conditio conspicuous language is used, see Section 2-102(a)(7). Suppose, for example, that the seller's offe notice of any breach of warranty must be given within 30 days of when the buyer "should have disc that the seller "will not be bound unless the buyer agrees to the seller's terms. That language cond bound is not effective unless it is **CONSPICUOUS**. Whether it is conspicuous or not may depend the language is in standard terms or "boilerplate.

3. Section 2B-202 omits subsection (d).

4. In November, 1996, the Drafting Committee decided to eliminate all references to "stand "standard terms in Sections 2-203, 2-205, and 2-207. This approach was reaffirmed at the Januar Drafting Committee and all bracketed references to standard terms have been deleted.

SECTION 2-204. FIRM OFFERS; SEALED RECORDS.

(a) An offer by a merchant to enter into a contract made in an authenticated record that by i assurance that the offer will be held open is not revocable for lack of consideration during the time stated, the offer is irrevocable for a reasonable time not exceeding 90 days. A term of assurance in offeree to the offeror is ineffective unless the term is conspicuous.

(b) Affixing a seal to a record evidencing a contract for sale or an offer does not make the r instrument. The law with respect to sealed instruments does not apply to the contract or offer.

SOURCE: Sales, Section 2-205 (December, 1994).

Notes

1. The September 10, 1993 draft of Section 2-205 provided that if no time is stated in a wri

offer is irrevocable for a commercially reasonable time. A motion to restore the original language imposing a three month limit, was subsequently approved. See Section 2B-203.

2. At the September, 1996 meeting, the Drafting Committee voted to replace the word "con 1996 Draft with "manifests assent. See Section 2B-303, last sentence. It protects an offeror again offer is in a record, frequently a standard form, prepared by the offeree to be used by the offeror. W Section 2-103 and the concept of "manifests assent , the word conspicuous has been restored.

3. Former Section 2-203 on Sealed Instruments now appears in Section 2-204(b).

SECTION 2-205. OFFER AND ACCEPTANCE.

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

(1) An offer to make a contract invites acceptance in any manner and by any medium re circumstances. Subject to Section 2-203(d), a definite expression of acceptance in a record that als from the offer is an acceptance.

(2) An order or other offer to buy or acquire goods for prompt or current shipment invit prompt promise to ship or by a prompt or current shipment of goods. If the order or offer is constru by the shipment of non-conforming goods, the non-conforming shipment is not an acceptance if the notifies the buyer that the shipment is offered only as an accommodation.

(b) If the beginning of a requested performance is a reasonable mode of acceptance, an offe notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptan

SOURCE: Sales, Section 2-206.

Notes

1. Section 2-204 and Section 2-205 [formerly Section 2-206] were revised to state that, in t forms and other disputes over records, issues of contract formation are to be separated from questi become part of the contract. Thus, revised Section 2-203(b) provides that the parties can intend to terms in the records of the parties do not otherwise establish a contract and revised Section 2-205(a expression of acceptance in a record accepts an offer even though it contains terms varying the ter principles were previously found in Section 2-207(1) and (3) of the 1990 Official Text. Compare S

Although the statute does not say so, it is unlikely that a definite acceptance with varying te record will be found unless the varying terms are in the "boilerplate.

2. The formation test in Section 2-205(a)(1) follows that in the original Section 2-206(1). U clearly provides otherwise, a definite acceptance creates a contract even though the acceptance cont that vary the offer. Unlike the Restatement, Second and Article 19 of CISG, a definite acceptance materially vary the terms of the offer can create a contract. The offeree can avoid a contract by exp conspicuous language that no contract exists unless the offeror agrees to the offeree's standard term Presumably, if both parties state conspicuously that they will not be bound unless the other agrees t contract unless there is subsequent conduct by both recognizing the existence of a contract.

Language in an offer or purported acceptance which attempts to condition contract formatio the other to the terms proposed must be conspicuous when contained in a record. Section 2-203(d)

Here are some examples.

Example #1. After negotiations where no agreement was reached, B sent S an offer in a rec purchase 1,000 units of described goods at $500 per unit. The front of the purchase order contained filled in and the back contained several standard terms, including an arbitration clause. S sent an ac of which stated "we are pleased to accept your order for 1,000 units at $500 per unit. The back of contained a standard term excluding all liability for consequential damages. After the acknowledgm changed its mind (the market price went up) and faxed a rejection to B. There is a contract under S which reinforces Section 2-203(a). B clearly accepted the offer and the seller's record did not cons language or otherwise that there would be no contract unless S agreed to all of the terms proposed.

The case for a definite expression of acceptance is even clearer if S also shipped the goods b revoke. There would be no contract, however, if S had said "we are pleased to accept your order at conspicuously indicated that it did not intend to conclude a contract unless B agreed to all of S's ter standard. See Section 2-203(d). Whether B's arbitration clause or S's exclusion clause are part of upon Section 2-207.

Example #2. Suppose, in **Example #1**, that Seller "accepted Buyer's order for $600 per u the back of the acknowledgment contained a standard term that "seller reserves the right to litigate a Nevertheless, Seller shipped the goods with the acknowledgment and Buyer accepted them without contract under Section 2-203(b). Since the price term was negotiated, Seller's price of $600 constit which Buyer accepted by using the goods. [The usual principles of contract formation apply here.] unfair surprise and B assented without objection by accepting the goods. Which if any of the confli records prepared by the parties become part of the contract is determined by Section 2-207.

Example #3. Suppose, in **Example #2**, that Seller accepted Buyer's order for $500 and shi goods which Buyer accepted. Later, there was a dispute, Buyer demanded arbitration and Seller ins the right to litigate. There is a contract under either Section 2-205(a)(1) or 2-203 despite the differe dispute resolution. Unless the Buyer's arbitration clause becomes part of the agreement under Sect rule is that the seller may litigate.

Example #4. Suppose that terms in the records of both parties conspicuously state that ther contract unless their terms are agreed to by the other party. See Section 2-203(d). The seller ships goods. There is a contract under Section 2-203(a) and (b). The agreement of the parties includes th 2-207.

3. Section 2-205 conforms to Section 2B-204 in that the phrase "invites acceptance is subs
be construed as language. The response by an "electronic agent is treated in Section 2B-204(c).
Section 2B-204 omit subsection (b) of Section 2-205.

4. Recent cases and revised Article 2.

Two recent cases in the Seventh Circuit, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir.
and *Hill v. Gateway 2000, Inc.*, ___ F.3d ___, 1997 WL 2809 (7th Cir. 1997), raise questions about
adequacy of the proposed contract formation provisions in Part 2 and the operation of the new "pas
provision in Section 2-404(a). Both were decided by Judge Easterbrook.

In *ProCD* the defendant, an individual, bought software with a "shrinkwrap license from a
transaction that appears to satisfy the evolving definition of "mass market in Section 2B-102(a)(25
took possession of the disk he was told that there were terms on the inside. The key term was a lice
both in the standard form record and on the computer disk, that he had an option to accept the licen
the software for a refund. D used the software, violated the license and was sued by P, the produce
the district court, enforced the license. Among other things, the court concluded: (1) The dispute in
a "battle of the forms under Section 2-207; (2) Section 2-204(1), augmented by Section 2-606, sup
parties intended to conclude the contract when D accepted the terms of the license by using the prog
for and took delivery of the disk. The court rejected the argument that D was bound only by terms
payment and possession; and (3) Article 2, which the court applied to the license of goods, did not
dispute be conspicuous or be presented in any particular way. Section 2-302 was not discussed. No
to Section 2-207(1) and (2), which supports the view that a contract can be formed along with a pro
contract.

In *Gateway*, the defendant, responding to advertising, ordered a computer directly from Gat
manufacturer. D paid for the computer by credit card before it was shipped and was unaware, at tha
the contract. The computer arrived in a box with no external message that there were terms inside.
contained, inter alia, a limited express warranty, a service commitment and an agreement to arbitrat
that the purchaser would be bound to the terms unless the computer was returned within 30 days. D
and, when warranty claims were made, Gateway demanded arbitration. The district court refused to
upon appeal, the decision was reversed: D had agreed in writing to arbitrate by failing to object in t
court rejected Section 2-207 as inapplicable and affirmed the approach of ProCD to formation unde
importantly, the court rejected any claim that D was surprised by the terms and imposed the primary
discover, understand and respond to the standard terms on the purchaser: [T]he Hills knew before th
that the carton would include some important terms, and they did not seek to discover these in adva
did not learn of the terms in advance, they inspected the documents after delivery and did not exerc
the contract and obtain a refund.

The following questions were discussed at the May, 1997 meeting of the Drafting Committe

1. Does Article 2 adequately support the court's conclusion that the contract is not formed a
terms not included until the buyer has an option after paying for and taking possession of the goods
reject and return the goods for a refund. If not, what revisions should be made to respond to transac

2. Does Article 2 adequately neutralize the risk of unfair surprise in these cases? If not, wh

made?

The following solution, proposed by the Reporter, was discussed but no final action was tak

In a contract where the buyer [remote or immediate] has taken delivery of or paid for the goods material terms of the proposed agreement are disclosed by the seller and those material terms ar to the buyer after payment or receipt, the terms do not become part of the agreement unless the of and agrees to them by affirmative conduct or by authenticating the record in which they are

SECTION 2-206. CONSUMER CONTRACTS; RECORDS.

(a) In a consumer contract, if a consumer agrees to a record, any non-negotiated term that a in a transaction of this type would not reasonably expect to be in the record is excluded from the co consumer had knowledge of the term before agreeing to the record.

(b) Before deciding whether to exclude a term under subsection (a), the court, on motion of motion, after affording the parties a reasonable and expeditious opportunity to present evidence on be included or excluded from the contract, shall decide whether the contract should be interpreted t

(c) This section shall not operate to exclude an otherwise enforceable term disclaiming or r warranty.

SOURCE: New.

Notes

1. The question is when a consumer who agrees to a record, usually by authentication or by assent to terms in the record, bound by the terms in the record? The answer in a consumer contract that the terms is excluded when a term is not negotiated, a reasonable consumer in this type of tran it, and the consumer had no knowledge of the term before the agreement. The ALI supported this p at the Annual Meeting in May, 1997.

2. Subsection (b) gives the parties the right to a hearing on the context issues. The court de a matter of contract interpretation. See Section 2-105(b). The usual burdens of proof apply, e.g., if exclude the term the consumer must establish the conditions for exclusion.

Subsection (b)(1) of the January, 1997 Draft identified possible sources of evidence relevan reasonable consumer in a transaction of this type would expect the term. That text was deleted at th of the Drafting Committee and will be relegated to the Comments.

3. Subsection (c) states that if a term excluding or modifying an implied warranty is enforce 2-407(e), the term cannot be excluded under Section 2-206(a). Section 2-105(a), however, may hav

Not all records are standard forms but many records contain standard terms, usually preprint not distinguish between standard and other terms in a consumer contract. Arguably, the risk of surp consumer agrees to a record with standard terms than when the record deals with terms that are freq as price, payment or quantity.

SECTION 2-207. EFFECT OF VARYING TERMS IN RECORDS.

(a) This section is subject to Sections 2-202 and 2-206.

(b) If a contract is formed by offer and acceptance and the acceptance is by a record contain from the offer or by conduct of the parties that recognizes the existence of a contract but the records otherwise establish a contract for sale, the contract includes:

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

(2) terms not in records to which the parties have agreed;

(3) terms supplied or incorporated under any provision of this [Act]; and

(4) terms in a record supplied by a party to which the other party has expressly agreed.

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

(1) terms agreed to prior to the confirmation;

(2) terms in a confirming record that do not materially vary the prior agreement and are objected to;

(3) terms in confirming records to the extent that they agree; and

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

Notes

1. **Drafting History**. The original Section 2-207 was both an exception to the common law read principle and a particularized application in commercial cases of the unconscionability doctri practice it applied to determine if there was some contract for sale when the writings of the parties so, what terms in the writings of the parties became part of the contract. One objective was to neut advantage gained where standard terms were used (although Section 2-207 was not limited to stand the risk of unfair surprise where one party apparently agreed (assented by conduct) to standard term read or understood. The assumption was that even in commercial transactions the risk of unfair sur rules where standard terms are involved. More particularly, it assumed that commercial parties in u [i.e., no record containing all the terms of the contract] do not have a realistic opportunity to review other before apparently assenting by conduct.

Initially, two versions of Section 2-207 were drafted. The first followed Section 2-207 in th and attempted to amplify and clarify it in light of apparent objectives, academic commentary, and j second developed a simplified structure that focused on the unfair surprise issue. Assuming that so under Sections 2-203 and 2-205, the sole question was whether "varying terms became part of the 1-3, 1993 meeting, the Drafting Committee approved the approach of the second version of Section implement that objective was made in the May, 1994 draft, where the key concept, "varying terms, 2-207(a). Drawing on the September, 1994 Draft of the Licenses article, the December 20, 1994 D new section on "standard form agreements and defined such terms as "standard form and "standa These sections provided a direct response to recurring questions raised in standard form contracting Section 2-206, covering "Standard Form Agreements, and the new definitions to deal with most u advantage taking, the May, 1995 Draft of Section 2-207 was limited to "conflicting standard terms other terms by adding to or contradicting them.

In October, 1995 the Drafting Committee decided to limit Section 2-206 to cases where all contained in a standard form record. Section 2-207, therefore, was reworked to deal with the unstru negotiated transaction where standard terms are contained in the records [not standard forms] of on

At the November, 1996 meeting of the Drafting Committee, however, the decision was mad responding to standard forms and standard terms in commercial transactions. Thus, Section 2-206(redraft of Section 2-207 that used the words "records and "terms rather than "standard forms an approved in principle. The January, 1997 Draft, however, retained [standard terms] bracketed for t contained a subsection (c) proposing a "clean up rule where one party claims that standard terms i incorporated by express agreement. At the January, 1997 meeting of the Drafting Committee, the R delete all references to standard terms in and subsection (c) to Section 2-207.

The March, 1997 Draft of Section 2-207, dealt with two special cases where disputes over t where both parties exchange records (herein of the "battle of the records) and (2) where one party a contract previously formed, and stated what terms are included in, and by necessary implication e contract. Thus, terms upon which the records agree in substance are included but terms upon whic are excluded, unless they are "otherwise agreed to or become part of a modification under Section "otherwise agreed to principle is subject to an exception: The court may find, after reviewing the t a record to which one party apparently assented should be excluded because that party would be un hardship if the term were included. The "unfair surprise exception was justified as follows:

A primary purpose of original Section 2-207 and the interpretive cases was to police against unf
commercial transactions. The risk of unfair surprise is high when one party attempts to include
("boilerplate) drafted to serve its own interest in a contract where the other party appears to agr
otherwise but did not read and was not expected to read the term. These terms are frequently ex
unless the other party assented with express awareness of or expressly agreed to them. Althoug
Committee, because of definitional problems, has not relied upon the presence of "standard term
requirement of "expressly agreed in the statute, the process of contract formation here is still su
unconscionability limitation in Section 2-106, which deals with unfair surprise and hardship. It
interpreting revised Section 2-207 will continue to find unfair surprise where the circumstances
terms not clearly exclude terms not clearly covered by Section 2-207 unless there is express agr
lesson from the case law is that it is much easier for a court to find unfair surprise or the presenc
after the fact than it is to state those principles in the statute. Thus, Section 2-207(3) states the e
in broad terms and relies upon the courts to apply it.

At the March, 1997 meeting, the Drafting Committee voted to delete the "unfair surprise p
2-207(3) and to treat the confirmation issue and the conflicting records problem in two subsections.

The July, 1997 Draft of Section 2-207 was approved at the May, 1997 meeting of the Drafti

Revised Section 2-207 (July, 1997): A Road Map.

Assume that some contract has been formed under Article 2, Part 2. What are its terms? No
terms will be agreed at the time of contract formation and other terms may be included later. Even
later are modifications, Section 2-207 rather than Section 2-210(a) may provide the applicable princ
short, Sections 2-207 and 2-210(a) must be read together.

(a) **All terms are expressed in one record.**

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

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

Section 2-207 does not apply here. Since the agreement is oral, the statute of frauds probab
Section 2-201. If not, the usual principles of agreement apply.

(c) **Some Terms in the Record of only one party.**

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

For example, suppose the buyer makes an oral offer and the seller makes a definite acceptan
contains terms that vary from the offer. A contract is formed, see Section 2-205(a)(1), and the vary
the agreement.

Suppose, further, that the seller ships and the buyer accepts the goods. Does the buyer's con

goods equal agreement to the seller's varying terms? Under subsection (b)(4), the answer is no: Th agree to the term. As a practical matter, the courts have distinguished between negotiated and "boi required a higher quality of assent to incorporate the boilerplate.

Suppose, further, that the seller's offer is made in a record and the buyer accepts orally or by other terms that vary from the offer. This is a highly unlikely version of the "first shot problem an applies. Again, terms in the seller's record are not part of the contract unless the buyer has expressl

(d) **Both parties exchange records.**

Subsection (b) applies if the contract is created by offer and acceptance and both the offer a in records. Both the "first and "last shot are neutralized and ambiguous conduct does not bring e the agreement. There must be express agreement.

Subsection (b) also applies if the contract is formed by conduct rather than by offer and acce terms in the records are excluded because the records do not agree in substance, those excluded ter the agreement by ambiguous conduct. Thus, if the seller seeks to include a term in its record and th record, the seller's term is out to the extent that the records do not agree. The would not agree unle on the same matter, e.g., notice time for breach of warranty, and the terms agreed in substance, e.g., This is the "knock out rule in current Section 2-207(3) and Article 2.22 of the UNIDROIT Princip "knock out does not depend upon standard terms. Hence, revised Section 2-207 deals with the "ba these cases, the crucial question is how to treat the excluded terms. Can they still become part of th answer is found in subsection (b)(4): The answer is yes if, after their initial exclusion, the parties ex

(e) **Confirmations.**

Section 2-207(c) deals specifically with records that confirm a contract previously made. C 2-202(b), dealing with confirmations for purposes of the statute of frauds.

Suppose Seller and Buyer conclude an oral contract not subject to the statute of frauds or a c through "informal correspondence. Later, Seller sends a record confirming the agreement and con the contract. What is the effect of the varying terms?

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

Under subsection (d), only terms in the confirmation that do not materially vary the contract seasonably objected to become part of the contract. Terms which materially vary the contract are ex modification in good faith which satisfies Section 2-210(a). This analysis applies if either or both confirm the earlier agreement.

(f) **"My way or no way."**

Section 2-203(d) recognizes that a party may condition its willingness to contract upon the c agreement to terms proposed and states that states that conspicuous language in a record that will p contract on the exchange of records with varying terms but will not prevent a contract if there is "co recognizing the existence of a contract. Section 2-203(a). In cases of mutual conduct, what is the no way provision? If the drafter cannot claim there is no contract, can it claim that the contract (ba the terms in its record?

The reporters believe that the default rule in Section 2-207(b) should prevail over the expres "knockout rule eliminate terms upon which the writings do not agree and the requirement of expre terms that were excluded from being incorporated simply because the parties have performed part o

How should this result be implemented in the statute? In principle a party who expressly co willingness to contract on agreement to specific terms and then ships the goods or accepts the good that agreement should be precluded from relying on the condition.

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

(a) A "course of performance is a sequence of conduct between the parties to a particular t if:

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

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

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

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

(c) Except as otherwise provided in subsection (d), the express terms of an agreement and a of performance, course of dealing, or usage of trade must be construed whenever reasonable as con

If such construction is unreasonable:

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

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

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

(d) Subject to Section 2-210, course of performance is relevant to show a waiver or modificatio inconsistent with the course of performance.

SOURCE: Sales, Section 2-208.

Notes

This section has been conformed to revised Section 1-304(a) and, ultimately, will be moved

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

(a) An agreement made in good faith which modifies a contract under this article is binding consideration.

(b) Except in a consumer contract, a contract that contains a term that excludes modificatio by an authenticated record may not be otherwise modified or rescinded. However, a party whose la inconsistent with the term requiring an authenticated record may not assert that term if the language other party to change its position reasonably and in good faith.

(c) Subject to subsection (b), a term in a contract may be waived by the party for whose ben Language, conduct or a course of performance between the parties may be relevant to show a waive executory portion of a contract, however, may be retracted by seasonable notification received by th performance is required of any term waived unless the waiver induced the other party to change its in good faith.

SOURCE: Sales, Section 2-209.

Notes

1. There are several changes in revised Section 2-210 [formerly Section 2-209 of the 1990 O

First, the requirement that a modifying agreement must be made in good faith, previously fo is explicitly stated in subsection (a). This follows the cases, see, e.g., *Roth Steel Products v. Sharon Corp.*, 705 F.2d 134 (6th Cir. 1983), and avoids the argument that a contract modification is neither enforcement of a contract under Section 1-203. This revision is rejected in Section 2B-303.

Second, subsection (b) in the May, 1997 Draft has been deleted. If the original contract sati frauds there is no requirement that the modification also satisfy the statute. If, however, the origina original agreement coupled with the modification are within the statute and do not satisfy it, the mo unenforceable. This deletion both protects oral modifications of agreements that comply with the s problem that has puzzled the commentators and the courts. See, e.g., *Costco Wholesale Corp. v. Worldwide Licensing*, 898 P.2d 347 (Wash.App. 1995).

Third, except in a consumer contract the parties may agree in a contract that an authenticate to modify or rescind the contract. In short, the parties create their own statute of frauds in the form Short of compliance, the only way to avoid this limitation is by the estoppel test stated in subsection seeking to invoke the NOM clause may be estopped if language or conduct inconsistent with the NO reasonable, good faith reliance by the other party on an oral modification. See *Brookside Farms v. Rizzo's, Inc.*, 873 F. Supp. 1029 (S.D. Tex. 1995). This result is consistent with the estoppel excep revised Section 2-201(c)(3).

2. Subsection (c) recognizes the general principle of waiver where NOM clauses are not inv benefit of one party may be waived by one party without agreement by the other. These terms will conditions upon an agreed or promised performance, such as a condition of notice.

There are three types of waiver. In the first, called election waiver, the party for whose bene included elects not to insist upon the condition after the time for its occurrence has passed. The cor a need to prove reliance by the other party. Election waiver is included in the first sentence of subs called reliance waiver, the party for whose benefit a condition is included states that he will not insi a condition in the future. Here, however, the waiver may be retracted unless the other party has cha "reasonably and good faith. Subsection (c), last sentence. In the third, the court simply excuses th nonoccurrence would cause "disproportionate forfeiture and the occurrence of the condition was n agreed exchange. Restatement, Second, Contracts § 229. See *Aetna Casualty and Surety Co. v. Murphy*, 538 A.2d 219 (Conn. 1988) (burden on party seeking excuse to prove that condition was n exchange).

To illustrate, suppose the contract contains a NOM clause and a schedule for installment del The seller encounters production problems, misses a due date and requests an extension of delivery First, suppose the buyer states that it will not insist on the NOM condition and orally agrees to a tim does not request a written modification and proceeds to deliver under the modified schedule. Later NOM clause and sues for damages caused by late delivery. Here, the NOM clause is waived under language inconsistent with the term which induced reasonable, good faith reliance and the agreed m delivery schedule, if in good faith, is enforceable under subsection (a). Second, suppose the buyer s delivery is excused and orally agrees to a time extension. The seller, without obtaining a written m under the modified schedule. Later, the buyer invokes the NOM clause and sues the seller for dama

delivery. Once again, the NOM clause was waived under subsection (b).

Although a party may waive one late installment, an agreement to modify the time of future necessarily enforceable. It must be either a "good faith agreement under subsection (a) or induce r reliance under subsection (d). The doctrine of waiver is not available to create or modify agreed du Compare Sections 2-604 and 2-702.

SECTION 2-210. ATTRIBUTION PROCEDURE.

(a) An attribution procedure is a procedure established by agreement or mutually adopted b purpose of verifying that electronic records, messages, or performances are those of the respective p errors in the transmission or informational content of an electronic message, record, or performance commercially reasonable.

(b) The commercial reasonableness of an attribution procedure is a question of law to be de in light of the purposes of the procedure and the commercial circumstances at the time of the agreem procedure may require the use of algorithms or other codes, identifying words or numbers, encrypti key escrow, or any security devices that are reasonable under the circumstances.

SOURCE: Section 2B-110 (May, 1997).

SECTION 2-211. ATTRIBUTION OF ELECTRONIC RECORD, MESSAGE, OR PERFORMANCE.

(a) As between the parties, an electronic message, record, or performance received by a par the party indicated as the sender if:

(1) it was sent by that party, its agent, or its electronic agent;

(2) the receiving party, in good faith and in compliance with an attribution procedure co sent by the other party; or

(3) subject to subsection (b), the message or performance:

(A) resulted from acts of a person that obtained access to access numbers, codes, cor or the like from a source under the control of the alleged sender creating the appearance that it came sender;

(B) the access occurred under circumstances constituting a failure to exercise reason alleged sender; and

(C) the receiving party reasonably relied to its detriment on the apparent source of th performance.

(b) In a case governed by subsection (a)(3), the following rules apply:

(1) The receiving party has the burden of proving reasonable reliance, and the alleged s burden of proving reasonable care.

(2) Reliance on an electronic record or performance that does not comply with an agree procedure is not reasonable unless authorized by an individual representing the alleged sender.

(c) If an electronic message was transmitted pursuant to an attribution procedure for the det the message contained an error the following rules apply:

(1) If the sender complied with the attribution procedure and the error would have been receiving party also complied with the attribution procedure, the sender is not bound if the error rel of the message or performance.

(2) If the sender receives a notice required by the attribution procedure of the content of performance as received, the sender has a duty to in a commercially reasonable manner review the error detected by it.

(d) Except as otherwise provided in subsection (a)(1) and (c), if a loss occurs because a par procedure for attribution that was not commercially reasonable, the party that required use of the pr unless it disclosed the nature of the risk to the other party or offered commercially reasonable alter

rejected. The party's liability under this section is limited to losses that could not have been preven
reasonable care by the other party.

SECTION 2-212. AUTHENTICATION EFFECT AND PROOF; ELECTRONIC AGENT AUTHENTICATION.

(a) An authentication is intended to establish the party's identity, its adoption and acceptanc
term, and the authenticity of the record or term.

(b) Operations of an electronic agent constitute the authentication of a party if the party des
or selected the electronic agent for the purpose of achieving results of that type.

(c) A record or message is authenticated as a matter of law if a party complied with an attri
authentication. Otherwise, authentication may be proven in any manner including by showing that
which a party necessarily must have executed or adopted a symbol in order to proceed further in the
information.

SOURCE: Section 2B-114 (May, 1997).

SECTION 2-213. ELECTRONIC TRANSACTIONS AND MESSAGES: TIMING OF CONTRACT AND EFFECTIVENESS OF MESSAGE.

(a) If an electronic message initiated by a party or an electronic agent evokes an electronic
messages reflect an intent to be bound, a contract exists when:

(1) the response signifying acceptance is received; or

(2) if the response consists of electronically furnishing the requested information or noti
information, when the information or notice is received unless the originating message prohibited t

(b) Subsection to Section 2-211, an electronic message is effective when received, even if

of its receipt.

(c) Subject to subsection (d), operations of one or more electronic agents which confirm the agreement are effective to form an agreement even if no individual representing either party was aw action or its results.

(d) In an electronic transaction, the following rules apply:

(1) An agreement is formed by the interaction of two electronic agents if the interaction agents each engaging in operations that signify agreement, such as by engaging in performing the ag instructing performance, accepting performance, or making a record of the existence of an agreeme

(2) An agreement may be formed by the interaction of an electronic agent and an indivi agreement is formed if an individual has reason to know that the individual is dealing with an electr actions the person should know will cause the agent to perform or to permit further use, or that are constituting acceptance regardless of other contemporaneous expressions by the individual to whicl cannot react.

(3) The terms of the contract include terms on which the parties have previously agreed electronic agents could take into account, and, terms provided by this article or other law.

SOURCES: Sections 2B-204, 2B-203(e) and (f) (May, 1997).

SECTION 2-214. ACKNOWLEDGMENT OF ELECTRONIC MESSAGE.

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

(1) If the originator indicated in the message or otherwise that the message was conditio acknowledgment, the message does not bind the originator until acknowledgment is received and [t

acknowledgment is not received in a reasonable time.

(2) If the originator requested acknowledgment but did not state the message was condi
acknowledgment and acknowledgment has not been received within a reasonable tune after the mes
to the other party, the originator may either retract the message or specify a further reasonable time
acknowledgment must be received or the message will be treated as not having binding effect. If ac
received within that additional time, the originator may treat the message as not having binding effe

(3) If the originator requested acknowledgment and specified a time for receipt, the orig
the options in subsection (a)(2) if receipt does not occur within that time.

(b) Receipt of acknowledgment establishes that the message was received but does not in it
content sent corresponds to the content received.

SOURCE: Section 2B-205 (May, 1997).

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.

(b) If the contract price is payable in whole or in part in goods, each transferor is a seller fo article with respect to the goods transferred.

(c) If all or part of the contract price is payable in an interest in real property, this article ap goods but not to the transfer of the interest in real property.

SOURCE: Sales, Section 2-304.

Notes

There are no substantive changes in former Section 2-304.

SECTION 2-302. PERFORMANCE AT SINGLE TIME.

(a) If all of a seller's performance can be rendered at one time, the performance is due at on buyer's reciprocal performance is due only on tender of full performance.

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

(c) If payment cannot be apportioned or the agreement or the circumstances indicate that pa demanded for part performance, payment is due on completion of full performance.

SOURCE: Sales, Section 2-307.

Notes

1. This is an elaboration of former Section 2-307 and clarifies when a party's performance what the other party's duties are on full performance. Subsection (a) follows Section 2B-603. Subs which state when, in the absence of an agreed installment contract, a part performance is permitted be apportioned, follow Section 2B-604. Except for covering the obligations of both seller and buye substance are intended.

2. The factors justifying delivery in more than a single lot include the type of disruptive circ alternatives reasonably available and the understanding that the parties will make up any deficienci time. Thus, if the seller agreed to deliver 10 carloads and, because of a railroad strike, only three ca time of delivery and the cost of alternative transportation was high, the seller is probably obligated Assuming reasonable efforts, the balance is due as cars become available.

This section should be distinguished from Section 2-715, which deals with excuse and subs when changed circumstances disrupt agreed methods of shipment, delivery or payment. Presumabl to vary a "default rule than to excuse an agreed performance.

3. The operation of Section 2-302 creates an installment contract, i.e., goods delivered "in separately accepted. Section 2-710(1). But it is not a credit installment contract: payment for eac This makes sense if payment for the single lot was due upon tender. But suppose the contract said quantity to be delivered and the parties agreed upon 30 days credit. If circumstances justify deliver each lot due 30 days after delivery or must payment be made upon tender? The answer should be th survives and payment is not due until all of the goods are tendered. Only the "default rule is alter

4. Clearly, the installment contract created by Section 2-302 is by operation of law. It in no the parties's power to create by agreement an installment contract where payment is due after the g accepted.

SECTION 2-303. OPEN-PRICE TERM.

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

(1) not agreed to;

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

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

(b) If a contract formed under subsection (a), the price is a reasonable price at the time that by the contract to make delivery.

(c) A price to be fixed by the seller or the buyer must be fixed in good faith.

(d) If a price left to be fixed otherwise than by agreement of the parties fails to be fixed thro party, the other party at that party's option may treat the contract as canceled or may fix a reasonabl

(e) If the parties intend not to be bound unless the contract price is fixed or agreed to and it to, a contract is not formed. In that case, the buyer shall return any goods already received or, if una reasonable value at the time of transfer, and the seller shall return any portion of the contract price p

SOURCE: Sales, Section 2-305.

Notes

There are no revision of substance in former Section 2-305.

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

(a) A contractual term that measures the quantity of goods by the output of the seller or the buyer means the actual output or requirements that may occur in good faith. A party may not offer unreasonably disproportionate to a stated estimate or, in the absence of a stated estimate, to any nor comparable previous output or requirements unless there are no outputs or requirements in good fai

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

SOURCE: Sales, Section 2-306.

Notes

1. Section 2-304(a), which conforms in substance to Section 2B-306(a), has several objecti

First, it states the meaning of "output and "requirements terms when used in a contract fo not cause a contract to fail for indefiniteness. See Section 2-203(c). The parties may agree upon a quantity or something in between. But unless the parties agree to measure all or part of the quantity "requirements, Section 2-304(a) does not apply. See *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, 925 S.W. 2d 759 (Tex. 1996) (good faith increases in output subject to "take or pay

Second, it imposes a duty of good faith on the exercise of discretion by either party to deter output or requirements. Section 2-306(a), however, does not require that there must be an exclusiv before an output or requirements term is enforceable. Although some states require exclusive deali *Geometric v. Harvard Industries*, 46 F.3d 718 (8th Cir. 1995) (Missouri law), this extreme position rejected. The term should be enforceable where the seller or buyer agrees to supply or demand all or requirements to or from the other. See *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d C

1991) (non-exclusive requirements term satisfies statute of frauds); Restatement (Second) Contract consideration requirement is met there is no additional requirement of mutuality of obligation). For the buyer agrees to buy 10% of its actual requirements in good faith from the seller should be enfor hand, the buyer would not have the additional obligation to use "best efforts unless there was an ex Section 2-306(2). See *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119 (3d Cir. 1992).

Third, it clarifies that if there are no actual output or requirements in good faith, the party ha even though there are estimates in the contract or there were prior output or requirements. The que of output or requirements occurred in good faith, not whether the lack of actual output or requireme disproportionate. This follows the interpretation of prior Section 2-306(1) in *Empire Gas Corp. v. Bakeries Co.*, 840 F.2d 1333 (7th Cir. 1988), but rejects the court's dictum that the unreasonably di limitation is not applicable to any decrease in quantity or requirements. See also, *Tigg Corp. v. Do Corp.*, 962 F.2d 1119 (3d Cir. 1992).

Fourth, the question when a party with no actual output or requirements has acted in good fa to answer. Some courts have drawn the line between decisions made because the contract is simply costly (bad faith) and those made because an event external to the contract has adversely affected th enterprise (good faith). The traditional definitions of good faith, see Section 2-103(1)(b) of the 19 clearly respond to this problem. At least one court has held, however, that bad faith is established i actual requirements fails to offer a reason for that situation. See *Empire Gas Corp.*, supra.

Fifth, in cases where there are some actual output or requirements in good faith, Section 2-3 the exercise of discretion by requiring a reasonable proportion between agreed estimates or prior co requirements and the goods actually supplied or ordered. Suppose, for example, that the buyer esti be 50,000 units per year. Over a five year period, the buyer's orders averaged between 45,000 to 5 6th year, buyer's actual requirements in good faith were 80,000 per year. If 80,000 units were orde whether the quantity is "unreasonably disproportionate to the stated estimate and this question is a of the variations and whether they were reasonably foreseeable at the time of the contract than the n seller. See *Orange & Rockland v. Amerada Hess Corp.*, 397 N.Y.S.2d 814 (N.Y.A.D. 1977).

2. Section 2-304(b) deals with an exclusive dealing agreement in a contract where the requi depend upon the resale market demand for them. Unless otherwise agreed, the seller must use "bes requirements. On the other hand, if the buyer has X requirements in good faith, the seller can insist efforts to promote their sale. Actual requirements in good faith are not enough. Unlike Section 2I effort is made in this Draft to state a standard for "best efforts.

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

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

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

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

SOURCE: Sales, Section 2-308.

Notes

There are no revisions of substance in former Section 2-308. See Section 2B-203(b).

SECTION 2-306. TIME FOR PERFORMANCE NOT SPECIFIED.

(a) Except as otherwise expressly provided in this article, the time for performance or any o

agreement in which a time for performance is not specified is a reasonable time.

(b) If an agreement provides for successive performances but is indefinite in duration, the d

agreement is a reasonable time. Subject to Section 2-311, either party may terminate the contract a

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

Notes

1. Section 2-306 adopts without change the provisions for time and duration of performanc
2-309(a) and (b) of the December, 1994 Draft. Termination of the contract, previously covered in S
covered in Section 2-311. This conforms in substance to Section 2B-315.

2. The basic "gap filler for time is a "reasonable time, defined in Section 1-204(2). Whe
action to be taken within a reasonable time, however, "any time which is not manifestly unreasonab
agreement. Section 1-204(1).

3. If the agreement is for "successive performances but is indefinite in duration, the durati
time. Subsection (b). The contract, however, is terminable at will by either party, subject to the no
Section 2-311(a).

SECTION 2-307. OPTIONS AND COOPERATION RESPECTING PERFORMANCE.

(a) An agreement that is otherwise sufficiently definite to be a contract is enforceable even

of performance open, to be specified by one of the parties, or to be fixed by agreement.

(b) If one party is required to specify the particulars of performance, the specification must

faith and within limits of commercial reasonableness.

(c) An agreement providing that the performance of the seller be to the satisfaction of the b specifying the standard of performance requires that the performance be such that a reasonable pers buyer would be satisfied.

(d) A specification relating to an assortment of goods is at the buyer's option. Except as ot subsection (e), a specification or arrangement relating to shipment is at the seller's option.

(e) If a specification by one party would materially affect the other party's performance but made or one party's cooperation is necessary to the agreed performance of the other but is not seasc other party, in addition to all other remedies:

(1) is excused for any resulting delay in the party's own performance; and

(2) may proceed to perform in any reasonable manner or, after the time for a material pa own performance, treat the failure to specify or cooperate as a breach of contract.

SOURCE: Sales, Section 2-311.

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

(a) In this section, "agreed letter of credit means a letter of credit that carries the direct obl confirmer or financing agency.

(b) Failure of a party seasonably to furnish an agreed letter of credit is a breach of a contra

(c) Delivery to a seller of an agreed letter of credit intended as the primary method of paym buyer's obligation to pay. If the letter of credit is dishonored, the seller on seasonable notification directly from the buyer.

(d) The term "confirmed letter of credit in a contract for sale means an irrevocable letter c the direct obligation of a confirmer in the beneficiary's financial market.

SOURCE: Sales, Section 2-325.

Notes

Section 2-308, formerly Section 2-325 of the 1990 Official Text, states the effect of supplyi
supply an agreed letter of credit. Letter of credit is defined with reference to Section 5-102(a)(10) o
All other aspects of the letter of credit transaction are covered by revised Article 5.

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 trade and any course of performance or course of dealing between the parties.

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

Notes

1. In the May, 1994 Draft, Sections 2-319 through 2-324, dealing with shipment and delive
deleted. The conclusion was that these terms were out of date with current practice.

2. Section 2-309 is a first step toward filling the gap on delivery terms. If the meaning of a
delivery term cannot be found in the agreement or an applicable usage of trade, the meaning may be
reference of the Incoterms of the International Chamber of Commerce. Thus, if any applicable usag
performance, or course of dealing is not shown, the meaning of shipment terms used in an agreeme
reference to the Incoterms published by the International Chamber of Commerce

3. There are many new commercial terms which have come into use, especially in internati
since the drafting of the original Article 2. Their terms evolve over time, and a statutory definition
adequately to changes in commercial practice.

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

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

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

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

(b) The following survive termination of a contract:

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

(2) a term limiting the scope, manner, method, or location of the exercise of rights in the

(3) an obligation of confidentiality, nondisclosure, or noncompetition;

(4) an obligation to return or dispose of goods;

(5) a choice of law or forum ;

(6) an obligation to arbitrate or otherwise resolve disputes through alternative dispute re

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

(8) an indemnity term;

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

(10) any term limiting disclosure of information; and

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

(c) The obligation under subsection (b)(3) must be promptly performed.

SOURCE: Licenses, Section 2B-617.

Notes

1. Section 2-310 states what obligations survive a termination. See former Section 2-106(4 defined as an act which ends a contract for other than breach. See Section 2-102(a)(30).

2. Section 2-310 has been conformed to Section 2B-626.

SECTION 2-311. TERMINATION; NOTIFICATION.

(a) A party may not terminate a contract, except on the happening of an agreed event, such
the stated term, unless the other party receives notice of the termination and is given a reasonable ti
termination is effective.

(b) A term dispensing with notification is invalid if its operation is unconscionable. Howev
standards for the nature and timing of notification is enforceable if the standards are not manifestly

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

Notes

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

There are three exceptions to this important default rule.

First, notice is not required if the contract provides that termination will occur on the "happ
event. For example, if the parties in a requirements contract agree that the contract is terminated i
requirements in good faith, a termination notice is not required.

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

Finally, the parties can agree to dispense with notification, unless the "operation of that ag
unconscionable. Compare Section 1-105, which ties unconscionability to the time of contracting.

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

3. Without more, the exercise of an agreed power to terminate is also subject to the duty of
1-203, which cannot be disclaimed by agreement. Section 1-102(3). Many courts, however, have f
the terminating party follows the terms of the agreement. Under this approach, the motive of the te
irrelevant and the agreed termination is effective if a reasonable notice is given. But see *Sons of Th*
Borden, Inc., 690 A.2d 575 (N.J. 1997), extending the scope of the good faith duty beyond this limi

SECTION 2-312. SALE BY AUCTION.

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

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

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

(d) If an auctioneer knowingly receives a bid on a seller's behalf or the seller makes or proc has not been given that authority for such bidding is reserved, the buyer at the buyer's option may a goods at the price of the last bid made in good faith before the completion of the sale. This subsect bid at an auction required by law.

SOURCE: Sales, Section 2-328.

Notes

No revisions of substance are proposed in former Section 2-318. There are relatively few ca no significant problems of interpretation. For a focused analysis, see Jorge Contreras, *The Art Auct Duties and Assumptions*, 13 Hastings Comm./Ent. L. J. 717 (1991); Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 Wm. & Mary L. Rev. 501 (1988).

1. In a "sale by auction the auctioneer "invites price offers from successive bidders which reject. Restatement (Second), Contracts § 28(1). Although specifically stated, an auctioneer can condition deliv upon payment for all goods sold, even if the sale is in separate lots. If each lot is a separate sale, bi on constructive notice of the terms of later sales. Restatement (Second), Contracts § 28(2).

2. In subsection (b), the quaint phrase "fall of the hammer is preserved in the first sentenc
The more inclusive phrase "during the process of completing the sale is used rather than "while th

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

If it is announced in "express terms that the auction is not subject to the seller's power to w
contract is not formed until some bid is made within a reasonable time and not withdrawn by the bi
auctioneer announces the completion of the sale. Both parties have some discretion (the auctioneer
the bid is made. This supports the conclusion that the contract is formed at the place where the auc
rather than at the point where the bid is made, whether made by mail or through EDI.

Because of different usage, the phrases "with reserve and "without reserve are no longer u
Nevertheless, auction sales subject to the seller's power to withdraw the goods are known as sales
auction sales where the seller has no power to withdraw the goods are known as sales "without rese

The assumption is that a seller, at a minimum, must give notice if it bids at an "unforced au
auctioneer's believe that the seller should not be able to bid at all at a sale where the seller has no p
goods.

Suppose, during the course of an auction where the seller reserves power to withdraw the go
expressly announces that the seller no longer reserves power to withdraw the goods. Original Secti
recognize this conversion possibility, which exists in practice. Such a conversion, in effect, announ
that the goods will not be sold below the last bid before the conversion. Presumably, a sale "withou
converted to a sale "with reserve during the course of the auction. For a case holding that the good
terms put up without reserve where the auctioneer stated that there was no minimum bid and the g
highest bidder, see *Miami Aviation Serv. v. Greyhound Leasing & Finance Corp.*, 856 F.2d
166 (11th Cir. 1988).

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

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

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

The last sentence of Section 2-328(4) of the 1995 Official Text states that the subsection do
"forced sale. To avoid conflicts with auction sales under Article 9 and Section 2-819(c), this phra

"an auction required by law. Resales under Article 2 and dispositions under Article 9 are permitte
is assumed that creditors can bid at auctions required by statute or court order without giving notice
required by applicable law.

Note, however, that in a public auction to implement a resale following a breach of contract
Section 2-819(c) must be met before the seller is entitled to the remedy in Section 2-819(a).

5. **Auctions, warranties and disclaimers.**

In Part 4, Warranties, "Seller is defined to include "an auctioneer or liquidator that fails to
acting on behalf of a principal. Section 2-401(5). There is no requirement that the auctioneer disc
of any principals before or after the sale.

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

Section 2-403 provides that express warranties may be made by a seller (auctioneer or princ
buyer (the bidder), both through representations made at or just prior to the auction or in a "mediun
the public, including advertising. As a practical matter, implied warranties are rarely made at auct
is the usual practice of the auction industry to offer goods "as is, where is with no implied warrant
auctioneer. To facilitate this practice, Section 2-407(e) provides that in a consumer auction contrac
modifications of implied warranties that satisfy subsections (b) or (c) of Section 2-407 are effective

PART 4

WARRANTIES

SECTION 2-401. DEFINITIONS. In this part:

(1) "Damage means all loss resulting in the ordinary course from a breach of warranty, inc
person or property as permitted in Section 2-806.

(2) "Goods includes a component incorporated in substantially the same condition into oth

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

(4) "Remote buyer means a buyer or lessee from a person other than the seller against whi
of warranty breach is asserted.

(5) "Representation means a description, demonstration or depiction of the goods, an affir
relating to the goods, or a sample or model of the goods.

(6) "Seller includes an auctioneer or liquidator that fails to disclose that it is acting on beh

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

(a) A seller in a contract for sale warrants that:

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

(2) the goods will be received free from any security interest or other lien or encumbranc
buyer at the time of contracting does not have knowledge.

(b) A warranty under subsection (a) may be disclaimed or modified only by express langua
circumstances giving the immediate buyer reason to know that the seller does not claim title or purp
right or title as the seller or a third party may have. In an electronic transaction that does not involv

an individual, language is sufficient if it is conspicuous and related to the warranty of title against i

language in a record is sufficient to disclaim warranties under this section if it is conspicuous and s

warranty of title or against infringement in this sale or words of similar import.

(c) A seller who is a merchant that regularly deals in goods of the kind sold warrants that th

delivered free of the rightful claim of a third party by way of infringement or the like. However, a b

specifications to the seller holds the seller harmless against any claim of infringement or the like tha

compliance with the specifications.

(d) A seller's warranty under this section, made to an immediate buyer, extends to any remo

transferee that may reasonably be expected to buy the goods and that suffers damage from breach o

rights and remedies of a remote buyer or transferee against the seller for breach of warranty are dete

the contract between the seller and the immediate buyer.

(e) A right of action for breach of warranty under this section accrues under Section 2-814(

transferee discovers or should have discovered the breach.

SOURCE: Sales, Section 2-312.

Notes

1. "Seller in subsection (a) includes an "auctioneer or liquidator who fails to disclose befo
is acting on behalf of a principal. Section 2-401(6). See *Jones v. Ballard*, 573 So.2d 783 (Miss. 1
no requirement, however, that the auctioneer or liquidator reveal the name of its principal either bef
auction. An auctioneer who does not disclose its principal may, however, disclaim the warranty of
(b). See Section 2-312 on auctions.

2. A warranty that the "title conveyed is good and its transfer rightful, see *Sumner v. Fel-A*
680 P.2d 1109 (Alaska 1984), covers cases where the title is contested and protects the buyer again
an otherwise good title that affect the value of the goods. See, e.g., *Frank Arnold KRS, Inc. v. L.S.*
Auction Co., Inc., 806 F.2d 462 (3d Cir. 1986) (two law suits contest title); *Jeanneret v. Vichey*, 69
259 (2d Cir. 1982) (export restrictions in country from which painting was taken affect value); *Colt*
540 N.W.2d 172 (S.D. 1995) (conflicting vehicle identification numbers). As one court put it, there
encumbrance of the purchaser's title or actual disturbance of possession to permit a purchaser to rec
warranty of title when he demonstrates the existence of a cloud on his title, regardless of whether it
a third party's title is superior. The policy is that a purchaser "should not be required to engage in
validity of his ownership. *Maroone Chevrolet, Inc. v. Nordstrom*, 587 So.2d 514, 518 (Fla.App. 1

(conflicting vehicle identification numbers).

As such, the language "and uncontested in subsection (a) of the March, 1997 Draft was del

3. Without more, the statute of limitations for breach of warranty under subsection (a) runs of action accrues under Section 2-814(a). Cf. *Foxley v. Sotheby's, Inc.*, 893 F. Supp. 1224 (S.D.N against auctioneer claiming fraud in sale of forged art work). Under the Uniform Sales Act the stat delivery or when quiet possession was disturbed. See *Menzel v. List*, 246 N.E.2d 742 (N.Y. 1969). whether in warranty of title disputes the statute should run from when the breach was or should hav Arguably, the latter time, capped by an appropriate tolling limitation, is proper. See *Balog v. Cente Gallery-Hawaii, Inc.*, 745 F. Supp. 1556 (D.Haw. 1990) (warranty that art work "genuine explicitl future performance). At the March, 1996 meeting, the Drafting Committee agreed upon a "discove with a four year period to bring suit after the cause of action accrues. That decision is implemented Section 2-814, however, still governs all other statute of limitations issues. There is no overall time provision that no action can be brought ten years after the goods were delivered to the immediate bu the nonconformity was discovered.

4. The Drafting Committee deleted the phrase "in writing from an earlier draft of subsectio of disclaimer need not be in a record. If the disclaimer is in a record, however, the language, if con the suggested wording in the second sentence, secures a "safe harbor for the disclaimer.

5. In March, 1995 meeting, the Drafting Committee concluded that (1) the disclaimer provi (b) and (c) should be retained in Section 2-402 rather than moved to Section 2-406, and (2) no spec consumer buyers was needed in light of Section 2-206. At the September, 1996 meeting, it was arg "notice should be substituted for "knowledge in subsection (a)(2). Since notice is a broader conc the scope of the warranty against liens or encumbrances. No action was taken.

6. Subsection (e) is new: Lack of privity is no defense between the seller and a remote buye Section 2-408(b), where the same principle is expressed. A remote buyer's remedies against the sel by the contract between that seller and its immediate buyer and Article 2. In short, the remote buye See Section 2-401 (definitions) and Section 2-408(b). Moreover, a remote buyer's claim against th within four years after the cause of action is should be discovered. The cases are divided on whethe defense in warranty of title suits. See Note, 45 Bus. Lawyer 2289 at 2300 (1995); *Mitchell v. Webb* 547 (Tex.Civ.App. 1979) (lack of privity no defense).

SECTION 2-403. EXPRESS WARRANTY TO IMMEDIATE BUYER.

(a) If a seller makes a representation or promise relating to the goods to an immediate buye or the promise becomes part of the agreement unless a reasonable person in the position of the imm believe that the representation or promise became part of the agreement or would believe that the re of the value of the goods or purported to be merely the seller's opinion or commendation of the goo

be created under this section even though the seller does not use formal words, such as "warranty

(b) A representation or a promise that becomes part of the agreement is an express warranty obligation to the immediate buyer that the goods will conform to the representation or, if a sample i whole of the goods will conform to the sample, or that the promise will be performed. The obligati goods do not conform to any representation at the time when the tender of delivery was completed performed when due.

(c) A seller's obligation under this section may be created by representations and promises for communication to the public, including advertising, if the immediate buyer had knowledge of th agreement.

SOURCE: Sales, Section 2-313.

Notes

1. Section 2-403 deals with express warranties in a direct contractual relationship between buyer. The questions is whether descriptions, affirmations, demonstrations, depictions, samples, m see Section 2-401(5)] and promises become part of or terms of the agreement between the parties. does not supplant other provisions dealing with contract formation and the scope of an agreement. a contract between the parties and an express warranty made during negotiations may be excluded b integrated writing, see Section 2-202.

2. Subsection (a) states the general principles applicable where an "immediate buyer claim warranty by the seller. It follows Section 2-313(1) of the 1990 Official Text, except that the phrase agreement is substituted for "becomes part of the basis of the bargain. The change clarifies that a treated like any other term of the agreement and that the buyer need not initially prove reliance to in agreement.

Subsection (a) also states when a claimed affirmation of fact, promise, description or sampl the agreement. If the "immediate buyer alleges and proves what the seller represented or promise goods, the usual assumption is that they become part of the agreement unless the seller establishes t reasonable person would not believe that the representations or promises became part of the agreem the representations were puffing. This is consistent with the Comments to Section 2-313 of the 199 of the interpretive case law. This "presumption , however, is not stated in the statute.

One question is whether a reasonable person in the position of the buyer would believe that fact or promise became part of the agreement. Thus, even if the particular buyer knew of the affirm there would be no express warranty if a reasonable person in the position of the buyer would not be would conclude that it was puffing.

A second question is whether what was affirmed or said about the goods was puffing. Put d language used or conduct an opinion, commendation or a general valuation rather than an affirmati so there is a probable "puffing defense which the seller can raise in a motion for summary judgme jury.

There are a number of factors relevant to whether a buyer is reasonable in believing that an rather than "puffing is involved. For example, the buyer might be unreasonable if the seller's repr context (1) were verbal rather than written, (2) were general rather than specific, (3) related to the c rather than the goods themselves, (4) were "hedged in some way, (5) related to experimental rathe concerned some aspects of the goods but not a hidden or unexpected non-conformity, (7) were phra rather than fact, or (8) were not capable of objective measurement. See *Federal Signal Corp. v. Saf Factors, Inc.*, 886 P.2d 172 (Wash. 1994), where the court held that the trial court erred in not maki where the seller stated that a new product was "better than an earlier, comparable model. See also *Paccar, Inc.*, 37 F.3d 1181 (6th Cir. 1994) (representations about strength of fiberglass roof which caused personal injury when the truck rolled over were "puffing as a matter of law).

3. Subsection (c)(1) clarifies that an express warranty in a direct contractual relationship ma communications to the public, including advertising, if the buyer had knowledge at the time of the a subsection (a), where there is no explicit knowledge requirement.

Subsection (b)(2) is taken without change from the first clause in Section 2-313(2) of the 19

4. A warranty, express or implied, is breached if the goods do not conform when the seller' completed. See Section 2-814(c)(1). Thus, if the seller expressly warranted that the goods were ne standard to which the goods must conform) and used goods were tendered, there is a breach of warr suppose that the seller tendered by notifying the buyer that the goods were available for pick-up. T the contract at that time and the risk of loss did not pass to the buyer. When buyer appeared the nex goods had deteriorated. Since the tender was not completed until receipt, the obligation was breach

CISG Article 36(1), however, provides that the seller is liable for any "lack of conformity w risk passes to the buyer, even though the lack of conformity becomes apparent after that time.

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

(a) Subject to Sections 2-406 and 2-407, a seller that is a merchant with respect to goods of contract for sale an implied warranty that the goods are merchantable. The serving for value of foo consumed on the premises or elsewhere is a sale under this section.

(b) To be merchantable, goods, at a minimum, must:

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

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

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

(4) run, within the variations permitted by the agreement, of even kind, quality, and qua

unit and among all units involved;

(5) be adequately contained, packaged, and labeled as the agreement or circumstances r

(6) conform to the promise or affirmations of fact made on the container or label.

(c) Subject to Section 2-408, implied warranties other than those described in this section n

of dealing or usage of trade.

SOURCE: Sales, Section 2-314.

Notes

1. Section 2-404(b)(3) has been revised to state that merchantable goods must be fit for the which "goods of that description are used. This is more accurate historically and gives sharper gui with the standard. If also follows CISG Article 35(2), which states that "Except where the parties h the goods do not conform to the contract unless they: (a) are fit for the purposes for which such goo description would ordinarily be used.

Note the overlaps between Section 2-404 on the implied warranty of merchantability and Se 2-408 on express warranties. For example, in Section 2-404(a) the description of the goods plays a "description is within the definition of "representation used in Section 2-403. Moreover, subsect labels and affirmations of fact made on the contained. Again, these are within the broad definition important in assessing liability under Section 2-408, dealing with express warranties in other than d relationships.

2. Subsection (b)(7) in the May, 1995 Draft, dealing with the merchantability of goods to b to the human body, was deleted at the October, 1995 meeting of the Drafting Committee. The prob catch in a single sentence and are best left for the courts to resolve under the more general standard Section 2-314(b) or the evolving law of products liability. See Restatement of the Law Torts: Prod comment (g).

3. **Privity.** Under revised Article 2, an implied warranty of merchantability is made only to buyer unless three exceptions are satisfied: (1) An implied warranty made to an immediate buyer is foreseeable remote purchaser under Section 2-409(a); (2) The warranty is assigned by the immediat or transferred by operation of law, see Section 2-409(b)(1); or (3) A court, relying on other state law to a remote purchaser or user. See Section 2-409(b)(2). The same analysis applies to the implied w arises under Section 2-405

Under this analysis, it is possible for a manufacturer-seller to make an implied warranty of r
remote purchaser. Without more, the manufacturer-seller could be liable to a remote purchaser or t
consequential damages, including injury to person or property. The likelihood of this is reduced in
because the remote purchaser is bound by disclaimers and limitations in the contract between the se
buyer. See Section 2-409(a). There is no such limitation if a court acts under Section 2-409(b)(2) [

4. **Personal injury.**

Without more, a seller who makes and breaches an implied warranty of merchantability can
consequential damages to person or property proximately resulting from the breach, if the condition
satisfied. See Section 2-806(3), where personal injury damages are excluded from the "disproportio
for Sections 2-806(3) and 2-810(c), where an exclusion of liability for consequential injury to perso
unconscionable, revised Article 2 does not distinguish between economic loss and damage to perso
special privity rules for personal injury in former Section 2-318 have been deleted and proposed Se
1996 Draft, which provided special rules for personal injury claims resulting from a breach of warra

This stance does not resolve the tension between warranty law and tort law where goods cau
person or property. The primary source of that tension arises from disagreement over whether the c
and the concept of merchantability in Article 2 are coextensive where personal injuries are involved
merchantable under warranty law can they still be defective under tort law and if goods are not defe
they be unmerchantable under warranty law. The answer to both questions is yes if the contract sta
merchantability, e.g., reasonable expectations, and the tort standard for defect are different. Even th
different standards will be the same in most cases, i.e., unmerchantable goods are frequently defecti
are frequently unmerchantable, there are a few exceptions, especially where design defects are invo

The consensus is that the tension should be resolved in a Comment to Section 2-404 rather t
Article 2. The following Comment was approved in principle by representatives of NCCUSL and t
Annual Meeting in May, 1997.

> When recovery is sought for injury to person or property that allegedly resulted from manufactu
> in goods sold or inadequate instructions or warnings, the applicable state law of products liabili
> the goods are merchantable under Section 2-404. Merchantability in the context of a claim to re
> person or property is synonymous with the level of safety required for the goods as a matter of p
> by the courts of this state or, if applicable, the Restatement of the Law (Third), Torts: Products
>
> When, however, the claim for injury to person or property is based on an implied warranty of fi
> 2-405 or representations made by the seller to the buyer, such as affirmations or promises about
> goods, this Article determines whether an implied warranty of fitness was made or breached and
> affirmations or descriptions create contractual warranties to which the goods must conform, as w
> available for damage proximately resulting from any non-conformity.

At the ALI Annual Meeting in May, 1997, the membership adopted the following language

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

law.

This language was clearly a substitute for the first sentence of the pre-ALI Comment. The e actions for injury to person or property under Section 2-404. There is some disagreement, however language was intended to displace the entire Comment, the second paragraph of which permitted ac or property based upon the implied warranty of fitness, Section 2-405, or express warranties, Sectio

Whatever the intent, there clearly was no intention to preclude actions for injury to person o Section 2-405 or Sections 2-403 and 2-408. Moreover, the definition of "representations, see Sect express warranty sections is broad enough to cover descriptions of or other affirmations about good from Section 2-405. For clarity, however, the following paragraph should also be included with the

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

5. Revised Section 2-405(a) does not displace or preempt any inconsistent state law, such a shield statutes enacted by many states, which immunize suppliers of blood and other body parts fr liability under Article 2 or strict liability in tort. See, e.g., *Doe v. Travenol Laboratories, Inc.*, 698 780 (D. Minn. 1988).

SECTION 2-405. IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE. Subject to Sections 2-406 and 2-407, if a seller at the time of contrac reason to know any particular purpose for which the goods are required and that the buyer is relying judgment to select or furnish suitable goods, there is an implied warranty that the goods are fit for t

SOURCE: Sales, Section 2-315.

SECTION 2-406. DISCLAIMER OR MODIFICATION OF WARRANTY.

(a) Language or conduct relevant to the creation of an express warranty and language or co disclaim or modify an express warranty must be construed wherever reasonable as consistent with e Section 2-202 with regard to parol or extrinsic evidence, language or conduct disclaiming or modif

is ineffective to the extent that this construction is unreasonable.

(b) Except as otherwise provided in Section 2-402(b) and (e), an implied warranty is discla
language or an expression that, under the circumstances, makes it clear that the implied warranty ha
modified. An implied warranty may also be disclaimed or modified by course of performance, cou
of trade.

(c) Except as otherwise provided in subsection (e), language in a record is sufficient to disc
implied warranty if the language is conspicuous and:

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

(2) in the case of the implied warranty of fitness, states that "the goods are not warrante
particular purpose , or words of similar import;

(3) Unless the circumstances indicate otherwise, states that the goods are sold "as is or
words of similar import.

(d) If, before entering into a contract, a buyer has examined the goods, sample, or model as
has declined to examine them, there is no implied warranty with regard to conditions that an exami
circumstances would have revealed to the buyer.

(e) Except in a sale by auction under Section 2-312, language in a consumer contract is suf
modify an implied warranty only if:

(1) At the time of contracting, a seller in good faith passes through to a buyer an expres
obligation created by another seller under Section 2-408(b) that is reasonable in scope, duration and
conspicuous language in a record stating, for example, "You are receiving an express warranty obli
[manufacturer] instead of any implied warranty of merchantability or fitness from us; or

(2) Conspicuous language in a record which language the consumer has separately auth
"Unless we say otherwise in the contract, we make no promises about the quality or usefulness of w

They may not work. They may not be fit for any specific purpose that you may have in mind.

(f) Remedies for breach of warranty may be limited in accordance with this article with resp

limitation of damages and contractual modification of remedy.

SOURCE: Sales, Section 2-316.

Notes

1. Subsection (a) preserves the policy that when language creating and language disclaimin express warranty are inconsistent, the disclaimer is inoperative, subject to Section 2-202 (the "parol if the agreement contained both an express warranty that a car's mileage was 25,000 and a disclaim warranties, the express warranty would prevail. If, however, the seller, in contract negotiations, sta been driven more than 25,000 and a subsequent **integrated** record stated "This car is sold without e evidence of the oral express warranty should be excluded under the parol evidence rule. Section 2- contracts, however, the disclaimer in a record would be excluded from the contract if a reasonable c circumstances would not expect to find it in the contract. See Section 2-206(a)

2. Subsection (b), which is subject to subsection (e), provides the general rule governing th modification of implied warranties in commercial contracts. After the October, 1995 meeting of th subsections (b), (c), and (d) of the October, 1995 Draft were integrated into a single, new subsectio 1996 meeting of the Drafting Committee, the decision was made to delete all "regulatory and "ma subsection (b). The key question is whether under the circumstances, the language, whether or not clear that implied warranties have been disclaimer or modified.

The disclaimer or modification of implied warranties by course of performance, course of d trade is now covered in subsection (b).

3. Subsection (c), which is also subject to subsection (e), by stating what language containe sufficient to disclaim or modify an implied warranty, implements a decision of the Drafting Commi "safeharbor for commercial contracts. The Drafting Committee rejected the complex "safeharbor Draft and requested a redraft to comply in substance with Section 2-316(c) of the 1995 Official Tex

Under subsection (c), if language of disclaimer or modification is contained in a record and conspicuous, a valid disclaimer or modification is achieved when the sufficient language for the tw for used goods is provided.

Note that a failure to satisfy the "safe harbor of subsection (c) does not mean that the discla Rather, the seller must now meet the more open ended standard in subsection (b).

4. Subsection (d), which states the effect of a pre-contract examination of the goods, applie and consumer contracts. A seller who attempts to disclaim or modify implied warranties in consum must comply with subsection (e).

5. Subsection (e) of the March, 1997 Draft stated three alternative ways for a seller to discla

implied warranties in consumer contracts. The May, 1997 Draft, however, made several major cha
the text.

Note that the revised subsection is mandatory: In a consumer contract, one or more of the stated
satisfied.

Note also that auction sales to consumers are excepted from subsection (e). A disclaimer or mo
warranty at an auction is sufficient if subsections (c) is satisfied. In most auctions, the "as is d
(c)(3) will be involved.

Here is a brief comparison of the two drafts.

(a) Subsection (e)(1) of the January, 1997 draft validated disclaimers where the language co
applicable federal law. This subsection has been deleted in the July, 1997 Draft.

(b) Subsection (e)(2) of the January, 1997 draft stated that where the seller, in good faith, m
warranty in lieu of an implied warranty of quality, the language is sufficient if it complies with sub
language must be conspicuous, in a record and satisfy the content requirements. The July, 1997 Dr
(e)(1)] now makes it clearer that a dealer or retailer in a consumer contract may disclaim or modify
conspicuous language of prescribed content if, at the time of contracting, that seller has passed thro
warranty from a manufacturer or producer.

(c) Subsection (e)(3) [now e(2)] provided a safe harbor through conspicuous language in a
language the consumer has separately authenticated. The required content of the language was stat

Alternative A was taken from a Ford Motor Company consumer lease, provided by Mike Green
this language is rated "very hard on three of the accepted readability scales and "average on th
to Mike Ferry of the Legal Services of Eastern Missouri, Inc., "very hard means that it is comp
year college level.

Alternative B was suggested by Mike Ferry and rates "very easy on three of the four scales and
The first sentence says you get no promises unless they are in the contract. The second says "no
second says "no fitness and the third says "you assume the risk.

After extensive discussion, the Drafting Committee approved the language now contained i
the July, 1997 Draft, subject to further tests of its comprehensibility.

SECTION 2-407. CUMULATION AND CONFLICT OF WARRANTIES.

Warranties, whether express or implied, must be construed as consistent with each other and as cun
that construction is unreasonable, the intent of the parties determines which warranty prevails. In a
the following rules apply:

(1) Exact or technical specifications prevail over an inconsistent sample or model or genera description.

(2) A sample, model or demonstration prevails over inconsistent general language of descri

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

SOURCE: Sales, Section 2-317.

Notes

1. One change was made in Section 2-409. An implied warranty of merchantability in a co is inconsistent with an express warranty is not displaced under Section 2-409(3). Rather, the requir 2-406(b) must be satisfied.

SECTION 2-408. EXTENSION OF EXPRESS WARRANTY TO REMOTE BUYER AND TRANSFEREE.

(a) In this section, "goods means new goods and goods that are sold as new goods.

(b) If a seller makes a representation or a promise relating to goods on or in a container, on or that is packaged with or otherwise accompanies the goods and authorizes another person to deli or record to a remote buyer and it is so delivered, the seller has an obligation to the remote buyer a the case of a remote consumer buyer, to any member of the family or household of the remote cons goods will conform to the representation or that the promise will be performed, unless a reasonable the remote buyer would not believe the representation or promise or would believe that any represe value of the goods or purported to be merely the seller's opinion or commendation of the goods.

(c) If a seller makes a representation or a promise relating to the goods in a medium for con public, including advertising, and a remote buyer with knowledge of the representation or promise from a person the seller has an obligation to the remote buyer and its transferee and, in the case of a buyer, to any member of the family or household of that consumer buyer, that the goods will confor

or that the promise will be performed, unless a reasonable person in the position of the remote buy representation or promise or would believe that the representation was merely of the value of the go merely the seller's opinion or commendation of the goods.

(d) An obligation may be created under this section even though the seller does not use form "warranty or "guaranty .

(e) An obligation arising under this section is breached when the goods are received by the goods, at the time they left the seller's control, did not conform to any representation made, or if th performed when due.

(f) The following rules apply to the remedies for breach of an obligation created under this

(1) A seller under subsections (b) and (c) may modify or limit the remedies available to breach, but a modification or limitation is not effective unless it is communicated to the remote buy representation or promise.

(2) Damages may be proved in any manner that is reasonable. Unless special circumsta proximate damages of a different amount;

(A) a measure of damages if the goods do not conform to a representation is the valu represented less the value of the goods as delivered; and

(B) a measure of damages for breach of a promise is the value of the promised perfo value of any performance made.

(3) A seller in breach under this section is liable for incidental or consequential damage 2-805 and 2-806 but is not liable for consequential damages for a remote buyer's lost profits;

[(4) A remote consumer buyer that bought the goods on credit and is entitled to damage (f)(2) may, upon notifying the immediate seller, deduct damages from any part of the price still due

(5) An action for breach of an obligation under subsection (e) is timely if commenced w

provided in Section 2-814.

(g) This section is subject to Section 2-409(b).

SOURCE: New.

Notes

Section 2-408, dealing with express warranties to remote purchasers and transferees, combi
and 2-405 in the November, 1996 Draft. It is in addition to the warranties extended under Section 2
intended to limit the judicial development of broader grounds for imposing liability on a seller to a
Section 2-409(b)(2).

1. **Section 2-408(b) "Pass through" warranties.**

(a) New Section 2-408(b) deals specifically with the "pass through warranty, including the
box, made by a seller (usually a manufacturer) to remote purchasers and their transferees through a
intermediary (usually a retailer in the chain of distribution) who is **not** an agent of the seller.

If the intermediary is an agent of the seller, Section 2-403 applies. Other cases where Section 2
include those where there is direct dealing between the seller and buyer through an intermediary
manufacturer makes an offer to the public (if you buy and use this product, the following will o
individuals accept the offer by purchasing the goods from a retailer.

The warranty is made to a remote purchaser, defined in Section 2-401(4), and the household an
consumer buyer and is extended to a transferee from the remote buyer, who is sheltered. The tr
dependent upon the rights of the remote purchaser.

The obligation created is independent of any contract between the remote purchaser and the inte
terms of that contract may differ from the obligation created under subsection (b).

(b) Subsection (b) states when the seller's obligation to the remote purchaser is created. Th
when the goods are delivered to the remote purchaser. Nevertheless, the alleged affirmations or pro
obligation if the remote buyer, upon learning of the representation or promise, would not believe it,
the position of the remote purchase would not believe it or would believe that a promise or represen
follows the exclusionary language of Section 2-403(b).

Common situations where subsection (b) applies include warranties made on goods or in a r
box (including "shrink wrapped products), warranties made on the goods or on labels or records ac
and warranties in literature delivered before, at or after delivery of the goods. Since a direct obligat
seller, it is irrelevant that the representations or promises were made after the remote purchaser paid
the goods from the retailer. The phrase "otherwise packaged with the product signals an expansiv
subsection.

(c) The assumption underlying subsection (b) is that the seller has no other warranty (or co
to the remote purchaser. Thus, the seller should be able to define what affirmations or promises are

understanding that no implied warranties are created. In short, there is no need to disclaim that whi

Suppose, however, that the representation or promise attempts to disclaim or limit the time may be asserted or to limit a remedy for breach. Should these limitations be part of the obligation c yes under subsection (f)(1).

Should the remote purchaser be bound by the limitations simply because he elected to enfor created under subsection (a)? The answer is yes if the limitation was delivered at the time the repre made. This accord with two recent cases, *Olathe Mfg. v. Browning Mfg.*, 915 P.2d 86 (Kan. 1996) *Hornberger v. GMC*, 929 F. Supp. 884 (E.D. Pa. 1996), where the courts concluded that a buyer wh "pass through warranty was not bound by limitations on that warranty or remedies that were not co of contracting.

2. **Section 2-408(c). Express warranties to the public.**

New Section 2-408(b) deals with warranty obligations arising from communications to the p when a remote purchaser with knowledge of a representation or promise made by the seller to the p goods from an immediate seller or lessor in the chain of distribution, the seller making the represen obligation to the remote buyer if the goods fail to conform unless the stated limitations are establish question, the factors relevant to the question under Section 2-403 also apply to Section 2-408(b).

Illustrations:

1. Seller advertises its product in trade journals, on the Internet and on TV. Buyer buys the seller, directly or through an agent. Whether the advertisement is an express warranty and part determined under Section 2-403.

2. Seller advertises as in #1 and Buyer purchases directly from Seller, ordering by Fax and before the goods arrive. The goods arrive in a box which contains additional warranties and ter This is not a pass through warranty under Section 2-408(b). Rather, Section 2-403 applies to th other provisions of Article 2 govern whether the terms in the box are part of the agreement.

3. Seller advertises as in #1 and Buyer purchasers the goods from a retailer. In the box are limitations prepared by Seller, which Retailer was authorized to deliver to B. Since there is no between B and S, Section 2-408(b) determines the status of the terms in the box and Section 2-4 status of the advertising.

4. Seller advertises as in #1 and Buyer purchases from a Retailer. There are no pass throug status of the advertising is determined by Section 2-408(c). Neither Section 2-403 nor 2-408(b)

5. S advertises as in #1. Aware of the advertising, which is general, B asked Retailer wheth meet a required specification. When R did not know, B contacted S directly and asked. S respo described goods would meet the specifications and B then purchased the goods from R. If the g specification, B's claim against S should be resolved under subsection (c). But (b) seems to req public and this was a representation made directly to B. Nevertheless, the liability case is strong be enforced under subsection (c).

3. **Remedies.**

Subjection (f) was drafted after the March, 1997 meeting of the Drafting Committee. The a subsection (f)(2) were presented to the Drafting Committee for decision. At the May, 1997 meetin rejected and subsection (f) was redrafted.

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

(a) A seller's express warranty under Section 2-403 or implied warranty under Section 2-40 an immediate buyer extends to any buyer or transferee, and in the case of a consumer buyer, to any household of the buyer, that may reasonably be expected to use or be affected by the goods and that of warranty. The rights and remedies of the buyer, members of a consumer buyer's family or house against the seller for breach of a warranty extended under this subsection are determined by the ter between the seller and the immediate buyer. However, the seller is not liable for consequential lost warranty under this section.

(b) This section and Sections 2-402 and 2-408 do not:

(1) diminish the rights and remedies of a third party beneficiary or assignee under the la persons to which goods are transferred by operation of law;

(2) displace principles of law and equity that extend an express or implied warranty to o remote buyer, transferee, or other person.

(c) The operation of this section may not be excluded, modified, or limited unless the seller interest based on the nature of the goods in having a warranty extend only to the immediate buyer.

SOURCE: Sales, Section 2-318.

Notes

1. **Overview.** Section 2-409, which is based on Section 2-318(c) in the 1995 Official Text, warranty claims by a remote purchaser or transferee against "the seller with whom there is no priv

addition to the express warranty obligations created under Section 2-408 but is subject to the defini
The section operates as follows:

Subsection (a). Under subsection (a), the seller's warranty made to an immediate buyer is e
foreseeable buyer or transferee (i.e., a person who obtains title to or an insurable interest in the goo
the breach. Except for consumer buyers, however, the warranty is not extended to members of the
might be expected to use or be affected by the goods. Thus, the warranty extension is primarily ver

At the ALI Council meeting in December, 1996, the Council supported a motion that forese
persons affected who suffer economic loss from breach of an express warranty should be restored to
January, 1997 meeting, the Drafting Committee narrowly rejected a motion to extend the warranty t
is in the family or household of the purchaser or transferee and has suffered economic loss but not l
March, 1997 meeting, the Drafting Committee voted for a limited horizontal extension in the case o
buyers and this was not limited to economic loss.

The protected remote person's rights against the seller are defined and limited by the terms o
between the seller and the immediate buyer and the terms of this Act. It is, in short, a derivative wa
beneficiary stands in the shoes of the immediate buyer. Express warranties under Section 2-408, ho
limited. They create direct obligations to the remote purchaser. Thus, limitations in the contract be
immediate buyer would not bind the remote purchaser.

Moreover, where there is no exclusion in the contract with the immediate buyer the seller is
remote purchaser or transferee for "consequential lost profits. See Section 2-806. Thus, a remote
purchaser could not recover lost profits resulting from the breach but **could** recover other conseque
including injury to person or property.

Although protected persons may be called beneficiaries, the warranty extension is based mo
intention of the parties. The seller **should** be responsible to foreseeable buyers and transferees for t
goods warranted to the immediate buyer. But since the warranty is derivative, the protected purcha
the terms and conditions of the contract between the seller and immediate buyer. Thus, disclaimers
remedies in that contract bind the beneficiaries as well. A motion to restore the "three alternatives
Section 2-318 was defeated at the November, 1996 meeting.

Subsection (b).

Subsection (b) states two things that are not diminished or displaced by Section 2-409.

Subsection (b)(1) clarifies that Section 2-409 supplements rights and remedies of third party
assignees under contract law and transferees by operation of law. For example, subsection (a) shou
cases where an immediate buyer to whom a warranty has been made by the seller assigns the warra
remote purchaser under Section 2-503. In these cases, the remote purchaser's rights against the sell
assignment rather than subsection (a) and are subject to the contract and relevant defenses between
immediate buyer. They should be treated under Section 2-503 rather than Section 2-410(a). A lead
Co. v. Carbonline Co., 864 F.2d 560 (7th Cir. 1989).

Subsection (b)(2), taken from Section 2A-316, states that neither Section 2-408 nor 2-409 d

law and equity that a court might use to extend a warranty beyond the immediate buyer. Thus, a c
a remote commercial or consumer buyer has a direct claim against the seller for damage resulting fr
warranty of merchantability, see, *Hininger v. Case Corp.*, 23 F.3d 124 (5th Cir. 1994) (reviewing T
that there were sufficient direct dealings between the seller and the remote buyer before and after th
privity, see *U.S. Roofing, Inc. v. Credit* alliance Corp., 279 Cal. Rptr. 533 (Cal.App. 1991). Since S
2-409 does not state the remote purchaser's rights and remedies, they would be those under Article
particular case. See Section 2-408(f), which might be applied by analogy.

2. Subsection (c) states that the "operation of this section cannot be varied by agreement, u
"substantial interest based on the nature of the goods in making the warranty only to the immediat
2-503(b). This change was approved at the January, 1997 meeting of the Drafting Committee. Sub
does not limit the power of the seller and immediate buyer to shape the terms of the contract. Rath
warranty and remedy terms have been agreed.

3. The definition of "the seller in Section 2-401 is broad enough to include a seller whose
the Convention on the International Sale of Goods. Under CISG, the seller's liability for non-confo
only to the immediate buyer. Lack of privity is a defense. But if the CISG seller's immediate buye
state governed by the UCC, the CISG seller could be liable to the non-CISG remote buyer under Se
Complex federal preemption issues aside, a foreign seller is not insulated from warranty extensions
buyers under the UCC.

4. Section 2-411 in the November, 1996 Draft, dealing with "Injury to Person or Property R
of Warranty, has been deleted.

PART 5

TRANSFERS, IDENTIFICATION, CREDITORS, AND GOOD-FAITH PURCHASERS

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

(a) Except as otherwise expressly provided in this article, this article applies whether or not or a third party has title to or possession of the goods and despite any statute or rule of law that poss possession is fraudulent.

(b) Subject to Section 2-104(a)(1), in cases not covered by other provisions of this article, i to goods is material, the following rules apply:

(1) Title to goods does not pass under a contract for sale before their identification to th otherwise expressly agreed, a buyer acquires by their identification a special property interest as lim

(2) Any retention or reservation by the seller of title in goods shipped or delivered to th 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 b and on any conditions expressly agreed to by the parties.

(4) Title passes to the buyer at the time and place at which the seller completes perform to the physical delivery of the goods, despite any reservation of a security interest and even if a doc delivered at a different time or place.

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

(A) if the contract requires or authorizes the seller to send goods to the buyer but doe seller to deliver them at a particular destination, title passes to the buyer at the time and place of shi

(B) if the contract requires delivery at a particular destination, title passes on tender

(c) If delivery is to be made without moving goods and the seller is to deliver a document o goods passes when and where the seller delivers the document.

(d) If delivery is to be made without moving goods and the goods are already identified at t contracting and no document of title is to be delivered, title to the goods passes at the time and plac

(e) Title to goods revests in the seller upon the buyer's rejection or refusal to receive them, justified, or upon the buyer's justified revocation of acceptance. Revesting occurs by operation of l

SOURCE: Sales, Section 2-401; Licenses, Section 2B-501.

Notes

1. No changes of substance have been made in Section 2-401 of the 1990 Official Text.

2. Although a sale occurs when title passes from seller to buyer for a price, Section 2-102(a title is largely irrelevant under Article 2. The same is true under CISG. See Article 4(b) which stat "concerned with . . . the effect which the contract may have on the property in the goods sold. Sect relevant to disputes over the location of title arising outside of Article 2. No effort has been made t or determine whether the rules of Section 2-501 are applicable to them.

3. Except as to the rights of buyers in ordinary course of business who buy out of inventory goods within the scope of a certificate of title is governed by the applicable Certificate of Title Act. 2-104(a)(1). The CTA, however, may or may not preempt Section 2-501. See, e.g., *Aetna Casualt Co. v. A.L.J.A., Inc.*, 905 F. Supp. 36 (D. Mass. 1995) (Massachusetts CTA does not abrogate form 2-401, it simply adds further requirements). But see *Ladd v. Ford Consumer Finance Co.,Inc.*, 550 N.W.2d 826 (Mich. App. 1996) (Michigan Mobil Home Commission Act supersedes former Sectio

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

(a) Identification of goods as goods to which a contract refers may be made at any time and expressly agreed to by the parties. In the absence of express agreement, identification occurs when

(1) the contract is made, if the contract is for the sale of existing and described goods;

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

(3) crops are planted or otherwise become growing crops, if the contract is for the sale o harvested within 12 months or the next normal harvest season after contracting, whichever is longe

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

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

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

(d) This section does not impair an insurable interest recognized as such under any other la

SOURCE: Sales, Section 2-501.

Notes

1. Subsection (a) is revised for a clearer focus on how and when goods are identified to the Section 2A-217, from which the form was taken. However, no change was made in the rules of "h identification occurs in the absence of "explicit agreement.

2. What the buyer gets upon identification is stated in subsection (b). No change is made i 2-501: The buyer gets both an insurable interest and a special property interest.

3. The extent to which a seller retains an insurable interest in identified goods is stated in S change is made. In light of Section 2-502(d), the insurable interest of both seller and buyer comple insurable interests recognized by other sources of law. See Section 2A-218 on "insurance and pro

4. **Advantages of Identification.** The advantages to the buyer of identification and obtaini "special property interest are not stated in Section 2-502. These advantages include: (1) The acqui oriented remedies against the seller under Sections 2-824 and 2-807; (2) Protection against the sel Section 2-505; (3) Earlier status, in some states, as a buyer in ordinary course of business under Se right to inspect the goods under Section 2-609(a); and (5) Standing to sue third parties who cause i Section 2-813.

Similarly, the advantages to the seller of identification are not stated in Section 2-502. Thes (1) Shipment under reservation, Section 2-604(a); (2) Resale under Section 2-819(a); (3) Possible e identified at the time of contracting are damaged or destroyed, Section 2-714; (4) Possible action fo by the buyer, even though the goods have not been accepted, Section 2-822(a)(2); and (6) Standing

cause injury to identified goods, Section 2-813. In addition, the seller, upon breach, may make a co decision to identify goods to the contract and pursue appropriate remedies. See Section 2-817.

When the advantages to both parties of identification are catalogued, it is difficult, as Comm conclude that identification has a "limited effect under Article 2.

5. **CISGA.** There is no comparable provision in CISGA. But see Article 32(1), dealing wi requirements when goods shipped by the seller are not "clearly identified to the contract.

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

(a) All rights of a seller or buyer, including a right to damages for breach of the whole cont out of the assignor's due performance of its entire obligation, may be assigned unless the assignmer change the duty of the other party, increase the burden or risk imposed on that party by the contract likelihood of obtaining return performance.

(b) A party may delegate to another person its performance under a contract for sale unless contract has a substantial interest in having the original promisor perform or directly control the per contract. A delegation of performance does not relieve the delegating party of any duty to perform

(c) Acceptance of a delegation of duties by an assignee constitutes a promise by the assigne duties. The promise is enforceable by the assignor or the other party to the original contract. The o assignment or transfer that delegates performance as creating reasonable grounds for insecurity and party's rights against the assignor, may demand assurance of due performance from the assignee.

(d) An assignment or transfer of "the contract or "all my rights under the contract , or an a in similar general terms, is an assignment of rights. Unless the language or the circumstances indic assignment for security, the assignment or transfer is a delegation of performance of the duties of th

(e) Subject to Article 9, if a contractual term prohibits the assignment of rights otherwise as subsection (a), the assignment is effective. However, whether or not the contract so provides, the a

contract for which damages under this article are available.

(f) A contractual term prohibiting the delegation of duties otherwise delegable under subsec

enforceable, and an attempted delegation is not effective. A prohibition of assignment or transfer o

construed as precluding only the delegation to the assignee or transferee of the assignor's duty to pe

SOURCE: Sales, Section 2-210; Leases, Section 2A-303; Licenses, Sections

2B-502, 2B-507.

Notes

1. This section reintegrates Section 2-211 (July, 1996) with Section 2-403 (July, 1996) and integration to deal more specifically with terms that prohibit assignments and delegations that are o See Section 2A-303.

2. Subsection (a) states the default rule on an assignment of rights. They are enforceable ur "unless clause). Rights are broadly defined ("all). See also, subsection (d) (rules of interpretatio however, provides that a term prohibiting an otherwise permissible assignment of rights is not enfo assignment is effective. The prohibited assignment is a breach of contract for which damages can b general principles of Section 2-804. See Section 9-318(4).

3. Subsection (b) states the default rule for a delegation of duties: They are enforceable "un The second sentence of subsection (b) states the effect of a delegation of duties on the duty of the d consenting party and subsection (c) states the effect of the delegatee's acceptance of the duties dele changes from Section 2-210 of the 1990 Official Text. Subsection (f) makes clear that, unlike a pro rights, a term prohibiting the delegation of duties is effective and provides some rules of interpretat

4. Because of differences in the underlying transaction, Section 2-503 is less complex than example, there is no need for a special treatment of "residual interests in goods, Section 2A-303(2 terms which prohibit the creation and perfection of security interests, Section 2A-303(3), appears to Moreover, Section 2-503 is consistent with the basic principles of assignment and delegation law (a exhaustive statement) and has survived an occasional testing in the courts. See *Baxter Healthcare* *O.R. Concepts, Inc.*, 69 F.3d 785 (7th Cir. 1995); *Sally Beauty Co. v. Nexxus Products Co.*, 801 F.2d 1001 (7th Cir. 1986).

5. If a contract contains warranties and the buyer either transfers the contract or assigns the party, the third party can usually enforce the warranties against the seller. See Section 2-409(b)(1).

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

(a) Except as otherwise provided in this section, a purchaser of goods acquires rights and ti
the transferor had or had power to transfer. A purchaser of a limited interest in goods acquires righ
extent of the interest purchased.

(b) A person with voidable rights or title acquired in a purchase of goods from a seller that
possession or control has power to transfer good title to a good-faith purchaser for value of goods u
possession or control of the goods.

(c) Voidable rights or title are acquired under subsection (b) even if:

(1) the transferor was deceived as to the identity of the purchaser;

(2) the delivery was in exchange for a check later dishonored;

(3) it was agreed that the transaction was to be a cash sale; or

(4) the delivery was procured through fraud punishable under criminal law.

(d) The entrusting of possession of goods to a merchant that deals in goods of that kind giv
buyer from that merchant power to transfer all rights and title of the entruster and to transfer the go
interest perfected by the entruster under Article 9 to a buyer in the ordinary course of business.

(e) Entrusting includes any delivery and any acquiescence in retention of possession, regard
expressed between the parties to the delivery or acquiescence or whether the procurement of the en
possessor's disposition of the goods was punishable under criminal law.

SOURCE: Sales, Section 2-403.

Notes

1. Section 2-504, formerly Section 2-403 of the 1990 Official Text, has been revised to cla
purchaser of goods gets better rights or title than the transferor had power to transfer.

Section 2-504(a) states the *nemo dat* principle in a separate subsection. Without more, a bu
rights and title to goods than that of its seller.

Section 2-504(b) states the good faith purchaser exception to the *nemo dat* principle. The B
obtain voidable rights or title in a purchase from the purported true owner before there is power to t

purported true owner must give up possession and control of the goods in that transaction, but not n seller. See *Inmi-Etti v. Aluisi*, 492 A.2d 917 (Ct. App. Md. 1985) ("voidable title cannot be obtain is a voluntary transfer of the goods).

The power to pass good title includes but is not limited to the four situations stated. Remain the scope of "purchase , when title or rights are voidable, and who is a good faith purchaser for val See *Johnson & Johnson Prod. v. Dal Intern. Trading Co.*, 798 F.2d 100 (3d Cir. 1986) (good faith purchaser of voidable title protected).

2. Section 2-504(d) protects a BIOCB from a merchant to whom goods have been entrusted 2-504(e): The BIOCB takes free of "all rights and title of the entruster. See *Prenger v. Baker*, 542 (Iowa 1995). The phrase "transfer the rights free of the security interest is clearer in this context th BIOCB takes the rights under the security interest.

Normally, a BIOCB will take free of a security interest "created by his seller under Section though the secured was not an entruster under Section 2-504(e). See *Key Bank v. Maine v. Estes*, 6 162 (Maine 1995) (consumer debtor purchases boat and, without secured party's consent, purchases boat to himself, and sells to BIOCB). Occasionally, a secured party will gain control of goods in w interest and entrust them to a merchant who did not create the security interest, see Section 9-307(1 2-504(d), the entrusting secured party will lose the security interest to a buyer in the ordinary course *Sears Consumer Fin. Corp. v. Thunderbird Prods.*, 802 P.2d 1032 (Ariz. 1990).

3. The "shelter principle operates, see subsection (d). Thus, if goods are entrusted to a me the merchant sells them to a non-merchant, the non-merchant purchaser from the merchant also has title to a BIOCB.

4. Except as to the rights of a buyer in the ordinary course of business who buys out of inve subject to applicable certificate of title acts. Section 2-104(a)(1). Subject to that exception, if the C title passes to covered goods, Section 2-501 does not apply. Otherwise, the certificate may be pres but the ultimate question of "good title is determined under Section 2-501.

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

(a) Except as otherwise provided in subsections (b) and (c), the rights of creditors of the sel goods identified to a contract for sale and retained by the seller are subject to the buyer's rights und and 2-824(b) if the buyer's rights vest before a creditor's claim in rem attaches to the goods.

(b) A creditor of a seller which has retained possession of goods subject to a sale or identifi contract as void or voidable if, as against the creditor, retention of possession by the seller is fraudu

under any statute or rule of law. However, it is not fraudulent for a seller, for a commercially reaso
contract becomes enforceable, to retain possession in good faith and in current course of trade.

(c) Except as otherwise provided in subsection (a) or Section 2-504(d), this article does not
creditor of the seller under Article 9 or in a case in which an identification to the contract or deliver
current course of trade but in satisfaction of or as security for a preexisting claim for money, securit
circumstances that the transaction would constitute a fraudulent transfer or voidable preference und
law other than this article.

SOURCE: Sales, Section 2-402.

Notes

1. Under revised subsection (a), the rights of "creditors of the seller not just "unsecured cr
subject to the buyer's right to possession of the goods under Section 2-824 (formerly Section 2-502
(formerly Section 2-716), and Section 2-822(b) (formerly Section 2-709(2)). This change expands
oriented remedies against creditors of the seller, including secured and lien creditors. The right to p
however, does not determine priorities over those creditors in the goods or the proceeds. The langu
(proposed by the ABA Task Force) states the priority rule: The buyer's rights must **vest** before the
attaches.

2. The rights of an Article 9 secured creditor of the seller against a buyer are preserved und
unless stated otherwise in Sections 2-824 and 2-807 or Section 2-504(c) is involved. Revised subse
provides a priority rule if the buyer's right vests before the security interest attaches. If the security
the buyer's right to possession from the seller is preserved subject to the security interest unless the
course of business.

A few illustrations reveal the broad operation of this provision. In all, assume that the buye
possession of goods retained by the seller under either Section 2-824 or 2-807.

#1. C becomes an unsecured creditor of S either before or after the contract for sale. C lose
case unless S's retention is fraudulent under Section 2-505(b) or (c)(2) applies.

#2. LC obtains a judicial lien on the goods either before or after S retained possession. Aft
a special property interest by virtue of identification, Section 2-502, and a right to possession of the
2-824 (i.e., B's right vests). If LC's lien attaches before B's rights vest, B takes subject to the judic
attaches after B's rights vest, B takes free of the lien under subsection (a).

#3. SP creates a security interest in the goods which attaches either before or after the buyer
before, a buyer in the ordinary course of business may take free of that security interest under Secti
B's status as a BIOCB should arise upon identification of the goods not when possession is transfer

take subject to buyer's rights in the collateral, even though the buyer has not perfected a security int

Since December, 1995 representatives of the Article 2 and Article 9 Drafting Committees ha discuss this and other overlap problems between sales and secured transactions. Moreover, the pro the 1996 Annual Meeting and discussion continued at the September, 1996 meeting of the Drafting motion to give the buyer a "super priority under Article 2 was narrowly defeated). Although a gen emerged on some issues, others remain for decision. More specifically, when does the buyer protec become a BIOCB? The right to possession (which protects the buyer's need for the goods) is under status arises when the buyer has a right to possession against the seller, not when possession is actu right arises when the buyer has a special property interest in the goods and the right to possession a or 2-807.

SECTION 2-506. SALE ON APPROVAL AND SALE OR RETURN; SPECIAL INCIDENTS.

(a) If delivered goods conform to the contract and may be returned by the buyer, the transac

(1) a sale on approval, if the goods are delivered primarily for use; or

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

(b) Under a sale on approval:

(1) the risk of loss and the title to goods identified by the contract do not pass to the buy

(2) use of the goods consistent with the purpose of trial is not an acceptance, but a failur notify the seller of election to return the goods is an acceptance, and acceptance of any part of conf acceptance of the whole; and

(3) after seasonable notification of election to return, the return is at the seller's risk and merchant buyer shall follow any reasonable instructions.

(c) Under a sale or return:

(1) the option to return extends to the whole or any commercial unit of the goods while original condition but must be exercised seasonably; and

(2) the return is at the buyer's risk and expense.

(d) An "or return term of a contract for sale negates the sale aspect of a contract within the

article on parol or extrinsic evidence.

(e) Goods held on approval are not subject to claims of a buyer's creditors until acceptance held on sale or return are subject to those claims while in the [if delivered to a merchant buyer and possession.

SOURCE: Sales, Sections 2-326, 2-327.

Notes

1. Section 2-506 has been revised to include all material on the nature and the special incid return and "sale on approval in one section. Thus, old Section 2-327 has been rolled into Section on consignments and creditor's rights, previously in Section 2-326, was contained in a new Section that the Drafting Committee, at the March, 1996 meeting, voted to move the rights of a consignor a consignee from Section 2-407 to Article 9. Thus, except for Section 2-504(c) on entrusting, Article about either a bailment or a consignment transaction, whether or not creditor's rights are involved.

2. New Section 2-506(e) preserves the traditional creditor's rights distinction between "app With the deletion of Section 2-407 in an earlier draft,[see below], Article 2 says nothing about wha and what the seller can do trump them. A possible solution, included in revised subsection (e), mak (whatever they are) depend upon whether the seller in a sale or return delivered them to a merchant suggested, however, limiting protection to cases where the buyer is a merchant is unsound.

To illustrate, suppose a brewery sells beer to a retailer to be "returned if the beer is not sold "freshness expiration date. In this "sale or return Section 2-506 deals with the rights between the the beer, while in the buyer's possession, is subject to the rights of the buyer's creditors. Which cre what precautions the seller can take are not stated. If, instead, the beer is "consigned to the retaile about anything. Where secured creditors are involved, Article 9 will have something to say, but exa clear.

3. Former Section 2-326 (1990 Official Text), renumbered Section 2-407 in the July, 1995 the Drafting Committee at the March, 1996 Meeting. The UCC will treat the consignment problem tentative proposals, revised Article 9 now: (1) Defines consignment and defines security interest to whether or not for security; (2) Applies to "any consignment ; (3) Requires perfection of a consign prescribes how a consignor may file a financing statement; (4) Defines the rights of creditors of and consignee; and (5) Defers consideration of the duties and remedial rights of the consignor upon def

4. Assuming that revised Article 9 will ultimately cover most aspects of a consignment for code provisions covering a "pure consignment, i.e., a bailment with the bailee acting as an agent w for the consigned goods and to transfer good title by a contract for sale to that buyer. Moreover, the coverage for consignments for security between the enactment of Article 2 and Article 9.

One observer has suggested that the essence of old Section 2-326(3) be retained a subsection 9 project is completed.

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PART 6

PERFORMANCE

SECTION 2-601. GENERAL OBLIGATIONS. Parties are obligated to perform in accordance with the contract.

SOURCE: Sales, Section 2-301.

Notes

1. Section 2-601 is derived from former Section 2-301 which provided that the seller's obli and deliver and the buyer's obligation was to accept and pay in accordance with the contract. Comp Article 53. The phrasing of the parties' obligations is broader than that stated in former Section 2-3 phrasing is intended to encompass all of the obligations of the parties' contract, not merely those re payment for the goods. "Contract as defined in Section 1-201(11) means the total legal obligation determined from their agreement (Section 1-201(3)), the provisions of the U.C.C. or any other appl provision makes explicit what is implicit throughout Article 2, that each party has to perform its ob by the contract.

2. The July 1996 draft (Section 2-501(b)) stated that each party's obligation to perform was other party's substantial performance of its obligation it that other party was to perform first under t substantial performance rule was derived from general principles of contract law. See Restatement § 237. The July 1996 draft (Section 2-501(c)) also provided that a nonmaterial breach entitled the a remedies but did not entitle the aggrieved party to withhold its own performance. Those two subse as inconsistent with the decision to retain the perfect tender rule in Section 2-703 and not necessary include service contracts connected with the sale of goods within the scope of Article 2. (Novembe Committee meeting). To reflect the decision to not cover service contracts, the provisions containe on service contracts have been deleted (Sections 2-502, 2-503, 2-504). Even though service contra within the scope of Article 2, service obligations may arise as part of a limited remedy such as a pro issues presented by that service promise is the level of the repair obligation required and the remedi repair is not provided as promised. Those issues are addressed in Section 2-810 on limited remedie

3. Section 2-505 from the July 1996 draft has been consolidated with Section 2-604 of the J to Section 2-702 of this draft in order to deal with waiver of breach concepts all in one section.

SECTION 2-602. MANNER OF SELLER'S TENDER OF DELIVERY.

(a) Tender of delivery requires that the seller put and hold conforming goods at the buyer's any notification reasonably necessary for the buyer to take delivery. A tender of delivery includes t agreement to install or assemble the goods. Tender must be at a reasonable hour. A tender of good

for the period reasonably necessary to enable the buyer to take possession or control of the goods. T
facilities reasonably suited to receive the goods.

(b) If the seller is required or authorized to send the goods to the buyer but the agreement d
delivery at a particular destination, tender requires that the seller deliver conforming goods to the ca
Section 2-603.

(c) If the agreement requires the seller to deliver at a particular destination, tender requires
subsection (a) and, in an appropriate case, the tender of documents [of title] pursuant to subsections
need not deliver at a particular destination unless required by a specific agreement or by the comme
the terms used by the parties.

(d) If conforming goods of a seller are in the possession of a bailee and are to be delivered t
being moved, the following rules apply:

(1) Tender requires the seller to tender a negotiable document of title covering the good
acknowledgment by the bailee to the buyer of the buyer's right to possession of the goods.

(2) Tender to the buyer of a nonnegotiable document of title or of a record directing the
sufficient unless the buyer seasonably objects. However, risk of loss of the goods and of any failure
the document [of title] or to obey the direction remains on the seller until the buyer has had a reason
document [of title] or direction. A refusal by the bailee to honor the document [of title] or to obey t
tender. Receipt by the bailee of notification of the buyer's rights fixes those rights as against the ba

(e) If an agreement requires a seller to deliver a document [of title], the following rules app

(1) All required documents [of title] must be tendered in correct form, except as provide
with respect to bills of lading in a set.

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

SOURCE: Sales, Section 2-503.

Notes

1. Section 2-602 is derived from former Section 2-503 and with three changes, continues th
section. First, a test for interpreting delivery terms was added to subsection (c) as recommended in
Delivery to a particular destination must be required by "specific agreement or the commercial unc
Thus, this section continues the prior policy expressed in former Comment 5 to former Section 2-5(
a shipment contract, not a destination contract. In addition, with the deletion of the defined shippin
former Sections 2-319 through 2-323, whether a shipping term designates a destination or a shipme
upon commercial usage. See Section 2-309. Second, the phrase "to the buyer was added to subse
recommended in the PEB study report to make clear that the bailee must acknowledge to the buyer
goods. Third, a tender of delivery includes any agreed assembly or installation as part of the tender
make clear when the tender is complete, both for purposes of the buyer's corresponding duty of pay
for purposes of the accrual of a cause of action for breach under Section 2-814.

2. The PEB study report recommended that bailee be defined. The Drafting Committee dec
bailee. Bailee is defined in Section 7-102(1)(a) for the purpose of Article 7 as "the person who by a
of lading or other document of title acknowledges possession of goods and contracts to deliver them
in three sections, Sections 2-602(d), 2-612(b), and 2-818, but uses the term in a broader sense than
Section 7-102(1)(a) because it is not limited to persons who issue documents of title. Article 1 doe
of bailee. Articles 2A, 8, and 9 use the term bailee without definition. At the January, 1994 meetin
was posed. Suppose that the seller sells to the buyer a haystack located at a place other than the sel
and controlled by the seller's agent (not a bailee). The buyer intends to resell the hay to a third part
delivery. The current rules appear to be adequate for this problem. The place for tender is the plac
located, Section 2-305, [CISG Article 31(b) is in accord] and the adequacy of the tender of delivery
2-602(a). In the resale between the buyer and the resale buyer, since the goods are in the possessior
seller's agent) and are to be delivered without being moved, tender by the buyer (now a seller) is go
2-602(d). No revisions are required.

3. Seller's tender of delivery has three important consequences. First, it satisfies a conditio
to accept and to pay for the goods. See Section 2-606(a). Unless otherwise agreed, the buyer is not
tender of delivery. Compare Section 2-607, dealing with the buyer's tender of payment.

Second, it is an essential ingredient in the passage of risk of loss under Section 2-612, in tha
the risk or is an essential first step to transfer of possession of the goods. Tender of delivery in Sec
terms of tendering conforming goods. Under Section 2-612, the goods need not be conforming for
the buyer. Rather the risk of loss will pass to the buyer at the times stated in Section 2-612 even if
conforming. The requirements of Section 2-602 as to an effective tender, other than conformity of
relevant in some situations to the passage of the risk of loss, such as when goods are shipped by car
a bailee. This is a change from former Section 2-509 and Section 2-510(1). See notes following Se

Third, tender of delivery is the time for testing whether goods conform to the contract for th
determining the buyer's right to reject as well as breach of contract. Tender of delivery under forme
as under this section, means that the seller "puts and holds conforming goods for the buyer's dispo
implies that the goods must conform to the contract throughout the reasonable time that the seller is

the buyer to take possession or control. Thus, the seller, not the buyer, has the risk of damage to the reasonable time necessary for the buyer to take possession or control of the goods. See Section 2-6 consistent with the risk of loss principles stated in Section 2-612.

In any case, the tender "rules, in the absence of contrary agreement, must be clear and adap delivery patterns, i.e., where seller has no obligation to ship the goods, or seller is authorized or req or the goods are in the possession of a bailee. Interpretation of these requirements will be more dif terms in former Sections 2-319 through 2-324 have been deleted.

4. The bracketed language in subsections (c), (d), and (e) is designed to highlight a differen words "document and "draft are used in Article 5 that is broader than used throughout the other a Compare Section 1-201(a)(15) defining "document of title with Section 5-102(a)(6) defining "doc 3-104(e) defining "draft and Comment 11 to Section 5-102 stating "draft in Article 5 is different

5. It should be noted that draft Section 9-311(c) proposes a change from current Sections 9- provide that a secured party may perfect its security interest in the goods in the hands of a bailee wh negotiable document of title for the goods by mere notification to the bailee. Draft Section 9-311(c secured party does not perfect its security interest in goods in the hands of the bailee who has not is document for those goods until the bailee acknowledges in writing that it holds the goods for the se policy issues different in this context that mere notification should fix rights as against third parties 2-602(d)(2)?

6. **CISGA.** Under Article 30, the seller must "deliver the goods, hand over any documents and transfer the property in the goods, as required by the contract and this Convention. Articles 31 how this is to be done, with Article 31 the counterpart of Section 2-602 and Article 32 the counterp

Article 31(b) deals with the case where no carriage of the goods is involved and the "contrac goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, conclusion of the contract the parties knew that the goods were at, or were to be manufactured or pr place. Here the delivery obligation is satisfied by "placing the goods at the buyer's disposal at tha place controlled by the seller but not its place of business or by a bailee.

Where that place is controlled by the seller, the same result can be reached through Sections 2-602(a).

SECTION 2-603. SHIPMENT BY SELLER.

(a) If a seller is required or authorized to send the goods to the buyer and the contract does at a particular destination, the following rules apply:

(1) The seller shall put the goods in the possession of a carrier. However, unless reques required by usage of trade, the seller need not make a contract for their transportation or obtain and

of title necessary to enable the buyer to obtain possession or control of the goods.

(2) The seller shall promptly notify the buyer of the shipment if the goods are not clearl

contract by markings on the goods, shipping documents, or otherwise.

(b) A seller's failure to notify the buyer of the shipment or to make a proper contract for tra

required by subsection (a), is a ground for rejection only if material delay or loss results.

SOURCE: Sales, Section 2-504.

Notes

1. Section 2-603 changes former Section 2-504 by not obligating the seller to make a contra or to obtain and deliver documents unless the buyer requests the seller to do so or the seller is requi the trade. This change is designed to bring Article 2 more in line with commercial practice. See Jo *Incoterms and UCC Article 2 – Conflicts and Confusions*, 31 The International Lawyer 111, 129-30 (1997). In accord with international practice as reflected in CISG Article 32, the seller need when the goods are not clearly identified to the contract by markings on the goods, documents or ot the rule from former Section 2-504 which required the seller to notify the buyer in all cases.

Section 2-603 states the rules for tender when the seller is not obligated to deliver at a partic Section 2-602(b). The rules for tender in destination contracts are stated in Section 2-602(c) and as the cost and risk of making an appropriate contract for shipment with the carrier.

2. **CISGA.** Many international contracts for sale involve "carriage of the goods. In the ab delivery terms, such as the Incoterms 1990 of the International Chamber of Commerce, Articles 31(what the seller must do to deliver the goods. In the absence of agreement to deliver at "any other pa consists of "handing the goods over to the first carrier for transmission to the buyer. Article 31(a). "clearly identified to the contract the seller need **not** notify the buyer of the "consignment. Articl point, unless the seller is "bound to arrange for carriage of the goods it need not make any contract 32(2). Even if the seller is not bound to obtain insurance on the carriage, it must "at the buyer's re available information necessary to enable [the buyer] to effect such insurance. Article 32(3).

SECTION 2-604. SELLER'S SHIPMENT UNDER RESERVATION.

(a) If a seller has identified goods to the contract by or before shipment, the following rules

(1) Procurement of a negotiable bill of lading reserves in the seller a security interest in

Procurement of the bill to the order of a financing agency or the buyer indicates in addition only the

transferring that interest to the person named.

(2) Procurement of a nonnegotiable bill of lading to the seller or its nominee reserves po goods as security. However, except in a case of conditional delivery, a nonnegotiable bill of lading consignee does not reserve a security interest, even if the seller retains possession of the bill of ladi person named in the bill of lading to which or to whose order the bill promises delivery.]

(b) A shipment by a seller with reservation of a security interest which breaches the contrac an improper contract for transportation under Section 2-603. However, rights given to the buyer by identification of the goods to the contract and the seller's powers as a holder of a negotiable docum thereby impaired.

SOURCE: Sales, Section 2-505.

Notes

1. There are no changes in substance from former Section 2-505. The bracketed sentence i derived from Section 7-102(1)(b) and is not found in former Section 2-505. It has been suggested t

2. **CISGA.** There is no comparable provision in CISGA. Article 58(1) and (2), however, p cases where documents are involved to make payment a condition for handing over the goods or th Nevertheless, the buyer may still examine the goods before payment unless otherwise agreed. Artic

SECTION 2-605. RIGHTS OF FINANCING AGENCY.

(a) A financing agency, by paying or purchasing for value a draft or honoring a presentation credit that relates to a shipment of goods, acquires, to the extent of the payment, purchase or honor own rights under the draft and any document of title securing it, any rights of the shipper in the goo stop delivery and the shipper's right to have the draft honored by the buyer.

(b) The right to reimbursement of a financing agency that in good faith has honored or pur honored a presentation under a letter of credit under commitment to or authority from a buyer is no discovery of defects in any relevant document [of title] that was apparently regular on its face.

SOURCE: Sales, Section 2-506.

Notes

There is one change in former Section 2-506. Because a presentation under a letter of credi
accompanied by a draft as defined in Article 3, Section 5-102 Comment 11, but the rights obtained
presentation under a letter of credit should be comparable, the phrasing of this section has been bro
presentations under a letter of credit.

SECTION 2-606. EFFECT OF SELLER'S TENDER; DELIVERY ON CONDITION.

(a) Tender of delivery is a condition to a buyer's duty to accept and pay for the goods. Ten
to acceptance of the goods and payment according to the agreement. The seller shall tender first bu
delivery until the buyer has tendered payment.

(b) Subject to Section 2-816, if payment is due and demanded on the delivery of goods or d
buyer's right against the seller to retain or dispose of them is conditional upon the buyer's making t

SOURCE: Sales, Section 2-507.

Notes

1. Section 2-606 makes two substantive changes from former Section 2-507. First, subsect
default rule that the seller shall tender delivery first, but need not complete delivery unless the buye
changes the rule from former Article 2 that treated the seller's obligation to tender delivery and the
tender payment as concurrent conditions. This change is consistent with the PEB study report. Sec
retains the concept of seller's right to reclaim upon a conditional delivery in a cash sale transaction
subject to the requirements found in Section 2-816 which explicitly governs cash sale reclamations
transactions governed by former Section 2-702. Section 2-816 is consistent with PEB Commentary
reclamation. Although the PEB study report recommended that subsection (b) be eliminated and th
right be integrated with Section 2-702, the Drafting Committee decided that it was better to retain t
delivery in subsection (b) and make the right to reclaim in a conditional delivery subject to Section
cash and credit sale reclamations.

2. **CISGA.** Article 58(1), in accord, provides that if the buyer is "not bound to pay the pric
specific time, he must pay it when the seller places either the goods or documents controlling their
disposal in accordance with the contract and this Convention. If, however, the buyer must pay "or
determinable from the contract and this Convention, it must pay "without the need for any request
formality on the part of the seller. Thus, if no time if fixed to pay the seller must tender first. But
fixed, the buyer must pay at that time whether the seller tenders or not.

SECTION 2-607. TENDER OF PAYMENT BY BUYER; PAYMENT BY

CHECK.

(a) Subject to Section 2-606(a), tender of payment by a buyer is a condition to the seller's d

delivery.

(b) Tender of payment by a buyer is sufficient if made by any means or in any manner curre

course of business unless the seller demands payment in money and gives any extension of time rea

procure it.

SOURCE: Sales, Section 2-511.

Notes

1. Section 2-607 makes only one change to former Section 2-511. Subsection (a) has been
consistent with Section 2-606 which requires the seller to tender first. Thus, the buyer must tender
to the seller's obligation to complete the delivery. This rule is consistent with Section 2-609(a) wh
right to inspect prior to payment. If the parties do not otherwise agree, the seller will tender the goo
inspect and tender payment, and the seller will then be obligated to complete delivery.

Subject to Section 3-310, payment by check is conditional and is voided as between the par
the check on due presentment. In cases like this, the seller may have a limited right to reclaim the g
See Section 2-816(b)(2).

2. The Federal Reserve Bank of New York has identified an inconsistency between subsect
4A-406(b). If the seller demands money for payment and the buyer, instead, transfers payment und
buyer's duty to pay discharged? The Fed concludes "yes but worries that revised Article 2 will pre
to demand money: "[A] demand for currency is per se commercially unreasonable with respect to a
narrow grounds where rejection of a wire transfer is commercially reasonable are satisfied. The pro
Section 2-607 and, perhaps, should be solved in Article 1.

3. **CISGA.** Article 53 provides that the buyer "must pay the price for the goods . . . as requ
contract and this Convention. It is frequently agreed that payment shall be by a letter of credit, a n
within the scope of the Convention. In the absence of contrary agreement, questions about the time
answered in Articles 58 and 59. If a time for payment has not been fixed, the duty to pay arises wh
delivery. Article 58(1) and (2). If a time for payment is fixed, the buyer must pay at the time "with
request or compliance with any formality on the part of the seller.

SECTION 2-608. PAYMENT BY BUYER BEFORE INSPECTION.

(a) If a contract requires payment before inspection, nonconformity of the goods does not e

so making payment unless:

(1) the nonconformity appears without inspection; or

(2) despite tender of any required documents [of title], the circumstances would justify i

honor under Article 5.

(b) Payment pursuant to subsection (a) is not an acceptance of goods and does not impair a

inspect or other remedies of the buyer.

SOURCE: Sales, Section 2-512.

Notes

1. There are no changes of substance in former Section 2-512. See 5-109(b) (injunction ag

2. **CISG.** Article 58(3) protects the buyer's right to examine the goods before paying the p
procedures for delivery or payment agreed upon by the parties are inconsistent with his having such
Assuming such agreement, there is no provision comparable to Section 2-608.

SECTION 2-609. BUYER'S RIGHT TO INSPECT GOODS.

(a) If goods are tendered, delivered or identified to a contract for sale, the buyer has a right

acceptance to inspect them at any reasonable place and time and in any reasonable manner. If the s

authorized to send the goods to the buyer, the inspection may be after their arrival.

(b) Expenses of inspection must be borne by the buyer.

(c) A buyer is not entitled to inspect the goods before payment of the price if the contract p

(1) delivery "C.O.D. , "C.I.F. , or "C. & F. or delivery on terms which under applicable

usage of trade, or course of performance are interpreted as precluding inspection before payment; o

(2) payment upon tender of required documents of title, unless payment is due only after

available for inspection.

(d) A place, method, or standard of inspection fixed by the parties is presumed to be exclus

otherwise expressly agreed, the fixing of a place, method, or standard of inspection does not postpo

the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection

provided in this section unless the place, method, or standard fixed was clearly intended as an indis

failure of which avoids the contract.

SOURCE: Sales, Section 2-513.

Notes

1. Section 2-609 continues the rules from former Section 2-513 with two changes. The firs given the deletion of the shipment terms provisions from revised Article 2. Subsection (c) states a determining when the buyer does not have a right to inspect before payment. Former Section 2-319 and Section 2-321(1), Article 2 stated presumptions regarding when inspection was not allowed pri subsection (c)(1), whether payment is required before inspection will depend upon the commercial terms employed. The catch all language added to subsection (c)(1) is designed to dovetail with Sec terms. In subsection (c)(2), the phrase "payment against documents has been changed to "paymen documents because of uncertainty about the meaning of "payment against documents given that t appears in the Incoterms of the International Chamber of Commerce and the deletion of shipment te defined which terms required payment against documents. See Sections 2-319(4), 2-320(4), and 2- change is to bracket language at the end of subsection (b) to conform to the change in the definition Section 2-805 which no longer confines expenses to goods rightfully rejected, but rather to expense the goods which are the subject matter of the contract.

2. **CISGA.** Unless otherwise agreed, the buyer has a right to examine the goods upon tend payment. Article 58(3). If carriage of the goods is involved, examination "may be deferred until af arrived at their destination. Article 38(2). A special rule applies when the goods are redirected or Article 38(2).

The buyer must act fast to examine the goods, Article 38(1), and may lose the right to rely u non-conformity if timely notice, as defined in Article 39, is not given. The buyer, however, is prote Articles 38 and 39 if the seller knew "or could not have been aware of the non-conformity and dic 40, and is entitled to damages if "he has a reasonable excuse for his failure to give the required noti

SECTION 2-610. WHEN DOCUMENTS DELIVERABLE ON

ACCEPTANCE OR PAYMENT. Documents of title against which a draft is drawn must be deli

the drawee or to the issuer of a letter of credit that honors the draft on acceptance of the draft if the

than [a reasonable time] [three days] after presentment. Otherwise, delivery of the documents [of ti

payment.

SOURCE: Sales, Section 2-514.

Notes

1. Section 2-610 states a default rule for determining when the person holding documents o
those documents when presenting a draft to the buyer (drawee) or to an issuer of a letter of credit. T
when the draft is accepted by the buyer or issuer under Section 3-409 or when the draft is paid by th
Section 4-503, if the presenter is a bank, the presumption is that if the draft is payable more than thr
presentment, acceptance of the draft is sufficient to entitle the drawee or issuer to delivery of the do
payable within 3 days of presentment, then the drawee or issuer are not entitled to the documents un
The 3 day time period is not a rule that determines when the draft must be honored but rather what
determine when documents must be delivered. Compare Section 5-108(b). Some have argued that
should be lengthened to a "reasonable time. That debate is preserved for further decision by the br
end of the first sentence.

2. Section 2-610 continues the rule from former Section 2-514 with one change, to broaden
include an issuer who honors a letter of credit given that a letter of credit may be drawn on without
defined in Article 3. See Section 5-102, Comment 11. The bracketed language at the beginning of
a need to decide which definition of documents should be employed here, the Article 1 definition o
Section 1-201(15), or the Article 5 definition of "document, Section 5-102(a)(6) which is broader
"document of title.

3. There is no comparable CISGA provision.

SECTION 2-611. OPEN TIME FOR PAYMENT OR RUNNING OF CREDIT; AUTHORITY TO SHIP UNDER RESERVATION.

(a) Payment is due at the time and place the buyer is to receive the goods, even if the place
place for tender of delivery.

(b) If a seller is authorized to send the goods, the seller may ship them under reservation an
documents of title. However, the buyer may inspect the goods after their arrival before payment is
inconsistent with the terms of the contract.

(c) If tender of delivery is agreed to be made by way of documents of title [other than under
payment is due at the time when and at the place where the buyer is to receive the documents [of tit
the goods are to be received.

(d) If the seller is required or authorized to ship the goods on credit, the credit period runs f
shipment. However, postdating the invoice or delaying its dispatch correspondingly delays the start

SOURCE: Sales, Section 2-310.

Notes

1. Section 2-611 makes no changes of substance from former Section 2-310.

SECTION 2-612. RISK OF LOSS.

(a) This section is subject to Section 2-506(b) and (c).

(b) Except as otherwise provided in subsection (c), risk of loss passes to the buyer regardles of the goods to the contract as follows:

(1) Subject to this subsection, the risk of loss passes to a buyer upon receipt of the good not intend to take possession, risk of loss passes when the buyer receives control of the goods.

(2) If a contract requires or authorizes the seller to ship goods by carrier, the following r

(A) If the contract does not require delivery at a particular destination, the risk of lo buyer when the goods are delivered to the carrier as required by Sections 2-602 and 2-603, even if t reservation.

(B) If the contract requires delivery at a particular destination and the goods arrive t possession of the carrier, the risk of loss passes to the buyer when goods are tendered in the manne 2-602.

(3) If goods are held by a bailee to be delivered without being moved, the risk of loss pa

(A) on the buyer's receipt of a negotiable document of title covering the goods with indorsement;

(B) on acknowledgment by the bailee to the buyer of the buyer's right to possession

(C) after the buyer's receipt of a nonnegotiable document of title or record directing provided in Section 2-602(d)(2).

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

(1) If the buyer rightfully and effectively rejects the goods or revokes acceptance of the

has the risk of loss from the time when the rejection or revocation is effective.

(2) If the seller has tendered nonconforming goods, the risk of loss has passed to the b
are damaged or lost before the buyer effectively rejects or revokes acceptance, the seller has the ris
nonconformity of the goods caused the damage or loss.

(3) If conforming goods are identified to the contract when the buyer repudiates or is ot
and the risk of loss has not otherwise passed to the buyer, the buyer has the risk of loss for those go
reasonable time after the breach or repudiation.

Notes

1. Former Sections 2-509 and 2-510 provided for passage of the risk of loss depending upo
the goods, whether the there was a breach of contract, and whether the loss was insured rather then
to the buyer. If no breach of contract existed, then Section 2-509 determined when the risk had pas
report recommended that Section 2-510 be deleted as an unwise attempt to reallocate loss in the eve
breach was not causally connected with the loss. In addition, the attempt to reallocate the loss base
insurance coverage was unclear in application. See note 5 infra. Section 2-612 accords with the PE
adopting the perspective that opportunity to control the goods and prevent the loss is the primary po
has the risk of loss as a default rule. Thus, breach of contract and insurance coverage have been rej
relevant to the passage of risk of loss. Subsection (c) provides three exceptions to govern three par
of loss issues depend on whether there is a breach of contract. See note 6, infra. Of course, the par
allocate the risk of loss in a manner different than provided in Section 2-612.

2. The PEB study report also recommended that the distinction between a merchant and a n
former Section 2-509(3) be eliminated and that risk of loss pass upon receipt of the goods. Under f
if the seller was a merchant, the risk of loss passed to the buyer upon receipt of the goods, otherwis
to the buyer upon tender of delivery. Subsection (b)(1) implements this recommendation, providing
passes to the buyer when the buyer upon receipt or control of the goods. Receipt is defined in Secti
taking delivery of the goods. Delivery is defined as taking physical possession of the goods. Sectio
illustrate, suppose that S contracts to sell B a haystack located in a field and controlled by S's agent
independent bailee. The goods are identified to the contract but B never expects to take possession
resell the hay to a third person, who will then take possession. In this case, when S tenders delivery
B, although not in possession, has control of the goods and the risk of loss has passed. The fact tha
contract after tender but before possession is taken is irrelevant. Except as provided in subsection (
tendered conforming goods is also irrelevant to the passage of risk of loss to buyer.

3. Subsection (a) continues the rule from former Section 2-509(4) that the rules of Section 2
the contrary provisions of sale on approval and sale or return found in Section 2-506.

4. Subsections (b)(2) and (b)(3) restate the provisions from former Section 2-509(1) and (2)
changes. First, as stated above, the conformity of the goods is not relevant to passage of the risk of

the principles of these subsections apply even if there is a breach by the seller. Second, consistent w
Section 2-602(d)(1), the acknowledgment sufficient to pass the risk of loss to the buyer is the bailee
the buyer under Section 2-612(b)(3)(B). See *Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.*,
774 F. 2d 214 (7th Cir. 1985). These changes are consistent with the PEB study report recommend
report also recommended that the meaning of a destination contract be clarified. That recommenda
Section 2-602(c). The PEB study report recommended that the meaning of "carrier be clarified in
of loss purposes, the term "carrier in Section 2-612(b)(2) does not include transportation facilities
the parties to the contract. Rather, the term "carrier refers to independent methods of transportatio
water, including private express mail, United Postal Service and the United States Postal Service.
could shift to the buyer while the seller still has possession and control of the goods. Finally, the P
recommended that bailee be defined. See Note 2 to Section 2-602. For risk of loss purposes, the te
refers to a third person (neither seller nor buyer) who is in possession of the goods sold at the time
person may be a warehouse or a carrier who has issued a document of title, see Section 7-102(1)(a),
satisfies the requirements of a bailment. It is clear that a seller, after the contract for sale, may beco
either before or after the buyer takes possession. For example, suppose that S sells B a horse. B pa
of taking delivery, B contracts with S to board the horse for an agreed price. S is now a bailee. Wh
loss, however, should not be determined by Section 2-612(b)(3). Instead, the question is whether B
under either Section 2-612(b)(1) or 2-612(b)(2) before S becomes a bailee. Since no shipment was
never received the goods, risk remains on S unless S has obtained a contrary agreement.

5. Except as stated in subsection (c), risk of loss principles do not affect the parties' obligat
contract. The seller must tender and the buyer must pay as agreed. Thus, a buyer with the risk who
may be liable for the price or for damages for breach of contract. Similarly, a seller with the risk is
the goods as agreed or answer in damages for breach of contract. Former Section 2-510, dealing wi
on risk of loss, has been repealed. The assumption that a breach by either the seller or the buyer sh
deficiency in insurance coverage, reallocate the risk of loss otherwise assigned by Section 2-612 is
where there is no causal connection between the breach and the loss itself. Absent a causal connect
the risk has passed at the times stated in subsection (b) is still in the best position, cost considered,
the loss.

Moreover, application of the "breach standard in old Section 2-510 produced unexpected d
example, under Section 2-510(2), suppose the buyer in possession discovers a nonconformity in the
revokes acceptance before the loss occurs. Assuming that the buyer exercised ordinary care and dic
operation of Section 2-510(2) was unclear. Suppose that the fair market value of the goods was $1,
either (a) fully insured, or (b) half insured or (c) not insured at all. Since B, after revocation, must r
fair market value to the seller, the practical solution is that buyer pays seller $1,000 in (a), $500 in (
But there is nothing in the text of or Comments to Section 2-510(2) that dictated this result.

Similarly, under Section 2-510(3), suppose the buyer breaches while the goods are in the sel
possession and before the risk of loss has passed. It is unlikely that the buyer owes the price of the
market value of the goods is $1,000, the seller is not insured at all, and wants to recover that deficie
insurance coverage from the buyer. Does Section 2-510(3) support an action against the buyer for
what theory? Again, neither the text nor the Comments are helpful.

Finally, Section 2-510 was an anti-subrogation provision, since insurance "deficiency was
regard to subrogation rights. Once the chips have fallen in the reallocation process, the insurance c

with the outcome. But there is little evidence that insurance companies were aware of Section 2-51 calculated premiums with the availability of subrogation in mind.

6. Subsection (c) recognizes that there are three situations where breach should influence w loss. Subsection (c)(1) is designed to bring the risk of loss rules into conformity with the buyer's o goods upon rightful rejection or revocation of acceptance. Subsection (c)(2) is based upon the prin nonconformity causes the loss or damage to the goods, the seller should have the risk of loss. Subs upon the idea that a repudiation or failure to take delivery could surprise the seller who is expecting the buyer at a particular point and gives the seller a reasonable opportunity to decide what to do wit the application of Section 2-612, consider the following hypotheticals.

(a) S tenders nonconforming goods. Under subsection (b)(1), S has the risk of loss until B control of the goods. If the goods are lost or damaged while in S's possession or control, S has the current law].

(b) S tenders nonconforming goods. B takes possession of the goods. Under subsection (b risk of loss even though B has not accepted the goods under Section 2-706. If the goods are destroy acceptance, B is not liable for the price under Section 2-822 but would be liable for damages for br failing to perform its obligation under the contract. B would have a cause of action for the seller's conforming goods. [Change from the current law, see Section 2-510(1)]. However, if the nonconfo then, the risk of loss is on S to the extent the nonconformity caused the loss under subsection (c)(2)

(c) S tenders nonconforming goods. B takes possession of the goods. Under subsection (b loss. Assume B rejects the goods or accepts the goods and then revokes acceptance. The risk of lo the time the rejection or revocation is effective. Subsection (c)(1). This conforms the risk of loss r under Section 2-704 as a bailee to take reasonable care of the goods. Thus, if the goods are lost or rejection or revocation becomes effective, S has the risk of loss for those goods. B is only liable fo exercise ordinary care for the goods under Section 2-704. Rights to insurance proceeds is governed from current law, Section 2-510(2)].

(d) S tenders nonconforming goods. B takes possession of the goods. Under subsection (b loss. B accepts the goods and does not revoke acceptance. B has the risk of loss for those goods ar liable for the price. [same as current law, Section 2-510(1)].

(e) S tenders conforming goods. B takes possession of the goods. The risk of loss is on B (b)(1). B wrongfully rejects the goods. The goods are destroyed after rejection. Under Section 2-8 the price or may sue for breach of contract for B's wrongful rejection. If S regains possession of th goods are destroyed, S can recover the price only if the destruction was within a reasonable time aft to B. Even if S cannot recover the price because the goods are destroyed beyond the reasonable tim the buyer, S has a remedy for breach of contract against B for wrongfully rejecting the goods. [Sam 2-709]

(f) S tenders conforming goods. B takes possession of the goods. The risk of loss is on B u (b)(1). B accepts the goods but then attempts to wrongfully revoke acceptance. The goods are then recover the price under Section 2-822 as the wrongful revocation does not undo the acceptance. [S Section 2-709]

(g) S identifies conforming goods to the contract. B repudiates. Risk of loss under subsect on seller. Subsection (c)(3) advances the principle that if the goods are destroyed within a reasonab that S can treat the risk of loss as resting on B. The primary effect of that shifting of the risk of loss price under Section 2-822(a)(2). If subsection (c)(3) did not exist, S would still have its remedy for repudiation, but would not have the action for the price under Section 2-822. [Principle derived fro not dependant upon "deficiency in insurance coverage].

7. **CISGA.** "Passing of Risk is treated in Articles 66-70.

Article 67(1), dealing with "carriage of the goods, is comparable to Section 2-612(b)(2). T between "origin and "destination contracts, however, is not made. The question is whether the se carrier at a "particular place. The answer may come from Incoterms used by the parties.

Article 68, dealing with goods sold in transit, has no exact counterpart in Section 2-612, the being Section 2-612(b)(2). Furthermore, there is no provision like Section 2-612(b)(3), which treat of a bailee.

Cases not otherwise covered are picked up in Article 69, which is CISG's equivalent to old Even between commercial parties, the buyer, in some cases, may have the risk of loss before taking See Article 69(2). Article 69 presumably covers the "haystack hypo and bailment cases.

Breach of contract is relevant to passage of risk under CISGA. For example, if risk has pass the goods are lost or damaged thereafter, the obligation to pay the price is discharged if "the loss or or omission of the seller. Article 66. Also, under Article 69(1) risk passes to the buyer before pos regardless of any deficiency in insurance coverage if the buyer "commits a breach of contract by fai But a breach by the seller apparently does not prevent or reallocate the passage of risk. Rather, risk of Articles 67-69 are satisfied but the "remedies available to the buyer on account of the breach ar 70.

PART 7

BREACH, REPUDIATION, AND EXCUSE

SECTION 2-701. BREACH OF CONTRACT GENERALLY; SUBSTANTIAL IMPAIRMENT.

(a) Whether a party is in breach of contract is determined by the terms of the contract.

(b) A breach of contract occurs in the following circumstances, among others:

(1) A seller is in breach if it fails to deliver or to perform an obligation, makes a noncor performance, or repudiates the contract.

(2) A buyer is in breach if it wrongfully rejects a tender of delivery, wrongfully revokes repudiates the contract, or fails to make a required payment or to perform an obligation.

(c) To determine whether the value of an installment or the whole contract has been substa breach of contract under Section 2-708, 2-710, or 2-712, the court may consider whether:

(1) the extent to which the aggrieved party has been deprived of the benefit that it reason under the contract;

(2) cure of the breach is permitted and likely;

(3) adequate assurance of due performance has been given; and

(4) the party in breach acted in good faith.

(d) The cumulative effect of individual, insubstantial breaches of contract may substantially the whole contract to the other party .

SOURCE: Sales, Sections 2-703, 2-711; Licenses, Section 2B-108(a).

Notes

1. Section 2-701 is a new section that is derived, in part, from former Sections 2-703 and 2- breach as part of the index to the remedies sections. The PEB study report identified some ambigui Sections 2-703 and 2-711 which is solved by separating the types of breaches from the entitlement

Section 2-815 (seller's remedies) and Section 2-823 (buyer's remedies) merely index the remedies t
buyer is entitled to exercise if there is a breach. Section 2-701(b) identifies those events that are us
and correspond to those breaches identified in former Section 2-703 and Section 2-711. As recomm
report, the buyer's breach includes failure to pay after delivery as well as "payment due on or before
in former Section 2-703. If the failure after acceptance is a default under a security agreement, Arti
enforcement of the security interest. In addition, subsection (b) identifies that the failure to perform
contract is a breach. Neither Section 2-703 nor 2-711 contained that definition of breach.

2. Subsection (a) is a statement of breach that corresponds to the statement of obligation fou
Section 2-601 states that the parties are obligated to perform in accordance with the contract. Secti
breach of contract is determined by the terms of the contract. Terms of the contract is determined f
obligation of the parties, Section 1-201(11), which includes the parties' agreement, Section 1-201(3
applicable law including the types of breach identified in subsection (b).

3. Subsection (c) is a new section based upon Restatement (Second) of Contracts § 241 wh
breach. Instead of using the material breach terminology, subsection (c) uses the terminology alrea
whether the value of the installment or the contract is substantially impaired by a breach. Given the
perfect tender rule and the decision to not explicitly cover service contracts within the scope of Arti
impairment concept is relevant only to installment contract situation (Section 2-712), the anticipato
(Section 2-710) and the revocation of acceptance situation (Section 2-708). Those three sections ar
(c). The four factors listed in subsection (c) are taken from the Restatement (Second) of Contracts
the Restatement which are not reflected above are (i) the extent to which the injured party can be co
deprived benefit and (ii) the extent that the party to perform will suffer a forfeiture. Should those fa

4. Whether the conduct of the seller or the buyer is a breach depends upon whether the selle
to perform is excused (Sections 2-714 through 2-717), whether the seller cures the breach as provid
whether the performance obligation is waived, Section 2-702.

SECTION 2-702. WAIVER OF BREACH; PARTICULARIZATION OF NONCONFORMITY.

(a) Except as provided in subsection (c), a party that knows that the other party's performan
breach of contract but accepts that performance and fails within a reasonable time to object is precl
breach to cancel the contract. Except as otherwise provided in subsection (c), acceptance of that pe
object do not preclude a claim for damages unless the party in breach has changed its position reaso
in reliance on the aggrieved party's inaction.

(b) Failure to object to a nonconforming performance under subsection (a) does not foreclo
same or similar breach of contract in future performances of like kind unless the party foreclosed ex

statement waiving future performance may be retracted by seasonable notification received by the c
performance will be required unless the waiver has induced the other party to change its position re
faith.

(c) A party is precluded from relying on a nonconforming performance as follows :

(1) Payment upon tender of documents [of title] made without reservation of rights wai
recover the payment for defects apparent on the face of the document [of title].

(2) A buyer's failure to state, in connection with a rejection under Section 2-703, a part
nonconformity that is ascertainable by reasonable inspection precludes reliance on the unstated defe
to establish a breach of contract if:

(A) the seller, upon a seasonable particularization, had a right to cure under Section
[would] [could] have cured the [nonconformity] [breach]; or

(B) between merchants, the seller after rejection has made a request in a record for a
statement in a record of all nonconformities on which the buyer proposes to rely.

(3) A buyer's failure to state, in connection with a revocation of acceptance under Secti
nonconformity that justifies the revocation precludes the buyer from relying on the nonconformity t
or to establish breach of contract if the seller had a right to cure the breach under Section 2-709 and
cured the breach.

SOURCE: Sales, Section 2-605, Licenses Section 2B-620.

Notes

1. This section has not been reviewed by the Drafting Committee. It is an attempt to collec
rules regarding waivers of breach. Former Section 2-209 has been criticized as an unclear attempt t
control waiver in the context of Article 2. The PEB study report recommended that waiver be more
its application be clarified. This section and Section 2-210(d) is an attempt to do so.

2. Both this section and Section 2-210(d) do not operate on a clean slate in terms of determ
waiver and what the effect of a waiver is on the parties' rights and obligations. Under Section 1-10
developed at common law operate to supplement Article 2 provisions. It is unrealistic to preclude c

principles of waiver by attempting a complete and full statement of waiver principles within Article taken in this section and Section 2-210(d) is to clarify particular effects of application of the waiver defining what is a waiver for all cases.

3. Section 2-210(d) is an attempt to clarify that a party may waive an express condition to it obligation. The effect of that waiver of an express condition is that the performance obligation aris does not come to pass. If that condition is not also a performance obligation of the party, the failure breach of contract. Restatement (Second) Contracts § 225. Often it is difficult to tell whether the c condition to performance of the other party or whether it is also a performance obligation of that fir

For example, S agrees to sell goods to B for $5,000 with delivery on May 1. Is delivery Ma duty to pay or is delivery May 1 a promise that S will deliver on May 1? If the term is a condition, on May 1, B has no duty to perform its obligation to pay. S, however, has not breached the contract however, may have indicated that B waived the condition of delivery May 1. In that case, because t B's obligation to pay arises, even if delivery is not by May 1. B has no cause of action for breach a condition was not a performance obligation of S.

Assume, however, that the delivery term is a promise to perform by delivering on May 1. S is assumed to be dependent upon B's promise to perform and vis versa, Restatement (Second) Cont not deliver on May 1, S has breached the contract. B would be able to pursue its remedies for breac canceling the contract and damages for breach. If B, by B's conduct or words, waives performance on May 1, at common law, the effect of the waiver is that B could not cancel the contract, but could breach by failing to deliver on May 1. See Restatement (Second) Contracts § 246.

Unless it is very clear that a term is only an express condition to performance and not a perf courts should employ the presumption that terms in a contract are performance obligations and not Restatement (Second) Contracts § 227.

4. With that background, this section operates as follows. Subsection (a) implements the co party may waive a performance obligation and by doing so loses the right to cancel the contract but damages unless the other party detrimentally relies on the failure to object. Subsection (b) addresse under subsection (a) of a previous performance obligation on future performance obligations. The subsection (b) and the last sentence of Section 2-210(d) state the same rule. (Arguably, one of the s eliminated). Subsection (c) states three situations where failure to object does waive the right to est the particular nonconforming performance. Subsections (c)(1) and (c)(2) are from former Section 2 substance. Subsection (c)(3) is a new section included to dovetail with the expansion of the right to revocation situation under Section 2-709. Not listed in subsection (c) is the effect of the failure to p of breach in the case of the accepted goods under Section 2-707(c)(1). That omission is intentional that needs to be answered in the accepted goods case is what is the purpose of any particularization be imposed. A particularization requirement would not facilitate a statutory cure as the seller has n Section 2-709 when the goods are accepted and acceptance is not revoked. A deemed waiver by fai would be inconsistent with the prejudice standard in Section 2-707 where notice itself is excused un failure to notify.

To illustrate the operation of this section, assume that S agrees to sell goods to B, with deliv communicates to B that S can deliver the goods on May 5, but cannot make the delivery on May 1.

include a no oral modification or an anti-waiver clause. B accepts delivery on May 5 and does not
1 should be presumed to be a promise, not a mere condition to B's performance, unless the contract
otherwise. S's failure to deliver on May 1 is a breach of S's performance obligation. B's acceptanc
and failure to object to S's late delivery means that B cannot cancel the contract, but may pursue B'
caused by S's late delivery, unless S has detrimentally relied on B's silence. Subsection (a).

Assume that in the contract above, S agreed to deliver goods the first of every month for 6 m
delivery is late and not delivered until May 5. B accepts the delivery and does not object to its later
deliver the next month's installment on time on the first of June is intact. B's failure to object to th
a waiver of future timely deliveries. Subsection (b), first sentence. Assume, however, that B accep
May 5 and tells S that as long as the deliveries are made before the 5th of every month, B will take
be a statement waiving future performance of timely deliveries. In order to retract that waiver of fu
would have to give seasonable notice to S before S relied on the waiver to S's detriment.

Assume that S agreed to deliver goods that conformed to an express warranty on May 1. S
on May 1 but the goods did not conform to the warranty. B timely rejects the goods under Section
(a), B has objected by its rejection to the nonconforming performance. Under subsection (c)(2), if t
ascertainable by reasonable inspection and the seller had the right to cure the breach under Section
would have cured, then B has to particularize the nonconformity or is barred from asserting the non
breach or justify the revocation. If the nonconformity is not ascertainable by reasonable inspection,
the defect and will not suffer any adverse consequences from failing to particularize unless B know
accepts S's performance. In that case, subsection (a) will operate to preclude a cancellation and per
second sentence of subsection (a) applies.

Assume the same facts but that B did not reject, but accepted. B then timely and properly re
under Section 2-708(a)(2). B's timely and proper revocation should satisfy the objection required u
has a right to cure under Section 2-709 and would or could have cured, then B must particularize th
revocation or not be allowed to assert those defects to justify revocation or establish breach. As to
sufficient to justify revocation that B knows about, subsection (a) would operate to determine B's r

5. **CISG.** Article 39(1) provides that the buyer "loses the right to rely on a lack of conform
he does not give notice to the seller specifying the nature of the lack of conformity within a reasona
discovered it or ought to have discovered it. Presumably, this failure to specify bars the use of tha
for all remedial purposes. Other related Articles include Articles 39(2), 40, and 44.

The Drafting Committee rejected a motion to incorporate the provisions of Article 40, whic
seller is "not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates
knew or could not have been unaware and which he did not disclose to the buyer.

SECTION 2-703. BUYER'S RIGHTS ON NONCONFORMING DELIVERY; RIGHTFUL REJECTION.

(a) Subject to Sections 2-603(b), 2-710, 2-809, and 2-810, if the goods or the tender of deli

respect to conform to the contract, a buyer may:

(1) reject the whole;

(2) accept the whole; or

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

(b) A rejection under subsection (a) is not effective unless the buyer notifies the seller with after [tender of delivery] [the nonconformity was or should have been discovered].

SOURCE: Sales, Sections 2-601, 2-602 (December, 1994).

Notes

1. Section 2-703 carries forward the perfect tender rule from former Section 2-601. Althou question, the PEB study report recommended that the perfect tender rule be retained. Subsection (a may reject a non-conforming tender and subsection (b), previously found in former Section 2-602(1 for an effective rejection. Subsection (a) contains one new cross reference to the ability to reject fo shipment contract if loss or delay ensues, Section 2-603(b) (former Section 2-504), and carries forw to installment contracts, Section 2-710, liquidated remedies, Section 2-809, and limited remedies, S contained in former Section 2-601. As under current law, the buyer's ability to reject is circumscrib rejection in the installment contract context and by any agreed contractual limitations on the buyer' 2-810.

2. Subsection (b) carries forward the notice requirement from former Section 2-602(1). Th highlight an issue of when the reasonable time for rejection should start to run. Former Section 2-6 reasonable time runs from the time of "tender or delivery. A concern with starting the reasonable the time the nonconformity should have been discovered is the uncertainty in each case of when tha been. If a discovery time is implemented, then some limits must be placed on the right to reject con goods similar to the limitation in Section 2-708(b) that rejection must occur before any substantial c caused by their own defects.

3. The buyer's right to reject is determined by whether the goods or delivery fail to conform parties' total legal obligation, which includes the parties' bargain in fact, applicable course of perfo dealing and usage of trade, as well as terms incorporated from the U.C.C. and other applicable law. right to reject is also subject to the obligation of good faith. Section 1-203. Even if the buyer right ability to cancel the contract or pursue other remedies is tempered by the seller's right to cure in Se has the right to cure under Section 2-709, the buyer has an obligation to allow the seller to make the properly cures, the buyer's ability to force the goods back on the seller through rejection is defeated

4. A rejection not permitted under subsection (a) is wrongful and a breach by the buyer eve prompt notice under subsection (b). The rejection maybe effective but wrongful. Section 2-701(b) rightful under the standard of subsection (a) but ineffective under subsection (b). A rightful but ine an acceptance under Section 2-706(a)(3).

5. **CISG.** Under CISG, buyer remedies are triggered when the seller "fails to perform any o under the contract, Article 45(1), and preserved when proper notice of the nonconformity is given There is no rejection remedy, however, and the buyer is required to pay the price as agreed unless th avoided for a "fundamental breach. See Article 25. Upon finding non-conforming goods, the buy include requiring the seller to deliver substitute goods or repair them under Article 46, fixing an add the seller to perform under Article 47 and avoiding the contract for "fundamental breach under Art seller has broad power to "cure under Article 48 unless the buyer can avoid the contract under Arti

Thus, although a minor non-conformity may be a breach for which rights and remedies are p cannot buy replacement goods (cover) under Article 75 unless the contract is avoided for fundamen

SECTION 2-704. EFFECT OF EFFECTIVE RIGHTFUL REJECTION AND JUSTIFIABLE REVOCATION OF ACCEPTANCE.

(a) Subject to Sections 2-705 and 2-829(b), after an effective rightful rejection or justifiable acceptance, a buyer that takes delivery shall hold the goods with reasonable care at the seller's disp time to permit the seller to remove them. However, the buyer has no further obligation with regard

(b) If a buyer uses the goods after an effective rightful rejection or justifiable revocation of following rules apply:

(1) Any use by the buyer which is inconsistent with the seller's ownership or with the b rejection or revocation of acceptance and is unreasonable under the circumstances is an acceptance

(2) If use of the goods is reasonable under the circumstances and is not an acceptance, t returning or disposing of the goods, shall pay the seller the reasonable value of the use to the buyer. deducted from the sum of the price paid to the seller, if any, and any damages to which the buyer is this article.

(c) A buyer in possession that wrongfully but effectively rejects goods is subject to subsecti duty of care in subsection (a).

SOURCE: Sales, Sections 2-603 and 2-604.

Notes

1. Section 2-704 is based on former Section 2-602(2). Subsection (a) governs the buyer's d and provides the same rule as former Section 2-602(2)(b) and (c) and Section 2-602(3). As under c obligation to care for the goods is subject to a merchant buyer's obligations under Section 2-705, fo Section 2-604, and to the buyer's security interest that arises under Section 2-829(b), former Sectio merchant buyer in possession of goods after a rightful effective rejection or justifiable revocation m of the goods. A buyer who effectively but wrongfully rejects must also take reasonable care of the A buyer that wrongfully revokes acceptance has not undone the acceptance and is liable for the pric 2-822. In that case, the goods are the buyer's to do with as it wants. Similarly, a buyer that rightful does not effect a rejection because of failure to comply with Section 2-703(b) may be treated as hav This treatment of the buyer's obligations follows the PEB recommendation.

2. Subsection (b)(1) is based upon former Section 2-602(2)(a) and Section 2-606(1)(c). It e dichotomy between "acts inconsistent with the seller's ownership which may not be wrongful and acceptance and an act that was wrongful, which could be treated as an acceptance by the seller but n Section 2-606(1)(c)). Under former Section 2-602(2)(a) an "exercise of ownership by the buyer w The PEB study report recommended that this confusing state of affairs be clarified. Subsection (b)(2-706(a)(4) are now consistent with each other, providing that unreasonable acts inconsistent with t an acceptance if the seller elects to treat it as an acceptance. If the seller decides to treat the act as a is liable for the price. Section 2-822. If the seller does not treat the act as an acceptance, the seller remedy for conversion.

3. Subsection (b)(2) is new and is designed to deal with the situation where the buyer uses t rightful rejection or justifiable revocation without compromising the effectiveness of either the reje there could be a situation where the buyer's use of the goods is reasonable but that use does not con the goods. Although a reasonable use is not an acceptance, the buyer must pay the seller the reason of the use. Another possible measure of value, not stated in the text, is what it would cost the buyer use from a person in the seller's position. See Restatement, (Second) Contracts § 371(a). But the s value from the sum of any price paid to the seller. See Section 2-823(a), which permits the buyer to See also, Note, *Article 2: Revocation of Acceptance . . . Should a Seller be granted a Set off for the Buyer's Use of Goods*, 30 N. Eng. L. Rev. 1073 (1996).

To illustrate, suppose the buyer, after testing, discovered that machinery supplied by the sell to its warranted capacity. A rightful and effective rejection was made. The seller elected not to cur to dismantle and return the machine. The buyer, however, used the machine for three months and, available during that time, the use was reasonable under the circumstances. Assuming that the reas months use to the buyer was $5,000, the seller recovers nothing for the use if the sum of the buyer' (down payment plus interest) and damages resulting from the breach exceeds $5,000. The buyer, o amount over $5,000 as damages, including provable incidental and consequential damages under S

4. Subsection (c) clarifies the duties of a buyer who wrongfully but effectively rejects. Suc the goods with reasonable care and may be deemed to have accepted the goods if acting in a manne seller's ownership which is unreasonable.

5. **CISG.** Under Article 86, if a buyer has received and intends to reject goods, he must tal steps to preserve the goods. If the goods shipped to the buyer are at the buyer's disposal at the dest agent is present at the destination, the buyer must take possession if that can be done without payin

unreasonable inconvenience or expense.

SECTION 2-705. MERCHANT BUYER'S DUTIES; BUYER'S OPTIONS AS TO SALVAGE.

(a) Subject to a buyer's security interest under Section 2-829(b), if the seller does not have business at the market where the goods were rejected or acceptance was revoked, a merchant buyer [rightful] rejection or justifiable revocation of acceptance, shall follow any reasonable instructions with respect to goods in the buyer's possession or control and in the absence of such instructions sh effort to sell or otherwise dispose of the goods for the seller's account if they threaten to decline spe Instructions are not reasonable if on-demand indemnity for expenses is not forthcoming.

(b) A merchant buyer that sells goods under subsection (a) is entitled to reimbursement fro the proceeds for the reasonable expenses of caring for and selling them. If the expenses do not incl the buyer is entitled to a commission usual in the trade or, if there is none, to a reasonable sum not the gross proceeds.

(c) Subject to subsection (a), unless a seller gives instructions to a merchant buyer within a notification of an effective [rightful] rejection or justifiable revocation of acceptance, a buyer may for the seller's account, reship them to the seller, or resell them for the seller's account, with reimbu subsection (b).

(d) In complying with this section, a buyer shall act in good faith. Conduct in good faith u not constitute acceptance or conversion and may not be the basis of a claim for damages.

SOURCE: Sales, Sections 2-603 and 2-604.

Notes

1. Section 2-705 integrates former Sections 2-603 and 2-604 in one section and makes clea duties also arise after a justifiable revocation of acceptance. This treatment of a buyer's duties as t with the PEB recommendation to expand this section to cover both rejection and revocation situati

same as former Section 2-603(1) with the clarification of its application to a justifiable revocation. subsections (a) and (c) are designed to highlight the issue of whether a buyer has these duties in any whether the rejection is rightful or wrongful. Compare Section 2-704(c). Former Section 2-603(1) between a rightful or wrongful rejection. Subsection (b) is the same as former Section 2-603(2). S as former Section 2-603(3). Subsection (c) is the same as former Section 2-604. Just as under form and (b) apply to merchant buyers and subsections (c) and (d) apply to all buyers.

2. **CISG.** Article 87 allows a buyer who has taken possession of the goods under Article 8(Section 2-704) to store the goods at the expense of the other party as long as that expense is not unr Article 88, the buyer may sell the goods if the seller unreasonably delays in regaining possession of for the expense of preserving the goods. If goods will decline speedily in value or will be unreason preserve, the buyer must sell the goods. A party selling the goods may deduct from the proceeds th and selling the goods and account to the other party for the balance.

SECTION 2-706. WHAT CONSTITUTES ACCEPTANCE OF GOODS.

(a) Goods are accepted when the buyer:

(1) states to the seller at any time that the goods are accepted;

(2) after a reasonable opportunity to inspect the goods, signifies to the seller that the goo be taken or retained in spite of their nonconformity;

(3) after a reasonable opportunity to inspect the goods, fails to make an effective rejectio

(4) either before or after rejection or after revocation of acceptance, does any unreasonal with the seller's ownership or the buyer's claim of rejection or revocation of acceptance and that ac as an acceptance.

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

SOURCE: Sales, Section 2-606.

Notes

1. Section 2-706, former Section 2-606, states what constitutes acceptance of the goods. Su same as former Section 2-606(1)(a). Subsection (a)(3) is the same as former Section 2-606(1)(b). S on former Section 2-606(1)(c) but has been revised to be consistent with Section 2-704(b). This rev the PEB study report recommendation. See Notes 2 and 3 after Section 2-704. Subsection (a)(1) is situation where the buyer affirmatively states that the buyer has accepted the goods even if the buye advantage of the buyer's reasonable opportunity to inspect. Subsection (b) is the same as former Se

2. Under subsection (a)(2), the buyer must first have a reasonable opportunity to inspect the objectively signify to the seller that they will be taken or retained. The buyer may or may not have nonconformity.

Under subsection (a)(3), the buyer must first have a reasonable opportunity to inspect the go make an effective rejection under Section 2-703(b). The classic case is where the buyer discovers a to notify the seller of rejection within a reasonable time after delivery. The rejection was rightful u not effective under Section 2-703(b). Conversely, it is not an acceptance where the buyer effectivel permitted under Section 2-703(a). Unless the buyer does an act of unreasonable ownership or contr subsection (a)(4), a wrongful but effective rejection is a breach under Section 2-701 but not an acce 2-706.

Does this make sense? Why not state simply and clearly that a wrongful rejection under Sec though effectively communicated under Section 2-703(b), is an acceptance. An effective but wrong the seller's action for breach of contract damages. If an effective but wrongful rejection is treated a seller would have an action for the price.

Subsection (a)(4) gives the seller an option to treat certain unreasonable acts by the buyer as whether they occur before or after rejection or revocation and whether the rejection was rightful or justified. Thus, unreasonable use of goods during inspection could be an acceptance even though a otherwise proper. Similarly, an unreasonable use after a wrongful but effective rejection could also section must be read in conjunction with Section 2-704(b) which provides in effect that reasonable inconsistent with the seller's ownership may not be an acceptance although the buyer will have to c the reasonable value of the buyer's use of the goods.

3. **CISG.** The remedies of the buyer for breach by a seller do not depend upon whether the accepted the goods.

SECTION 2-707. EFFECT OF ACCEPTANCE; NOTICE OF BREACH; BURDEN OF ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE OF CLAIM OR LITIGATION TO PERSON ANSWERABLE OVER.

(a) A buyer shall pay the price in accordance with the contract for any goods accepted.

(b) Acceptance of goods by a buyer precludes rejection of the goods accepted but does not l other remedy provided by this article for nonconformity.

(c) If a tender has been accepted, the following rules apply:

(1) The buyer, within a reasonable time after the buyer discovers or should have discov contract, shall notify the party claimed against of the breach. However, a failure to give notice bars

remedy only to the extent that the party entitled to notice establishes that it was prejudiced by the fa

(2) If a claim for infringement or the like is made against a buyer for which a seller is a buyer shall notify the seller within a reasonable time after receiving notice of the litigation or be ba over for liability established by the litigation.

(d) A buyer has the burden of establishing a breach of contract with respect to goods accept

(e) In a claim for breach of a warranty, indemnity, or other obligation against the buyer for is answerable over, the following rules apply:

(1) The buyer may give notice of the litigation to the other party in a record, and the pe then give similar notice to any other person that is answerable over. If the notice invites the person the litigation and defend and states that failure to do so will bind the person notified in any action la as to any determination of fact common to the two actions, the person notified is so bound unless, a the notice, the person notified intervenes in the litigation and defends.

(2) If the claim is one for infringement or the like, the original seller may demand in a r turn over control of the litigation, including settlement, or otherwise be barred from any remedy ov agrees to bear all expense and to satisfy any adverse judgment, the buyer is so barred unless, after s demand, control is turned over to the seller.

(f) Subsections (c), (d), and (e) apply to an obligation of a buyer to hold the seller harmless or the like.

SOURCE: Sales, Section 2-607.

Notes

1. Section 2-707 is derived from former Section 2-607. Subsection (a) is the same in substa Section 2-607(1). Subsection (b) is substantively the same as former Section 2-607(2) except for th language which duplicates the standard for revocation of acceptance in Section 2-708. Subsection substance as former Section 2-607(3)(b). Subsection (d) is the same in substance as former Section (f) is the same in substance as former Section 2-607(6).

2. Subsection (c)(1) is based on former Section 2-607(3)(a) but makes the following two ch
substitutes the language "party claimed against for "seller in former Section 2-607(3)(a) in order
the non-privity claim for breach of warranty. Second, it provides that a failure to give notice bars a
entitled to notice is prejudiced by the failure to give notice. Since neither cure nor the remedies of
are available when the third type of notice is given, the task of determining the impact on the seller
is complicated. The requirement that the party claimed against establish prejudice is a middle posit
bar and requiring proof of material prejudice. See Restatement (Second) Contracts § 229, excusing
where the failure is not material and implementation would result in "disproportionate forfeiture.
again at the October, 1995 meeting of the Drafting Committee but no changes were adopted. The P
recommended that the text or the Comments indicate that the content of the notice need only indica
arisen regarding accepted goods and that either the text or Comments should reject cases that provi
standard for the content of the notice. A notice sufficient under this section is also sufficient under
waiving any remedies for breach.

3. Subsection (e) is the same in substance as former Section 2-607(5) with the following ch
broadens the ability to use the vouching in procedure to explicitly cover indemnity actions. Second
the notice to be given to any person who is answerable over, rather than just the seller. Third, subs
explicitly allows the person who is given the notice to similarly notify others who are answerable o
notice given under subsection (e)(1) is the same as the effect of the notice under former Section 2-6
(e)(2) is the same in substance as former Section 2-607(5)(b). The PEB study report recommended
Committee consider whether the vouching in procedure was constitutional and whether it was still
improvements in third party practice. The Drafting Committee rejected the suggestion that the vou
eliminated.

4. **CISG.** Although the buyer is obligated to take delivery and pay the price "as required by
this Convention, Article 53, the concept of acceptance is irrelevant to the obligations of either part
to state the "effect of acceptance.

SECTION 2-708. REVOCATION OF ACCEPTANCE.

(a) A buyer may revoke acceptance of a lot or commercial unit whose nonconformity subst
value to the buyer if the lot or unit was accepted:

(1) on the reasonable assumption that its nonconformity would be cured and it has not b
cured; or

(2) without discovery of its nonconformity if acceptance was reasonably induced by the
discovery before acceptance or by the seller's assurances.

(b) To be effective, a buyer's acceptance must be revoked within a reasonable time after the
should have discovered the ground for it and before any substantial change in condition of the good

their own defects. The revocation is not effective until the buyer notifies the seller of it.

(c) A buyer that justifiably revokes acceptance has the same rights and duties under Section with regard to the goods as if they had been rejected.

SOURCE: Sales, Section 2-608.

Notes

1. Section 2-708 has no changes of substance from former Section 2-608.

2. The PEB study report recommended that the Comments should clarify that a wrongful re acceptance is a breach of contract but does not undo the acceptance. Thus the buyer is still liable fo 2-822 and the seller is entitled to exercise its remedies for breach of contract. Section 2-815. The I recommended that the obligations of the buyer as to the goods after a justifiable revocation of accep Those rights are now clearly governed by Sections 2-704 and 2-705.

3. The buyer's ability to revoke acceptance under Section 2-708(a)(2) is subject to the selle Section 2-709. The PEB study report recommended that the seller's right to cure after revocation o time for performance had not expired be expressly provided for. See notes after Section 2-709 for e right to cure. The right to revoke acceptance under Section 2-708(a)(1) is not subject to the seller's Section 2-709 as the seller will have already had an opportunity to cure which the seller has not fulf not have two opportunities to cure.

4. The PEB study report recommended that a Comment should clarify the effect of a failure remedy on the buyer's right to revoke acceptance. The interrelationship between the right to revoke exclusive limited remedies is addressed in Section 2-810.

5. **CISG.** The buyer may declare the contract avoided for a fundamental breach. Article 49 cannot declare the contract avoided unless he can make restitution of the goods in substantially the received them unless restitution is rendered impossible not due to an act or omission of the buyer, deteriorated due to the inspection allowed by Article 38, or the goods are sold, consumed or transfo normal course before he discovered or should have discovered the nonconformity. Article 82.

SECTION 2-709. CURE.

(a) If a buyer effectively and rightfully rejects goods or a tender of delivery under Section 2 revokes an acceptance under Section 2-708(a)(2) and the agreed time for performance has not expir seasonable notice to the buyer and at its own expense, may cure any breach of contract by making a delivery within the agreed time and by compensating the buyer for all of the buyer's reasonable and

caused by the nonconforming tender and subsequent cure.

(b) If a buyer effectively and rightfully rejects goods or a tender of delivery under Section 2 revokes acceptance under Section 2-708(a)(2) and the agreed time for performance has expired, the notice to the buyer and at its own expense, may cure the breach of contract by making a tender of co compensating the buyer for all of the buyer's reasonable and necessary expenses caused by the nonc subsequent cure, if the cure is [appropriate and] timely under the circumstances and the buyer has n refuse the cure.

SOURCE: Sales, Section 2-508; Unidroit Principles, Article 7.1.4.

Notes

1. Section 2-709 is significantly changed from former Section 2-508 and is based in part on Principles, Article 7.1.4. Cure under this section means curing the breach of contract that the seller non-conforming tender. If the seller cures under this section, there is no breach of contract. The bu a remedy for breach of contract under this article without a breach of contract by the seller. If the se breach under this section, then the seller is in breach of contract and the buyer may resort to its rem right to cure under this section (which assumes the seller is able and willing to comply completely w requirements) and the buyer prevents the seller from curing, the buyer, not the seller, has breached t scenario, the seller would be entitled to pursue remedies for breach of contract. This section can be the seller a checklist of the actions it must take to avoid being in breach of contract once nonconfor has been made. With those basic points in mind, the specific subsections work as follows.

2. Former Section 2-508(1) provided for cure after rejection when the time for contract perf expired if the breaching seller notified the buyer and then made a conforming delivery within the co Section 2-508(1), Section 2-709(a) applies when the agreed time for performance has not yet expire expands the seller's right to cure in this situation by expressly providing the seller a right to cure aft acceptance under Section 2-708(a)(2) (when the goods are accepted without knowledge of the defec difficulty of discovery or the seller's assurances). This expansion to allow cure when the time for c not expired and when the buyer has revoked acceptance follows the PEB study report recommendat Committee decided to limit cure to the revocation situation covered in Section 2-708(a)(2) in order a double opportunity to cure. Under Section 2-708(a)(1) revocation, the goods have been accepted the non-conformity would be cured and the cure was not forthcoming or ineffective. In that situatio another opportunity to cure after revocation of acceptance would have given the seller two opportun 2-709(a) also circumscribes the seller's right to cure in both the rejection and revocation context by seller to (i) give seasonable notice of intent to cure to the buyer, (ii) cure at the seller's own expense buyer's reasonable expenses and (iv) make a conforming tender within the time for contract perfor

To illustrate the operation of subsection (a), consider the following example: S and B agree goods according to contract specifications on Jan. 15. S actually delivers the goods on Jan. 10 and

to contract specifications. B effectively and rightfully rejects the goods under Section 2-703. For S 2-709(a), the S must give seasonable notice to B, must compensate B for any of the B's reasonable non-conforming tender and attempted cure, must bear S's own expenses, and must make a complet later than Jan. 15. The concept of seasonable notice under subsection (a) incorporates the idea of d seasonable from the buyer's perspective, focusing on whether the buyer has reasonably changed po reliance on the non-conforming tender. See Hawkland, § 2:508:2. Assume instead that B accepts t goods, and then subsequently effectively and justifiably revokes acceptance under Section 2-708(a) cure the breach by making a conforming tender within the contract time if the cure satisfied all of th above.

3. Former Section 2-508(2) allowed the seller to cure when the buyer rejected a non-confor seller had reasonable grounds to believe the non-conforming tender was acceptable if the seller gav buyer and substituted a conforming tender within a reasonable time. The PEB study report expresse imprecision of the "reasonable grounds to believe test and disagreement about whether cure shoul revocation of acceptance context when the time for contract performance had expired. Early on, th decided that cure should be allowed in the revocation of acceptance situation covered by Section 2- reasons as stated above. The Drafting Committee has extensively discussed the right to cure at its r bulk of its attention on what test should be employed for allowing cure when the time for performa Section 2-508(2) was directed towards preventing surprise rejections. Former Section 2-508, Com Section 2-508(2), the cases had addressed rejection for minor defects or unknown defects as well as notes after Section 2-703 regarding the limits on the buyer's right to reject. At the March 1997 mee Committee selected the test found in subsection (b) as suggested by Professor Richard Hyland and Principles.

Under subsection (b), if the buyer effectively and rightfully rejects the nonconforming tende acceptance under Section 2-708(a)(2), the seller must give a seasonable notice to the buyer, must be expenses in making the cure, must tender conforming goods, the tender of conforming goods must reasonable time, the cure must be appropriate under the circumstances, the buyer must have no reas refusing the cure, and the seller must compensate the buyer for all of the buyer's reasonable and nec by the nonconforming tender and the proffered cure. Again whether the notice is given seasonably the cure has been made within a reasonable time must be judged from the buyer's perspective.

The time of the attempted cure relative to the agreed time for performance under the contra whether subsection (a) or subsection (b) applies. To illustrate, assume Seller agrees to tender goods contract specifications on Jan. 15. Seller tenders non-conforming goods on Jan. 14. Buyer effectiv on Jan. 15. If Seller's attempted cure takes place on Jan. 15, Seller's actions are judged under subs the attempted cure in fact is sufficient to cure the breach. If Seller's attempted cure takes place on J are judged under subsection (b). Assume instead that Seller tenders non-conforming goods on Jan. and rightfully rejects on Jan. 17. Seller's attempted cure will be judged under subsection (b).

Assume that the Seller tendered goods on Jan. 16 and the only reason for Buyer's rejection was late. Subsection (b) would apply. In that situation, if the cure was not timely and appropriate u and the buyer had reasonable grounds for refusing the cure, the seller could not cure. If the buyer h grounds to refuse the cure and the cure was otherwise appropriate and timely, then the seller's tende and if all of the other conditions stated were satisfied, would cure the breach caused by the original subsection (b) part of the inquiry of appropriate under the circumstances and the buyer's reasonable

would include the idea of shaken faith. The Committee expressed some concern with what "approp context of a cure under subsection (b). The words are bracketed to highlight that issue for further d of subsection (b) is adopted, the Comments would have to give examples or explanations of "appro circumstances.

4. The PEB study report recommended that the effect of a timely notice to cure when the se cure under the section should suspend the buyer's ability to pursue its remedies for breach. Section attempts to make clear that the seller's exercise of its right to cure under Section 2-709 prevents the the contract.

5. Under this approach, the following questions remain:

(a) Does the concept of conforming goods in subsection (b) pick up a cure related to quanti quality aspects of the contract requirements?

(b) Under former Section 2-508, there is some controversy about whether the goods may be by repair. The PEB study report recommended that the Drafting Committee decide in what circums be made conforming by repair.

6. **CISG.** Under CISG, the buyer has no remedy of rejection for a nonconforming tender ar the contract unless the seller has committed a "fundamental breach, see Article 49(1)(a) and Articl

Article 37 deals with Seller's cure where nonconforming goods are delivered "before the da Seller may cure "up to that date if the "exercise of this right does not cause the buyer unreasonable unreasonable expense. Buyer retains any right to claim damages.

Article 48(1), which does not apply if the contract is avoided for fundamental breach under right to cure "even after the date for delivery. Seller may "remedy at his own expense any failure t obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable uncertainty or reimbursement by the seller of expenses advanced by the buyer. Again, Buyer retai damages.

7. **UNIDROIT PRINCIPLES.** Article 7.1.4 provides:

(1) The non-performing party may, at is own expense, cure any non-performance, provided

(a) without due delay, it gives notice indicating the proposed manner and timing of the c

(b) cure is appropriate in the circumstances;

(c) the aggrieved party has no legitimate interest in refusing cure; and

(d) cure is effected promptly.

(2) The right to cure is not precluded by notice of termination.

(3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the party's performance are suspended until the time for cure has expired.

(4) The aggrieved party may withhold performance pending cure.

(5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay a harm caused or not prevented by the cure.

SECTION 2-710. INSTALLMENT CONTRACT: BREACH.

(a) In this section, "installment contract means a contract in which the terms require or the permit the delivery of goods in lots to be separately accepted, even if the agreement requires payme installments or contains a term stating "Each delivery is a separate contract or words of similar im

(b) A buyer may reject any nonconforming installment of delivery of goods [or documents contract if the nonconformity substantially impairs the value of that installment to the buyer [or if t defect in the required documents]. [However, if a nonconforming tender by the seller is not a breac under subsection (c) and the seller gives adequate assurance of its cure, the buyer shall accept that i

(c) If a nonconformity with respect to one or more installments in an installment contract is impairment of the value of the whole contract, there is a breach of the whole contract and the aggrie the contract. However, the power to cancel the contract for breach is waived, or a canceled contrac aggrieved party accepts a nonconforming installment without seasonably giving notice of cancellati respect to only past installments, or demands performance as to future installments.

SOURCE: Sales, Section 2-612.

Notes

1. Section 2-710 makes a few changes to former Section 2-612.

2. Section 2-710(a) makes two changes from former Section 2-612(1). First, it arguably br of an installment contract by providing that a contract in which the "the terms require or the circum in separate lots to be separately accepted is an installment contract. Former Section 2-612(1) provi "requires or authorizes the delivery of goods in separate lots to be separately accepted was an insta the definition now includes cases where "circumstances give either party the right to make or dema

or over a period of time. Section 2-302. The key, however, to the difference between a contract w
permit delivery in separate deliveries that is not an installment contract and one which is an installm
each delivery is subject to separate acceptance. If not, then the contract is not an installment contra
seller is to delivery a million tons of grain, it might not be feasible to delivery all of the tonnage at o
circumstances would permit the delivery of the grain in separate deliveries. Those circumstances w
indicate that each delivery was to be separately accepted, the key requirement to the application of t
section. The second change in the definition of installment contract is to clarify that a contract may
contract even if payment is called for in other than installments. Although not a change in the statu
should clarify that a contract where delivery of the goods is made in one lot, but payment is made in
installment contract.

3. Section 2-710(b) makes no changes in substance from former Section 2-612(2). The bra
subsection (b) is designed to raise the issue of whether a defect in documents should be tested unde
impairment test. Former Section 2-612(2) provided that a defect in documents was not tested unde
impairment test, but rather under the test of former Section 2-601 (perfect tender). See Hawkland,

The PEB study report suggested that the Drafting Committee consider applying Section 2-6
and sellers. The Drafting Committee rejected an attempt to provide for a seller's right to reject the
performance. Although a nonconforming installment payment is a breach, see Section 2-701(b)(2),
power to reject it under subsection (b). The seller can, however, demand adequate assurance of due
Section 2-711 and withhold future deliveries under Section 2-815(a)(1). The seller can also cancel
subsection (c) if the failure to pay one or more installments substantially impairs the value of the w
2-701(c). Unlike breach by the seller, the buyer has no statutory right to cure a breach in payment.
will probably accept a late or deficient payment and reserve rights to damages or cancellation under
Section 2-702 regarding waiver of breach. Allowing delays or deficiencies to cumulate may result
contract under Section 2-710(c).

The last sentence of subsection (b) is bracketed to highlight its interrelationship with the def
impairment in Section 2-701(c). Assume the seller delivers the first installment of goods under the
The goods do not conform to the contract. The seller has breached the contract. Section 2-710(b) p
rejecting that installment if the nonconformity does not substantially impair the value of that install
substantial impairment issue as to that installment, the factors in Section 2-701(c) are consulted. Tw
listed in subsection (c) are cure and adequate assurance. If the nonconformity results in substantial
of that installment, almost by definition, cure is not likely and adequate assurance of due performan
In that situation, the buyer can reject that nonconforming installment. Conversely, if the seller give
cure and cure is likely, the nonconformity does not substantially impair the value of that installmen
reject it. Prior to substantial impairment being defined in the Code, the last sentence of Section 2-7
get the court to focus on the key elements of finding substantial impairment. The definition in Sect
substantial impairment might make the last sentence of Section 2-710(b) unnecessary. The utility o
sentence of Section 2-710(b) is to isolate two of the substantial impairment factors in the installmen
important than the other factors in finding no substantial impairment has occurred.

If there is no substantial impairment of the value of the installment so that the buyer may no
mean that the buyer may not be able to recover damages for the non-conforming installment. Secti

The PEB study report suggested that the perfect tender rule and the seller's right to cure app

non-conforming installments. The Drafting Committee decided to retain the current construct of su
the value of the installment as the appropriate governing standard for rejection in an installment con
unclear is the scope of the cure required under subsection (b). Section 2-709 does not apply to the p
contemplated by this subsection as Section 2-709 depends first upon a rightful rejection or a justifia
Comments or the text should clarify what is required to effect a cure sufficient to preclude rejection

4. Section 2-710(c) is the same in substance as former Section 2-612(3) with a clarification
study report that the section state that if there is a breach of the whole, the aggrieved party may can
Whether there is a substantial impairment of the value of the whole contract depends upon consider
Section 2-701(c). The exercise of the aggrieved party's ability to cancel is also governed by Sectio
or seller may be the aggrieved party under subsection (c). The PEB study report also recommended
substantial impairment of the value of the whole contract be a subjective test as it is in determining
of the value of the installment under subsection (b). The Drafting Committee decided to leave the s
the same as the standard in former Section 2-612(3).

5. **CISG.** Article 73 governs a contract for "for delivery of goods by installments. Either
either a particular installment or the entire contract in defined cases of fundamental breach. See Ar
consistent with Section 2-710 but the terminology is somewhat different.

SECTION 2-711. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.

(a) A contract imposes an obligation on each party not to impair the other's expectation of r
performance. If reasonable grounds for insecurity arise with respect to the performance of either pa
demand in a record adequate assurance of due performance and, until that assurance is received, if c
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 ar
is determined according to commercial standards.

(c) Acceptance of improper delivery or payment does not prejudice an aggrieved party's rig
adequate assurance of future performance.

(d) After receipt of a demand under subsection (a), failure to provide within a reasonable ti
days, assurance of due performance which is adequate under the circumstances of the particular cas
contract under Section 2-712(a).

SOURCE: Sales, Section 2-609.

Notes

1. Section 2-711 has no revisions of substance from former Section 2-609. The PEB study recommend any changes to this section. Subsection (c) provides that accepting past failure to perfo party's right to obtain adequate assurance of future performance. Section 2-702(b) provides that fai breach does not preclude objecting to future breaches. These two different sections address two dif accepting non-conforming performance.

2. **CISG.** See Article 71(a), which recognizes a more limited principle of performance inse suspending performance under Article 71(a) must notify the other party "immediately and must co "if the other party provides adequate assurance of his performance. Article 71(3).

SECTION 2-712. ANTICIPATORY REPUDIATION.

(a) If either party to a contract repudiates a performance not yet due and the loss of perform substantially impair the value of the contract to the other party, the aggrieved party may:

(1) await performance by the repudiating party for a commercially reasonable time or re for breach of contract, even if it has urged the repudiating party to retract the repudiation or has not party that it would await the agreed performance; and

(2) in either case, suspend its own performance or, if a seller, proceed in accordance wit

(b) Repudiation includes language that one party will not or cannot make a performance sti contract or voluntary affirmative conduct that reasonably appears to the other party to make a future impossible.

SOURCE: Sales, Section 2-610.

Notes

1. Section 2-712 makes two changes from former Section 2-610. First, a working but not e repudiation, taken from § 250 of the Restatement, Second of Contracts, is provided in subsection (b that provided in Section 2-711(d) and would include an unqualified statement that one party will no unless the other agrees to an unjustified modification of the contract. Less clear are qualified staten perform the next installment of the contract until a good faith dispute over contract interpretation is such qualified statements are repudiations which do not substantially impair the value of the contra some definition of repudiation in the statute follows the PEB study report recommendation to that e

Second, it is now clearer that repudiation of a part performance (an installment) may constit impairment of the whole contract to the other. Previously, the language of Section 2-610 stated tha repudiates the contract with respect to a performance not yet due the loss of which will substantially contract to the other, the aggrieved party could take remedial action. Under the revision, repudiati "performance not yet due can constitute a substantial impairment of the entire contract. Such a su breach of the whole contract. See 2-710(c).

2. The PEB study report recommended that the section clarify the relationship between this remedies of the aggrieved party, including when the aggrieved party awaits the repudiating party's p than a commercially reasonable time. The remedies sections in Part 8 have clarified the relationshi repudiation and measurement of market price. See Sections 2-821 and 2-826. In addition, the gene in Section 2-803(b) would operate to prevent the aggrieved party from recovering damages for harm should have mitigated. Presumably, harm occurring because the aggrieved party awaited more than reasonable time under Section 2-712, if the aggrieved party could have mitigated that harm, could n PEB study report also recommended that the right of cancellation be clarified. That has been done Finally, the PEB study report recommended that this section address when the aggrieved party's co to waive the right to cancel. Section 2-702(a) addresses the waiver issue.

3. **CISG.** Article 72(1) states that if "prior to the date for performance of the contract it is c the parties will commit a fundamental breach of contract, the other party may declare the contract a party has "declared that he will not perform his obligations, Article 72(3), however, the other must of an intention to avoid the contract in order to permit that party "to provide adequate assurance of Article 72(3). Adequate assurance presumably requires more than just a simple retraction of the rep

SECTION 2-713. RETRACTION OF ANTICIPATORY REPUDIATION.

(a) A repudiating party may retract a repudiation until its next performance is due unless th after the repudiation, has canceled the contract, materially changed its position, or otherwise indicat considered to be final.

(b) A retraction may be by any method that clearly indicates to the aggrieved party that the intends to perform the contract. However, a retraction must contain any assurance demanded under

(c) Retraction reinstates a repudiating party's rights under the contract with due excuse and aggrieved party for any delay caused by the repudiation.

SOURCE: Sales, Section 2-611.

Notes

1. Section 2-713 contains no revisions of substance from former Section 2-611. The PEB s

recommended no changes to this section.

2. **CISG.** There is no comparable provision in CISG. Under Articles 71 and 72, however, suspending performance for an apparent inability of the other to perform a substantial part of the co intending to declare the contract avoided for a repudiation, Article 72(2), must give immediate noti point, the other has the chance to provide adequate assurance of performance. Presumably that ade include a retraction.

SECTION 2-714. CASUALTY TO IDENTIFIED GOODS. If the parties to a contract assume the continued existence and eventual delivery to the buyer of goods identified whe and the goods suffer casualty without the fault of either party before the risk of loss passes to the bu reasonable substitute is available, the following rules apply:

(1) The seller shall seasonably notify the buyer of the nature and extent of the loss.

(2) If the loss is total, the contract is avoided [terminated].

(3) If the loss is partial or the goods no longer conform to the contract, the buyer may never inspection and may treat the contract as avoided or accept the goods with due allowance from the p nonconformity but without further right against the seller.

SOURCE: Sales, Section 2-613.

Notes

1. Section 2-714 makes the following changes from former Section 2-613. First, former Se that the section applied if the "contract requires for its performance goods identified when the contr 2-714 changes that phrase to "the parties to the contract assume the continued existence and eventu of goods identified when the contract was made. Arguably assuming the continued existence and more lenient test than the contract requiring those goods for its performance. Evidence relevant to assumed the continued existence of identified goods should be considered. For example, even if th but does not expressly require the delivery of crops growing on the seller's land, a drought might st both parties assumed the continued existence of those crops for performance. Support for this assu from the capacity of the seller (i.e., a grower or a dealer), whether this farmer and others similarly s grown and sold only their own crops and any relevant prior course of dealing or usage of trade.

Second, the party claiming excuse can do so only if there is no commercially reasonable sub This provision is designed to deal with the following scenario. Seller agrees to sell stock goods, th when the contract was made and then destroyed. If the seller had other stock that was the commerc substitute for the identified goods, this section would not excuse the delivery. Third, the seller mus

loss. If the seller does not notify the buyer, the seller is not entitled to use this section to excuse the perform. Fourth, the phrase "or in a proper case under a 'no arrival, no sale' term is deleted pursu Committee's decision to delete the shipping terms definitions from Article 2. Other than these thre the same in substance as former Section 2-613.

2. The PEB study report recommended either that this section be revised to allow the sectio where the goods were destroyed prior to the risk of loss being put on the buyer when the goods dest performance of the contract or that this section be combined with the section on impracticability. S Drafting Committee decided however to leave the section as it appears above with the three change section closer to its roots in the impossibility doctrine in contracts. Excuse for casualty to goods id determined under Section 2-716.

3. **CISG.** Article 79(1) provides that a "party is not liable for a failure to perform any of hi proved that the failure was due to an impediment beyond his control and that he could not reasonab taken the impediment into account at the time of the conclusion of the contract or to have avoided c consequences. Article 79(2) also provides limited excuse where a party's failure is "due to the fai Arguably, this provision provides as much excuse from performance as does Section 2-714 (former

SECTION 2-715. SUBSTITUTED PERFORMANCE.

(a) If, without the fault of either party, agreed berthing, loading, or unloading facilities or ar carrier becomes unavailable, or an agreed manner of delivery otherwise becomes commercially imp party may claim excuse under Section 2-716 unless a commercially reasonable substitute is availab reasonable substitute performance must be tendered and accepted.

(b) If an agreed means or manner of payment fails because of domestic or foreign governm seller may withhold or stop delivery until the buyer provides a means or manner of payment which substantial equivalent. If delivery has already been made, payment by the means or in the manner p regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive, or p

SOURCE: Sales, Section 2-614.

Notes

1. Section 2-715 makes only one change in former Section 2-614. It makes clear in a case subsection (a) that excuse from performance is governed by Section 2-716 when no commercially r available. Under former Section 2-614, the relationship between former Section 2-615 and former unclear.

2. **CISG.** See Article 79(1).

SECTION 2-716. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.

(a) Subject to Section 2-715 and subsection (b), delay in performance or nonperformance b breach of contract if the seller's performance as agreed has been made impracticable by:

(1) the occurrence of a contingency whose nonoccurrence was a basic assumption on wh was made; or

(2) compliance in good faith with any applicable foreign or domestic governmental regu order, whether or not it later proves to be invalid.

(b) A party claiming excuse under subsection (a) shall seasonably notify the other party tha or nonperformance. If the claimed excuse affects only a part of the seller's capacity to perform, the production and deliveries among its customers in a manner that is fair and reasonable and notify the quota made available. In allocating production and deliveries, the seller may include regular custom contract as well as its own requirements for further manufacture.

SOURCE: Sales, Section 2-615.

Notes

1. Section 2-715 makes only one substantive change from former Section 2-615. Subsectio provides "Except so far as a seller may have assumed a greater obligation. As almost all provision can agree to alter the default rules. Thus, the parties may allocate the risk of occurrences or non-oc Deletion of this language accords with the intent of the PEB study report recommendation that the s agree to a greater or lessor obligation than provided for in former Section 2-615.

2. Although the PEB study report recommended that provisions regarding the buyer's excus to accept and pay for goods be incorporated in this section, the Drafting Committee decided to leav law which grants excuse due to frustration of purpose in a narrow category of cases. See Restateme § 265. The new Comments to Section 2-716 will summarize the interpretative case law under form "frustration doctrine. In sum, neither seller nor buyer can expect much sympathy when the claime contingency was a shift in market conditions or an increase in the cost of performance. Even thoug under these conditions will be highly unprofitable, the courts tend to focus on the agreed price and

there is flexibility in those terms or other terms dealing with the changed circumstances, excuse wi

3. **CISG.** See Article 79(1), which grants excuse for an "impediment beyond his control ar not reasonably be expected to have taken . . . into account at the time of the conclusion of the contra overcome . . . This language is consistent with the law interpreting Force Majeure clauses. "Impe external interference with the capacity to perform rather than changes affecting the incentive to perf unexpected labor dispute may impede the buyer's duty to take delivery of the goods but a severe dr would not impede the buyer's duty to pay for goods taken.

SECTION 2-717. PROCEDURE ON NOTIFICATION CLAIMING EXCUSE.

(a) A party that receives notification of a material or indefinite delay in performance or an a under Section 2-714 or 2-716 as to any delivery concerned, or if there is a breach of the whole cont 2-710(c), then as to the whole, by notification in a record, may:

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

(2) modify the contract by agreeing to take the available allocation in substitution under by accepting the goods with due allowance as provided in Section 2-714].

(b) If, after receipt of notification under Section 2-714 or 2-716, a party fails to terminate o within a reasonable time not exceeding 30 days, the contract lapses [is terminated] with respect to a

(c) This section may be varied by agreement only to the extent that the parties have assume obligation under Sections 2-714 and 2-716.

SOURCE: Sales, Section 2-616.

Notes

1. Section 2-717 changes former Section 2-616 as follows. First, the notice requirement an upon such notification apply also to casualty to goods addressed in Section 2-714. The bracketed la (a)(2) and (c) are designed to complete the integration of this section with the rights provided in Sec subsection (c) has been revised to accord with the deletion of the first phrase of former Section 2-6 2-716. If the seller agrees to a lesser obligation or a greater obligation than that provided under Sec parties can also agree that the buyer will have rights different than those provided in Section 2-717. under the provisions of Section 2-716 or 2-714, however, the parties can not have agreed prior to th that the buyer would have different rights than under Section 2-717.

2. **CISG.** There is no comparable provision in CISG. Article 79(4), however, requires that fails to perform "must give notice to the other party of the impediment and its effect on his ability t for failure to notify is damages. Also, Article 79(3) provides that the excuse or exemption provided effect for the period during which the impediment exists. These requirements provide a framewor parties can negotiate over allocations and adjustments.

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] [sale], on reasonable notification to the other party, has a rig sample the goods for the purpose of ascertaining the facts and preserving evidence. This right inclu possession or control of the other party.

(2) Parties to a [contract] [sale] may agree to an inspection or survey by a third party to det conformity or condition of the goods and may agree that the findings will be binding upon them in adjustment.

SOURCE: Sales, Section 2-515.

Notes

1. There are no changes of substance to former Section 2-515.

PART 8

REMEDIES

[A. IN GENERAL]

SECTION 2-801. SUBJECT TO GENERAL LIMITATIONS. The remedies of the seller, buyer, and other protected persons under this article are subject to the general limitations Sections 2-801 through 2-814.

SOURCE: New.

Notes

1. This section is new and sets out the remedial hierarchy of Part 8. Subpart A (Sections 2- contain sections that are applicable to both buyer and sellers and set forth remedial policies that cor more specific remedial rules in Subpart B (seller's remedies Sections 2-815 through 2-822) and Sub Sections 2-823 through 2-829). Part 8 follows the organizational structure used in Article 2A, Part

2. **CISG.** Revised Part 8 is consistent with the remedial structure in CISG. Chapter II state of the seller (Articles 30-44) and the remedies of the buyer upon breach of contract by the seller. A remedies include the "rights provided in Articles 46-52, which are unique to the buyer, and "dama Articles 74-77, which are common to the buyer and the seller. Similarly, Chapter III states the oblig (Articles 53-59) and the remedies of the seller upon breach by the buyer. Article 61. Seller's reme provided in Articles 62-65, which are unique to the seller, and "damages claimed under Articles 7- to both parties. In general, the prefers specific performance over damages and states applicable da general terms.

SECTION 2-802. BREACH OF CONTRACT; PROCEDURES. If a party is in breach of a contract, the party seeking enforcement:

(1) has the rights and remedies in this article and, except as limited by this part, in the agree

(2) may reduce its claim to judgment or otherwise enforce the contract by any available adm procedure, or the like, including arbitration if agreed to by the parties; and

(3) may enforce the rights granted by and remedies available under other law.

SOURCE: Licenses, Section 2B-701; Leases, Section 2A-501.

Notes

1. This section is new with no counterpart in former Article 2. It is modeled on Section 2A summary of the aggrieved party's general remedial rights upon a breach of contract. Whether a par contract depends upon application of the principles in Part 7.

SECTION 2-803. REMEDIES IN GENERAL.

(a) In accordance with Section 1-106, the remedies provided in this article must be liberall the purpose of placing the aggrieved party in as good a position as if the other party had fully perfo

(b) Unless the contract provides for liquidated damages under Section 2-809 or a limited re under Section 2-810, an aggrieved party may not recover that part of a loss resulting from a breach have been avoided by reasonable measures under the circumstances. The burden of establishing a f measures under the circumstances is on the party in breach.

(c) The rights granted by and remedies available under this article are cumulative, but a par more than once for the same injury. [Unless the contract provides for liquidated damages or a limit under Section 2-809 or 2-810, a court may deny or limit a remedy if, under the circumstances, it wo party in a substantially better position than if the party in breach had fully performed.]

(d) This article does not impair a remedy for breach of any obligation or promise collateral contract for sale.

SOURCE: Licenses, Section 2B-701; Sales, Section 2-701.

Notes

1. This section has no counterpart in former Article 2. The PEB study report recommended Article 2 begin with a statement of general remedial policy that (i) the expectation interest was the aggrieved party should be able to recover, (ii) the aggrieved party's remedy is subject to mitigation aggrieved party's remedies are cumulative without exceeding the expectation interest or foreclosing fundamentally inconsistent or the breaching party's reliance on the choice of remedy. Section 2-80 study report recommendations.

2. Subsection (a) contains the basic statement of the aggrieved party's expectation interest. expectation principle from Section 1-106(1) and references the other limitations found in Section 1 and consequential damages. Although it repeats the general principle of Section 1-106, it provides

application of the specific remedial measures found in Subparts B and C. The aggrieved party may
reliance or restitution interest under the general damage measure of Section 2-804.

3. Subsection (b) contains a statement of the mitigation principle to apply to an aggrieved p
recover damages as provided in Subparts B and C and is consistent with CISG Article 77. It supple
principles built into particular remedy sections of Part 7, see, e.g., Sections 2-806 and 2-817, and is
conduct by one party that prevents the other from curing a nonconforming performance. However,
mitigation requirements of a particular section, such as Section 2-819(a) on resale, or enforces an ag
liquidated damages, is not subject to subsection (b). The relationship to liquidated damages and lim
in the text. The relationship to other sections of Part 8 is clarified in the proposed Comment.

A failure to mitigate means only that the aggrieved party cannot recover the preventable loss
breach. In most cases, the burden of establishing a failure to mitigate damages is on the defendant.

4. Subsection (c) reiterates the policy favoring a cumulation of remedies by the aggrieved p
aggrieved party a choice of remedies, despite possible inconsistency, is supported by variables at th
such as the stage of performance, condition and location of the goods, market stability and availabil
of protecting the value of the bargain as agreed at the time of contracting through price, quantity an

Nevertheless, this choice of remedies must be made in good faith and be consistent with the
policy of subsection (a). Accordingly, the court [including an arbitral tribunal], if requested by the
particular choice when that remedy under the circumstances puts the aggrieved party in a **substant**
position than full performance would have done. [**Reinstated by Drafting Committee, 9/96**.] In m
cases, this will occur when the aggrieved party's choice of damages based upon the difference betw
price exceeds the profits that would have been made by full performance. At the March 1997 Draft
motions to delete the word "substantially and to delete the second sentence of subsection (c) were
1997 Committee meeting, the sentence was discussed again, although no votes were taken. The de
sentence

The limitation would not apply to enforceable agreed remedies, such as liquidated damages
remedies.

5. Subsection (d) is the same in substance as former Section 2-701.

6. As requested by the Drafting Committee at the Jan. 1997 meeting, the following is a draf
relates this section to the other remedies sections and explains how the principles should be applied

Proposed Comment to Section 2-803

1. The purpose of this section is to set forth the remedial policies of this Article in order to
application of the specific remedies found in Subparts B and C of Part 8. When a contract is br
application of the remedial provisions is to provide the aggrieved party the benefit of the bargai
aggrieved party in as good a position as if the breaching party had performed the contract. Subs
general principle.

2. When a contract is breached, the aggrieved party is deprived of the breaching party's pro

If the seller fails to provide goods that conform to the contract, the buyer is harmed by not recei
conforming goods. If the buyer breaches, the seller is deprived of the value that seller was to re
the goods. One way of starting to put an aggrieved party in such a position is to award the very
Thus the seller as aggrieved party could seek the price under Section 2-822 or specific perform
2-807. Likewise, the buyer could seek specific performance under Section 2-807 or have a spec
goods from the seller under Section 2-824. Specific performance is traditionally an equitable re
available in a particular case or the aggrieved party may not seek specific performance. Similar
may not be entitled to the price or the aggrieved buyer may not be entitled to get the goods. In t
the diminution in value to the aggrieved party must be measured. This diminution in value is us
general or direct damages.

3. General damages can be measured in several ways as provided in Subparts B and C.

If the seller breaches the contract, the buyer's general damages can be measured in one of three
accepted goods, and not revoked acceptance, the buyer is entitled to the difference in value betw
goods accepted and the value the goods would have had if the goods had conformed to the cont
the buyer has not accepted the goods or revoked acceptance as to the goods, the buyer has two c
measurement of general damages. First, the buyer can cover, obtain substitute goods for those r
recover the difference in value between the cover cost and the contract price. Section 2-825. Se
does not cover the buyer's general damages for seller's breach of contract will be measured by t
the contract price and the market price for the goods. Section 2-826.

If the buyer breaches the contract, the seller's general damages can be measured in several ways
resell the goods under Section 2-819 and recover the difference between resell price and contrac
could, alternatively, recover the difference between the market price and the contract price. Sec
the seller could seek to recover the seller's lost profit and expenditures in reliance on the contra
Section 2-821(b).

All of these general damage measurements are designed to compensate the aggrieved party for t
breaching party's promised performance. If for some reason, these general damage measures do
the aggrieved party in that position, then Section 2-804 can be used as a general damage measu

4. In addition to that lost value of the promised performance, many times the aggrieved par
consequence of failing to receive the breaching party's performance. Compensating these conse
of placing the aggrieved party in the position it would have occupied but for the breach of contr
consequential damages is in addition to the recovery for general damages. Traditionally the rec
damages were scrutinized to make sure that the breach in fact caused the consequential harm, t
reasonably certain in amount, the damages were not reasonably subject to mitigation by the agg
harm was a risk that was allocated to the breaching party as a foreseeable consequence of the br
continues that traditional view of consequential damage recovery in Section 2-806.

5. Finally, in addition to making the aggrieved party whole through recovery of general dam
consequential damages, the aggrieved party may have incurred incidental expenses in dealing w
breach that do not easily fall into either of the other two categories. Section 2-805. An aggrieve
these amounts rounds out the aggrieved party's recovery of the full performance position.

6. The subsection (a) principle is subject to Section 1-106 in order to make clear that puniti generally provided for in breach of contract cases under this Article.

7. In many contracts, the parties will have altered the default remedies set out in this Article liquidated damages clause, enforceable under Section 2-809. Another example is a limited rem Section 2-810 or an exclusion of liability for consequential or incidental damages enforceable u If such a clause is part of a contract under Sections 2-206 and 2-207 and is enforceable under Se 2-810, the principle of this section does not override those contractual agreements regarding the breach. This preference for contractual agreements regarding the allocation of the risk of breach in subsections (b) and (c).

8. The ability of the aggrieved party to choose any of these various general damage remedie general principle that a party cannot recover more than once for the same loss. Subsection (c). aggrieved buyer covers, under Section 2-825, the aggrieved buyer cannot get both cover price–c differential and market price–contract price differential. Similarly an aggrieved seller who rese may not get both the resell price–contract price differential and the market price–contract price

9. Subsection (b) provides that an aggrieved party cannot recover for losses that could have mitigated. Although the mitigation principle is most often associated with reduction of consequ Section 2-806, there may be instances where the general damages of the aggrieved party should Under Sections 2-821 and 2-826, the aggrieved party can seek to measure their general damages between the contract price and the market price at the time of performance. If the breaching par aggrieved party could have realistically mitigated its general damages by reselling or covering a the aggrieved party's general damages should be reduced accordingly. However, if the aggrieve resells as the case may be and has complied with the requirements of Section 2-825 or 2-819, th need not do anything else to mitigate its general damages. Similarly, if the breaching seller can cure that is not sufficient to cure the breach under Section 2-709 would have minimized the agg damages, the breaching seller can seek to have the buyer's general damages reduced accordingly who is exercising rights under Section 2-817 may take that action to mitigate the harm from the may not take that action if it is designed to increase the amount of damages due to the buyer's b

10. Finally, subsection (c) also provides a controlling principle on remedial choice: A court remedy if it provides an aggrieved party substantially more than its full performance position. H principle operate in practice?

(a) This principle should not be used to limit or deny the aggrieved party's cover or resa the aggrieved buyer covers under Section 2-825 and seeks the cover price–contract price differe seller resells under Section 2-819 and seeks the resell price–contract price difference, the marke differential is not relevant to determine if the seller or buyer are over compensated. The require resale contain enough protections against overcompensation and no additional protection is affo party by the principle of subsection (c). For example, assume an aggrieved buyer who covers at contract price is $15 per unit. The cover complies with all of the requirements of Section 2-825 price is $18 per unit so that the market price measure would yield general damages of $3 per un to recover $5 per unit and is not overcompensated. Similarly, assume the aggrieved seller resell complying with all of its requirements, for $15 per unit when the contract price is $20 per unit. entitled to recover the $5 per unit even if the market price per unit is $18 so that the market pric

$2 per unit. The aggrieved seller is not overcompensated by its recovery of the $5 per unit.

(b) Assume, however, that the buyer covers as provided in Section 2-825 or the seller re Section 2-819 and then seeks the market price–contract price difference as it provides for more price–contract price differential or the resell price–contract price differential. This is possible if fluctuating to bring about disparities between the cover or resell price and the market price. Co above, the aggrieved buyer covers at $20 per unit when the contract price is $15 per unit. The r relevant time for measuring market, however, is $25 per unit. The buyer is overcompensated if the $10 per unit under Section 2-826 instead of the cover price–contract price differential of $5 2-825. Similarly, if the aggrieved seller resells under Section 2-819 at $15 per unit when the co unit, and the market price at the relevant time for measuring market is $10 per unit, the aggrieve overcompensated if it attempts to recover the $10 per unit market price–contract price differenti instead of the $5 per unit resale price–contract price differential under Section 2-819. In these c aggrieved party seeks its market price based damages, the breaching party has the ability to sho party really engaged in a substitute transaction such as cover or resale and that if general damag the difference between cover or resale and contract price, the aggrieved party's choice of marke overcompensates the aggrieved party. Part of the breaching party's burden in this situation is to aggrieved party really engaged in a substitute transaction, that is that an aggrieved buyer really substitution for those contracted for, or that the aggrieved seller really did resell the goods that of the breached contract.

(c) If the seller seeks to recover lost profits and reasonable expenditures made in reliance breaching buyer could seek to demonstrate that the seller really resold the goods and the resell p differential is less than the seller's attempted proof of lost profits and reliance expenditures. If the resale does not place the seller in the position it would have been if the contract with the buy performed, then the seller's choice of the lost profit and reliance expenditure as the measure of damages should not be disturbed.

If the seller has not resold the goods and seeks recovery of lost profits and reliance expe Section 2-821(b) and the market price–contract price measure of general damages is less than th reliance expenditures, the seller is not overcompensated by its choice of the lost profit and relia general damages. In the situations where seller seeks to prove lost profit and reliance expenditu the market price–contract price differential is under compensatory. If the seller seeks to recover price–contract price differential when it is more than the lost profit and reliance expenditures, th principle of subsection (c) to argue that the seller is overcompensated by its choice of the marke

(d) The principle of not overcompensating the aggrieved party could be used to control to contend that a repair of an accepted good is the proper measurement of the loss in value beca nonconformity if that amount is substantially more than the difference between the market valu warranted and the value of the good accepted. This is consistent with the remedial policy of ave

(e) Finally, the concept of not overcompensating the aggrieved party could be used to p party's use of non-expectancy measures of harm, such as the reliance or the restitution interest. following Section 2-804.

11. Because measurement of damages is not an exact science, the court should not be conce

differences between the different measurements of general damages. For example, assume the s
has not resold proves that the market price–contract price differential is $100 per unit. The buy
the seller's lost profit and reliance damages range from $90-105 per unit. In that situation, the s
the market price measure of $100 per unit may be overcompensated if the buyer's proof of low
range is correct and under compensated if the higher end of the range is accurate. The seller's c
price measure does not substantially overcompensate the seller.

In sum, Part 8 does not favor the market damages when the seller properly resells or the buyer p
substitutional remedies are preferred, because they best approximate the position the plaintiff w
performance. Market price, at best, is a surrogate for resale or cover. Thus, in these cases, neith
defendant can insist on the market damages. Similarly, if there has been no qualifying resale an
chooses a lost profits remedy, i.e., a remedy that measures lost profits without regard to market
cannot object. Market price is, at best, an imprecise, artificial way of measuring the value of a p
and will under compensatedin most cases. Finally, if there is no qualifying resale and the plaint
price remedy, the defendant may be able to show that market damages exceed the lost profits th
made upon full performance. In these cases, a court may be persuaded to require the plaintiff to
remedy.

SECTION 2-804. MEASUREMENT OF DAMAGES IN GENERAL. If there is a breach of contract, the aggrieved party may recover compensation for the loss resulting in the o breach as determined under Sections 2-815 through 2-829 or as determined in any reasonable mann incidental damages and consequential damages, less expenses and costs avoided as a result of the b

SOURCE: Sales, Section 2-714(a); Licenses, Section 2B-701(I).

Notes

1. Section 2-804 is a new section that is designed to state a general measurement rule for us measurement rules from Subparts B and C are insufficient to place the aggrieved party in its rightfu comprehensive enough to allow recovery of the aggrieved party's reliance interest, where the party had not been entered into, or its restitution interest, restoration of unjust gains of the defendant to t example, the buyer may wish to recover its expenditures in reliance upon the seller's performance i expectancy interest with reasonable certainty. Assume the seller has agreed to provide the buyer wi manufactured goods and the seller then declares bankruptcy. Specific performance may not be avai unable to cover, and the market price may be uncertain. The buyer may use Section 2-804 to measu the breach in any reasonable manner. See Restatement (Second) Contracts § 349.

2. Even if an aggrieved party cannot establish general or "direct damages, an aggrieved pa incidental and consequential damages under Sections 2-805 and 2-806.

3. Using the principle of Section 2-803(c), an aggrieved party should not be able to use Sec damages based upon its reliance or restitutionary interests when those interests are greater than its e

illustrate, assume seller and buyer enter into an installment contract for 10 deliveries at $20,000 per of performing is actually $25,000 per delivery and the market price at time of delivery is $20,000 a undelivered goods for at most $20,000. Seller made a bad deal by underestimating the cost of Selle on each delivery that Buyer accepts, Seller is losing $5,000. Buyer breaches. Seller's general dama market or resell formula is $0. Under a restitution theory, Seller could argue that it should get the v conferred on Buyer by its part performance. If the value of the benefit conferred on Buyer is measu of the goods, the restitution recovery is identical to the expectancy recovery. If the value of the ben is measured by the contract price Buyer agreed to pay, than as to any installments accepted, the Buy the price under Section 2-822, and Seller gets no benefit from asserting restitution. If the value of t Buyer is measured by the cost of performance, then Seller will get the $25,000 per delivery as to the Buyer. See *Boomer v. Muir*, 24 P.2d 570 (Cal. App. 1933) (a construction contract situation where benefit conferred on the buyer was measured by the cost of performance of the builder); *U.S. v. Wes Mechanical Contractors*, 834 F.2d, 1533 (10th Cir. 1987) (subcontractor's contract price was $295 reasonable value of work under the subcontract as determined at trial was $475,000, subcontractor contractor in breach, 40% of the work was done by subcontractor prior to firing, subcontractor rece restitution for the value of the work performed). See also Restatement (Second) Contracts § 371. T 2-803(c) should prevent restitution or reliance recovery when the aggrieved party enters into a losin Restatement (2d) Contracts § 349 comment a. If the party completely performs the contract and the the Restatement (Second) Contracts § 373(2) provides that restitution is not allowed, thus the seller price.

SECTION 2-805. INCIDENTAL DAMAGES. Incidental damages resulting from breach of contract include compensation for any commercially reasonable charges, expenses, or commissions

(1) inspection, receipt, transportation, care, and custody of identified goods which are the su contract;

(2) stopping delivery or shipment;

(3) effecting cover, return, or resale of the goods;

(4) reasonable efforts otherwise to minimize or avoid the consequences of breach; and

(5) otherwise dealing with the goods or effectuating other remedies.

SOURCE: Sales, Sections 2-715(1), 2-710.

Notes

1. Section 2-805 combines the incidental damages of seller, former Section 2-710, and buye 2-715(1), into one section. The PEB study report did not recommend any changes to the definition The only substantive change has been to not limit incidental damages for inspection of the goods w aggrieved party to cases of rightfully rejected goods. Compare former Section 2-513(2) and former

limitation had received some criticism as being more restrictive than the common law and by encou
marginal case. See Hawkland, § 2-513:03.

2. Incidental damages are reasonable expenses incurred in anticipation of or after a breach t
perform duties with regard to the goods and to effect other remedies. They should be distinguished
damages which result from expenditures or commitments made before the breach to enable the agg
other party's performance. This distinction was observed in *Fertico Belgium S.A. v. Phosphate Chemicals Export Association, Inc.*, 510 N.E.2d 334 (N.Y. 1987), where the buyer recovered "incid
damages for arranging a "cover after the seller's delay in delivery and was entitled to consequentia
costs incurred in getting the goods to resale buyer after the time for performance had passed.

SECTION 2-806. CONSEQUENTIAL DAMAGES.

(a) Consequential damages resulting from a breach of contract include compensation for:

(1) any loss, including loss to property other than the goods sold, the party in breach at t
contracting had reason to know would probably result from the aggrieved party's general or particu
needs and which could not have been avoided by reasonable measures under the circumstances; and

(2) injury to person proximately resulting from any breach of warranty.

(b) The aggrieved party may not recover any consequential damages pursuant to subsection
disproportionate compensation to the aggrieved party. The breaching party has the burden of estab
damages under subsection (a)(1) result in disproportionate compensation.

SOURCE: Sales, Sections 2-710(b), 2-715(b) (March, 1995), Licenses Section 2B-102(a)(5).

Notes

1. Section 2-806 makes several changes to former Section 2-715(2). First, pursuant to the I
recommendation, sellers may now recover consequential damages. Second, the standard of foresee
principle in subsection (a)(1) apply to all consequential losses except for personal injury. Thus, cor
and loss to property other than the goods sold are now covered under subsection (a)(1). Third, the f
requires the breaching party have reason to know the loss would probably result as well as know of
particular needs and requirements. Fourth, subsection (b) allows the breaching party to establish th
damages the aggrieved party seeks result in disproportionate compensation to the aggrieved party.
explained in more depth below.

2. **Seller's recovery.** Sellers may now recover consequential damages under the same stan

applicable to buyers. The Drafting Committee rejected the interpretation that former Section 2-710 Section 1-106(1), denied consequential damages to sellers.

The following examples illustrate the application of Section 2-806 to sellers. Assume that t mitigation requirements of subsection (a)(1) have been satisfied.

(a) Seller makes a special expenditure in preparation to perform which will not be reimburs performance. After breach, Seller is unable to salvage the investment. The unreimbursed expendit consequential damages.

(b) Seller has a profitable business opportunity the capture of which depends upon prompt the contract price. Buyer, who knew of the opportunity at the time of contracting and that substitut difficult, fails to pay and Seller is unable, after reasonable efforts, to obtain substitute financing. Th with reasonable certainty, are recoverable as consequential damages. If Seller had been able to obta to capture the opportunity, the interest paid would be consequential rather than incidental damages. Second, Contracts § 351, Comment (e).

(c) Seller borrowed money at 8% interest to finance performance of the particular contract. repaid from the contract price. Buyer was late in payment and Seller could not obtain more favorab the loan. Consequential damages include the interest paid on the loan between the time when Buye price and the time when it was paid if the Buyer had reason to know at the time of contracting of th particular financing arrangement. If, however, the loan was obtained to finance general business op particular contract, the interest is fixed costs or overhead rather than consequential damages. See *A Corp. v. Metallurgiki Halyps*, S.A., 772 F.2d 1358 (7th Cir. 1985).

3. **Damage to other property.** At the March 1997 meeting, the Drafting Committee voted require that personal injury damages be recoverable as provided in former Section 2-715(2)(b) but t consequential losses be evaluated under the test of subsection (a)(1).

4. **Disproportionate compensation.** In addition to the usual limitations on the recovery of consequential damages, i.e., foreseeability, mitigation of damages, cause in fact, and proof with rea November, 1996 Draft also excluded from consequential damages losses which were "unreasonably risks fairly assumed under the contract by the breaching party. This limitation, which the breaching derived from § 351 of the Restatement, Second, of Contracts.

After discussion at the January, 1996 meeting of the Drafting Committee, the limitation was (a) rather than in a separate subsection (b) to clarify that the test was to be applied by the finder of f rather than subsequently by a court in what looked like a remittitur. Thus, claimed consequential da within the limitation or not under subsection (a) and there was no reason to give the court power to excluding or limiting recovery for loss of profits, by allowing recovery only for loss incurred in reli Section 2-806(b) (January, 1996). After discussion at the November 1996 meeting, two additional First, the unreasonably disproportionate limitation does not apply to consequential losses which are Second, the unreasonably disproportionate limitation is something that the breaching party must est "affirmative defense to the consequential damage case of the aggrieved party rather than requiring establish in every case that the consequential losses were not unreasonably disproportionate. At the an issue was raised whether damage to other property should also be exempted from the unreasonab

No action was taken on this suggestion. At the March 1997 meeting, the Committee voted to conti
disproportionate concept to consequential damages other than personal injury and to rephrase the co
along the lines expressed in the Restatement Second of Contracts § 351 while keeping it as a fact q
the nature of an affirmative defense rather than as part of the plaintiff's case in chief. Subsection (

The background of the "unreasonably disproportionate limitation should be clear, especiall
the plaintiff. Consequential damages result where the buyer is deprived of timely use of conformin
repudiation, non-delivery or breach of warranty. They usually include lost business profits, but cou
award damages for loss of good will, unreimbursed reliance and various disruption losses caused to
parties. The potential scope of consequential damages is influenced by the purpose for which the g
nature of the breach, and the type of loss caused. Where the purpose is to use the goods in a busine
breach is by non-delivery, the loss is profits (opportunity costs) that would have been made if deliv
Hydraform Products Corp. v. American Steel & Aluminum Corp., 498 A.2d 339 (N.H.
1985). Where the purpose is resale or the goods are intended as components for use in or with othe
parties and a breach of warranty occurs, (i.e., the goods are unmerchantable) more than the buyer's
Third parties now have claims for breach of warranty against the buyer, including possible damage
which can be asserted cumulatively by the buyer against the seller as consequential damages for bre
Finally, the liability potential may be exacerbated if there is a product recall. Thus, the risk of unce
heavy consequential damages is a matter of continuing concern to sellers. Although this limitation
risk, its application should be limited to cases where there is an extreme disparity between the price
and the foreseeable loss caused to the buyer (this suggests that the price was not intended to cover t
"informality of dealing, including the absence of a detailed written contract, which indicates that th
attempt to allocate all of the risks. Restatement, Second, § 351, Comment (f).

5. **Buyer's Recovery.** Section 2-806 states a default rule which tends to favor the buyer bu
easy to limit or exclude by agreement. In the current jargon, it is a "penalty default rule because th
recovery) if it fails to inform the seller of particular circumstances or losses of which the seller wou
reason to know. So if the foreseeability test is not satisfied or the contract contains an excluder clau
consequential losses is on the buyer.

6. **Conditions to recovery of consequential damages.** Even without an excluder
clause, the aggrieved party must satisfy four conditions to recover:

(a) The loss must result from (be caused by) the breach. This cause-in-fact requirement is c
of contract claims, but may be more difficult to establish when the loss is remote from the breach.

(b) The loss must result from general or particular requirements of the aggrieved party of w
party had notice (knowledge or reason to know) at the time of contracting. This is Article 2's versio
principle in *Hadley v. Baxendale*. In addition, Section 2-806 now requires the breaching party to ha
know at the time of contracting that the loss "would probably result from the breach. See Restater
§ 351. This occupies the middle ground between losses that are "likely to result and losses that ar
and is unlikely to change the operation of this section.

(c) An otherwise foreseeable loss is not recoverable if, after the breach, it could have been p
the aggrieved or the breaching party through "reasonable measures under the circumstances. This
specific application of Section 2-803(b), works best where the buyer can cover to minimize or avoi

Normally, the breaching party must establish that the plaintiff failed to mitigate. See Sectio where both parties could have avoided the loss by the same or similar acts and it is "equally reasona breaching party to minimize damages, the defendant is in no position to contend that the plaintiff fa e.g., *Nezperce Storage Co. v. Zenner*, 670 P.2d 871 (Id. 1983). An unresolved issue is whether the must bear the burden of proof that it mitigated its consequential damages as part of its case to recov damages or whether mitigation is in the nature of an affirmative defense that the defendant must est failed to mitigate in order to reduce the amount of consequential damages. Section 2-803(b) places that mitigation did not occur on the breaching party. The PEB study report assumed that the breach burden of demonstrating that the aggrieved party did not mitigate. The Comments could make this

(d) The plaintiff must prove the loss with reasonable certainty. This limitation controls loss remote or speculative damage, (e.g., loss of good will, new businesses) but is not an insuperable ba

7. The Drafting Committee rejected an alternative to subsection (a)(1), taken from Section provided that between merchants, no consequential damages are recoverable unless they are expres

This rejected alternative is a simple but extreme penalty default rule. Under it, the seller ha consequential damages unless the buyer bargains for protection that is expressly agreed to. This de in an Article 4A funds transfer, where the low cost of the transfer has no relationship to the dollar a risk that a payment order will be late, improperly executed or not executed at all and commercial p equal bargaining power are involved. Given the varieties and complexities of contracts for the sale appropriateness of the Article 4A model was doubted by the Drafting Committee.

8. **CISG.** There is no specific provision permitting the recovery of incidental damages, but buyer can recover foreseeable consequential damages. Article 74.

SECTION 2-807. SPECIFIC PERFORMANCE.

(a) A court may enter a decree for specific performance if the parties have expressly agreed goods or the agreed performance of the party in breach of contract are unique or in other proper circ parties expressly agree to specific performance, a court shall not enter a decree for specific perform breaching party's sole remaining contractual obligation is the payment of money.

(b) A decree for specific performance may contain terms and conditions as to payment of th or other relief the court considers just.

SOURCE: Licenses, Section 2B-704; Section 2A-521; Sales, Section 2-716 (December, 1994).

Notes

1. Section 2-807 makes the following changes from former Section 2-716. First, specific p limited to the buyer [former Section 2-716(1) applied only to buyers]. A seller may obtain specific buyer's agreement to accept and to pay for the goods in appropriate cases. This simply affirms wha always done, especially in long term supply contracts. Specific performance is an alternative to the price under Section 2-822. Unlike an action for the price, however, specific performance preserves *personam* to enforce the agreement for future performance.

Second, the parties may expressly provide for the remedy of specific performance in the con with the PEB study report recommendation. The expectation is that a court will enforce the agreed legal remedies at the time of the breach are entirely adequate. This expectation is consistent with a specific performance is, in most cases, a more efficient remedy than damages. See, e.g., Alan Schw *That Promisees Prefer Supra Compensatory Remedies: An Analysis of Contracting For Damage Measures*, 100 Yale L. J. 369 (1990).

Note that subsection (a) gives the court discretion ("may) to award specific performance if agreed. Thus, the court might decline to make the award where the remedy is burdensome to admi assumption is that a court will condition the specific performance decree upon full performance by Thus, a seller cannot obtain specific performance of the buyer's agreement to pay the price in the fu tenders goods that conform to the contract. See Section 2-822.

On the other hand, concern was expressed that under an agreed specific performance remed particularly a consumer buyer, could be forced to take and pay for goods that it did not need or wan inconsistent with the policy expressed in Section 2-822(a)(3) that unless resale is not reasonably av recover the price of identified goods that the buyer has not accepted. In these cases, the court "may the remedy. At the March 1997 Drafting Committee meeting, the Committee voted to limit the abi remedy where a party's sole obligation was to pay money. The language at the end of subsection (a last sentence of subsection (a) is designed to distinguish the "take and pay contracts from contracts obligation is to pay for goods already accepted. In take and pay contracts, the parties would be able performance and have that agreement enforced.

2. Because the buyer's right to replevin under former Section 2-716(3) was not a remedy a buyers and sellers it has been relocated to the buyer's remedy section, Section 2-824. See notes fol

3. **CISG.** Specific performance is the preferred remedy for sellers and buyers under the Co Articles 46 and 62. See also, Steven Walt, *For Specific Performance Under the United Nations Sales*, 26 Tex. Int'l L. J. 211 (1991). Article 28 provides, however, that if under CISG "one party is performance of any obligation by the other party, a court is not bound to enter a judgment for specif the court would do so under its own law in respect of similar contracts of sale not governed by this

SECTION 2-808. CANCELLATION: EFFECT.

(a) An aggrieved party may cancel a contract if there is a breach under Section 2-701, or in

installment contract, a breach of the whole contract under Section 2-710(c), unless there is a waiver

Section 2-702 or a right to cure the breach under Section 2-709.

(b) Cancellation is not effective until the canceling party notifies the party in breach of the

(c) Except as otherwise provided in subsection (d), upon cancellation, all obligations that a

both sides are discharged.

(d) The obligations surviving cancellation include:

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

(2) any term limiting disclosure of information;

(3) an obligation to return or dispose of goods;

(4) a choice of law forum;

(5) an obligation to arbitrate or otherwise resolve disputes through alternative dispute re

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

(7) a remedy for breach of the whole contract or any unperformed balance; and

(8) other rights, remedies, or limitations if in the circumstances such survival is necessa

purposes of the parties.

(e) Unless a contrary intention clearly appears, language of cancellation, rescission, or avoi

or similar language is not a renunciation or discharge of any claim in damages for an antecedent bre

SOURCE: Sales, Sections 2-106(3) and (4), 2-720; Licenses, Sections 2B-703 and 2B-626.

Notes

1. Former Section 2-106 contained a definition of cancellation and a cryptic rule about wha cancellation. The PEB study report recommended that the definition of cancellation be separated fr of cancellation and, in discussing the remedies sections of Article 2, recommended that the revision aggrieved party to cancel the contract. Section 2-808 responds to those recommendations. Section same definition of cancellation as found in former Section 2-106(4).

2. Subsection (a) provides that an aggrieved party has the right to cancel a contract for brea that the right to cancel cannot be exercised if the breach has been waived under Section 2-702 or th

the breach under Section 2-709. Subsection (a) makes explicit what was implicit in former Section Section 2-711 which listed cancellation as one of the seller's or buyer's rights when the other party was unclear on when the remedy to cancel was precluded. Sections 2-815 and 2-823 continue to lis breach and reference this section for the exercise of that right.

3. Subsection (b) is a new subsection that clarifies that the cancellation is effective when th notifies the breaching party. Under the definition of notify in Section 1-201(26), conduct may be su the buyer both rejects and cancels the contract at the same time, the buyer need not send two notice cannot use cancellation as a substitute for rejection under Section 2-703. If the seller tenders nonco the buyer has a right to reject the goods under that section, the buyer may cancel. That cancellation suffice as a proper rejection of the goods unless the buyer also complies with the sections on proper See Sections 2-703, 2-704, and 2-705. If the buyer rejects, and then the seller attempts to cure but t to cancel the contract, the buyer must notify the seller of that cancellation unless the circumstances that the buyer has canceled if the seller fails to effect a proper cure.

4. Subsection (c) states the effect of the cancellation on executory obligations found in form and (4). This general rule is subject to the specific exceptions stated in subsection (d). Subsection from former Section 2-106(3) that cancellation preserves any right based upon a previous breach. T that cancels the contract may sue for past breaches of the contract. Subsection (d)(5) continues the 2-106(4) that a canceling party retains any remedy for breach of the whole contract or its unperform effect of an aggrieved party's cancellation is that neither the aggrieved party or the breaching party performance of fully executory obligations but the aggrieved party retains all remedies for breach ag party as to both the past and future performance of the breaching party. Because cancellation is not the contract, the performance already rendered need not be returned to the other party. For example breaching party and has delivered a non-conforming installment of goods and the nonconforming in breach of the whole contract, the buyer may cancel the contract. When the buyer cancels, the buyer accepted non-conforming installments to the seller, but has the right to obtain damages due to the n past installments. The cancellation means that the seller need not deliver any of the remaining insta liable for breach of the whole contract. If the parties have already rendered their performance so tha executory on both sides, then cancellation is a meaningless remedy. Assume in a one shot contract delivered non-conforming goods and the buyer has accepted those goods. The buyer cancels due to The buyer is still liable for the price and has a counterclaim for damages under Section 2-827 unless acceptance under Section 2-707. The buyer's cancellation does not affect the buyer's obligation to give the buyer the ability to return the goods to the seller outside of the revocation right.

Subsections (2) through (4) of subsection (d) are new and were not found in former Section (2) is designed to allow the parties to provide in their contract the obligations that should survive ca (3) recognizes the validity of non-disclosure agreements that operate after cancellation of the contra rule is subject to contrary agreement of the parties. In some situations, the parties may intend that t obligation not survive cancellation of the contract. If so, the parties can so provide in their agreeme not only the language of the parties, but also applicable usage of trade, course of dealing and course Subsection (4) allows enforcement of alternative dispute resolution clauses, choice of forum clause clauses regarding reduction of the statute of limitations period as allowed under Section 2-814 as w regarding dispute resolution that is enforceable under other law. Cancellation of the contract should The list in subsection (d) is not exclusive and other rights may survive cancellation if the parties so

5. Subsection (e) is the same in substance as former Section 2-720.

6. **CISG.** CISG's equivalent to "cancellation is "avoidance for a fundamental breach of c
Article 25, 49(1), and 64(1). The effects of a proper avoidance are stated in Articles 81-84. In gene
avoid the contract under CISG than it is to cancel under Article 2. Moreover, the seller's remedies
damages or resale and the buyer's remedies of contract-market price damages and "cover depend u
75 and 76.

SECTION 2-809. LIQUIDATION OF DAMAGES; DEPOSITS.

(a) Damages for breach of contract may be liquidated [in the contract] but only in an amoun
in the light of the difficulties of proof of loss in the event of breach and either the actual loss or the
caused by the breach. If a term liquidating damages is unenforceable under this subsection, the agg
the remedies provided in this article.

(b) If a seller justifiably withholds or stops performance because of the buyer's breach of co
the buyer is entitled to restitution of the amount by which the sum of payments exceeds the amount
entitled under a term liquidating damages in accordance with subsection (a).

(c) A buyer's right to restitution under subsection (b) is subject to offset to the extent that th
right to recover damages under the provisions of this article other than subsection (a) and the amou
benefits received by the buyer directly or indirectly by reason of the contract.

(d) If a buyer has received payment in goods, their reasonable value or the proceeds of their
for the purposes of subsection (b).

SOURCE: Sales, Section 2-718. See Licenses, Section 2B-706.

Notes

1. Section 2-809 makes several changes from former Section 2-718. The PEB study report
the parties' agreement on liquidated damages should be enforceable regardless of the amount of act
the amount was a reasonable forecast at the time of contracting. Subsection (a) follows former Sec
the parties to fix a damages amount in their agreement if it is reasonable in light of either the anticip
in light of difficulties of proof of loss. Language regarding the inconvenience or nonfeasibility of o
from former Section 2-718(1) is not retained. The PEB study report also recommended that the las
Section 2-718(1) be deleted. That sentence provided that unreasonably large liquidated damages w

allowed courts to not enforce liquidated damage clauses that were a reasonable forecast at the time sentence of subsection (a) states what was implicit in former Section 2-718; if the liquidated damag unenforceable under the test of subsection (a), the aggrieved party may obtain other remedies as pro

Section 2-809 deals with the liquidation of damages not the limitation of damages by agreem agreements are covered by Section 2-810. To illustrate, suppose commercial parties negotiated a re damage amount of $5,000 under subsection (a) but the actual damages were $100,000. This agreem as a reasonable liquidated damages, even though damages were under liquidated. There is no need enforcement of the under liquidated damage clause is unconscionable. On the other hand, suppose, liquidate, the parties agreed that under no circumstance will the seller's damages for breach exceed limitation (an arbitrary fixing) rather than an attempt to fix a reasonable amount and its enforceabili Section 2-810(c).

2. Subsection (b) is the same in substance as former Section 2-718(2) with one change. Th allowed the seller to offset from the buyer's right to restitution a statutory liquidated damages amou of the total value of the buyer's performance or $500. The PEB study report recommended that the of dubious utility. At the March 1997 meeting, the Drafting Committee voted to delete that provisi

3. Subsection (c) is the same in substance as former Section 2-718(3). Subsection (d) is the former Section 2-718(4) except that it does not provide that the seller's right to sell goods received buyer's performance obligation is subject to the provisions on an aggrieved seller's resale under Se had notice of the buyer's breach prior to reselling the goods. Comment 2 to former Section 2-718 s a requirement was to make sure the seller made reasonable efforts to resell the goods for their true v Committee should address whether that requirement should be continued.

4. **CISG.** There is no provision dealing with liquidated damages. Restitution claims are pe cases of avoidance for fundamental breach. See Articles 81(2), 82 and 84.

SECTION 2-810. CONTRACTUAL MODIFICATION OF REMEDY.

(a) Subject to Section 2-809, the following rules apply:

(1) An agreement may add to, limit, or substitute for the remedies available under this a limiting or altering the measure of damages recoverable for breach of contract or limiting the buyer the goods and repayment by the seller of the price or to repair and replacement of nonconforming g seller.

(2) An agreed remedy under paragraph (1) may not be applied to deprive the aggrieved minimum adequate remedy under the circumstances.

(3) Resort to an agreed remedy under paragraph (1) is optional. However, if the parties

that the agreed remedy is exclusive, it is the sole remedy.

(b) Subject to subsection (a)(2), if, because of a breach of contract or other circumstances, a remedy fails substantially to achieve the intended purposes of the parties, the following rules apply:

(1) In a contract other than a consumer contract, the aggrieved party may pursue all rem under this article. However, an agreement expressly providing that incidental or consequential dan resulting from the failure to provide the limited remedy, are excluded is enforceable to the extent pe (c).

(2) In a consumer contract, an aggrieved party may reject the goods or revoke acceptan extent of the failure, may pursue all remedies available under this article including the right to recov incidental damages, despite any term purporting to exclude or limit such remedies.

(c) Subject to subsection (b), consequential damages and incidental damages may be limite agreement unless the limitation or exclusion is unconscionable. Limitation of consequential damag person in the case of a consumer contract is presumed to be unconscionable.

SOURCE: Sales, Section 2-719; Licenses, Section 2B-705.

Notes

1. Section 2-810 makes the several changes to former Section 2-719. Subsection (a)(1) is t as former Section 2-719(1)(a). Subsection (a)(3) is the same in substance as former Section 2-719(validates agreements modifying or limiting remedies. The unstated assumption is that such agreem conscionable at the time of contracting, Section 2-105, and not otherwise subject to the defenses of See Section 1-103. Due to the deletion of Section 2-602 on service contracts, Article 2 does not pro performance for service promises. The classic service promise is the seller promising to repair or re goods. The issue is what level of performance is required. If the seller has a right to cure, the cure the cure must result in conforming goods. Section 2-709. A repair or replacement promise as an ex for breach of a warranty of quality should also result in conforming goods. This point could be mad this section. If the repair or replacement promise is breached and repair or replacement is the exclu situation should be treated as a failure of the essential purpose of the agreed remedy under subsectio

Subsection (a)(2) responds to the PEB study report recommendation that the Drafting Comm placing in the statute a standard of when an agreement goes too far in limiting or altering remedies. agreed remedy become a penalty (too much) or sink below some minimum adequate remedy (too li cases where exclusive, limited remedies have been agreed, the courts have given the parties wide la

Electric Co. v. Westinghouse Electric Corp., 973 F.2d 391 (1st Cir. 1992), upholding an allocation risk between "highly sophisticated business entities. On the other hand, the aggrieved party, despi be entitled at the very least to some minimum adequate remedy, presumably not less than restitutio *Inc. v. Iron*, 979 F.2d 1068 (5th Cir. 1992). To test whether the contract provides a minimum adeq comparison could be to the expectancy interest, to the restitution interest, or to the reliance interest could also be tested by deciding whether the contract was illusory because the breaching party in ef so that the aggrieved party had no effective recourse for the breach of contract.

After discussion at the January and March, 1996 meetings, the Drafting Committee approve Section 2-810(a)(2) as a limitation on the agreed remedies permitted in Section 2-810(a)(1). What minimum adequate remedy depends upon the circumstances of each case. At the March 1997 meet Committee discussed whether the minimum agreed remedy provision is a subset of unconscionabili be so stated in the text. A motion to that effect failed by a vote of 2-5. A phrasing of that idea cou agreed remedy that does not provide the aggrieved party a minimum adequate remedy is unconscio would thus be similar to the statement in subsection (c) about the unconscionability of exclusion of for personal injury in the consumer goods case. This statement of the principle would be in accord former Section 2-719 which stated "If the parties intend to conclude a contract for sale within this A the legal consequence that there be at least a fair quantum of remedy for breach of the obligations o contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in a is subject to deletion and in that event the remedies made available by this Article are applicable as never existed.

2. Subsection (b) is derived from former Section 2-719(2) which stated that if a limited rem essential purpose, the aggrieved party could have remedies as provided in the Act. The constructio been troublesome for the courts. The PEB study report recommended that the revision clarify how applied. In these cases, the seller, either directly or through a dealer, obtains an agreement with the Make a limited express warranty, (2) Exclude or limit implied warranties, (3) Promise, on breach o repair, replace parts or otherwise cure the breach for a stated period of time, and (4) Exclude liabili damages. These clauses, typically, are well drafted and are stated to be "exclusive. Problems star and the seller is unable or unwilling to perform the limited, agreed remedy. Here there is one (the e probably two (the agreement to "cure) breaches by the seller. What are the buyer's remedies? Sh buyer is a consumer? Subsection (b) answers these questions.

Beyond a breach of contract, no attempt is made to define when "circumstances cause a fai inability of the seller after reasonable efforts to comply with the agreed remedy is a prime example. second breach of contract for which independent remedies are available. See Sections 2-103(a)(3), "circumstances are left to the courts. A failure, however, leaves the buyer facing a breach of warra agreement to repair by the seller and usually in possession of nonconforming goods.

Non-consumer contracts. Subsection (b)(1) provides a specific answer to the enforceabili consequential and incidental damage excluder when the exclusive, limited agreed remedy fails of it is the question that has been most troublesome for the courts. When a limited agreed remedy fails, damage excluder is still effective if enforceable under subsection (c). Thus an aggrieved party wou substitutes for the failed remedy but would not get consequential damages if the contract excludes t adopts as the default rule the presumption that the agreed limited remedy and the consequential and excluder are independent of each other in a commercial case. See *International Financial Services*

v. Franz, 534 N.W.2d 261 (Minn. 1995). As to the relationship between other remedies that the co for or limit, if a remedy fails of its essential purpose, the aggrieved party may resort to all remedies

Consumer Contracts. Subsection (b)(2) provides for the opposite presumption in consume contracts as in commercial contracts. That is, in consumer contracts, the consequential and inciden clauses would **not** be enforceable in the situation where the agreed remedy failed. Subsection (b)(2 default rule the presumption that the consequential and incidental damage excluder clause is depen the limited remedy.

Subsection (b) is subject to the overriding principle in subsection (a)(2) of a minimum adeq a limited, exclusive remedy was not provided and a consequential damage excluder that is enforcea and subsection (b) but if the aggrieved party was precluded from recovering consequential damages effect has no remedy. These circumstances have prompted some courts to deny enforcement to the presumably because either the seller was in some way at fault or the buyer had no minimum adequa restitution.

3. Subsection (c) is the same in substance as former Section 2-719(3) except that it explicit exclusion of incidental as well as consequential damages. An agreement excluding recovery for co incidental damages was enforced in *McNally Wellman Co. v. New York State Electric & Gas Corp.*, 63 F.3d 1188 (2d Cir. 1995) (New York law). The Drafting Committee voted against provic consequential damage excluders by stating a presumption of conscionability in a commercial case. report recommended that no special provisions for personal injury damages be included in this prov Committee rejected that recommendation as detrimental to the enactability of a revised Article 2.

4. **CISG.** There is no comparable provision in the Convention. Is Section 2-810 a rule of v Article 4(a)? If so, should Article 2 say so?

SECTION 2-811. REMEDIES FOR MISREPRESENTATION OR FRAUD.

Remedies for material misrepresentation or fraud include all remedies available under th nonfraudulent breach of contract. Rescission or a claim for rescission of a contract for sale and reje goods do not bar a claim for damages or other consistent remedy.

SOURCE: Sales, Section 2-721.

Notes

Section 2-811 contains no revisions of substance from former Section 2-721. Professor Gar suggested that the text or Comments of Section 2-811 be revised to make clear that if a contract ind by the buyer keeping the goods followed by the aggrieved buyer suing for deceit in tort, the aggriev damages based upon its expectation interest under Section 2-827 as opposed to its reliance interest. *Measuring Damages After Buyer's Affirmation of an Article 2 Sales Contract Induced by Fraud: A Study of Code Jurisprudence in Light of Section 2-721 and*

Pre-Code Conflicts in Remedial Theory, 1996 Col. Bus. L. Rev. 423.

SECTION 2-812. PROOF OF MARKET PRICE.

(a) If evidence of a price prevailing at a time or place described in this article is not readily
following rules apply:

(1) The price prevailing within any reasonable time before or after the time described m

(2) The price prevailing at any other place that in commercial judgment or usage of trad
substitute may be used, making proper allowance for any cost of transporting the goods to or from t

(3) Evidence of a relevant price prevailing at another time or place offered by one party
unless the party has given the other party notice that the court finds sufficient to prevent unfair surp

(b) If the prevailing price or value of goods regularly bought and sold in any established co
dispute, reports in official publications or trade journals or in newspapers, periodicals, or other mea
general circulation and published as the reports of that market are admissible in evidence. The circ
preparation of such a report may affect the weight of the evidence but not its admissibility.

SOURCE: Sales, Sections 2-723, 2-724.

Notes

1. Section 2-812 makes only one change in former Sections 2-723 and 2-724. Subsection (
2-723 has been deleted. Section 2-812 (a)(1) and (a)(2) are the same as former Section 2-723(2). S
same as former Section 2-723(3) and subsection (b) is the same as former Section 2-724.

2. Former Section 2-723(1) provided a rule for the time of measurement of market price wh
repudiation came to trial before the time for performance. In order to reduce uncertainty regarding
sound objective), market price was determined at the time when the seller or buyer "learned of the r
Section 2-723(1), however, created several dilemmas:

First, it appeared to be inconsistent with the provision for repudiation damages in Section 2-
Official Text, which were measured at the time the buyer "learned of the breach. Similarly, it seer
2-610(a) of the 1990 Official Text, which provided that an aggrieved party could wait for performa
reasonable time after the repudiation. Thus the PEB study report recommended that the revision a
measurement when the repudiation is treated as final.

Second, it stated that "any damages based on market price were subject to the "learned of t even though the time for delivery of some goods under the repudiated contract had passed at the tin of original Section 2-723(1) was to deal with uncertainty in the proof of future prices, the "any dar sense at all.

Third, the former Section 2-723(1) did not clearly provide for the special problems of repud contracts. For example, no distinction was drawn between goods sold on the "spot market and the sold under long-term contracts and there was no explicit requirement that profits awarded for repud contracts be discounted to present value. Thus the PEB study report recommended that the revision price should be of comparable goods under the same sort of contract conditions as the breached cor

The provisions on measurement of market price take into account the measurement of dama anticipatory repudiation. Sections 2-821 and 2-826.

3. **CISG.** Article 76 states the time when and place where the current price for damages is but makes to provision for proof of market price.

SECTION 2-813. LIABILITY OF THIRD PARTIES FOR INJURY TO

GOODS. If a third party deals with goods identified to a contract for sale and causes actionable inj 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 right of action against the third party.

(2) If the goods have been destroyed or converted, the party that had the risk of loss under t or since the injury has assumed that risk as against the other party, also has a right of action against

(3) If at the time of the injury the plaintiff does not have the risk of loss as against the other for sale and there is no arrangement between them for disposition of the recovery, any recovery or s the plaintiff's interest as 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 co

SOURCE: Sales, Section 2-722.

Notes

Section 2-813 contains no changes of substance from former Section 2-722. This provision procedural rule that details who has standing to pursue the damages for harm to the goods. The inju

generally actionable under law other than Article 2.

SECTION 2-814. STATUTE OF LIMITATIONS.

(a) An action for breach of a contract under this article must be commenced within the later the right of action has accrued or one year after the breach was or should have been discovered, but after the right of action accrued. Except in a consumer contract or an action for indemnity, the orig reduce the period of limitation to not less than one year.

(b) Except as otherwise provided in subsection (c) and (d) and Sections 2-402(e) and 2-404 for breach of contract accrues when the breach occurs, even if the aggrieved party did not have kno For purposes of this section, a breach by repudiation occurs when the aggrieved party learns of the

(c) If a breach of warranty occurs, the following rules apply:

(1) Subject to paragraph (2), a right of action for breach of warranty accrues when the s tender of delivery of the nonconforming goods.

(2) If a warranty expressly extends to performance of the goods after delivery, a right of when the buyer discovers or should have discovered the breach.

(d) A right of action for indemnity accrues when the act or omission on which the claim for or should have been discovered by the indemnified party.

(e) If an action for breach of contract is commenced within the applicable time limitation is remedy by another action for the same breach of contract is available, the other action may be comm expiration of the time limitation and within six months after the termination of the first action unles from voluntary discontinuance or from dismissal for failure to prosecute.

(f) This section does not alter the law on tolling of a statute of limitations and does not appl that accrued before the effective date of this article.

SOURCE: Sales, Section 2-725; Licenses Section 2B-707.

Notes

1. Section 2-814 makes several changes to former Section 2-725. Former Section 2-725(1) action for breach of contract must be brought within 4 years after the cause of action accrued. Subs limitation period of four years after the right of action accrues by allowing an action for breach to b the breach was or should have been discovered. An outside time limit of 5 years after accrual of th the extension of the limitations period. Thus if a party discovers a breach near the end of the four y party would have one year to bring the action but not longer than 5 years after the accrual of the cau follows the approach of Section 2B-705 (May 5, 1997 draft). Subsection (a) continues the rule fron 2-725(1) that the original agreement may reduce the limitations period to one year but no less. Hov does not allow that reduction of the limitation period in a consumer contract or allow that reduction period in an indemnity action. The limitation on the ability of parties to extend the statute of limita agreement found in former Section 2-725(1) was deleted as ineffectual as parties can find other way the limitations period.

2. Subsection (b) retains the rule from former Section 2-725(2) that a right of action accrue occurs regardless of knowledge of the breach. This general rule is subject to the exceptions for brea subsection (c), for indemnity actions in subsection (d), for breach of warranty of title in Section 2-4 discovery rule for accrual) and for breach of a remote warranty in Section 2-404(e) (providing a dis With the exception of the breach of warranty provisions in subsection (c), the other exceptions to th Subsection (b) also clarifies when a breach by repudiation occurs for purposes of accrual of the cau market price damages may be measured at a different time. See Sections 2-821 and 2-826.

3. Subsection (c) continues the rule from former Section 2-725(2) that the cause of action a warranty action when the tender of delivery is completed (including any agreed assembly or installa 2-602) unless the warranty expressly extends to performance of the goods after delivery. In that cas governs when the right of action accrues. Under current law, courts treat these two promises differe limitations purposes. Promise 1 is a promise that the goods will be free of defects for a period of ti repair or replace the goods if a defect arises during that time. Promise 2 is a warranty of quality cou repair or replace the goods for one year if the warranty is breached. Courts treat Promise 1 as a war extending to future performance and the discovery accrual rule applies. Courts treat Promise 2 as n explicitly extends to future performance, rather the goods must conform at time of tender and the pr for a year. The cause of action for breach of warranty accrues upon tender of delivery, and the caus repair would accrue upon the seller's failure to do so.

The Drafting Committee rejected a discovery rule for all breach of warranty causes of action test responds to the real risk that where certain types of manufactured goods are involved a buyer m reason to know of a breach of warranty until the limitation period has expired. The effect of this ris so-called "economic loss rule, which prevents access to the "discovery statute of limitations appli This issue was raised at the December, 1996 meeting of the ALI Council and the Council, by a vote preference for a "discovery rule where building materials and similar products were involved. At of the Ad hoc ALI group, the group acknowledged the Committee preference for the tender of deliv

4. Subsection (d) responds to the need to provide an accrual rule for indemnity causes of ac based upon Section 2A-506. An action for indemnity will accrue when the act or omission on whic or should have been discovered.

5. Subsection (e) is the same in substance as former Section 2-725(3) and subsection (f) is t as former Section 2-725(4).

6. **CISG.** The CISG has no statute of limitations. Parties must rely upon the on the Limita International Sale of Goods (1974), which the United States has now ratified.

[B. SELLER'S REMEDIES]

SECTION 2-815. SELLER'S REMEDIES IN GENERAL. If a buyer breaches the contract under Section 2-701 or 2-710(c) becomes insolvent, the seller may:

(1) withhold delivery of the goods under Section 2-816(a) or 2-818(a);

(2) stop delivery of the goods under Section 2-818(b);

(3) proceed with respect to goods still unidentified to the contract or unfinished under Secti

(4) reclaim the goods under Section 2-816(b);

(5) obtain specific performance under Section 2-807 or recover the price under Section 2-82

(6) resell the goods and recover damages under Section 2-819;

(7) recover damages for repudiation or nonacceptance under Section 2-821;

(8) recover incidental and consequential damages under Sections 2-805 and 2-806:

(9) cancel the contract under Section 2-808;

(10) recover liquidated damages under Section 2-809;

(11) enforce limited remedies under Section 2-810; or

(12) recover damages under Section 2-804.

SOURCE: Sales, Section 2-703.

Notes

1. Section 2-815 is based on former Section 2-703 which indexed the seller's remedies as w some circumstances when the remedies were available. Former Section 2-703 was criticized as an the seller's remedies. Pursuant to the Style Committee's recommendation, this section has been rev index section with the aggrieved seller's right to pursue any particular remedy dependant upon the r particular section and the principles in Subpart A, most notably those principles in Section 2-803, i to recover twice for the same injury and construing the remedies in light of the expectation principl 2-801 already states that the remedies in Subparts B and C are subject to the provisions of Subpart A restate that principle in this section.

Whether the buyer has breached the contract depends upon the provisions of Part 7. Thus S references the generic definition of breach in Section 2-701 and of breach in an installment contract Whether the seller can resort to remedies under this section for repudiation, depends initially upon w a breach of contract under Section 2-712. The seller may not resort to Section 2-815 unless the buy contract with respect to a performance not yet due the loss of which will substantially impair the va other. Thus, a partial repudiation of an installment that does not substantially impair the value of t not be actionable. It would, however, justify a demand for adequate assurance of due performance.

Because two of the seller's remedies, Section 2-816(b)(1) on reclamation and Section 2-818 delivery, become available upon buyer's insolvency, which is not necessarily a breach of the contra phrase references insolvency.

2. **Relationship to Article 9.** Several of the catalogued remedies for breach are "self-help remedies. Depending on the nature of the breach, the seller can withhold delivery, stop delivery by identify goods to the contract or salvage unfinished goods, resell the goods or cancel the contract w intervention. So long as the seller has possession or control of the goods the remedies are effective in breach.

What about purchasers from or creditors of the breaching buyer? Can they take an interest s Until the buyer has possession or control of the goods, the answer is no. This is consistent with Sec some of these remedies as security interests arising under Article 9, and the fact that what ever inter goods before delivery is subject to the seller's right to withhold delivery. Although the Article 2 an Committees agree on what the answer should be, a clear statement in the relevant sections must stil answer may be required where the seller is in breach and the buyer has the right to obtain possessio under the buyer's remedy sections even though the buyer does not yet have physical possession of t 2-824.

These remedies are supplemented by the power to suspend performance after a demand for a Section 2-711 or where the buyer is insolvent. Section 2-818(a). The exercise of self-help remedie seller, lead to an agreed settlement of the dispute or simply be a prelude to litigation. The unjustifie remedy is a breach by the seller.

3. The seller's judicial remedies include specific performance, Section 2-807, an action for 2-822, damages based upon the difference between the contract and market price, Section 2-821(a), by lost profits, Section 2-821(b). Claims for incidental damages are made under Section 2-805 and

damages, to which the seller is now entitled, are made under Section 2-806.

4. **CISG.** Article 61(1) provides a general guide to the Articles dealing with the seller's rig on breach by the buyer. Article 61(2) states that the seller is "not deprived of any right he may have exercising his right to other remedies.

SECTION 2-816. SELLER'S RIGHT TO WITHHOLD DELIVERY OF GOODS OR TO RECLAIM GOODS AFTER DELIVERY TO BUYER.

(a) If a buyer is in breach of contract under Section 2-701, the seller may withhold delivery affected. If the breach is of the whole contract, Section 2-710(c), the seller may withhold delivery balance.

(b) Under this article, a seller may reclaim goods delivered to a buyer under a contract for s following circumstances:

(1) A seller that discovers that the buyer has received goods on credit while insolvent m goods upon a demand made in a record within 10 days after receipt of the goods or, if a bankruptcy is the debtor is commenced during the 10 day period, such demand must be made within 20 days af If the buyer made a material misrepresentation of a credit condition in a record to the reclaiming sel reporting agency or the like less than 90 days before delivery, the demand is timely if made within a delivery.

(2) If payment is due and demanded on delivery to the buyer, the seller may reclaim the upon a demand made within a reasonable time after the seller discovers or should have discovered t made.

(c) Reclamation is subject to the rights under this article of a buyer in ordinary course of bu good-faith purchaser for value that arise before the seller takes possession under a timely demand fo Successful reclamation of the goods under subsection (b)(1) precludes all other remedies with respe

SOURCE: Sales, Sections 2-507(2), 2-702.

Notes

1. Section 2-816 makes several changes to former Section 2-702. First, the right to withhol of the buyer's insolvency found in former Section 2-702(1) has been relocated to Section 2-818(a). Section 2-818. Section 2-816(a) states the right of the seller to withhold delivery for breach of cont formerly stated within former Section 2-703 without a separate section. Pursuant to the Style Comm to make Section 2-815 a pure index section, the statement of the actual right to withhold delivery ha separate subsection. Perhaps the right to withhold delivery for either insolvency under Section 2-81 Section 2-816(a) should be combined in one subsection.

2. Second, pursuant to the PEB study report recommendation, subsection (b) sets forth two reclamation in a credit sale because of the buyer's insolvency from former Section 2-702(2) and rec recognized under former Section 2-507. Insolvency is defined in Section 1-201(23). These ground for Article 2, are in addition to the repossession right given to a secured party under Section 9-503. 2A-525. They are, however, limited to the goods and do not extend to the proceeds of the goods. E *States v. Westside Bank*, 732 F.2d 1258 (5th Cir. 1984) (proceeds within scope of reclamation). Mo public notice of the reclamation right has not been given, it is a mistake to treat this historical Artic non-possessory security interest. Reclamation here is exceptional and limited.

Although the PEB study report recommended that reclamation in a credit sale not follow the reclamation under 11 U.S.C. § 546(c) for reclamation rights recognized in a bankruptcy case, at the the Drafting Committee voted otherwise. Thus subsection (b)(1) has been redrafted to follow the n § 546(c), including that the notice be in a record. (Section 546(c) requires the demand be in writing expands the misrepresentations of solvency that extend the time for giving notice of reclamation to misrepresentations made to third parties such as credit reporting agencies instead of expanding the t reclamation only when misrepresentations are made to the seller as under former Section 2-702(2).

Subsection (b)(2) codifies the right of a cash seller to reclaim the goods that had been recog Section 2-507 and PEB Commentary No. 1. The time limit for making the reclamation demand, wh record, is a reasonable time after the seller discovered or should have discovered of the non-paymen time period was recommended in the PEB study report as reflecting the commercial reality of when of the problem with the payment. Subsection (a)(2) does not apply where, after delivery in a "cash discovers a nonconformity in the goods and stops payment of the check.

Section 2-816 does not contain the provision from former Section 2-702(2) that the seller ha reclaim the goods based upon fraudulent or innocent misrepresentation of solvency or intent to pay. needed because the introductory phrase of subsection (b) clearly provides these two bases of reclam of reclamation recognized for a seller.

3. Subsection (c) subjects the seller's right to reclaim under subsection (b) to the rights of a course or a good faith purchaser for value. This continues the rule from former Section 2-702(3) as reclaiming seller in a credit sale with one change. The good faith purchaser must have given value. 2-702(3), value was not a requirement. (See definition of purchase in Section 1-201(32) which incl As recommended by the PEB study report, with the integration of a reclaiming cash seller into Sect rights to the goods as against third parties are the same as the credit seller's rights.

At the March 18, 1994 meeting of the Drafting Committee, it was argued that subsection (c) protection to the reclaiming seller. Motions were made to delete secured parties from the list of cre priority over the seller and to expand the seller's protection to proceeds. The votes were inconclusi made in the draft. See *In re Blinn Wholesale Drug Co., Inc.*, 164 B.R. 440 (E.D.N.Y. 1994) ("good purchaser includes secured party with after acquired security interest). At the March, 1996 meetin Committee, a decision to require "new value before a good faith purchaser (with a perfected secur over the reclaiming seller was made. This decision was questioned at the 1996 Annual Meeting of coordinated with Article 9. At the March 1997 Drafting Committee meeting, the Committee voted in front of value.

Subsection (c) follows the recommendation of the PEB study report to clarify when the righ ordinary course and good faith purchaser for value are sufficiently ripe so as to defeat a reclaiming rights or a reclaiming seller to that seller taking possession of the goods. To illustrate, consider the

Case #1. Seller makes a timely demand and takes possession from the buyer before any rigl purchasers arise. Seller clearly wins.

Case #2. Seller makes a timely demand after the rights of buyers or purchases arise and the possession of the goods. This is easy. Buyer or purchaser wins.

Case #3. Seller makes a timely demand after the rights of buyers or purchases arise but befo possession. Seller then takes possession. If a first to possess test applies, Seller, as the first to take "right to possession test applies, the purchasers should win, even if that right is conditional or pos transferred.As a policy matter, a "right to possession test should apply and that right arises, at the e competing party becomes a buyer in the ordinary course of business or a good faith purchaser.

Case #4. Consider the following variations on Case #3.

(a) A buyer otherwise in the ordinary course of business has a special property interest in id has not taken possession when the seller's timely reclamation demand is received.

(b) A good faith buyer for value has either a special property interest or title in the goods bu possession when the seller's timely reclamation demand is received.

(c) A secured party (a good faith purchaser) who has given new value has an enforceable se buyer's after-acquired property which attaches to the goods but the secured party has not repossesse reclamation demand is made.

Seller should lose in each case. The status of the purchasers is clear and the right to possess though still conditional. The seller, on the other hand, has given up possession without public notic reclamation right and has not regained possession before the rights of the others arises. To win, the timely notice of reclamation and retake possession from the buyer before the right to possession of purchasers arises.

Subsection (c) also contains the rule from former Section 2-702(3) that successful reclamati credit sale reclamation precludes all other remedies with respect to the goods. This provision was c

Draft pursuant to a vote of the Drafting Committee. The issue rose again at the January, 1995 meet Committee, where it was argued that the deletion was improper and would change the law. This co at the December, 1995 meeting of the Reporter with the Article 9 Drafting Committee. Thus, the p subject to further discussion.

In that discussion, it is helpful to distinguish between reclamations under subsection (b)(1) a under subsection (b)(2). Reclamations under subsection (b)(1) do not involve a breach of contract b Reclamations under subsection (b)(1) are based upon a special remedy triggered solely by the buyer buyer's breach. Reclamation for insolvency is based upon a presumed fraud that the buyer is perpe that situation, when a seller reclaims, in effect the seller is rescinding the contract as a remedy for th both sides return the performance of the other. With that justification for insolvency based reclama limit the seller to only its reclamation right and not give it other remedies against the buyer.

Reclamations under subsection (b)(2) do involve a breach of contract by the buyer. Thus it in a reclamation under subsection (b)(2) to limit the seller to reclaiming the goods and not having a Compare what happens if the buyer refuses to pay prior to delivery. The seller has the goods and al code, including the right to damages measured either by resale or contract price. If the seller delive pay because of a bounced check, the buyer has breached the contract and the seller has the right to not at all clear that the seller should be limited to getting the goods back and not getting any further of contract. At the March 1997 meeting, the Committee voted to limit the principle of the last sente under subsection (b)(1).

The Committee also expressed concern about what the last sentence means when applied to subsection (b)(1). Of principle concern was whether it precludes remedies for damages to the good until reclaimed, the goods are the buyer's goods to do with as the buyer sees fit. Thus the goods wh in the same condition as they were when delivered to the buyer. The Comments should clarify that remedies is not to prevent actions for damages to the goods. The preclusion could apply only to pre based upon insolvency of the buyer. Compare Section 2-811. When the buyer is insolvent, but has the contract, the other remedies to preclude would be damages for fraud based upon the buyer's ins the fear is double counting of harm, the principle of Section 2-803(c) that a party may not recover m same injury should suffice. If the buyer is insolvent and has otherwise breached the contract, shoul other remedies for breach? Is the fear here a secret lien or is the fear overcompensation of the selle overcompensation of the seller, the principle of Section 2-803(c) provides the controlling principle not preclude other remedies designed to place the seller in its full performance position when the bu the contract. If the fear is a secret lien, it is unclear how precluding the seller's other remedies for b less secret.

4. After considerable discussion, a decision not to grant the reclaiming seller the remedy of at the March, 1996 meeting of the Drafting Committee. At the March 1997 meeting, the Committe the text or in the Comments whether the reclamation right extended to proceeds. Currently courts h conclusions on this issue. Thus the law would stay as it is, confused and conflicting on the proceed report concluded that the right to reclaim should not extend to proceeds of the goods.

5. **CISG.** Under the Convention, a seller who avoids a contract for fundamental breach can goods from the buyer. Although goods delivered either for cash or on credit can be reclaimed, there limitations on the time or method of reclamation. See Articles 64(1), 81(2), and 84(2).

SECTION 2-817. SELLER'S RIGHT TO IDENTIFY GOODS TO CONTRACT DESPITE BREACH OR TO SALVAGE UNFINISHED GOODS.

(a) An aggrieved seller may:

(1) identify to the contract conforming goods not already identified if they are in the sell control at the time the seller learned of the breach of contract; and

(2) resell goods that are shown to have been intended for the particular contract, even if

(b) If goods are unfinished at the time of breach of contract, an aggrieved seller, in the exer commercial judgment to minimize loss and for the purpose of effective realization, may complete t wholly identify the goods to the contract, cease manufacture and resell for scrap or salvage value, o reasonable manner.

SOURCE: Sales, Section 2-704.

Notes

1. No changes of substance have been made in former Section 2-704. The PEB study repor any changes to this section.

2. Section 2-817 gives an aggrieved seller several choices if goods are conforming but not i but unfinished at the time of breach.

Subsection (a)(1) permits the seller to identify conforming goods to the contract, Section 2- appropriate remedies. Subsection (a)(2) permits the seller to resell identified but unfinished goods exists under Section 2-819(b). Neither option explicitly requires the exercise of "reasonable comm are subject to the general mitigation requirement in Section 2-803.

Subsection (b) assumes that goods to be manufactured by the seller are unfinished at the tim the seller a choice to either complete the manufacturing process (and resell) or stop manufacturing a must be made in the exercise of "reasonable commercial judgment To illustrate, suppose the cont the buyer repudiates when the manufacturing process is 50% completed. It would cost $600 to fini resale price of the completed goods is estimated to be $100. On the other hand, if the seller stopped salvaged, the estimated damages under Section 2-821(b) would be $400. All things being equal, Se the seller to stop and salvage. The post-breach decision to invest $600 to realize $100 on resale of the full contract price if resale is not possible, enhances the seller's damages and is not commercial

3. **CISG.** The Convention does not have a comparable provision.

SECTION 2-818. SELLER'S REFUSAL TO DELIVER BECAUSE OF BUYER'S INSOLVENCY; STOPPAGE IN TRANSIT OR OTHERWISE.

(a) A seller that discovers that the buyer is insolvent may refuse to make delivery except fo payment for all goods previously delivered under the contract.

(b) Subject to subsection (d), a seller may stop delivery of goods in the possession of a carr the buyer is insolvent or repudiates or fails to make a payment due before delivery or if, for any oth right to withhold or reclaim the goods.

(c) As against a buyer under subsection (b), the seller may stop delivery until:

(1) receipt of the goods by the buyer;

(2) acknowledgment to the buyer by any bailee of the goods, other than a carrier, or by a reshipment or as warehouseman, that the bailee holds the goods for the buyer; or

(3) 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 deliv

(2) After notification, the carrier or bailee shall hold and deliver the goods according to the seller. The seller is liable to the bailee or carrier for any resulting charges or damages. A carrie delivery if the seller does not provide indemnity for charges or damages upon the carrier's or bailee

(3) If a negotiable document of title has been issued for goods, the carrier or bailee need notification to stop until surrender of the document.

(4) A carrier or bailee that has issued a nonnegotiable document need not obey a notific received from a person other than the person named in the document as the person from which the for shipment or storage.

SOURCE: Sales, Sections 2-702(1) and 2-705.

Notes

1. Section 2-818 makes several changes in former Section 2-705. As recommended by the seller's right to stop delivery on credit and demand cash as well as payment for past deliveries upon insolvency found in former Section 2-702(1) has been relocated to subsection (a).

2. Subsection (b) is the same in substance as former Section 2-705(1) except that the limita may only stop delivery of a "carload, truckload, planeload or larger shipments of express or freight breached the contract has been deleted. The Drafting Committee concluded that the "carload, truck limitation was unrealistic in light of changing shipping methods and practices. For example, why s to stop delivery of a packet of goods shipped by, say, Federal Express, upon breach by the buyer, es location of the goods can quickly be determined by computer? In most cases, the carrier or bailee's subsection (d)(1), which provides that the carrier must, after receiving notice from the seller, have a to prevent delivery and by subsection (d)(2) which makes the seller liable for damages caused by s right to indemnity prior to stopping delivery. This flexible standard takes into account the type of g the carrier's ability to find them and promptly stop delivery at the time notice is received.

3. Subsection (c) is the same in substance as former Section 2-705(2). As under current law to stop delivery under subsection (b) is too late if any of the events listed in subsection (c) have occ

4. Subsection (d) makes two changes to former Section 2-705(3). First, it clarifies that the both bailees and carriers whereas former Section 2-705(3) seemed to limit some of its application to carriers. Second, it provides that the carrier or bailee may demand indemnity for charges or damage the limitation of carload, truckload, or planeload, the carrier or bailee could be under the obligation damages to third parties for delay while the one package is dug out of the conveyance. A right to in merely the right to sue the seller for damages. This sentence gives the carrier or bailee the right to g before the harm is caused to anyone else and is modeled on the buyer's right under Section 2-705 to expenses in caring for rejected goods.

5. Note that creditors of or purchasers from the buyer are subject to the seller's right to stop See *In re Morrison Industries, L.P.*, 175 B.R. 5 (W.D.N.Y. 1994) (right to stop effective against bu bankruptcy).

6. **CISG.** Article 71(1) states when a party may suspend performance of obligations and A that right over to cases where the goods have been "dispatched. These provisions have little detail that delivery can be suspended even if the buyer has a document entitling the buyer to obtain the go in subsection (c)(3) is to the contrary. Article 71(3), however, requires the party suspending perfor notice of suspension to the other and to continue performance if the other provides adequate assura These latter requirements are not found in Article 2. Should seller be obligated to give notice of sto

SECTION 2-819. SELLER'S RESALE.

(a) If a buyer has breached a contract and the goods concerned are in the seller's possession

may resell them or the undelivered balance. If the resale is made in good faith, within a commercia
in a commercially reasonable manner, the seller may recover the contract price less the resale price
consequential and incidental damages, less expenses avoided as a result of the breach.

(b) A resale:

(1) may be at a public auction or private sale including sale by one or more contracts to
identification to an existing contract of the seller;

(2) may be as a unit or in parcels and at any time and place and on any terms, but every
including the method, manner, time, place, and terms, must be commercially reasonable; and

(3) must be reasonably identified as referring to the breached contract, but the goods nee
existence or have been identified to the contract before the breach.

(c) If the resale is at a public auction, the following rules apply:

(1) Only identified goods may be sold unless there is a recognized market for the public
goods of the kind.

(2) The resale must be made at a usual place or market for public sale if one is reasonab
Except in the case of goods that are perishable or which threaten to decline in value speedily, the se
reasonable notice of the time and place of the resale.

(3) If the goods are not to be within the view of persons attending the sale, the notificati
state the place where the goods are located and provide for their reasonable inspection by prospecti

(4) The seller may buy the goods.

(d) A good-faith purchaser at a resale takes the goods free of any rights of the original buye
fails to comply with this section.

(e) A seller is not accountable to the buyer for any profit made on a resale. However, a pers
a seller or a buyer which has rightfully rejected or justifiably revoked acceptance shall account for a

amount of the claim secured by the security interest as provided in Section 2-823(b).

SOURCE: Sales, Section 2-706.

Notes

1. Section 2-819 provides for seller's recovery of damages after resale of the goods when th makes a few changes from former Section 2-706. Subsection (a) states the basic ability of the selle recover damages based upon the difference between the resale price and the contract price when the contract. Subsection (a) is the same as former Section 2-706(1) except that it (i) makes explicit the seller be in possession or control of the goods, a requirement implicit in the seller's ability to resell clear that the sale must be not only be in a commercially reasonable manner but must take place wit reasonable time, and (iii) references not only the seller's right to incidental damages but also to con an action for the price is not available, Section 2-822(a), the seller may prefer to resell the "goods c undelivered balance. The buyer, of course, must be in breach and the resale process is subject to t policies in Article 1 and Section 2-803 as well as the particular requirements of Section 2-819. The include those which at the time of the breach are: (1) existing and identified; (2) existing and not id thereafter; (3) unfinished but finished and identified thereafter, Section 2-817(b); and (4) not existi until after the resale contract.

2. Subsection (b) is the same in substance as former Section 2-706(2) except that it substitu auction for "public sale. The consensus of the Drafting Committee was that a public sale was a p

3. Subsection (c) is the same in substance as former Section 2-706(4). Subsection (d) is the former Section 2-706(5). Subsection (e) is the same in substance as former Section 2-706(6).

4. The requirement in former Section 2-706(3) that a reselling seller give the buyer notice o private sale has been deleted. Previously, notice was treated as a condition precedent to a proper re required in a disposition by public or private sale to enforce a security interest under Section 9-504(possession may have a security interest arising under Article 2, Section 9-113, and the resale remed of a secured party, Section 9-113, Comment 1, a common notice requirement seemed to make sens interest of the buyer or debtor was considered.

The Drafting Committee, however, decided to limit the notice requirement to sales made to interest created by agreement or clearly imposed by statute. See Section 2-829(b). Notice in the lat important because the debtor has an interest in the goods sold (title) and owes a fixed amount of mo resale under Section 2-819, the buyer is normally not a debtor (the price is not yet due) and has no i although the buyer could have an interest if the goods are identified to the contract for sale prior to Section 2-502. In the view of the Drafting Committee, therefore, the deletion of former subsection the buyer and would avoid undermining an otherwise commercially reasonable resale and creating u up remedies if the resale were not proper. In short, if the private resale is in good faith and is comm under subsection (a), the seller is entitled to resale damages even though the buyer was not notified give notice to the buyer in a public sale as required by Section 2-819(c)(2), should that preclude the damages under this section if the sale was conducted in good faith, commercially reasonable and in reasonable manner? Or should the buyer merely have a claim for damages caused by the failure to g

5. The relationship between Sections 2-819 and 2-821 is important. Consider these variatio are in fact resold:

(a) **Resale in good faith and in a commercially reasonable manner.** Section 2-819(a) is probably the preferred remedy. Section 2-821(b), however, is available in a lost volume 2-821(a) might be available, but only if those damages do not put the seller in a better position than performed. See Section 2-803(c). Thus, the fact that the seller has complied with Section 2-819(a) foreclose the choice of market damages under Section 2-821(a). The question is, considering the re of market price damages puts the seller in a substantially better position than full performance wou prove the resale was in fact a substitute transaction for the contract that was breached and that mea 2-821(a) would place the seller in a better position than full performance, buyer can seek to limit th market price remedy under the principle of Section 2-803(c).

(b) **Resale in good faith but not in a commercially reasonable manner.** Although Section 2-819(a) is not available, Section 2-821(a) may be used and, in a case of lost volu Section 2-821(b) are available.

(c) **Resale in bad faith.** Although not stated in the text, damages under Section 2-821(a) s available only if they are the substantial equivalent of damages that would have been available if th Section 2-819(a). Should this principle be placed in the text or the Comments?

6. **CISG.** Article 75 permits the seller to resell the goods after the contract has been avoide breach, but contains none of the detail in Section 2-819. If the seller resells, damages are measured between the contract price and the price in the substitute transaction. Furthermore, if the seller res by the difference between the contract price and the market price are not available. Article 76.

SECTION 2-820. PERSON IN POSITION OF SELLER.

(a) In this section, a person in the position of a seller includes, as against a principal, an age become responsible for the price of goods on behalf of the principal or any person that otherwise ho other right in goods similar to that of a seller.

(b) A person in the position of a seller has the same remedies as a seller under this article.

SOURCE: Sales, Section 2-707.

Notes

There are no changes of substance in former Section 2-70 except that former subsection (2) make clear that a person in the position of the seller has all of the remedies of the seller and not just listed in former Section 2-707.

SECTION 2-821. SELLER'S DAMAGES FOR NONACCEPTANCE, FAILURE TO PAY, OR REPUDIATION.

(a) If a buyer breaches a contract, the seller may recover damages based upon market price incidental and consequential damages, less expenses avoided as a result of the breach, as follows:

(1) Except as provided in subsection (2), the measure of damages is the contract price le of comparable goods at the time and place for tender.

(2) In the case of a repudiation governed by Section 2-712, the measure of damages is t less the market price of comparable goods at the place for tender and at the time when a commercia after the seller learned of the repudiation has expired. The commercially reasonable time includes t retraction under Section 2-712 and the time needed to obtain substitute performance.

(b) A seller may recover damages measured by other than the market price, together with in consequential damages, including:

(1) lost profits, including reasonable overhead, resulting from the breach of contract dete reasonable manner; and

(2) reasonable expenditures made in preparing for or performing the contract if, after the is unable to obtain reimbursement by salvage, resale, or other reasonable measures.

SOURCE: Sales, Section 2-708.

Notes

1. Section 2-821 makes several changes from former Section 2-708. Subsection (a) provide damages based upon the market price of the goods and makes the following changes to former subs

2. First, it provides two different times for measuring market price depending upon whether has repudiated the contract or not. Under former Section 2-708(1) and former Section 2-723(1), the repudiation case was determined at the time the aggrieved party learned of the breach if the case ca time for performance as to all or some of the goods. Under Section 2-821(a), the market price in a measured at a commercially reasonable time after the seller learned of the repudiation. The judgme reasonable time to forecast what future market prices will be for goods of that kind and that the sell permitted to speculate on uncertain markets after that period--the time when the seller should have

mitigated damages--has expired. An issue left open is what should the time for measuring market b repudiated just prior to the time of tender. Will the reasonable time for measuring market price in t price after the tender date? Assume the buyer repudiates on Sept. 30 and the tender date is Oct. 1. repudiated, market price is measured on Oct. 1. If the buyer repudiates, market price is measured a seller reasonably awaited performance (presumably not later than Oct. 1) and the time necessary for engaged in a substitute transaction that the seller never did engage in (presumably sometime after O actually resold, its damages would be measured by the resale section, not the market price section.

Another way to implement this principle without stating two different times for measureme is to provide that market price is measured as of the time of tender and to let the mitigation principl control when the market price should be measured in an anticipatory repudiation case. This has the time for measuring market price that cannot be manipulated by the buyer as illustrated above. It als mitigation so that if the seller could have reduced its damages by acting before the tender date, it m recover those damages that could have been reduced. Under this approach, subsection (a)(2) would market price would be measured at the latest as of the time stated in (a)(1). Measurement of the ma time would depend upon application of the mitigation principle.

3. Second, the word "unpaid prior to contract price in former Section 2-708(1) has been de breaching buyer can recover all or part of any contract price paid to the seller is determined under S given that the seller may now recover consequential damages, consequential damages as well as inc referenced in subsection (a). Fourth, the phrase "comparable goods, which was not contained in f includes both the goods themselves and the type of contract under which they are sold. Thus, the m type of goods sold on the "spot market and those sold under a long-term contract would not be con *Manchester Pipeline Co. v. Peoples Natural Gas Co.*, 862 F.2d 1439 (10th Cir. 1988). Other concerns about measuring damages for breach of a long-term supply contract remain. For example market for goods sold under long-term contracts at the relevant time. Should the court then use a "s so, wouldn't that price tend to over or under compensated Fifth, the subsection (a) awards damages "contract price **less** the market price of comparable goods. The "difference between language in 2-708(1) has been deleted.

4. The time for determining the contract price is not the same as the time for measuring ma "contract price is not tied to when a commercially reasonably time after the seller learned of the re Unless the contract price is a fixed price, the parties should have the benefit of any escalation or fle have agreed.

5. Subsection (a) is subject to Section 2-803. Thus, a seller cannot choose subsection (a) if it in a substantially better position than full performance by the buyer would have done. To illustra resells identified goods under Section 2-819(a) at or above the contract price or actually recovers th 2-822. Section 2-821(a) is not available because any recovery would put the seller in a better positi would have done. Similarly, if the difference between the contract price and the resale price under $1,000 and the difference between the contract price and the market price under Section 2-821(a) w amount will control. Finally, if damages under Section 2-821(a) substantially exceed the profits tha made by full performance under subsection (b), subsection (b) controls.

Note that the seller's choice of Section 2-821(a) controls unless the buyer proves from actua market price recovery puts the seller in a better position than full performance. Hypothetical figure

probability, market damages should be limited to the case where the seller has identified goods on h them. Here market damages serve as a surrogate for resale damages.

6. Subsection (b) provides for the seller's recovery of lost profit and reliance expenses that recoup from resale, salvage or other reasonable measures. The seller's choice of subsection (b) is li 2-803(c), not the nature of the buyer's breach. Thus, the seller can choose subsection (b) where the the buyer establishes that the choice puts the seller in a substantially better position than full perfor highly unlikely in three cases: (1) The seller does not have completed goods on hand; (2) Upon repu work and salvages under Section 2-817(b); and (3) The seller is a "lost volume seller. See the pro Section 2-803 for the relationship between the lost profit measure and market price damages. The s profits is also subject to the mitigation principle of Section 2-803. There is a consensus among the any recovery for future profits should be reduced to present value. See Section 2A-102(1)(u).

The buyer may require a seller who has selected subsection (a) to use subsection (b) when th market price substantially exceeds the profits that would have been made by full performance. As a will be limited to a seller, such as a jobber or middleman, who does not have completed goods on h by making forward contracts for them. The cases have concluded that a seller who does not take th fluctuations is overcompensated when market damages under subsection (a) exceed the profits that under subsection (b). See, e.g., *Nobs Chemical, U.S.A., Inc. v. Koppers Co., Inc.*, 616 F.2d 212 (5th Cir. 1980); *Union Carbide Corp. v. Consumers Power Co.*, 636 F. Supp. 1498 (E.D. Mich. 1986).

7. Damages under subsection (b) include lost profits and, in appropriate cases, unreimburse expenditures in preparation or part performance. In most cases, lost profits, including reasonable o by subtracting the seller's total variable cost to perform, whether actual or estimated, from the contr should adequately compensate most lost volume sellers and sellers who have no completed goods c defining the appropriate way to measure lost profits, the separation of lost profit recovery from relia recouped from resale or other reasonable measures is consistent with the PEB study report recomm

A seller who stops work and salvages under Section 2-817(b), may have both lost profits an reliance expenditures. Subsection (b)(2) allows recovery of those expenditures as well, provided th reasonable efforts to mitigate losses. Thus, in this case, the amount needed to put the seller in as go performance includes both lost net profits, reasonable overhead and unreimbursed reliance.

No effort is made to state when a seller has lost volume because of the buyer's breach or to measurement standard for that complex situation. Recovery for lost volume, however, is still possi standards of subsection (b). As before, the problems of definition and measurement are left to the c *Davis Chemical Corp. v. Diasonics, Inc.*, 826 F.2d 678 (7th Cir. 1987), on appeal from remand, 924 F.2d 709 (7th Cir. 1991). See also, John M. Breen, *The Lost Volume Seller and Lost Profits Under UCC 2-708(2): A Conceptual, Linguistic Critique*, 50 U. Miami L. Rev. 779 (1996).

8. **CISG.** If the contract is avoided and the aggrieved seller has not resold the goods under 76 allows for contract damages to be measured by the difference between the contract price and the

SECTION 2-822. ACTION FOR PRICE.

(a) If a buyer fails to pay the price as it becomes due, the seller may recover, together with consequential damages, the price of:

(1) goods accepted;

(2) conforming goods lost or damaged after risk of their loss has passed to the buyer, bu retained or regained control of the goods, the loss or damage must occur within a commercially rea risk of loss has passed to the buyer; and

(3) goods identified to the contract, if the seller is unable after a reasonable effort to rese reasonable price or the circumstances reasonably indicate that this effort would be unavailing.

(b) A seller that remains in control of the goods and sues for the price shall hold for the buy identified to the contract. If the seller is entitled to the price and resale becomes possible, the seller under Section 2-819 at any time before the collection of the judgment. The net proceeds of the resa buyer. Payment of the judgment entitles the buyer to any goods not resold.

(c) If a buyer has breached the contract, a seller that has sued for but is held not entitled to section may still be awarded damages for nonacceptance under Section 2-821.

SOURCE: Sales, Section 2-709.

Notes

1. Section 2-822 makes a few changes from former Section 2-709. Subsection (a) is the sa 2-709(1) with two changes. First, consistent with the seller's ability to recover consequential dama the seller to recover consequential damages as well as incidental damages. Second, subsection (a)(commercially reasonable time limit on recovering the price only applies when the seller has retaine of the goods. As under former Section 2-709, Comment 1, a wrongful revocation of acceptance is buyer of the obligation to pay the price under subsection (a)(1). Subsection (b) is the same in subst 2-709(2) except that it makes clear that the seller's resale is subject to Section 2-819. Subsection (Section 2-709(3) which provided that if the buyer "wrongfully rejected or revoked acceptance of th pay when due or has repudiated the seller who could not get the price could still sue for damages u 2-708. That phrasing has been reduced to "if the buyer has breached the contract.

2. The seller may now claim specific performance under Section 2-807(a). If justified by th buyer may be ordered to accept and pay for the goods in exchange for the seller's conforming perfo circumstances where this would be improper? For example, suppose the agreement for specific per

form? Presumably, Section 2-206 deals with this problem. Or, suppose that there is an agreement
and the goods could easily be resold to a third person. Arguably specific performance is inefficient
court could be persuaded to exercise its discretion and not enforce the agreement. To resolve these
2-807(a) has been revised to provide that if the parties agree to specific performance as a remedy, a
performance may not be ordered if the breaching party's only obligation is to pay money.

3. **CISG.** Under Article 62, the seller may "require the buyer to pay the price, take delivery
other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirem
conditions, such as those found in Section 2-822, and there is no specific provision permitting reco

[C. BUYER'S REMEDIES]

SECTION 2-823. BUYER'S REMEDIES IN GENERAL; BUYER'S SECURITY INTEREST IN REJECTED GOODS. If a seller is in breach of the contract under Section 2-701, or in breach of the whole contract under Section 2-710(c), the aggrieved buyer may:

(1) recover the price paid under Section 2-829(a) or deduct damages from price unpaid unde

(2) cancel the contract under Section 2-808;

(3) cover and obtain damages under Section 2-825;

(4) recover damages for nondelivery or repudiation 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);

(9) recover incidental and consequential damages under Sections 2-805 and 2-806;

(10) recover liquidated damages under Section 2-809;

(11) enforce limited remedies under Section 2-810; or

(12) recover damages under Section 2-804.

SOURCE: Sales, Section 2-711.

Notes

1. Consistent with the revisions to seller's index of remedies, the buyer's index of remedies Section 2-711(1) and (2) has been revised to be an index only with no substantive limitations conta than there be a breach of contract as defined in Part 7. To make Section 2-823 an index section nec new section, Section 2-829.

2. All of the buyer's remedies in Subpart C are subject to the principles stated in Subpart A 2-803. A remedy from the list is available as provided in the referenced section and subject to the r Subpart A.

SECTION 2-824. PREPAYING BUYER'S RIGHT TO GOODS; REPLEVIN.

(a) A buyer that pays all or a part of the price of goods identified to the contract, whether or shipped, on making and keeping good a tender of full performance, has a right to recover them from repudiates or fails to deliver as required by the contract.

(b) A buyer may recover from the seller by replevin, detinue, sequestration, claim and deliv goods identified to a contract if, after reasonable efforts, the buyer is unable to effect cover for the g circumstances indicate that an effort to obtain cover would be unavailing or if the goods have been reservation and satisfaction of the security interest in them has been made or tendered.

(c) If the requirements of subsection (a) or (b) are satisfied, the buyer's right vests upon ide goods to the contract for sale even if the seller has not then repudiated the contract or failed to deliv contract.

SOURCE: Sales, Sections 2-502 and 2-716(3).

Notes

1. Section 2-824 combines the remanent of former Section 2-502 and former Section 2-716 section the buyer's right to obtain goods from the possession of the seller.

2. Subsection (a), based upon former Section 2-502, expands the prepaying buyer's ability t from the seller. Previously, a pre-paying buyer could recover identified, conforming goods from a s insolvent within 10 days after receipt of the first payment. Under revised Section 2-824(a), a pre-pa identified goods, whether or not conforming, from a seller, whether or not insolvent, who repudiate

"upon making and keeping a tender of full performance.

Revision history. Both the PEB Study Group and the ABA Task Force favored the repeal o Section 2-502 because tying the buyer's right to the goods to the seller's insolvency created an unac invalidation in bankruptcy. See 16 Del. J. of Corp. Law 981 at 1128-1129. If Section 2-502 were r pre-paying or financing buyer would have no right to the goods under Article 2 unless a right to spe replevin under Section 2-807 were established. See Section 2-505(a). Beyond that, protection wou compliance with Article 9, which, in practice, may be difficult to do.

The Drafting Committee concluded, however, that pre-paying buyers, especially consumer b some protection under Article 2. An early revision of Section 2-824 broadened protection by substi fails to deliver for "insolvency as the trigger for recovery and eliminating the 10 day time limitati Section 2-502(2) of the 1990 Official Text and limited the scope of buyer's right to "conforming, i regardless of which party identified them. See Section 2A-522(2), in accord. Under this version, th nonconforming goods were not covered by Section 2-502.

At the January, 1994 meeting, the Drafting Committee expanded the scope of Section 2-824 requirement that the identified goods be conforming and conditioning the right to recover upon tend performance rather than tender of any "unpaid portion of the price.

At the March 1997 meeting of the Article 9 Drafting Committee, that Committee agreed in p of the pre-paying buyer under subsection (a). In addition, the Article 9 Committee agreed in princip buyer under this section may be a buyer in the ordinary course prior to obtaining possession of the g

The difference between a pre-paying and a financing buyer is that the former usually pays pa receiving goods that are identified and conforming to the contract and the latter pays to finance the processing of goods that are likely to be unfinished at the time of identification. Revised Section 2- situations, requires the buyer to tender the full contract price before identified but unfinished goods extent to which a financing buyer can perfect a purchase money security interest in non-conforming determined under Article 9. See Report, PEB Study Group, Uniform Commercial Code, Article 9 1

3. Subsection (b) is the same in substance as former Section 2-716(3). This provision has b section as a buyer's remedy as opposed to a remedy available to either party under Section 2-807. T been stated more broadly as stated in Section 2A-521 in order to cover variations in state law legal r of personal property. Although the PEB study report recommended that this provision be deleted as the buyer's right to specific performance (Section 2-807), the right to replevin the goods is a legal r to the equitable limits on granting specific performance and thus may be available to the buyer in a would not order specific performance.

4. Subsection (c) is a new provision to clarify when the rights of the buyer under either subs sufficiently vested to determine priority of claims to the goods as against third parties who may atta goods. Subsection (c) states that the buyer's rights vest upon identification, even though the seller r differently, the rights vest conditionally but, if there is a breach, relate to the time of identification.

What about creditors of the seller? Revised Section 2-505(a) (Nov. 1996) states that the rig seller with respect to goods identified to the contract and retained and subject to the buyer's rights u

those rights vest prior to the time when a creditor's in rem claim (judgment lien or security interest)
Thus, if the buyer's rights vest (upon identification) before the creditor's claims attach, buyer gets p
free of creditor claims. If, however, the rights vest after attachment, the buyer is subject to the attac
qualifies as a buyer in the ordinary course of business under Article 9.

5. **CISG.** CISG has no provision dealing with a buyer's right to goods on the seller's insol
general, does not deal with the claims of the seller's creditors to those goods. But see Articles 41-4
however, states that the "buyer may require performance by the seller of his obligations without re
buyer has prepaid the price. Revised Section 2-824 is now closer to Article 46(1) in granting the bu
specific performance. See CISG Article 28, which states that a court is not "bound to specifically
CISG "unless the court would do so under its own law in respect of similar contracts of sale not gov
Convention.

SECTION 2-825. COVER; BUYER'S PURCHASE OF SUBSTITUTE GOODS.

(a) If a seller breaches a contract, the buyer may cover by making in good faith and without any reasonable purchase of, contract to purchase, or arrangement to procure comparable goods to su from the seller.

(b) A buyer that covers in the manner required by subsection (a) may recover damages mea covering less the contract price, together with any incidental or consequential damages, less expens the seller's breach.

(c) A buyer that fails to cover in a manner required under subsection (a) is not barred from remedy.

SOURCE: Sales, Section 2-712.

Notes

1. Section 2-825 makes no changes in substance from former Section 2-712.

2. If, after a breach, specific performance is not available and the buyer still needs the good preferred remedy. Subsection (a) authorizes "cover and promotes flexibility in the sources and nat a buyer may cover in good faith by making the goods itself, purchasing from the breaching party or parties if those transactions are reasonable. Similarly what is "reasonable may vary with whether t commercial or a consumer buyer. Finally, the phrase "comparable goods suggests that the goods c not conform exactly to those promised under the breached contract.

3. Subsection (b) conditions the "cover measure of damages upon satisfying subsection (a) would not be available if the buyer acted in bad faith, delayed unreasonably or made an unreasonab arrangement. Presumably, the burden is on the buyer to prove that it is entitled to damages under su recommended by the PEB study report, if a buyer covers under subsection (a), the buyer should not market price damages under the principle of Section 2-803(c) without stating the principle in this se Comment to Section 2-803.

4. As in Section 2-819, a buyer who covers in bad faith may be limited to the damages that recovered by a good faith cover under Section 2-825(b). See Section 2-803.

5. **CISG.** Under Article 75, if the contract is avoided and the buyer has "bought goods in re damages are measured by the "difference between the contract price and the price in the substitute t any further damages under article 74. If the buyer has made a purchase under Article 75, damages u available.

SECTION 2-826. BUYER'S DAMAGES FOR NONDELIVERY OR REPUDIATION.

(a) If a seller breaches a contract, the buyer may recover damages based on market price, to incidental and consequential damages, less expenses avoided in consequence of the seller's breach,

(1) Except as provided in subsection (2), the measure of damages is the market price fo at the time of the breach or when the buyer learned of the breach, whichever is later, less the contra

(2) In the case of a repudiation governed by Section 2-712, the measure of damages is t comparable goods at the time when a commercially reasonable period after the buyer learned of the the contract price. The commercially reasonable time includes the time for awaiting a retraction un the time needed to obtain substitute performance.

(b) Market price is determined at the place for tender. However, in cases of rejection after of acceptance, it is determined at the place of arrival.

SOURCE: Sales, Section 2-713.

Notes

1. Section 2-826 makes several changes to former Section 2-713. This provision is parallel to recover damages based upon the market price under Section 2-821. Subsection (a) changes the r

price to the later of the time of the breach or when the buyer learned of the breach whichever is late
2-713(1) measured the market price when the buyer learned of the breach. Thus, if the seller failed
October 1 but the buyer did not learn of that failure until October 4, market price is determined on

2. If there is a repudiation, market price is measured at the end of the commercially reasona
repudiation. Thus, market price is measured at the time when the buyer should have covered. See
Karl O. Helm Aktiengesellschaft, 736 F.2d 1064, *rehearing denied*, 750 F.2d 69 (5th Cir. 1984).
Under this approach, whether the buyer had a valid reason for not covering is irrelevant. See also,
Elevator Co. v. Frosh, 494 N.W.2d 347 (Neb.App. 1992), holding that the time for determining ma
the time the buyer learned of the repudiation if it was commercially reasonable to cover on that date
2-713 and Section 2-723(1), if the case came to trial before the time for performance, the market pr
the buyer learned of the breach. This was criticized as being inconsistent with the anticipatory repu
allowed an aggrieved buyer to await the seller's performance for a commercially reasonable time.
when the case comes to trial is not relevant to when the market price is measured under Section 2-8

If the seller repudiated on September 15 and the contract performance date is Oct. 1, under
market price would be measured at the end of the time the buyer awaited retraction (presumably no
the end of the time needed for cover (sometime after Oct. 1). If the buyer actually covered, howeve
measured under Section 2-825. If the seller just didn't deliver on Oct 1, as opposed to repudiating
price would be measured either on the date of the breach (Oct 1.) or when buyer learned of the brea

As stated in the notes after Section 2-821, this leaves the time for measuring market price o
by the breaching party. Any repudiation would extend the time for measuring market price beyond
pointed out in those notes, stating one time for measuring market price, subject to the mitigation pri
2-803(b), is a cleaner way of measuring market price damages and much less subject to manipulatio
party. Under this approach, subsection (a)(2) would be eliminated and market price would be meas
case as stated in subsection (a)(1). Measurement of the market price before the time stated in subse
depend upon the mitigation principle.

3. Section 2-826 does not freeze the contract price to the same time as measurement of mar
the agreed price contains escalation provisions, the court must attempt to interpret and apply those
principle of putting the party in the position it would have been if the contract had been performed.

4. Section 2-826, like Section 2-821 for the seller, is the buyer's "fall back remedy. It is a
"cover, in that damages are measured by the difference between the contract price and the market
goods at a time when "cover could have or should have been made. Like Section 2-821(a), choice
2-826(a) is limited by the remedial policy in Section 2-803(c): It must not put the buyer in a substan
than full performance would have. This approach rejects cases like *Tongish v. Thomas*, 840 P.2d 4
holding that the specific terms of Section 2-713(1) of the 1990 Official Text control the general rem
Section 1-106(1). The mitigation principle in Section 2-803 also serves to control the buyer's reme
other hand, a buyer who properly covers under Section 2-825(a) is precluded from seeking damages

5. Subsection (b) is the same in substance as former Section 2-713(2).

6. **CISG.** Under Article 76, if the contract has been avoided and there has been no "purcha
75, the buyer may recover the difference between the contract price and "current price at the time o

any further damages recoverable under article 74.

SECTION 2-827. BUYER'S DAMAGES FOR BREACH REGARDING ACCEPTED GOODS.

(a) A buyer that has accepted goods and not justifiably revoked acceptance and has given n Section 2-707(c)(1) may recover as damages for any nonconforming tender the loss resulting in the events from the seller's breach as determined in any reasonable manner.

(b) A measure of damages for breach of a warranty of quality is the value of the goods as w value of the goods accepted at the time and place of acceptance [unless special circumstances show different amount].

(c) A buyer may recover incidental and consequential damages.

SOURCE: Sales, Section 2-714.

Notes

1. There are no changes of substance in former Section 2-714. Subsection (b), however, is s of damages rather than "the measure of damages and is limited to breaches of a warranty of quality breach of a warranty of title are measured under subsection (a) rather than subsection (b). When ph "the , the unless clause does not make as much sense. Should it be eliminated?

2. Section 2-827 applies when the buyer has accepted the goods, Section 2-706, and has no acceptance under Section 2-708. Subsection (a) states the general damage rule, see Section 2-804, one measure of damages for breach of a warranty of quality, unless "special circumstances justify Subsection (c) states simply that incidental and consequential damages under Sections 2-805 and 2- addition to damages under Section 2-827.

3. Subsection (b) has been frequently litigated, with sometimes puzzling results. The key n a warranty of quality, i.e., Sections 2-403, 2-406, and 2-407, is the difference between the market v price, although that may be prima facie evidence of market value) of the goods as warranted and the goods delivered at the time of acceptance rather than the time of tender. Damages have been deter ways: (a) If the goods are non-conforming but usable without repairs, the court simply determines t the market value at the time of acceptance; (b) If the goods are not usable without repairs, the court value as delivered plus the reasonable cost of repairs, which constitutes the market value of the goo the goods are not usable under any circumstances, the court determines the difference in market val and the cost to purchase (market value) goods as warranted. See *Schroeder v. Barth, Inc.*, 969 F.2d 1992).

4. It is not always clear what "special circumstances show damages of a different amount a amount should be. For example: (1) Suppose a seller warrants to a farmer that seeds are X when in contract excludes liability for consequential damages. As a result of the breach of warranty, the far because Y won't grow on the land. The market value of X and Y at the time of acceptance are the s found "special circumstances on these facts and awarded the farmer the value of the lost crop. The really consequential damages liability for which was excluded by the contract. (2) Suppose that the specific computer system would satisfy the buyer's particular purposes. The specific system, howe purposes and another, more expensive system was required. Again, special circumstances suggest t measured by the difference in the market value of the system delivered and the market value of a h replacement system that would satisfy the particular purposes rather than the specific system promi *Computer Systems, Inc. v. Staten Island Hospital*, 788 F. Supp. 1351 (D. N.J. 1992). (3) Another category where special circumstances frequently exist is damages for breach of warranty of title. Se *Leasing, Inc. v. Goushy*, 795 F.2d 693 (D. N.J. 1992). These damages are now to be measured und (a).

5. **CISG.** Under the Convention, a buyer has more power to "require the seller to perform has more power to "cure non-conformities than under Article 2. After delivery where the seller ha however, Article 50 provides that if the goods "do not conform with the contract and whether or no been paid, the buyer may reduce the price in the same proportion as the value that the goods actuall time of delivery bears to the value that conforming goods would have had at that time. Thus, Arti measurement standard in 2-827(b) with the buyer's power to reduce the price granted in Section 2-8

SECTION 2-828. DEDUCTION OF DAMAGES FROM PRICE. A buyer, on so notifying a seller, may deduct all or any part of the damages resulting from any breach from any still owed under the same contract.

SOURCE: Sales, Section 2-717.

Notes

1. There are no changes of substance in former Section 2-717 of the 1990 Official Text, co 50.

2. At the March 1997 meeting, there was some discussion of whether this is too limited a re ability to deduct from the unpaid price might be appropriate in other situations. After the meeting, proposed for discussion and decision:

> If the buyer is a consumer and a remote buyer as defined in Section 2-401(4), that buyer, or a tra that buyer, on so notifying the immediate seller of that buyer, may deduct all or any part of dam any breach of warranty under Section 2-404 that is related to the sale from any part of the contra under the related contract of sale to the immediate seller, or to any transferee of that seller. If th has been paid, a consumer buyer who is a remote buyer as defined in Section 2-401(4) is entitle amount of the contract price paid, from the immediate seller, or its transferee, for all or any part

resulting from a breach of warranty under Section 2-404 related to the sale.

This could be added as subsection (b) and would allow a consumer remote buyer who suffe of the obligation under Section 2-404 to deduct its damages from the price still owed to the immedi the immediate seller would recover from the remote seller the amount so deducted. If the price is p would have a right of refund for the amount of damages resulting from the breach of the remote obl would obtain that refund from the immediate seller or its transferee.

This is not a set off in the traditional sense as the parties are not mutual. The immediate sel not an assignee of the remote seller's rights and obligations to the buyer. Thus this provision could consistent with either traditional set off rights or rights of a contract assignee. This provision woul breach of the remote seller's obligation against the immediate seller who has not breached its own c

SECTION 2-829. RECOVERY OF PRICE; BUYER'S SECURITY INTEREST IN REJECTED GOODS.

(a) If the seller has breached the contract, the buyer may recover any payments made on the are not accepted.

(b) On rightful rejection or justifiable revocation of acceptance, a buyer has a security inter buyer's possession or control for any payments made on their price and any expenses reasonably in inspection, receipt, transportation, care, and custody. The buyer may hold the goods and resell them for an aggrieved seller under Section 2-819, except that the buyer shall give the seller reasonable no resale and must account to the seller for any excess of the proceeds of resale over the amount of the in this subsection.

SOURCE: Sales, Section 2-711.

Notes

1. Pursuant to the revision of Section 2-823 to be a pure index of remedies and that should substantive rights, the buyer's right to return of the price from former Section 2-711(1) had to be se Subsection (a) does so.

2. Subsection (b) is the same in substance as former Section 2-711(3) and former Section 2 (b) creates a statutory security interest on behalf of the buyer in limited circumstances and for a lim compass, the subsection deals with when the security interest arises, what it secures, how long it las the buyer's rights as a secured party and its duties as a bailee, and the right of resale. Compare Sect

the buyer is exercising a security interest in the goods, should the buyer's resale be subject to the A
or should current law be continued and make the buyer comply with the seller's resale provisions in
that the buyer resells under Section 2-819 to protect a security interest in goods in which the seller h
interest. The buyer must account to the seller for any excess over the claims secured and must give
intended resale to the seller. The buyer's obligation under Section 2-704 or 2-705 is subject to the b
subsection.