

1 **UNIFORM COMMERCIAL CODE**

2 **REVISED ARTICLE 2 SALES**

3 _____
4 **NATIONAL CONFERENCE OF COMMISSIONERS**

5 **ON UNIFORM STATE LAWS**

6 _____
7 **January 24, 1997 Draft**
8 _____

9 **PART 1**

10 **GENERAL PROVISIONS**

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

13 **SECTION 2-102. DEFINITIONS.**

14 (a) In this article:

15 (1) "Authenticate" means to execute or adopt a symbol, including a digital signal,
16 identifier, or other symbol, or to do an act that encrypts a record or an electronic message in
17 whole or in part, with present intent to sign [or authenticate] a record or term that contains the
18 authentication or to which a record containing the authentication refers. **[2B-102(a)(2)]**

19 (2) "Between merchants", with respect to a transaction, means between parties
20 both of which are chargeable with the knowledge or skill of merchants.

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

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

4 (5) "Commercial unit" means a unit of goods which by commercial usage is a
5 single whole for purposes of sale and whose division materially impairs its character or value in
6 the relevant market or in use. A commercial unit may be a single article, such as a machine; a set
7 of articles, such as a suite of furniture or a line of machinery; a quantity, such as a gross or
8 carload; or any other unit treated in use or in the relevant market as a single whole. **[Conformed
9 in substance to 2A-103(1)(c).]**

10 (6) "Conforming" goods or performance under a contract for sale means goods or
11 performance that are in accordance with the obligations under the contract. **[Style, 11/3/96]**

12 (7) "Conspicuous", with reference to a term, means so displayed or presented that
13 a reasonable person against whom it is to operate would likely have noticed it or, in the case of
14 an electronic message intended to evoke a response without the need for review by an individual,
15 in a form that would enable the recipient or the recipient's computer to take it into account or
16 react to it without review of the message by an individual. **[The last sentence in the July, 1996
17 draft was deleted. Compare 2B-102(6).]**

18 (8) "Consumer" means an individual who buys or contracts to buy goods, that at
19 the time of contracting, are intended by the buyer primarily for personal, family or household use.

20 (9) "Consumer contract" means a contract for sale between a seller regularly
21 engaged in the business of selling and an individual who buys or contracts to buy goods, that at
22 the time of contracting, are intended by the buyer primarily for personal, family or household use.

1 (10) "Contract" includes a contract for sale.

2 (11) "Contract for sale" means a present sale or a contract to sell at a future date,
3 whether or not the goods are future goods..

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

5 (13) "Electronic agent" means. . . . [Follow 2B-102(a)(13)(Nov. 1996)]

6 (14) "Electronic message" means. . . . [Follow 2B-102(a)(14)(Nov. 1996)]

7 (15) "Electronic transaction" means a transaction in which a contract is formed by
8 the use of an electronic message or electronic response to a message, whether or not reviewed by
9 an individual. [2B-102(a)(15)(Nov. 1996)]

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

17 (17) "Foreign exchange contract" is a contract for the exchange of money of
18 different nations which, in the understanding of the parties or trade practice, is to be performed
19 by the exchange of bank balances or bank credits.

20 (18) "Future goods" means goods that at the time of contracting are neither
21 existing nor identified.

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

1 commercial standards of fair dealing.

2 (20) "Goods" means all things, including specially manufactured goods, that are
3 movable at the time of identification to a contract for sale or, unless the context otherwise
4 requires, future goods. The term includes the unborn young of animals, growing crops, or other
5 identified things attached to realty as described in Section 2-108. The term does not include
6 money in which the price is to be paid, .the subject of foreign exchange contracts, documents,
7 information, instruments, accounts, chattel paper, general intangibles, or [add other new Article 9
8 collateral]

9 (21) "Letter of credit" means an irrevocable letter of credit issued by a financing
10 agency of good repute and, if the shipment is overseas, of good international repute.

11 (22) "Lot" means a parcel or single article that is the subject matter of a separate
12 sale or delivery, whether or not it is sufficient to perform the contract. [**Conformed to 2A-**
13 **103(1)(s)**]

14 (23) "Merchant" means a person that deals in goods of the kind involved in the
15 transaction, a person that by occupation purports to have knowledge or skill peculiar to the
16 practices or goods involved in the transaction, or a person to which knowledge or skill may be
17 attributed by the person's employment of an agent or broker or other intermediary that purports to
18 have the knowledge or skill. [**Conformed in grammatical style to 2B-102(a)(26).**]

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

20 (25) "Receipt":

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

22 (B) with respect to an electronic transaction, means . . . [**Follow 2b-**

1 **102(a)(29)(Nov. 1996)]**

2 (26) "Record", as a noun, means information that is inscribed on a tangible
3 medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

4 **[5-102(a)(14), 2b-102(a)(30)]**

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

6 (28) "Seller" means a person who sells or contracts to sell goods.

7 (29) "Standard form" means a record prepared by one party in advance for general
8 and repeated use which substantially consists of standard terms and is used in a transaction
9 without negotiation of, or changes in, the substantial majority of the standard terms. Negotiation
10 or customization of price, quantity, method of payment, or time or method of delivery does not
11 preclude a record from being a standard form. **[2B-102(a)(34)(Nov. 1996), except that**
12 **“quantity” rather than “volume” is used.]**

13 (30) "Standard terms" means terms prepared in advance for general and repeated
14 use by one party. **[2B-102(a)(35)(1996); UNIDROIT Principles, Art. 2.19(2)]**

15 (31) "Termination" means an act by a party, pursuant to a power created by
16 agreement or law, which puts an end to a contract for a reason other than for breach by the other
17 party. **[Conformed to 2A-103(1)(z), except that “breach” rather than “default” is used. See**
18 **2B-102(a)(37).]**

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

20 "Check". Section 3-104(e).

21 ...

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

1 apply throughout this article.

2 **SOURCES: Sales (July, 1996); Licenses (October, 1996).**

3 **Notes**

4 1. These definitions come primarily from the July, 1996 Draft of Article 2, which, in
5 turn, drew upon the October, 1995 and the May, 1995 Drafts. Sources not noted come from the
6 1990 Official Text of Article 2. Other definitional sources include Article 2A, Article 2B,
7 Licenses (Oct. 1996) and the UNCITRAL Draft Model Law on EDI. Definitions that relate
8 primarily to licenses have been excluded from this Draft.

9 2. Following the Sept. 1996 meeting of the Article 2 Drafting Committee, the last
10 sentence in the July, 1996 definition of "conspicuous" was deleted. Rather, the situations listed
11 in that sentence will be noted in the comments as factors to be considered rather than as
12 conditions to establishing a safe harbor. Unlike 1-201(10), the definition does not state that the
13 decision on conspicuous is for a court as a matter of law. Depending on the circumstances, the
14 decision is for the trier of fact. The definition does not conform to 2B-102(a)(6)(Nov. 1996), and
15 this has sparked controversy.

16 **The policy questions are whether (1) compliance with any one of the “factors” in the**
17 **last sentence should constitute a “safe harbor” and (2) the court or jury should decide the**
18 **question. What ever definition is agreed, it should ultimately be in Article 1.**

19 3. The July, 1996 Draft contained three alternative definitions of good faith. At the 1996
20 Annual Meeting, the Conference voted to adopt a modified version Alternative C. Alternative C
21 provided that "good faith" means "honesty in fact and the observance of reasonable commercial
22 standards of fair dealing in the conduct or transaction concerned." The Conference voted to
23 delete the phrase after "fair dealing" and follow the definition in 3-103(a)(4). Accord: 2B-
24 102(a)(16). This is not a significant change, since the duty of good faith applies to the
25 "performance and enforcement" of the contract. Section 1-203. But see 5-102(a)(7) which
26 provides that good faith means "honesty in fact in the conduct or transaction concerned."

27 4. The July, 1996 Draft contained four new, important definitions: Standard form,
28 standard term, manifest assent and opportunity to review. As a matter of policy, the November,
29 1996 Draft conforms to Article 2B on the substance of these definitions. In the January, 1997
30 Draft, the terms “standard form” and “standard terms” are used only in 2-206. **The policy**
31 **question remains: Should a broader use of these concepts apply in commercial contracts?**

32 **Section 2-103 on “manifesting assent” and “opportunity to review” was deleted at**
33 **the November, 1996 meeting of the Drafting Committee. See revised 2-206, which relies**
34 **upon other concepts. See also, 2B-112 and 2B-113.**

1 1984)(explores theory of extension by analogy). Also, by including “transactions in goods in
2 subsection (a), courts may apply Article 2 to transactions that are not sales unless the particular
3 sections that apply are limited to contracts for sale.

4 5. Embedded software. Subsection (b) deals with transactions where both goods and
5 information licensed under Article 2B are involved. See 2B-103 on the scope of Article 2B.
6 Presumably, Article 2B governs all disputes over “licenses of information and software
7 contracts and “related support and maintenance agreements. 2B-103(a). Article 2, however,
8 may apply to transactions excluded from Article 2B under 2B-103(d). Thus, a “sale or lease of a
9 copy of a computer program that was not developed specifically for a particular transaction if the
10 program is “embedded in goods is excluded by 2B-103(d)(3) and is governed by Article 2.

11 6. Subsection (c), which is subject to subsection (b), delineates the line between Article 2
12 and other articles in the UCC, without attempting to define it.. It follows 2B-103(b).

13 7. Obligations created by foreign exchange contracts, which are defined in 2-102(a)(17),
14 are excluded from Article 2.

15 **SOURCES: 2B-103 (Feb. 1996); Sales (October, 1995)**

16 **SECTION 2-104. TRANSACTIONS SUBJECT TO OTHER LAW.**

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

18 (1) certificate of title statute of this State: (list any certificate of title statutes
19 covering automobiles, trailers, mobile homes, boat, farm tractors and the like);

20 (2) final consumer protection decision of a court of this State existing on the
21 effective date of this article, or consumer protection statute of this State, or; and

22 (3) [List any other law of this State to which Article 2 is subject].

23 (b) In the case of a conflict between this article and a statute or decision referred to in
24 subsection (a), the statute governs or decision.

25 (c) Failure to comply with a statute or decision referred to in subsection (a) does not itself
26 constitute a breach of contract or affect the applicability of this article.

27 **SOURCES: 2A-104. See 2B-104.**

1 applies to "validity" disputes involving unconscionability, §2-105, claims for personal injury
2 resulting from a breach of warranty, §2-706(a)(2), and disputes over title. Finally, CISG applies
3 only to disputes between the parties to a contract for sale. Lack of contractual privity is a defense
4 in a suit under CISG. Under Article 2, however, a remote buyer may be able to sue a seller for
5 breach of warranty. Lack of contractual privity, in these cases, is not a defense. See §2-318.
6 Since Article 2 does not define "seller" to exclude a seller under CISG, to the extent that lack of
7 privity is not a defense a remote United States buyer of imported goods presumably can sue a
8 Canadian seller for breach of warranty under Article 2.

9 3. Although Article 2 assumes that a court will adjudicate the dispute, the parties may
10 select the forum by agreement or agree that the dispute will be adjudicated in arbitration. Unless
11 otherwise stated, the use of the word "court" in Article 2 includes alternative tribunals to which
12 the parties may turn by agreement for adjudication.

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

14 (a) If a court finds as a matter of law that a contract or any terms thereof was
15 unconscionable at the time it was made or was induced by unconscionable conduct, the court
16 may refuse to enforce the contract, enforce the remainder of the contract without the
17 unconscionable term, or so limit the application of any unconscionable term as to avoid an
18 unconscionable result.

19 (b) Before making a finding of unconscionability under subsection (a), the court, on
20 motion of a party or its own motion, shall afford the parties a reasonable opportunity to present
21 evidence as to the setting, purpose, and effect of the contract or term thereof or of the conduct.

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

23 **Notes**

24 1. Except for the language "induced by unconscionable conduct", Section 2-105 is the
25 same as §2-302 in the 1990 Official Text. Section 2-105 does not adopt the broader language of
26 §2A-108. A proposal to conform original §2-302 to §2A-108(2) & (3) was rejected by the
27 Drafting Committee at the October, 1993 meeting. The phrase "induced by unconscionable
28 conduct," taken from §2A-108(2), was added and approved at the Annual Meeting of the
29 Conference in July, 1996. The "induced" phrase, however, does not appear in 2B-109(Nov.
30 1996). See 2A-108, comments, and Uniform Consumer Credit Code 5.108, Comment 1.

1 What is “unconscionable conduct” that induces a contract that is otherwise conscionable?
2 Possible examples include cases where excessive pressure is placed upon senior citizens (a used
3 car dealer takes the keys to the car of prospective buyers and won’t let them leave for food or
4 medication until they buy the used car) or the contract is presented in a manner so that the
5 purchaser cannot see that an important term has been changed. In short, the conduct approaches
6 but does not clearly reach defenses such as duress or fraud. **These examples and the concept of**
7 **“inducement” were criticized at the Meeting of the ALI Article 2 Consultative Group in**
8 **November, 1996. The issue will be revisited after revised 2-206 is completed.**

9 2. The expanded treatment of consumer contracts and standard form contracts in Article
10 2 is a particularized application of unconscionability concepts. See, e.g., §§2-206 and 2-316.
11 Nevertheless, §2-105 may still apply to a dispute even though the requirements of those
12 particular sections has been satisfied. Thus, a disclaimer of warranty that satisfies the
13 requirements of §2-316(b) or a standard form to which a commercial party has manifested assent,
14 2-206(a), may still be unconscionable on other grounds. Those grounds, however, are limited to
15 cases where there was little or no opportunity in the market to find needed goods with different
16 terms and where the terms offered were unreasonably favorable to the buyer or seller. These
17 cases are few and far between. See, e.g., *Martin v. Joseph Harris Co., Inc.*, 767 F.2d 296 (6th Cir.
18 1985).

19 3. The Drafting Committee limited unconscionability to the time of contracting and
20 concluded that the remedy should be avoidance or limitation of the contract or clause rather than
21 damages. Moreover, the court or other tribunal rather than a jury determines whether a "contract
22 or any clause thereof is unconscionable."

23 **SECTION 2-106. INTERESTS AND PART INTERESTS IN GOODS.**

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

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

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

29 (d) An undivided share in a described bulk of fungible goods is sufficiently identified to
30 be sold, even if the quantity of the bulk is not determined. Any proportion of the bulk or quantity
31 agreed upon by number, weight, or other measure, to the extent of the seller's interest in the bulk,

1 may be sold to the buyer. The buyer is an owner in common.

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

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

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

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

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

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

21 **Notes**

22 1. Section 2-107 implements a suggestion by the California State Bar Committee that

1 there should be consistency in terminology. Thus, the phrase "real property" is substituted for the
2 terms "realty" and "land" on the assumption that all mean the same thing. Similarly, the
3 undefined phrase "contract to sell" [found in the original Article 2] was replaced by the defined
4 phrase "contract for sale," which includes a contract for the sale of future goods. The phrase
5 "contract for the sale of future goods" is proposed to replace "contract to sell."

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

11 3. What about long-term sale and leaseback of buildings and structures? In typical cases,
12 an owner of improved or unimproved land will convey it and then take a leaseback for a term of
13 years. At some point in the leaseback, the lessee (formerly the owner) has a right to remove and,
14 presumably, sell structures on the land. In general, Article 2 does not apply to this transaction
15 even though the owner has a right to sever and sell. If, however, the owner actually sells the
16 structures to a third person and reserves the right to sever, that transaction is covered by 2-107.
17

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

19 (a) Except as otherwise provided in Section 1-103 and this article, the effect of any
20 provision may be varied by agreement.

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

23 (c) Whenever this article allocates a risk or imposes a burden as between the parties, an
24 agreement may shift the allocation and apportion the risk or burden

25 **Notes**

26 1. Section 2-108 retains the general principle of Section 2-109(a) of the July, 1996 Draft
27 but deleted subsection (b), which purported to list those sections which could not be limited or
28 varied by agreement. In the view of the Drafting Committee, subsection (b) duplicated the
29 principle of variance in 1-102(3) and posed an unacceptable risk of unintended under and over
30 inclusion in the drafting. Compare 2B-114.

31 2. Without purporting to make an exclusive statement, the comments should identify the
32 sections which specifically prohibit variation. See, e.g., 1-203 & 2-102(a)(19), 2-202(b), 2-106,

1 2-316(a) and 2-318. See also, 2-710(a), §2-403, and §2-714(a).

2 **PART 2**

3 **FORMATION, TERMS, AND READJUSTMENT OF CONTRACT**

4 **SECTION 2-201. FORMAL REQUIREMENTS; STATUTE OF FRAUDS; SEALED**
5 **INSTRUMENTS.**

6 (a) Except as otherwise provided in this section, an agreement for the sale of goods for the
7 price of [\$1,000] or more which is otherwise valid as a contract is not enforceable by way of action
8 or defense, unless there was a record authenticated by the party against which enforcement is sought
9 or by his agent sufficient to indicate that a contract for sale has been made between the parties.

10 (b) A record is not insufficient merely because it omits or incorrectly states a contractual
11 term. However, a contract is not enforceable under subsection (a) beyond the quantity of goods
12 agreed to in the authenticated record.

13 (c) Between merchants, including a farmer when buying or selling farm products, if within
14 a reasonable time a record in confirmation of the contract and sufficient against the sender under
15 subsection (a) is received and the party receiving it has notice of its contents, the record satisfies the
16 requirements of subsection (a) against such party unless notice of objection to its contents is given
17 by record within 10 days after it is received.

18 (d) An otherwise valid contract that does not satisfy the requirements of subsection (a) is
19 nevertheless enforceable:

20 (1) If the goods are to be specially manufactured for the buyer and are not suitable for
21 sale to others in the ordinary course of the seller's business and the seller, before notice of

1 repudiation is received and under circumstances which reasonably indicate that the goods are for the
2 buyer, has made either a substantial beginning of their manufacture or commitments for their
3 procurement; or

4 _____ (2) If the party against whom enforcement is sought admits in a pleading, testimony
5 or otherwise in court that a contract for sale was made, but the contract is not enforceable beyond
6 the quantity of goods admitted; or

7 _____ (3) to the extent that performance has been tendered by one party and accepted by the
8 other party; or

9 _____ (4) to the extent of an agreement enforceable under this section by which the parties
10 waive the requirements of this section as to future transactions.

11 _____ (e) A contract enforceable under this section is not unenforceable merely because it is not
12 capable of being performed within one year after its making.

13 (f) The affixing of a seal to a record evidencing a contract or an offer does not make the
14 record a sealed instrument. The law with respect to sealed instruments does not apply to the contract
15 or offer.

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

17 **Notes**

18 1. Section 2-201(a) in the November, 1996 draft abolished the statute of frauds for Article
19 2. This result was strongly recommended by the PEB Study Group and was approved by the Drafting
20 Committee on March 6, 1993. A motion to restore the statute of frauds was rejected by a voice vote
21 of the Commissioners at the 1995 and 1996 Annuals Meeting of NCCUSL. **However, at the**
22 **November, 1996 meeting, the Drafting Committee decided to restore “some version” of the**
23 **statute of frauds. The above version, which is based upon the able draft by Professor W.**
24 **David East, makes it easy to satisfy or avoid the statute of frauds.**

25 2. Subsections (a) and (b) follow original 2-201(1), with some clarifications: (1) The

1 diminimus figure is \$1,000 rather than \$500 (why not \$10,000?); (2) The phrase “authenticated
2 record is used; (3) It is clearer that the record requirement is in addition to an agreement that is
3 “otherwise valid as a contract; (4) The phrase “agreed to in the record replaces “shown in the
4 writing.

5 3. Subsection (c) follows original 2-201(1), except that “notice replaces “had reason to
6 know. Presumably, notice “given means notice “received rather than notice “sent.

7 What about the farmer as a merchant? The current draft includes “farmer as a merchant
8 when “selling or buying farm products without defining “farmer or “farm products. Dave East’s
9 draft contains definitions. What is the best way to resolve this problem once and for all? One
10 suggestion: Settle the problem in the definition of merchant.

11 4. Subsection (d) follows original 2-201(3). Subsection (d)(2) is still troublesome. Clearly,
12 the failure to raise the defense in a timely fashion is a waiver but “admissions otherwise made by
13 lawyers in pleadings designed to raise the defense should not be a waiver. Beyond pleadings, if
14 someone admits the contract and the quantity in depositions, testimony and otherwise while under
15 oath [either in pre-trial discovery or during trial], the waiver should kick in. In short, current 2-
16 201(3)(b) is unsatisfactory and needs some work

17 Subsection (d)(4) is included for discussion in light of necessary revisions to 2-210. Its one
18 thing to waive a statute of frauds defense by not raising it and quite another to agree to waive the
19 statutory defense in the future. Is this agreement against public policy? See 1-102, comment 2.
20 Certainly, it is different from the waiver in the future of an agreed “no oral modification clause.
21 My judgment is to say nothing in the statute about this.

22 5. What about the “estoppel exception, principally Restatement (Second) Contracts 139
23 which is used by the courts. The trick is to say that 2-201(d), by stating some exceptions to
24 subsection (a), does not preempt the estoppel exception without spelling out what that exception is
25 in the statute.

26 6. Subsection (e) is new. See 2-201(a) (Nov. 1996).

27 7. Subsection (f) is 2-201(b) in the November, 1996 Draft. I kept it here rather than creating
28 a new section (and messing up the numbers again).

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

30
31 (a) Terms on which confirmatory memoranda [records] of the parties agree, or which are
32 otherwise set forth in a record intended by the parties as a final expression of their agreement with
33 respect to the included terms, may not be contradicted by evidence of a previous agreement or

1 contemporaneous oral agreement. However, the terms may be explained and, in addition, terms may
2 be supplemented by evidence of:

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

4 (2) noncontradictory additional terms unless the court finds that the record was
5 intended as a complete and exclusive statement of the terms of the agreement.

6 (b) In determining whether the parties intended a record to be final or complete and exclusive
7 with respect to some or all of the terms, the following rules apply:

8 (1) The court shall consider all evidence relevant to the intention of the parties to
9 integrate the record.

10 (2) Except in a consumer contract, a contractual term indicating that the record
11 completely embodies the agreement of the parties is presumed to state the intention of the parties on
12 the issue.

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

14 **Notes**

15 1. If, after a preliminary hearing authorized by §2-202(b)(1), the court concludes that the
16 parties intended a partially integrated writing, §2-202(a) states when evidence of prior agreements
17 or contemporaneous oral agreements is excluded. Evidence is excluded if it contradicts terms in the
18 record but evidence is admitted if it proves a non-contradictory additional term. This latter ground
19 for admissibility changes original §2-202, which excluded evidence of "inconsistent additional
20 terms," and arguably narrows the effect of a partial integration. The change follows comment 3 of
21 the original §2-202, which stated that if the "additional terms are such that, if agreed upon, they
22 would certainly have been included in the document in the view of the court, then evidence of their
23 alleged making must be kept from the trier of fact." **But see 2B-301(a)(2), which retains the**
24 **"consistent additional terms" language.**

25 2. The effect of a totally integrated record is that both contradictory and non-contradictory
26 additional terms are excluded. The best evidence of a total integration is a so-called "merger" clause.
27 The last sentence of §2-202(b) in the May, 1994 Draft stated that a merger clause does not create a
28 conclusive presumption of a total integration. Although this sentence was consistent with the case

1 law, see e.g., *ARB, Inc. v. E-Systems, Inc.*, 663 F.2d 189, 198-199 (D.C. Cir. 1980), it was removed
2 at the March, 1995 meeting of the Drafting Committee. As a practical matter, a merger clause
3 creates a presumption that both parties intended a total integration and puts a difficult burden on one
4 party to establish the contrary. **At the September, 1996 meeting, the Drafting Committee voted**
5 **to include 2-201(b)(2), limiting the effect of the presumption to contracts other than consumer**
6 **contracts. See 2B-301(b)(Alternative 2), stating that a merger clause not in a standard form**
7 **is "presumed to state the intent of the parties on this issues."**

8 3. In the case of either a partial or a total integration, terms in the record may be "explained
9 and also may be "supplemented...by course of dealing or usage of trade or by course of performance"
10 §2-202(a)(1). Evidence intended to explain a term in a record is relevant to contract interpretation.
11 The parol evidence rule does not apply. Evidence intended to supplement a term in a record poses
12 in different language the problem of whether additional terms are contradictory or not. But unless
13 the record clearly excludes or contracts out of the trade usage or course of dealing or performance,
14 both §1-205(3) and §2-202(a)(1) support admissibility to supplement even though it may also appear
15 to vary or contradict that term. The reason is the special status of this evidence (it is not directly
16 related to pre-contract negotiations) and the assumption that the parties intended to include it unless
17 otherwise clearly agreed. See, e.g., *Nanakuli Paving & Rock Co. v. Shell Oil Co., Inc.*, 664 F.2d 772
18 (9th Cir. 1981).

19 4. Subsection (c) of the May, 1994 Draft, which stated that before extrinsic evidence was
20 admissible to interpret a contract the court must find that the contract was ambiguous, was deleted
21 at the March, 1995 meeting of the Drafting Committee. Subsection (c), which sparked controversy,
22 was inconsistent with the policy of the 1990 Official Text, §2-202, comment 1(c), the Restatement,
23 Second of Contracts, see §§200-203, and the approach of most courts. See, e.g., *Pacific Gas &*
24 *Electric Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968)(Traynor, Chief
25 Justice). Thus, the courts, as before, are left to decide whether a merger clause is conclusive on the
26 question of intention and when extrinsic evidence should be admitted to interpret language in the
27 record. Nevertheless, many still argue that a merger clause in commercial contracts should be
28 conclusive.

29 At the October, 1995 meeting of the Drafting Committee, the scope of the court's power to
30 interpret a term in an integrated writing was discussed. Concern was expressed lest the phrase
31 "terms may be explained" in §2-202(a) would be limited to the sources listed in (1) and (2) and that
32 the dreaded "plain meaning rule" might reemerge. A motion to save the phrase passed, however,
33 [9-8, 7-0] with the expectation that the comments would state that the sources of evidence for
34 contract interpretation are broader than those indicated in subsection (a). See CISG Art. 8(3).

35 **Despite a contrary recommendation by the Coordination Committee, the Article 2**
36 **Drafting Committee voted (September, 1996) to retain subsection (b)(1) which requires the**
37 **court to conduct a preliminary hearing on whether the parties intended to integrate the record.**
38 **The last clause, dealing with type of evidence relevant to the intention question, however, was**
39 **deleted at the November, 1996 meeting.**

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

6 2. Under basic contract law, either party can condition the formation of a contract upon
7 agreement by the other party to terms proposed. See 2-207(1) (1990 Official Text). Subsection (d)
8 deals with the case where either the offeror or the person purporting to accept an offer expresses that
9 condition in a record: The condition is not effective unless the language is conspicuous, see 2-
10 102(a)(7). Suppose, for example, that the seller's offer, made in a record that notice of any breach
11 of warranty must be given within 30 days of when the buyer "should have discovered the breach
12 and that the seller "will not be bound unless the buyer agrees to the seller's terms. That language
13 conditioning intention to be bound is not effective unless it is conspicuous.

14 3. 2B-202 omits subsection (d) and contains two other differences: (1) The phrase "actions
15 of electronic agents" is included in subsection (a); and (2) the phrase "one party reserves the right
16 to modify terms" is inserted in subsection (b).

17 **4. In November, 1996, the Drafting Committee decided to eliminate all references to**
18 **"standard forms" and "standard terms" in Sections 2-2-3, 2-205 and 2-207. In order to test**
19 **this decision, this draft places "standard terms" in brackets, where appropriate, and works**
20 **with the following revised definition: "Standard term means a term in a record that is**
21 **prepared by one party for general and repeated use and is used in a transaction without**
22 **change or negotiation."**

23 **SECTION 2-204. FIRM OFFERS.** An offer by a merchant to enter into a contract made
24 in an authenticated record that by its terms gives assurance that the offer will be held open is not
25 revocable for lack of consideration during the time stated. If a time is not stated, the offer is
26 irrevocable for a reasonable time not exceeding 90 days. A [standard term] term of assurance in a
27 record supplied by the offeree is ineffective unless the term is conspicuous.

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

29 Notes

30 1. The September 10, 1993 draft of §2-205 provided that if no time is stated in a written firm
31 offer, "the offer is irrevocable for a commercially reasonable time." A motion to restore the original
32 language of §2-205, imposing a three month limit, was subsequently approved. See 2B-203.

1 Compare 2B-204(a).

2 2. The formation test in §2-205(a)(1) follows that in the original §2-206(1). Unless the offer
3 clearly provides otherwise, a definite acceptance creates a contract even though the acceptance
4 contains terms in a record that vary the offer. Unlike the Restatement, Second and Article 19 of
5 CISG, a definite acceptance containing a terms that materially vary the terms of the offer can create
6 a contract. The offeree can avoid a contract by expressly stating that no contract exists unless the
7 offeror agrees to the offeree's standard terms. See 2-203(d). Presumably, if both parties state that
8 they will not be bound unless the other agrees to their terms, there is no contract unless there is
9 subsequent conduct by both recognizing the existence of a contract.

10 Language in an offer or purported acceptance which attempts to condition contract formation
11 upon agreement by the other to the terms proposed should be conspicuous when contained in a
12 record. 2-203(d).

13 Here are some examples.

14 Example #1. After negotiations where no agreement was reached, B sent S an offer in a
15 record to purchase 1,000 units of described goods at \$500 per unit. The front of the purchase order
16 contained blanks which Buyer filled in and the back contained several standard terms, including an
17 arbitration clause. S sent an acknowledgment the front of which stated "we are pleased to accept
18 your order for 1,000 units at \$500 per unit." The back of the acknowledgment contained a standard
19 term excluding all liability for consequential damages. After the acknowledgment was mailed, S
20 changed its mind (the market price went up) and faxed a rejection to B. There is a contract under
21 2-205(a)(1), which reinforces §2-203(a). B clearly accepted the offer and the seller's record did not
22 conspicuously indicate by language or otherwise that there would be no contract unless S agreed to
23 all of the terms proposed.

24 The case for a definite expression of acceptance is even clearer if S also shipped the goods
25 before attempting to revoke. There would be no contract, however, if S had said "we are pleased to
26 accept your order at \$600 per unit" or had conspicuously indicated that it did not intend to conclude
27 a contract unless B agreed to all of S's terms, both negotiated and standard. See §2-203(d). Whether
28 B's arbitration clause or S's exclusion clause are part of the contract depends upon §2-207.

29 Example #2. Suppose, in Example #1, that Seller "accepted" Buyer's order for \$600 per unit
30 and the back of the acknowledgment contained a standard term that "seller reserves the right to
31 litigate any dispute." Nevertheless, Seller shipped the goods with the acknowledgment and Buyer
32 accepted them without objection. There is a contract under §2-203(b). Since the price term was
33 negotiated, Seller's price of \$600 constituted a counteroffer which Buyer accepted by using the
34 goods. [The usual principles of contract formation apply here.] There was no risk of unfair surprise
35 and B assented without objection by accepting the goods. Which if any of the conflicting terms in
36 the records prepared by the parties become part of the contract is determined by §2-207.

1 Example #3. Suppose, in Example #2, that Seller accepted Buyer's order for \$500 and
2 shipped the goods which Buyer accepted. Later, there was a dispute, Buyer demanded arbitration
3 and Seller insisted that it had reserved the right to litigate. There is a contract under either
4 §2-205(a)(1) or §2-203 despite the different standard terms on dispute resolution. Unless the Buyer's
5 arbitration clause becomes part of the agreement under §2-207, the "default" rule is that the seller
6 may litigate.

7 Example #4. Suppose that terms in the records of both parties conspicuously state that there
8 will be no contract unless their terms are agreed to by the other party. See §2-203(d). The seller
9 ships and the buyer accepts the goods. There is a contract under §2-203(a) & (b). The agreement
10 of the parties includes the terms stated in 2-207.

11 3. 2-205 conforms to 2B-204 in that the phrase “invites acceptance” is substituted for the
12 “must be construed as” language. The response by an “electronic agent”, 2B-204(c), is not yet
13 integrated into 2-205. Both 2A-206 and 2B-204 omit subsection (b) of 2-205.

14 **SECTION 2-206. STANDARD FORM RECORDS.**

15 (a) Subject to Section 2-207, where a consumer authenticates a standard form or engages in
16 other affirmative conduct that appears to agree to the terms of a standard form, [standard terms]
17 terms that a reasonable consumer in a transaction of this type would not expect to appear in the form
18 are not part of the agreement.

19 (b) When a consumer claims that a [standard term] term is excluded under subsection (a),
20 the court shall afford the parties a reasonable and expeditious opportunity to present evidence on
21 whether the term was reasonably expected. Evidence may include but is not limited to:

22 (1) Efforts by the party preparing the form to inform the consumer of the terms, including:

23 (A) The setting and circumstances in which the form was or in the ordinary course
24 of business is presented to the consumer;

25 (B) Whether the term was called to the consumer’s attention in fact or in the ordinary
26 course of business or through a prior course of dealing between the parties;

27 (c) The degree to which the seller, or any other person on the seller’s behalf,

1 publicized the terms of the type of sale involved, including the term in dispute;

2 _____ (D) The degree to which the consumer knew of and understood the terms prior to
3 authentication or other affirmative conduct; and

4 _____ (2) Facts from other sources that are relevant to the consumer's reasonable expectations,
5 including:

6 _____ (A) The nature and price of the described goods;

7 _____ (B) The expectations of other consumers in similar types of transactions;

8 _____ (c) Usages, standards and common practices with respect to goods of the same type
9 or description;

10 _____ (D) Previous purchases made from other sellers of goods of the same type or
11 description;

12 _____ (E) Characteristics particular to the consumer involved, such as lack or education or
13 more than average knowledge about the type of transaction involved.

14 _____ (c) Issues arising under subsection (b) shall be decided by the court as a matter of law. If the
15 seller establishes that a reasonable consumer had reason to know of the contested term and
16 authenticated or engaged in other affirmative conduct of agreement, a prima facie case is established
17 that the term is part of the agreement.

18 _____ (d) If the seller complies with other requirements in this Article for including terms in a
19 consumer contract, nothing in this section shall exclude such terms.

20 **SOURCE: New.**

21 **Notes**

22 1. This section expands 2-206(b) of the November, 1996 Draft. The question is when a

1 consumer who authenticates or by affirmative conduct appears to agree to [standard terms] terms in
2 a standard form is bound by terms in the form. The answer is when a reasonable consumer in this
3 type of transaction would not reasonably expect them. Subsection (a).

4 2. Subsection (b) gives the parties the right to a hearing and indicates the source and type
5 of evidence that may be relevant to reasonable expectations. Subsection (b)(1) deals with
6 information flowing from the seller to the buyer and subsection (b)(2) deals with evidence from the
7 surrounding context or from the buyer's own experience. If a "safe harbor" is needed, it should
8 appear in (b)(1). There is disagreement about whether the particularized experience of the consumer
9 should be included. See subsection (2)(b)(E).

10 3. Subsection (c) states that the issue is for the court as a matter of law and when the seller
11 establishes a prima facie case.

12 4. Subsection (d) states that if the term is included in a consumer contract under another
13 section in Article 2 it will not be excluded under 2-206.

14 5. **Not all records are standard forms (all standard forms are records) but many**
15 **records contain standard terms, usually preprinted. Rather than worry about a definition of**
16 **standard form, why not focus on standard terms, as redefined in Section 2-203, note 4, where**
17 **ever they appear?**

18 **SECTION 2-207. EFFECT OF VARYING TERMS.**

19 (a) Subject to subsection (b) and Section 2-202, if a contract is formed as provided in
20 Sections 2-203 and 2-205 or an agreement is confirmed by a record, the contract includes:

21 (1) those [standard terms] terms on which the records of the parties agree in
22 substance;

23 (2) those [non-standard terms] terms to which the parties have otherwise agreed;

24 (3) those terms supplied by applicable usage of trade, course of dealing or course of
25 performance;

26 (4) those terms not objected to in a timely manner which do not materially alter the
27 contract; and

1 (5) those terms supplied or incorporated under any other provision of this Act.

2 (b) If a contract is formed by a definite acceptance in a record containing [standard terms]
3 terms that materially vary the contract, the terms are not part of the contract.

4 (c) Standard terms not included in the contract under subsection (a) but that are contained
5 in the records of one party or both parties become part of the contract only if the party seeking
6 inclusion establishes that the other party expressly agreed [manifested assent] to them.

7 **SOURCE: Sales, Section 2-207.**

8 **Notes**

9 1. Drafting History. The original Section 2-207 was both an exception to the common law
10 "duty to read" principle and a particularized application in commercial cases of the unconscionability
11 doctrine in §2-302. In practice it applied to determine if there was some contract for sale when the
12 writings of the parties were in conflict and, if so, what terms in the writings of the parties became
13 part of the contract. One objective was to neutralize any strategic advantage gained where standard
14 terms were used (although §2-207 was not limited to standard terms) and to reduce the risk of unfair
15 surprise where one party apparently agreed (assented by conduct) to standard terms which had not
16 been read or understood. The assumption was that even in commercial transactions the risk of unfair
17 surprise requires special rules where standard terms are involved. More particularly, it assumed that
18 commercial parties in unstructured transactions [i.e., no record containing all the terms of the
19 contract] do not have a realistic opportunity to review the standard terms of the other before
20 apparently assenting by conduct.

21 Initially, two versions of Section 2-207 were drafted. The first followed Section 2-207 in the
22 1990 Official Text and attempted to amplify and clarify it in light of apparent objectives, academic
23 commentary, and judicial decisions. The second developed a simplified structure that focused on
24 the unfair surprise issue. Assuming that some contract was formed under §§2-203 and 2-205, the sole
25 question was whether "varying terms" became part of the contract. At the October 1-3, 1993 meeting,
26 the Drafting Committee approved the approach of the second version of §2-207. A first effort to
27 implement that objective was made in the May, 1994 draft, where the key concept, "varying terms,"
28 was defined in §2-207(a). Drawing on the September, 1994 Draft of the Licenses article, the
29 December 20, 1994 Draft of Article 2 added a new section on "standard form agreements" and
30 defined such terms as "standard form" and "standard terms" in Part 1. These sections provided a
31 direct response to recurring questions raised in standard form contracting. Relying on new §2-206,
32 covering "Standard Form Agreements," and the new definitions to deal with most unfair surprise and
33 advantage taking, the May, 1995 Draft of §2-207 was limited to "conflicting" standard terms. i.e.,
34 terms which vary other terms by adding to or contradicting them.

1
2 In October, 1995 the Drafting Committee decided to limit §2-206 to cases where all of the
3 agreement was contained in a standard form record. Section 2-207, therefore, was reworked to deal
4 with the unstructured, partially negotiated transaction where standard terms are contained in the
5 records [not standard forms] of one or both parties. Revised §2-207 in the July, 1996 operated as
6 follows:

7 First, it assumed a contract for sale had been formed under §§2-203 and 2-205. Section
8 2-207 does not deal with contract formation. It also assumed that there agreement between the
9 parties on terms other than standard terms.

10 Second, Section 2-206, where all of the terms were contained in a standard form or a record
11 containing standard terms, did not apply. If it applied, §2-207 did not.

12 Third, Section 2-207 applied where one or both parties used records [not standard forms] and
13 the record contained standard terms which varied [added to or differed from] materially the terms
14 [standard terms, negotiated terms or terms supplied by Article] in the agreement between them.

15 Fourth, the purpose of §2-207 is [in all drafts] to minimize unfair surprise and "first" and
16 "last" shot advantage taking where one party seeks to include a standard term which varies terms in
17 the agreement. Key definitions are "term," §1-201(42), and "standard terms," §2-102(a)(39). The
18 phrase "varying terms," although not defined, includes standard terms which materially add to or are
19 different from the agreement of the parties.

20 Fifth, the need for §2-207 arises [in all drafts] because the party against whom the standard
21 terms operate has apparently agreed to them by conduct [not "manifested assent", §2-102(a)(29)]
22 under circumstances where there is no realistic opportunity to review the record. Unlike the §2-206
23 case where all terms are in a standard form or record with standard terms, there is no assurance that
24 a seller or a buyer will (or even "should") take time to read and understand the "boilerplate." Thus,
25 a special test to validate apparent assent is required. Moreover, in the July, 1996 Draft, more than
26 a simple awareness of the standard terms was required. In the absence of express agreement, the
27 other party should also understand that the party seeking inclusion intended the standard terms to be
28 part of the contract. This follows Judge Wisdom's well reasoned opinion in Step-Saver Data Sys.
29 v. Wyse Technology, 939 F.2d 91, 102-103 (3d Cir. 1991)("shrink wrap" license).

30 **At the November, 1996 meeting of the Drafting Committee, however, the decision was**
31 **made to delete any rules responding to standard forms and standard terms in commercial**
32 **transactions. Thus, 2-206(a) was withdrawn and a redraft of 2-207 that used the words**
33 **“records” and “terms” rather than “standard forms” and “standard terms” was approved in**
34 **principle. That redraft appears above, with [standard terms] bracketed for testing purposes**
35 **and subsection (c) proposing a “clean up” rule where one party claims that standard terms in**
36 **a record were incorporated by express agreement.**

1
2 **Battle of the “Records:” A Road Map.**

3 A. All terms are expressed in one record.

4 Where all of the terms of a commercial contract are contained in one integrated record to
5 which both parties have assented, usually by signature, 2-207 is not necessary(although subsection
6 (a) may be helpful). Whether the record is a standard form or contains standard terms is irrelevant.
7 Subject to 2-202, the usual rules of agreement apply, see 2-203 & 2-205, beneath the general
8 umbrella of unconscionability. Herein lies the recently deceased doctrine of “manifest assent.

9 B. No terms are expressed in a record.

10 Where all of the agreement is oral, neither 2-202, 2-206 nor 2-207(a)(1) apply. However, the
11 balance of subsection 2-207(a) will help (rules of inclusion) and the resurrected statute of frauds, 2-
12 201, will apply.

13 C. Terms in the Record of only one party.

14 There are three prototypes here.

15 (1) If the parties conclude an oral agreement of sale (which may or may not be a contract) and
16 one party sends a confirmation in a record that contains terms that vary the oral agreement, 2-
17 207(a)(1) does not apply. Varying terms, however, may be included under subsections (a)(2)-(5)
18 and, where standard terms are involved, subsection (c).

19 (2) If B makes an oral offer which S accepts in a record that contains terms that materially
20 vary the newly created contract, the varying terms are excluded under Subsection (b).
21 Non-standard varying terms might subsequently be included under subsection (a)(2)-(4). Standard
22 varying terms might subsequently be included under subsection (c). This deals with the infamous
23 “last shot.

24 Suppose the varying terms are not material? Under old 2-207(2) they would, between
25 merchants, be included if not objected to. Does subsection (a)(4) apply to this situation? Should it?

26 (3) Suppose B makes an offer in a record and S accepts over the telephone, but the oral
27 acceptance contains terms that vary or conflict with the newly created contract. The scenario is
28 unlikely (how can you have an oral acceptance that is both definite and contains varying terms?), but,
29 if real, would be covered by subsection (b). But subsection (b) deals with S’s varying terms and
30 assumes that B’s offered terms in the record, whether standard or not, are part of the bargain unless
31 objected to.

1 If B's record contains standard terms, the "first shot" problem is covered by subsection (b):
2 They are not included unless S expressly agrees to them. Without subsection (c), the "first shot" rule
3 would be alive and uncommonly healthy.

4 D. The agreement is contained in the records of both parties

5 In transactions at a distance where both parties exchange records and one or both records
6 contain "preprinted" terms, the risk of unfair surprise and strategic advantage taking is probably the
7 highest. The agents who handle these transactions rarely take the opportunity to review the standard
8 terms and this reality is well understood by all. Thus, both parties can include advantageous terms
9 and know that the other party won't read it and will probably manifest a blanket assent to all terms
10 without objection.

11 This fact pattern (its the standard terms, stupid) dominates the voluminous litigation under
12 2-207. Assuming that some contract was created, judicial energy is expended in determining whether
13 asserted standard terms were excluded under old 2-207(2) or 2-207(3) and, then, answering claims
14 that the same standard terms were subsequently incorporated by language or conduct that indicated
15 express agreement. In the process, an interesting "express agreement" jurisprudence (based on the
16 comments to rather than the text of 2-207) has developed.

17 Consider these cases under revised 2-207.

18 (1) Records but no standard terms.

19
20 After negotiations, Buyer orders 1,000 units of goods at \$50 per unit in a record. Seller sends
21 an acknowledgment "accepting" the offer and promising to send 900 units in a record. Before the
22 acknowledgment arrives, Seller sells the goods to a third person for \$65 a unit. The purported
23 acceptance is probably a counteroffer when it is received by Buyer and, thus, a rejection of the offer.
24 2-205(a)(1). It is difficult to find a "definite" acceptance when the purported acceptance varies a
25 negotiated term, i.e., price.

26 Variations: (1) S's acknowledgment is an acceptance with a materially varying term (price).
27 Under subsection (b), S's price term is excluded and B's controls (no knockout here) unless B agrees
28 to the term; (2) S's acknowledgment is not an acceptance but S ships and B accepts the goods. There
29 is a contract under 2-203(a), but whose price term controls? Under 2-207(a)(1) the price terms in
30 the record do not agree and both are excluded (a knockout, maybe below the belt). Here the code
31 "gap fillers" prevail. But on these facts, unless B accepted S's counteroffer on price by using the
32 goods, we should get the same result.

33 (2) Standard but not conflicting terms in records.

34 After negotiations, Buyer sends an offer to buy 1000 units at \$50 per unit in a record which
35 contains a standard term arbitration clause. Seller sends an acknowledgment accepting the offer in
36 a record which contains a standard term warranty disclaimer. Seller then ships and Buyer accepts

1 the goods. Neither objects to the other's terms. Later, Buyer claims that the goods are
2 unmerchantable and initiates arbitration. Seller denies that it agreed to arbitrate and claims that all
3 implied warranties were disclaimed.
4

5 There is a contract. 2-203(a). Whether either the arbitration clause or the disclaimer (which
6 just happen to be standard terms) are part of the contract depends upon §2-207(a)(1). Although they
7 are both additional rather than conflicting terms, the records of the parties do not agree on them in
8 substance and, if included, they would materially alter the contract. Thus, they are excluded unless
9 the parties have expressly agreed to them under subsection (c).

10 (3) Conflicting terms in records.

11 Suppose the records of both parties contained standard term arbitration clauses which differ
12 in material ways. For example, Buyer's clause might agree to arbitrate "all disputes arising out of
13 or relating to" the contract and Seller's clause might agree to arbitrate only disputes "involving
14 breach of warranty claims." Here the terms conflict. Assuming a contract, under §2-207(a)(1),
15 neither clause becomes part of the contract. The "knock out rule" is in effect unless the parties have
16 expressly agreed to them. Of course, even though both parties wanted to arbitrate, neither will now
17 get to: The supplementary terms of this Act do not authorize arbitration.

18 On the other hand, if the records contained arbitration clauses which agreed in substance, the
19 parties must arbitrate to the extent of that agreement unless one or both made a timely objection.
20 Subsection (a)(4).

21 (E) More on Confirmations.

22 Suppose Seller and Buyer reach an oral agreement or conclude a contract for sale through
23 "informal" correspondence. Later, Seller then sends a record confirming the agreement and
24 containing terms that vary the prior agreement. What is the effect of the varying terms?

25 Original §2-207(1) provided that a "written confirmation which is sent within a reasonable
26 time operates as an acceptance even though it states terms additional to or different from
27 those...agreed upon." Thus, the confirmation was treated as an acceptance rather than a proposal to
28 modify the contract and the additional or different terms became part of the contract only if
29 §2-207(2) was satisfied. The problem was complicated where an earlier oral agreement was
30 unenforceable under the statute of frauds and the writing both satisfied the statute between
31 merchants, see §2-202(2), and proposed additional or different terms. Furthermore, a confirmation
32 proposing additional or different terms and expressly conditioning the contract upon agreement to
33 them was probably a repudiation rather than an acceptance or a proposal for modification.

34 The November, 1996 Draft solved the problem as follows:

35 First, the statute of frauds was repealed. [The statute of frauds is now reinstated.]

1 Second, whether the oral or informal agreement was a contract was decided under §§2-203
2 and 2-205. [This remains the same.]

3 Third, if there was a contract whether the terms in the standard form confirmation become
4 part of the agreement depended upon 2-207(a)(3): The terms were not included unless the other party
5 expressly agreed to them. [The same result is obtainable under sub. (a)(2) and, where standard terms
6 are involved, sub. (c).]

7 Fourth, if the record proposes a modification and the terms are included under §2-207(a)(3),
8 whether the modification is enforceable is determined by §2-210(a).

9 Finally, whether the record is a repudiation rather than a proposed modification is determined
10 by §2-713.

11 **SECTION 2-208. ELECTRONIC TRANSACTIONS: FORMATION.**

12 [This section will be conformed to 2B-206.]

13 **SECTION 2-209. COURSE OF PERFORMANCE OR PRACTICAL**
14 **CONSTRUCTION.**

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

19 (b) Express terms of an agreement, course of performance, course of dealing, and usage of
20 trade must be construed whenever reasonable as consistent with each other. However, if that
21 construction is unreasonable:

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

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

1 (3) course of dealing prevail over usage of trade.

2 (c) Subject to Section 2-210, course of performance is relevant to show a waiver or
3 modification of a term inconsistent with the course of performance.

4 **SOURCE: Sales, Section 2-208.**

5 **Notes**

6 This Section has been conformed to 2B-302 (Sept. 1996). It is probable that 2-209, as
7 conformed, **will be moved to Article 1. If so, a drafting strategy may be to move 2-209 to the end**
8 **of Part 2 so that section renumbering can be avoided.**

9 **SECTION 2-210. MODIFICATION, RESCISSION, AND WAIVER.**

10 (a) A good-faith agreement modifying a contract under this article is binding without
11 consideration.

12 (b) If the agreement modifying the contract or the contract as modified are within Section 2-
13 201, the requirements of the statute of frauds must be satisfied.

14 (c) Except in a consumer contract or as otherwise provided in subsection (d), an agreement
15 that contains a term prohibiting modification or rescission except by a signed record may not be
16 otherwise modified or rescinded. However, a party whose language or conduct is inconsistent with
17 a term requiring a signed record to modify or rescind the contract may not assert the term if the
18 language or conduct induced the other party to change its position reasonably and in good faith.

19 (d) A contractual term may be waived. Language or a course of performance between the
20 parties is relevant to show a waiver of any term inconsistent with that language or course of
21 performance. The waiver of an executory portion of a contract may be retracted by seasonable
22 notification received by the other party that strict performance is required of any term waived unless
23 the waiver induced the other party to change its position reasonably and in good faith.

1 **SOURCE: Sales, Section 2-209.**

2 **Notes**

3 1. There are several changes in revised Section 2-210 [formerly Section 2-209 of the 1990
4 Official Text].

5 First, the requirement of a good faith agreement to modify, previously found in a comment,
6 is explicitly stated in subsection (a). This follows the cases, see, e.g., *Rosh Steel Products v. Sharon*
7 *Steel Corp.*, 705 F.2d 134 (6th Cir. 1983), and avoids the argument that a contract modification is
8 neither the "performance or enforcement" of a contract under §1-203. This revision is rejected in
9 2B-303.

10 Second, the section is revised to reflect the reinstatement of the statute of frauds. Subsection
11 (b).

12 Third, except in a consumer contract the parties may agree that a signed record is required
13 to modify or rescind the contract. See Subsection (c). A "no oral modification" clause can be
14 waived by the party for whose benefit it was intended, subsection (b), second sentence. Similarly,
15 subsection (d) clarifies the nature and effect of waiver when other terms of the contract are involved.
16 Thus, the party for whose benefit a term is required can waive it by electing not to insist on it at an
17 appropriate time or by inducing reliance in the other party by representing that a term will not be
18 insisted on at a future time. These revisions are rejected in 2B-303.

19 2. Except in Consumer Contracts, subsection (c) validates "no oral modification" terms in
20 contracts for sale. In other cases, the normal rules of modification and rescission apply, including
21 agreed modifications under subsection (1). In the original Section 2-209(2), the NOM clause was
22 valid in all transactions, with the requirement that a form containing the NOM clause supplied by
23 a merchant had to be separately signed by a non-merchant. The Drafting Committee excluded
24 Consumer Contracts from NOM clauses and deleted the "separately signed" clause, leaving
25 commercial parties who are not merchants to fend for themselves.

26 3. Subsection (c) provides that a NOM clause, a contract condition, may be waived in certain
27 circumstances by the party for whose benefit it was included, provided that the words or conduct of
28 waiver are inconsistent with the NOM clause and induce reasonable, good faith reliance. Reliance
29 is required whether the language of waiver is part of or independent from an agreement with the
30 other party. Compare Restatement, Second, Contracts §139. This revision is rejected in 2B-303.

31 To illustrate, suppose the contract contains a NOM clause and a schedule for installment
32 deliveries by the seller. The seller encounters production problems, misses a due date and requests
33 an extension of delivery time from the buyer. First, suppose the buyer states that it will not insist
34 on the NOM condition and orally agrees to a time extension. The seller does not request a written
35 modification and proceeds to deliver under the modified schedule. Later, the seller invokes the NOM

1 clause and sues for damages caused by late delivery. Here, the NOM clause is waived under
2 subsection (b) by express, inconsistent language which induced reasonable, good faith reliance and
3 the agreed modification is enforceable under subsection (a). The modification of the delivery
4 schedule is enforceable under §2-209(a). Second, suppose the buyer states that the late delivery is
5 excused and orally agrees to a time extension. The seller, without obtaining a written modification,
6 proceeds under the modified schedule. Later, the buyer invokes the NOM clause and sues the seller
7 for damages arising from late delivery. Once again, the NOM clause was waived under Subsection
8 (c), this time by the buyer's "language and conduct in effecting a modification...is inconsistent with
9 the term and induces the other party to change its position reasonably and in good faith."

10 Although a party may waive one late installment, an agreement to modify the time of future
11 deliveries is not necessarily enforceable. It must be either a "good faith" agreement under subsection
12 (a) or induce reasonable, good faith reliance under subsection (d). The doctrine of waiver is not
13 available to create or modify agreed duties under the contract. Compare 2-604.

14 4. Subsection (d) recognizes the general principle of waiver where NOM clauses are not
15 involved. There are three types. In the first, called election waiver, the party for whose benefit a
16 condition is included elects not to insist upon the condition after the time for its occurrence has
17 passed. The condition is excused without a need to prove reliance by the other party. Election waiver
18 is included in the first sentence of subsection (d). In the second, called reliance waiver, the party for
19 whose benefit a condition is included states that he will not insist upon the occurrence of a condition
20 in the future. Here, however, the waiver may be retracted unless the other party has changed its
21 position "reasonably and good faith." Subsection (d), last sentence. In the third, the court simply
22 excuses the condition when its nonoccurrence would cause "disproportionate forfeiture" and the
23 occurrence of the condition was not a "material part of the agreed exchange." Restatement, Second,
24 Contracts §229. See Aetna Casualty and Surety Co. v. Murphy, 538 A.2d 219 (Conn. 1988)(burden
25 on party seeking excuse to prove that condition was not a material part of exchange).

26 **4. Subsection (b) reflects the return of the statute of frauds. Section 2-201 applies if**
27 **either the modification or the contract as modified is within the scope of 2-201(a).**

28 **5. This section will be coordinated with new Section 2-702, dealing with “waiver” of**
29 **remedies.**

30 **SECTION 2-211. ELECTRONIC MESSAGES; ATTRIBUTION.**

31 **SECTION 2-212. INTERMEDIARIES IN ELECTRONIC MESSAGES.**

32 **Notes**

33 1. Sections 2-211 and 2-212 will be conformed to Article 2B. See 2B-110 and 2B-111.

34 2. Section 2-211 (July, 1996), dealing with “delegation of performance, has been moved

1 to Section 2-503.

2 **PART 3**

3 **GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT**

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

5 (a) The price may be made payable in money or otherwise.

6 (b) If the price is payable in whole or in part in goods, each transferor is a seller for the
7 purposes of this article with respect to the goods transferred.

8 (c) The sale of goods is subject to this article even if all or part of the price is payable in an
9 interest in real property. This article applies to the transfer of goods but not to the transfer of an
10 interest in real property.

11 **SOURCE: Sales, Section 2-304.**

12 **Notes**

13 There are no substantive changes in former §2-304.

14 **SECTION 2-302. TRANSFER AT SINGLE TIME.**

15 (a) If all of one party's performance can be rendered at one time, the performance is due at
16 one time and the other party's reciprocal performance is due only on tender of full performance.

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

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

1 performance.

2 **SOURCE: Sales, Section 2-307.**

3 **Notes**

4 1. This is an elaboration of former §2-307 and clarifies when a party's performance is due
5 at one time and what the other party's duties are on full performance. Subsection (a) follows 2B-603.
6 Subsections (b) and (c), which state when, in the absence of an agreed installment contract, a part
7 performance is permitted and how payment is to be apportioned, follow 2B-604. Except for
8 covering the obligations of both seller and buyer, no changes of substance are intended. See 2-610(a)
9 and 2-611(a) on who, seller or buyer, must tender first.

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

16 This section should be distinguished from §2-716, which deals with excuse and substitute
17 performance when changed circumstances disrupt agreed methods of shipment, delivery or payment.
18 Presumably, it takes less disruption to vary a "default" rule than to excuse an agreed performance.

19 3. The operation of §2-302 creates an installment contract, i.e., goods delivered "in separate
20 lots to be separately accepted." §2-711(1). But it is not a credit installment contract: payment for
21 each lot is due upon tender. This makes sense if payment for the single lot was due upon tender. But
22 suppose the contract said nothing about the quantity to be delivered and the parties agreed upon 30
23 days credit. If circumstances justify delivery in lots, is payment for each lot due 30 days after
24 delivery or must payment be made upon tender? The answer should be that the agreed credit term
25 survives and payment is not due until all of the goods are tendered. Only the "default" rule is altered
26 by circumstances.

27 4. Clearly, the installment contract created by §2-302 is by operation of law. It in no way
28 interferes with the parties's power to create by agreement an installment contract where payment is
29 due after the goods are tendered and accepted.

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

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

32 (1) not agreed to;

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

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

4 (b) The price of a contract formed under subsection (a) is a reasonable price at the time that
5 the seller is to complete its initial delivery.

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

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

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

14 **SOURCE: Sales, Section 2-305.**

15 **Notes**

16 1. There are no substantive revisions in former §2-305.

17 2. Section 2B-305 on “open terms” provides a structure and approach to a variety of open
18 terms, including price. Although not reflected in the November, 1996 Draft, an effort to conform
19 Articles 2 and 2B on substance if not structure will be made.

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

21 (a) A contractual term that measures the quantity of goods by the output of the seller or the
22 requirements of the buyer means the actual output or requirements that may occur in good faith. A
23 party with actual output or requirements occurring in good faith may not offer or demand a quantity

1 unreasonably disproportionate to any stated estimate or, in the absence of a stated estimate, to any
2 normal or otherwise comparable previous output or requirements.

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

6 **SOURCE: Sales, Section 2-306.**

7 Notes

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

9 First, it states the meaning of "output" and "requirements" terms when used in a contract for
10 sale. Such terms do not cause a contract to fail for indefiniteness. See §2-203(c). The parties may
11 agree upon a fixed quantity or no quantity or something in between. But unless the parties agree to
12 measure all or part of the quantity by "output" or "requirements," §2-304(a) does not apply.

13 Second, it imposes a duty of good faith on the exercise of discretion by either party to
14 determine the level of output or requirements. Section 2-306(a), however, does not require that there
15 must also be an exclusive dealing arrangement before an output or requirements term is enforceable.
16 Although some states require exclusive dealing, see *Essco Geometric v. Harvard Industries*, 46 F.3d
17 718 (8th Cir. 1995)(Missouri law), this extreme position is rejected. The term should be enforceable
18 where the seller or buyer agrees to supply or demand all or part of its output or requirements to or
19 from the other. See *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir.
20 1991)(non-exclusive requirements term satisfies statute of frauds); Restatement (Second) Contracts
21 sec. 79(c)(where consideration requirement is met there is no additional requirement of mutuality
22 of obligation). For example, a term where the buyer agrees to buy 10% of its actual requirements
23 in good faith from the seller should be enforceable. On the other hand, the buyer would not have the
24 additional obligation to use "best efforts" unless there was an exclusive dealing contract. §2-306(2).
25 See *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119 (3d Cir. 1992).

26 Third, it clarifies that if there are no actual output or requirements in good faith, the party has
27 no duty to perform even though there are estimates in the contract or there were prior output or
28 requirements. The question is whether the lack of output or requirements occurred in good faith, not
29 whether the lack of actual output or requirements was "unreasonably disproportionate." This follows
30 the interpretation of prior §2-306(1) in *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333
31 (7th Cir. 1988), but rejects the court's dictum that the unreasonably disproportionate limitation is not
32 applicable to any decrease in quantity or requirements. See also, *Tigg Corp. v. Dow Corning Corp.*,
33 962 F.2d 1119 (3d Cir. 1992). The California State Bar, however, disagrees with this clarification,

1 believing that the "yardstick for output and requirements contracts should be prior output or shared
2 estimates, not actual output or requirements."

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

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

21 2. Section 2-304(b) deals with an exclusive dealing agreement in a contract where the
22 requirements of a buyer depend upon the resale market demand for them. Unless otherwise agreed,
23 the seller must use "best efforts" to supply those requirements. On the other hand, if the buyer has
24 X requirements in good faith, the seller can insist that the buyer use "best efforts to promote their
25 sale." Actual requirements in good faith are not enough. Unlike 2B-306(c) & (d), no effort is made
26 in this Draft to state a standard for "best efforts."

27 **SECTION 2-305. ABSENCE OF SPECIFIED PLACE FOR DELIVERY.**

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

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

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

1 (c) An agreement providing that the performance of the seller be to the satisfaction of the
2 buyer without further specifying the standard of performance requires that the performance be such
3 that a reasonable person in the position of the buyer would be satisfied.

4 (d) A specification relating to an assortment of goods is at the buyer's option. Except as
5 otherwise provided in subsection (e), a specification or arrangement relating to shipment is at the
6 buyer's option.

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

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

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

13 **SOURCE: Sales, Section 2-311.**

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

15 (a) Failure of a party seasonably to furnish an agreed letter of credit intended as the primary
16 method of payment is a breach of a contract for sale.

17 (b) Delivery to a seller of an agreed letter of credit suspends the buyer's obligation to pay.
18 If the letter of credit is dishonored, the seller on seasonable notification may require payment
19 directly from the buyer.

20 (c) The term "confirmed credit means that the credit must also carry the direct obligation
21 of a financing agency of goods repute or, if the shipment is overseas, of good international repute
22 that issues an irrevocable letter of credit.

1 **SOURCE: Sales, Section 2-325.**

2 **Notes**

3 Section 2-308, formerly §2-325 of the 1990 Official Text, states the effect of supplying or
4 failing to supply an agreed letter of credit. Letter of credit is defined with reference to §5-102(a)(10)
5 of the 1995 Official Text. All other aspects of the letter of credit transaction are covered by revised
6 Article 5.

7 **SECTION 2-309. SHIPMENT TERMS; SOURCE OF MEANING.** The effect of a
8 party's use of shipment terms such as “FOB , “CIF , or the like, must be interpreted in light of
9 applicable usage of trade and any course of performance or course of dealing between the parties.
10 If any applicable usage of trade, course of performance or course of dealing is not shown, the
11 meaning of shipment terms used in an agreement may be interpreted by reference to the Incoterms
12 published by the International Chamber of Commerce.

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

14 **Notes**

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

17 2. Section 2-309 is a first step toward filling the gap on delivery terms. If the meaning of a
18 stated shipment or delivery term cannot be found in the agreement or an applicable usage of trade,
19 the meaning may be determined by reference of the Incoterms of the International Chamber of
20 Commerce. Nevertheless, some definition of delivery terms for revised Article 2 might still be
21 required.

22 **SECTION 2-310. TERMINATION; SURVIVAL OF OBLIGATIONS.**

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

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

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

- 1 (2) a limitation on the scope, manner, method, or location of the exercise of rights in
2 the goods;
- 3 (3) an obligation to return or dispose of goods, which obligation must be promptly
4 performed;
- 5 (4) a choice of law or forum ;
- 6 (5) an obligation to arbitrate or otherwise resolve disputes through alternative dispute
7 resolution procedures;
- 8 (6) a term limiting the time for commencing an action or for providing notice;
- 9 (7) a remedy for breach of the whole contract or any unperformed balance or an
10 indemnity ; and
- 11 (8) any right, remedy, or obligation stated in the agreement as surviving.

12 **SOURCE: Licenses, Section 2B-617.**

13 **Notes**

- 14 1. Section 2-310 states what obligations survive a termination. See former §2-106(4).
15 "Termination" is defined as an act which ends a contract for other than breach. See §2-102(a)(48).
- 16 2. Section 2-310 has been conformed to 2B-617. **More thought should be given to**
17 **clarifying the sources of the obligations and rights that survive termination under subsection**
18 **(b), e.g., remedies for breach of the whole contract that survive termination, and coordination**
19 **with 2-808 on cancellation.**

20 **SECTION 2-311. TERMINATION; NOTIFICATION.**

- 21 (a) A party may not terminate a contract, except on the happening of an agreed event, unless
22 the other party receives reasonable notification of the termination.
- 23 (b) An term dispensing with notification is invalid if its operation is unconscionable.
24 However, an agreement specifying standards for the nature and timing of notification is enforceable

1 if the standards are not manifestly unreasonable.

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

3 **Notes**

4 1. Assuming that a party has power to terminate the contract, §2-311(a) states when notice
5 is a condition precedent to termination and subsection (b) limits agreements attempting to dispense
6 with the notice requirement. See former §2-309(3). In short, the power to terminate at will is
7 conditioned upon the receipt by the other party of "reasonable notification," which, in turn, "depends
8 on the nature, purpose and circumstances of such action." §1-204(2). This differs from the
9 September, 1996 draft of 2B-629(a), which states that the party terminating the contract must send
10 reasonable notice of termination. Article 2B has been requested to conform to Article 2 on this.

11 2. The "reasonable notification" condition in subsection (c) refers to the time after which
12 notice is received before the termination is effective. In short, the other party must be given a
13 "reasonable time" to exit from the contract.

14 There are three exceptions to this important default rule. First, notice is not required if the
15 contract provides that termination will occur on the "happening of an agreed event." For example,
16 if the parties in a requirements contract agree that the contract is terminated if the buyer has no actual
17 requirements in good faith, a termination notice is not required. Second, the parties can agree on
18 what is reasonable notification, if the agreement is not "manifestly unreasonable." Section 1-204(1).
19 Franchise and distributorship contracts typically provide for 30, 60 or 90 days notice and the courts
20 have generally upheld such time provisions as reasonable. Finally, the parties can agree to dispense
21 with notification, unless the "operation" of that agreement "is unconscionable."

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

28 3. Without more, the exercise of an agreed power to terminate is also subject to the duty of
29 good faith, §1-203, which cannot be disclaimed by agreement. §1-102(3). Many courts, however,
30 have found good faith where the terminating party follows the terms of the agreement. Under this
31 approach, the motive of the terminating party is irrelevant and the agreed termination is effective if
32 a reasonable notice is given. In light of express concerns about this issue [e.g., the State Bar of
33 California], perhaps some clarification is required.

34 **SECTION 2-312. SALE BY AUCTION.**

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

2 (b) A sale by auction is complete when the auctioneer so announces by the fall of the hammer
3 or in another customary manner. If a bid is made during the process of completing the sale but before
4 a previous bid is accepted, the auctioneer may reopen the bidding or declare the goods sold under
5 the previous bid.

6 (c) A sale by auction is with reserve unless at the time the goods are put up or during the
7 course of the auction it is announced in express terms that the sale is without reserve. In an
8 auction with reserve, the auctioneer may withdraw the goods at any time until completion of the
9 sale is announced. In an auction without reserve, after the auctioneer calls for bids on an article
10 or lot, the article or lot may not be withdrawn pending a bid within a reasonable time. In either
11 case, a bidder may retract a bid until the auctioneer's announcement of completion of the sale, but
12 a bidder's retraction does not revive any previous bid.

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

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

19 **Notes**

20 No major revisions are proposed in former §2-318. There are relatively few cases and
21 they reveal no significant problems of interpretation. The Notes after each subsection, however,
22 raise possible questions for revision and comment. For a focused analysis, see Jorge Contreras,
23 The Art Auctioneer: Duties and Assumptions, 13 Hastings Comm./Ent. L. J. 717 (1991). See
24 also, Patty Gerstenblith, Picture Imperfect: Attempted Regulation of the Art Market, 29 Wm. &

1 Mary L. Rev. 501 (1988).

2 1. Subsection (a).

3 (a) How is a “sale by auction defined? Basically, an auctioneer “invites price
4 offers from successive bidders which he may accept or reject. R.2d, Contracts sec. 28(1).
5

6 (b) Can an auctioneer condition delivery upon payment for all goods sold, even if
7 in separate lots? Yes. Do we need a comment on this?

8 (c). If each lot is a separate sale, are bidders who arrive late on notice of the terms
9 of later sales? The answer should be yes: constructive notice. R.2d 28(2). Comment?

10 2. Subsection (b).

11 (a) The phrase “fall of the hammer, although well understood, is a bit quaint. A
12 more inclusive phrase is “announcement of completion of the sale. R.2d 28(c).

13 (b) The “prior bid problem can occur when the sale is “with reserve, the
14 default rule. 2-320(c). Subsection (b) supports a limited extension of the auctioneer’s discretion
15 beyond the time when the sale was completed.

16 3. Subsection (c).

17 (a) In a sale “with reserve (the default rule), the auctioneer invites bids (offers)
18 and reserves the power to accept or reject them. Bidders assume the risk that the goods will be
19 withdrawn before the sale is concluded. The contract is concluded, however, when the
20 completion of the sale is announced. See *Sly v. First Nat’l Bank of Scottsboro*, 387 So.2d 198
21 (Ala. 1980); R.2d sec. 26, 28, Comment b.

22 (b) If the sale is in “explicit terms...without reserve , when is the contract
23 formed? Clearly, a final deal is not struck until a some bid is made within a reasonable time and
24 not withdrawn before the auctioneer announces the completion of the sale. Both parties have
25 some discretion (the auctioneer’s is more limited) after the bid is made. This supports the
26 conclusion that the contract is formed at the place where the auctioneer is located, rather than at
27 the point where the bid is made, whether made by mail or through EDI.

28 (c) Suppose, during the course of a “with reserve auction, the auctioneer
29 announces that the sale is now “without reserve. Original 2-328(c) did not recognize this
30 conversion possibility, which (we are told) exists in practice. Such a conversion, in effect,
31 announces a “reserve bid in that the goods will not be sold below the last bid before the
32 conversion. Does modern auction practice support the underlined language added to subsection

1 (c) above? Suppose a sale “without reserve” is converted to a sale “with reserve” during the
2 course of the auction? For a case holding that the goods were not in “explicit terms” put up
3 without reserve where the auctioneer stated that there was no minimum bid and the goods would
4 be sold to the highest bidder, see *Miami Aviation Serv. V. Greyhound Leasing & Finance Corp.*,
5 856 F.2d 166 (11th Cir. 1988).

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

11 4. Subsection (d).

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

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

20 (c) S The last sentence states that subsection (d) does not apply to a “forced
21 sale. There are several questions: (1) What is a forced sale? Does it include a disposition to
22 enforce a security interest under Article 9; (2) Is it clear enough that a creditor of the seller
23 should be able to bid without notice; (3) Should a seller who is the creditor be permitted to bid
24 without notice; and (4) Section 2-819(c)(4), which permits a seller to buy at a public resale,
25 appears to conflict with subsection (c). How should this be reconciled?

26 5. Possible coordination\conflict with other provisions in Revised Article 2.

27 **2-402(a).** When must the auctioneer disclose the name of the principal to avoid liability
28 as a seller? In auctions where hundreds of sellers are involved or goods on consignment arrive
29 just before sale, practical problems are posed if disclosure must be just before the bidding. But if
30 not then, when?

31 **2-408.** According to one commentator, this section as written would cause “catastrophic
32 changes in the auction industry. The argument is that since most auction contracts are “consumer
33 contracts, the limitations upon disclaimers make the typical “no warranties” auction sale
34 unworkable. One solution is to except auctions from the definition of “consumer contract.
35 Another is to provide a “safe harbor” for the “as is” disclaimer at auctions.

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

3 (b) A warranty under subsection (a) may be disclaimed or modified only by express
4 language or by circumstances giving the buyer reason to know that the seller does not claim title
5 or purports to sell only such right or title as the seller or a third party may have. Language in a
6 record is sufficient to disclaim warranties under this section if it is conspicuous and states "There
7 is no warranty of title or against infringement in this sale" or words of similar import.

8 (c) A seller that deals in goods of the kind sold warrants that the goods will be delivered
9 free of the rightful claim of a third party by way of infringement or the like. However, a buyer
10 that furnishes specifications to the seller shall hold the seller harmless against any claim of
11 infringement or the like that arises out of compliance with the specifications.

12 (d) A seller's warranty of title, made to an immediate purchaser, extends to any remote
13 purchaser that may reasonably be expected to buy the goods and that suffers damage from breach
14 of the warranty. The rights and remedies of a remote purchaser against the seller for breach of
15 warranty are determined by the enforceable terms of the contract between the seller and the
16 immediate buyer and this by article.

17 (e) A right of action for breach of warranty under this section accrues when the buyer
18 discovers or should have discovered the breach.

19 **SOURCE: Sales, Section 2-312.**

20 **Notes**

21 1. Subsection (a) defines seller to include an "auctioneer or liquidator who fail to
22 disclose its principal." See *Jones v. Ballard*, 573 So.2d 783 (Miss. 1990). There is no
23 requirement that the auctioneer or liquidator reveal the name of its principal. An auctioneer who

1 does not disclose its principal may, however, disclaim the warranty of title under subsection (b).

2 2. In addition to warranting that the "title conveyed is good and its transfer rightful," see
3 Sumner v. Fel-Air, Inc., 680 P.2d 1109 (Alaska 1984), revised subsection (a)(1) provides that
4 the seller also warrants that the title is uncontested. This protects the buyer against colorable
5 "clouds" on an otherwise good title that affect the value of the goods. See, e.g., Frank Arnold
6 KRS, Inc. v. L.S. Meier Auction Co., Inc., 806 F.2d 462 (3d Cir. 1986)(two law suits contest
7 title); Jeanneret v. Vichey, 693 F.2d 259 (2d Cir. 1982)(export restrictions in country from which
8 painting was taken affect value); Colton v. Decker, 540 N.W.2d 172 (S.D. 1995)(conflicting
9 vehicle identification numbers). As one court put it, there "need not be an actual encumbrance of
10 the purchaser's title or actual disturbance of possession to permit a purchaser to recover for a
11 breach of warranty of title when he demonstrates the existence of a cloud on his title, regardless
12 of whether it eventually develops that a third party's title is superior." The policy is that a
13 purchaser "should not be required to engage in a contest over the validity of his ownership."
14 Maroone Chevrolet, Inc. v. Nordstrom, 587 So.2d 514, 518 (Fla.App. 1991)(conflicting vehicle
15 identification numbers).

16 3. Without more, the statute of limitations for breach of warranty under subsection (a)
17 runs from when the cause of action accrues under §2-814(a). Cf. Foxley v. Sotheby's, Inc., 893 F.
18 Supp. 1224 (S.D.N.Y. 1995)(suit against auctioneer claiming fraud in sale of forged art work).
19 Under the Uniform Sales Act the statute ran from the time of delivery or when quiet possession
20 was disturbed. See Menzel v. List, 246 N.E.2d 742 (N.Y. 1969). The question is whether in
21 warranty of title disputes the statute should run from when the breach was or should have been
22 discovered. Arguably, the latter time, capped by an appropriate tolling limitation, is proper. See
23 Balog v. Center Art Gallery-Hawaii, Inc., 745 F. Supp. 1556 (D.Haw. 1990)(warranty that art
24 work "genuine" explicitly extended to future performance). At the March, 1996 meeting, the
25 Drafting Committee agreed upon a "discovery" statute of limitations with a four year tolling
26 period. That decision is implemented in subsection (e). Section 2-814, however, still governs all
27 other statute of limitations issues. **Should a "tolling" period be adopted, such as "8 years
28 after the breach?"**

29 4. The Drafting Committee deleted the phrase "in writing" from an earlier draft of
30 subsection (b). The language of disclaimer need not be in a record. If the disclaimer is in a
31 record, however, the language must be conspicuous and can follow the suggested wording to
32 secure a "safe harbor." See §2-408(c).

33 5. In March, 1995 meeting, the Drafting Committee concluded that (1) the disclaimer
34 provisions in subsections (b) and (c) should be retained in §2-402 rather than moved to §2-408,
35 and (2) no special protection for consumer buyers was needed in light of the new provision
36 governing standard form records. §2-206. At the September, 1996 meeting, it was argued that
37 the word "notice" should be substituted for "knowledge" in subsection (a)(2). Since notice is a
38 broader concept, this might narrow the scope of the warranty against liens or encumbrances. No
39 action was taken.

1 6. Warranty issues involving infringement, subsection (e), the licensing of technology
2 and transfers of other intellectual property remain to be decided. A probable model for revision
3 is Article 42 of CISG.

4 7. Subsection (e) is new: Lack of privity is no defense between the seller and a remote
5 buyer. A remote buyer's remedies against the seller, however, are limited by the contract between
6 that seller and its immediate buyer and Article 2. In short, the remote buyer's rights are
7 derivative. See §2-401(definitions) and §2-410(a). Moreover, a remote buyer's claim against the
8 seller must be brought within four years after the cause of action is should be discovered. The
9 cases are divided on whether lack of privity is a defense in warranty of title suits. See Note, 45
10 Bus. Lawyer 2289 at 2300 (1995); Mitchell v. Webb, 591 S.W.2d 547 (Tex.Civ.App. 1979)(lack
11 of privity no defense).

12 **SECTION 2-403. EXPRESS WARRANTIES TO IMMEDIATE BUYER**

13 (a) If a seller makes an affirmation of fact that describes or relates to the goods, provides
14 a sample or model, or makes a promise to the immediate buyer, the affirmation, sample, model or
15 promise becomes part of the agreement with the immediate buyer unless a reasonable person in
16 the position of the immediate buyer would believe otherwise or would believe that the
17 affirmation was merely of the value of the goods or purported to be merely the seller's
18 commendation of the goods.

19 (b) If the affirmation, sample, model or promise becomes part of the agreement, the seller
20 has an obligation to the immediate buyer that the goods will conform to the affirmation or model,
21 that the whole of the goods will conform to the sample, or that the promised performance will be
22 provided. The obligation is breached if the goods do not conform to any affirmation, sample or
23 model at [tender of delivery] the time the risk of loss passes to the immediate buyer, or if the
24 promised performance is not given when due.

25 (b) A seller's obligation to the immediate buyer under this section may be created:

26 (1) in a medium for communication to the public, including advertising;

1 (2) even though the seller does not use formal words, such as “warranty or
2 “guarantee.”

3 **SOURCE: Sales, Section 2-313.**

4 **SECTION 2-404. EXPRESS WARRANTY OBLIGATIONS TO REMOTE**
5 **BUYERS OR LESSEES ARISING OTHER THAN AS PART OF AGREEMENT OF**
6 **SALE.**

7 (a) If the seller makes an affirmation of fact that describes or relates to new goods, or a
8 promise, on a container or in a label, or in a record that the seller authorizes another person to
9 deliver to a remote buyer or lessee of those goods and that is so delivered, the seller has an
10 obligation to the remote buyer or lessee that goods will conform to the affirmation or that the
11 promise performance will be performed, unless a reasonable person in the position of the remote
12 buyer or lessee would believe otherwise or would believe that an affirmation was merely of the
13 value of the goods or purported to be merely the seller's recommendation of the goods.

14 (b) If a seller makes an affirmation of fact that describes or relates to the goods, provides
15 a sample or model, or makes a promise in a medium for communication to the public, including
16 advertising, and a remote buyer or lessee with knowledge of the affirmation, sample, model or
17 promise buys or leases new goods from a person in the chain of distribution, the seller has an
18 obligation to the remote buyer or lessee that the goods will conform to the affirmation or model,
19 that the whole of the goods will conform to the sample, or that the promise performance will be
20 provided, unless a reasonable person in the position of the remote buyer or lessee would believe
21 otherwise or would believe that the affirmation was merely of the value of the goods or purported
22 to be merely the seller's commendation of the goods.

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

3 (d) An obligation arising under this section is breached if the goods do not conform to
4 any affirmation, sample or model at the time the goods are received by the remote buyer or
5 lessee, or if the promised performance is not given when due.

6 (e) If an obligation created under this section is breached, the remote buyer's or lessee's
7 remedies against the seller are determined by this Article to the extent appropriate in the
8 circumstances, subject to the following:

9 (1) A remote buyer or lessee is subject to any valid disclaimers or limitations of
10 remedies on the container, label or record or contained in the medium of communication to the
11 public that created the obligation;

12 (2) The remedies of rejection and revocation of acceptance are not available;

13 (3) The remote buyer or lessee must give the notice required in Section 2-
14 708(c)(1) and satisfy the burden of proof in Section 2-708(d);

15 (4) The remote buyer or lessee may recover compensation for the loss resulting in
16 the ordinary course from the breach, together with incidental and consequential damages, except
17 for consequential lost profits, less expenses and costs avoided as a result of the breach; and

18 (5) The period of limitations in Section 2-814 begins to run when a breach of
19 obligation occurs under subsection (d).

20 **SOURCE: New.**

21 **Notes**

22 Sections 2-403 and 2-404 in this Draft dealing with express warranties integrate Sections

1 2-403, 2-404 and 2-405 in the November, 1996 Draft.

2 1. Section 2-403 deals with express warranties in direct contractual relationships
3 between seller and buyer.

4 Subsection (a) states the general principles applicable where an "immediate" buyer
5 claims a breach of express warranty by the seller. They cover any case where there is privity of
6 contract between the seller and buyer. Subsection (a) follows §2-313(1) of the 1990 Official
7 Text, except that the phrase "becomes part of the agreement" is substituted for "becomes part of
8 the basis of the bargain." The change clarifies that an express warranty is treated like any other
9 term of the agreement and that the buyer need not initially prove reliance to establish an express
10 warranty.

11 Subsection (a) also states when a claimed affirmation of fact, promise, description or
12 sample becomes "part of the agreement." If the "immediate" buyer alleges and proves what the
13 seller affirmed, promised or displayed to the buyer about the goods, the usual assumption is that
14 they become part of the agreement unless the seller establishes "otherwise." This is consistent
15 with the comments to §2-313 of the 1990 Official Text and most of the interpretive case law.
16 This "presumption", however, is not stated in the statute.

17 One question is whether a reasonable person in the position of the buyer would believe
18 that the affirmation of fact or promise became part of the agreement. Thus, if the buyer did not
19 hear the affirmation or did not believe it in fact or relied upon its own or another's skill and
20 judgment, the exception would be satisfied.

21 A second question is whether what was affirmed or said about the goods was puffing.
22 Put differently, was what was said opinion, commendation or a general valuation not an
23 affirmation of fact or promise? Thus, "puffing" is a defense which the seller can raise in a motion
24 for summary judgment or establish before a jury.
25

26 There are a number of factors relevant to whether a buyer is reasonable in believing that
27 an express warranty rather than "puffing" is involved. For example, the buyer might be
28 unreasonable if the seller's representations taken in context (1) were verbal rather than written,
29 (2) were general rather than specific, (3) related to the consequences of buying rather than the
30 goods themselves, (4) were "hedged" in some way, (5) related to experimental rather than
31 standard goods, (6) concerned some aspects of the goods but not a hidden or unexpected
32 non-conformity, (7) were phrased in terms of opinion rather than fact, or (8) were not capable of
33 objective measurement. See *Federal Signal Corp. v. Safety Factors, Inc.*, 886 P.2d 172 (Wash.
34 1994), where the court held that the trial court erred in not making findings of fact where the
35 seller stated that a new product was "better than" an earlier, comparable model. See also, *Jordan*
36 *v. Paccar, Inc.*, 37 F.3d 1181 (6th Cir. 1994)(representations about strength of fiberglass roof
37 which shattered and caused personal injury when the truck rolled over were "puffing" as a matter
38 of law).

1 3. Subsection (b)(1) clarifies that an express warranty in a direct contractual relationship
2 may be created by communications to the public, including advertising.

3 Subsection (b)(2) is taken without change from the first clause in §2-313(2) of the 1990
4 Official Text.

5 Subsection (b)(3) states when the express warranty is breached. Express warranties may
6 relate to new or used goods. The question whether the goods conform to the express warranty or
7 not turns on the condition of the goods when the warranty was made. Thus, if the express
8 warranty related to new goods (establishing the standard to which the goods must conform) and
9 used goods were delivered at the time specified in subsection (b)(3), there is a breach of
10 warranty. **The bracket phrase, [tender of delivery] raises a policy question for discussion.**

11 Section 2-404(a): “Warranty in the box.

12 New Section 2-404(a) deals specifically with the “pass through warranty, a.k.a. the
13 “warranty in the box, and other affirmations and promises made on labels or containers. This is
14 a package warranty (gives and takes) that a seller authorizes an intermediary (not necessarily an
15 agent) to deliver to a remote buyer or lessee. It is a first cousin to the “mass market license and
16 raises similar questions, i.e., when does it become part of the agreement between the seller and
17 buyer (privity) and, if there is no privity, when does it create an obligation that the remote buyer
18 or lessee can enforce. The focus here, however, is on the non-privity case. The assumption is
19 that the remote buyer gets the entire package, i.e., what it gives and takes, even though there is no
20 privity of contract. See subsection (e)(1).

21 **At the ALI Council meeting in December, 1996 it was suggested that Article 2 might**
22 **adapt the “mass market” concept found in 2B-102(a)(25) and 2B-308 to contracts for the**
23 **sale of goods. Other terms except licenses are present in these transactions, i.e., a standard**
24 **form used in multiple transactions where a sale is directed to the general public through**
25 **retail or similar distribution under substantially the same terms for the same goods, and**
26 **the risk of unfair surprise is high. One answer is that in consumer contracts revised 2-206**
27 **provides some protection. In commercial contracts, however, the “manifest assent”**
28 **requirement no longer exists. Policy question: Should such an adaptation be made?**

29 Section 2-404(b). Express warranties to the public.

30 New Section 2-404(b) deals with warranty obligations arising from communications to
31 the public. In essence, when a remote buyer or lessee with knowledge of an affirmation of fact or
32 promise made by the seller to the public purchases the goods from a seller or lessor in the chain
33 of distribution, the seller making the affirmation or promise has an obligation to the remote buyer
34 if the goods fail to conform unless the remote buyer or lessee, as a reasonable person, would not
35 believe, etc. After discussion, the Drafting Committee defeated a motion to delete the word

1 “knowledge at the September, 1996 meeting.

2 Remedies.

3 What remedies should be available to a remote buyer or lessee when the seller breaches
4 an obligation created under 2-404? There is no direct contractual relationship between the
5 parties. Should the remote buyer or lessee have all of the remedies that would be available
6 against their immediate seller or lessor?

7 Subsection (e) gives an answer to the last question.

8 First, subsection (e)(1) deals with the downside in the “pass through warranty under
9 subsection (a): If the buyer seeks to enforce the warranty given it must take the valid limitations
10 “in the box. See the note on “Shrinkwrap licenses, supra.

11 Second, subsection (e)(2) precludes the remote plaintiff from rejecting the goods or
12 revoking acceptance against the seller or pursuing any remedies consistent with rejection or
13 revocation. Thus, the remote party cannot recover the price paid to the immediate seller from the
14 seller under subsections (a) and (b) and can’t measure damages by “cover or the contract price-
15 market price formula.

16 Third, subsection (e)(3) treats the goods as accepted for purposes of notice and burden of
17 proof. Thus, the remote party must give the seller notice as required by 2-708(c)(1) and must
18 establish that the goods did not conform to the warranty under 2-708(d).

19 Fourth, subsection (e)(4) states the basic measure of damages as stated in 2-804(1). See
20 also, 2-827(b).

21 What about consequential damages, which are foreclosed if a remote purchaser or
22 transferee sues under 2-409(a)? To test the waters, this Draft states that the remote plaintiff may
23 recover consequential damages except for lost profits. See 2-806. Thus, a remote plaintiff might
24 recover foreseeable reliance expenses that don’t quite fit the definition of incidental damages in
25 2-805.

26 Fifth, the four year limitation period in 2-814(a) begins to run when the breach of
27 obligation occurs under 2-404(d), i.e., when the nonconforming goods are received or when the
28 promise was not performed when due.
29

30 **SECTION 2-405. IMPLIED WARRANTY OF MERCHANTABILITY; USAGE OF**

31 **TRADE.**

1 (a) Subject to Section 2-408, a warranty that goods are merchantable is implied in a
2 contract for their sale if the seller is a merchant with respect to goods of that kind. The serving
3 for value of food or drink to be consumed on the premises or elsewhere is a sale under this
4 section.

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

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

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

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

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

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

13 (6) conform to the promise or affirmations of fact, if any, made on the container or
14 label.

15 (c) Subject to Section 2-408, implied warranties other than described in this section may
16 arise from course of dealing or usage of trade.

17 **SOURCE: Sales, Section 2-314.**

18 **Notes**

19 1. Subsection (b)(7) in the May, 1995 Draft, dealing with the merchantability of goods to
20 be consumer or applied to the human body, was deleted at the October, 1995 meeting of the
21 Drafting Committee. The problems are too complex to catch in a single sentence and are best left
22 for the courts to resolve under the more general standard of merchantability in §2-314(b) or the
23 evolving law of products liability. See Restatement of the Law Torts: Products Liability §2,
24 comment (g) (Tent. Draft No. 2, March 13, 1995).

1 2. Personal injury.

2 Following extensive discussion at the 1996 Annual Meeting of the Conference and
3 elsewhere, the Drafting Committee voted to withdraw proposed Section 2-319 in the July, 1996
4 Draft, which attempted to accommodate the tension between warranty law and tort law where
5 goods caused damage to person or property. Part of that tension arises from the debate over
6 whether the concept of defect in tort and the concept of merchantability in Article 2 are
7 coextensive, i.e., if the goods are not defective under tort law must they be merchantable under
8 Section 2-314? The following proposed comment reflected the position of the Drafting
9 Committee:

10 **_____ “The requirement in subsection (b)(3) that goods, to be merchantable, must at a
11 minimum be “fit for the ordinary purposes for which goods of that description are used” is
12 contract-based. It is derived from the description of goods in a contract for sale. This
13 requirement is not synonymous with the obligation in the law of products liability that the
14 goods not be defective. Conforming goods may be defective if the contract description
15 contemplates goods with those qualities. Goods without defect may fail nevertheless to
16 conform to a particular contract description. In many situations, however, the contract
17 and tort obligations will substantially overlap, particularly where manufacturing defects
18 are involved and personal injuries result. In those situations, determinations whether
19 goods are merchantable should be guided by determinations that goods are or are not
20 defective under product liability law.”**

21 At the December, 1996 meeting of the ALI Council a motion was made and passed (19-0)
22 to the effect that except where breach of an express warranty or an implied warranty of fitness
23 was established the state should have one standard for defect when goods cause personal injuries
24 and that standard should come from applicable tort law. In short, if the goods are both
25 unmerchantable and defective or the goods are not defective but are unmerchantable under the
26 UCC tort law whether there is liability. One member of the Council suggested the following
27 language for the comment:

28 **“When recovery is sought for injury to person or property the determination as to
29 whether goods are merchantable within subsection (b)(3) is to be determined by applicable
30 state products liability law on the issue of defect.”**

31 Does this language now reflect the position of the Drafting Committee?

32 3. Revised §2-406(a) does not displace or preempt any inconsistent state law, such as the
33 so-called "blood shield" statutes enacted by many states, which immunize suppliers of blood and
34 other body parts from implied warranty liability under Article 2 or strict liability in tort. See,
35 e.g., Doe v. Travenol Laboratories, Inc., 698 F. Supp. 780 (D. Minn. 1988).

36 **SECTION 2-406. IMPLIED WARRANTY OF FITNESS FOR PARTICULAR**

1 **PURPOSE.** Subject to Section 2-408, if a seller at the time of contracting has reason to know
2 any particular purpose for which the goods are required and that the buyer is relying on the
3 seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the
4 goods are fit for that purpose.

5 **SOURCE: Sales, Section 2-315.**

6 **SECTION 2-407. DISCLAIMER OR MODIFICATION OF WARRANTIES.**

7 (a) Language or conduct relevant to the creation of an express warranty and language or
8 conduct tending to disclaim or modify an express warranty must be construed as consistent with
9 each other, if such a construction is reasonable. Subject to Section 2-202 with regard to parol or
10 extrinsic evidence, language or conduct disclaiming or modifying an express warranty is
11 ineffective to the extent that such a construction is unreasonable

12 (b) Except in a consumer contract, if language in an agreement is construed to disclaim or
13 modify an implied warranty, the following rules apply:

14 (1) All implied warranties are disclaimed or modified by language [or
15 expressions] that under the circumstances call the buyer's attention to the disclaimed or
16 modification of the warranties and states that the implied warranties have been disclaimed or
17 modified.

18 (2) Subject to Section 2-206(a), conspicuous language contained in a record that
19 disclaims or modifies an implied warranty is sufficient to satisfy paragraph (1) in the following
20 cases:

21 (A) A disclaimer or modification of the implied warranty of
22 merchantability is sufficient if the language mentions merchantability or states "These goods may

1 not be fit for their ordinary purpose" or is of similar import.

2 (B) A disclaimer or modification of the implied warranty of fitness is
3 sufficient if the language states "There are no warranties that these goods will conform to the
4 purposes for which they are purchased made known to the seller" or is of similar import.

5 (c) Language like "as is" or "with all faults" is sufficient to disclaim or
6 modify an implied warranty.

7 (3) If the buyer before entering into the contract, has examined the goods, sample,
8 or model as fully as desired or has declined to examine them, there is no implied warranty with
9 regard to conditions that an examination in the circumstances would have revealed.

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

12 (c) Language in a consumer contract purporting to disclaim or modify the implied
13 warranty of merchantability or the implied warranty of fitness for particular purpose is ineffective
14 unless the buyer has expressly agreed to it.

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

17 **SOURCE: Sales, Section 2-316.**

18 Notes

19 1. Subsection (a) preserves the policy that when language creating and language
20 disclaiming or modifying an express warranty are inconsistent, the disclaimer is inoperative,
21 subject to §2-202 (the "parol evidence rule"). The enforceability of merger clauses in standard
22 form contracts is governed by §2-206(a) and (b).

23 2. Subsection (b) now governs the disclaimer or modification of implied warranties in
24 commercial contracts. After the October, 1995 meeting of the Drafting Committee, subsections

1 (b), (c), and (d) of the October, 1995 Draft were integrated into a single, new subsection (b). At
2 the January, 1996 meeting of the Drafting Committee, the decisions was made to delete all
3 "regulatory" and "mandatory" language in subsection (b) and to provide a "safe harbor" for
4 language contained in a record. Thus, subsection (b)(1) now states a general standard for
5 exclusion or modification of implied warranties whether or not the language is contained in a
6 record. [The phrase "as is" is not specifically mentioned, but such language could satisfy the
7 general standard.] Subject to Section 2-206, if the language is in a record, subsection (b)(2) states
8 what conspicuous language, if used, will be effective to modify or exclude. The seller who
9 follows this language will have a "safe harbor" unless the exclusion or modification is
10 unconscionable on other grounds. See §§2-206(a) & 2-105(a). If not within the "safe harbor," the
11 seller may still prevail under the general standard in subsection (b)(1). For example, if the
12 language in the record was not conspicuous but the term was negotiated, it would be outside the
13 "safe harbor" in subsection (b)(2) but effective under subsection b(1).

14 The November, 1996 draft contains a "safe harbor" for used goods: Conspicuous
15 expressions, such as "as is" or "with all faults", are sufficient to disclaim all implied warranties.

16 3. Subsection (c) states the requirements in a consumer contract, whether in a record of
17 not, for the seller to negate or limit any implied warranty. This applies to all goods, whether new,
18 used, or distress or seconds. Stated simply, the language of negation is inoperative unless the
19 buyer has expressly agreed to it. Based upon the discussion at the September, 1996 meeting of
20 the Drafting Committee, more work is needed here. For example: (1) Should the test vary if the
21 language is not in a record; (2) When does anyone "expressly agree" to something, see 2-207(c);
22 How should 2-408(c) relate to agreements limiting remedies which are enforceable under 2-810?

23 Remember, the 1995 Annual Meeting of NCCUSL voted to delete a provision that the
24 language of disclaimer was inoperative unless the seller provided by "clear and affirmative
25 evidence that the buyer expressly agreed to it.

26 **Policy decision: Are the requirements of revised 2-206 sufficient for consumer**
27 **contracts here and other places where terms varying the standard default rules are at**
28 **stake? If so, subsection (c) can be deleted.**

29 SECTION 2-408. CUMULATION AND CONFLICT OF WARRANTIES.

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

33 (1) Exact or technical specifications prevail over an inconsistent sample or model

1 or general language of description.

2 (2) A sample or model prevails over inconsistent general language of description.

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

5 **SOURCE: Sales, Section 2-317.**

6 **Notes**

7 1. One change was made in §2-409. An implied warranty of merchantability in a
8 consumer contract that is inconsistent with an express warranty is not displaced under §2-409(3).
9 Rather, the requirements of §2-406(b) must be satisfied.

10 **SECTION 2-409. EXTENSION OF EXPRESS OR IMPLIED WARRANTIES.**

11 (a) A seller's express or implied warranty made to an immediate buyer extends to any
12 remote purchaser or transferee that may reasonably be expected to use or be affected by the
13 goods and that is damaged by a breach of warranty. The rights and remedies against the seller for
14 breach of a warranty extended under this subsection are determined by the enforceable terms of
15 the contract between the seller and the immediate buyer and this article, except that the seller
16 shall not be liable for loss of profits.

17 (b) This section does not displace:

18 (1) the rights and remedies of third party beneficiaries and assignees under the law
19 of contracts or of persons to which goods are transferred by operation of law;

20 (2) principles of law and equity that extend a warranty to or for the benefit of a
21 remote buyer, transferee or other person.

22 (c) The operation of this section may not be excluded, modified, or limited, but a
23 disclaimer or modification of a warranty or the limitation of rights and remedies effective against

1 the buyer is also effective against the remote buyer or transferee.

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

3 **Notes**

4 1. Section 2-409 has been the subject of considerable discussion, both within and without
5 the Drafting Committee. After the 1994 NCCUSL Annual Meeting, the May, 1994 Draft was
6 further revised for clarity and was discussed at the March, 1995 meeting of the Drafting
7 Committee. In response to suggestions made at that meeting, the section was further revised for
8 clarity and consistency and subsection (c) was limited to sellers of unmerchantable new goods.
9 Other changes were made in the July, 1996 Draft and the November, 1996 draft, which built on
10 revised Section 2-313 of the July, 1996 Draft, followed extended discussion at the 1996 Annual
11 Meeting of NCCUSL and the September, 1996 meeting of the Drafting Committee. The current
12 draft follows decisions made at the November, 1996 meeting of the Drafting Committee.
13

14 2. Overview. Section 2-409 deals with warranty claims by a remote purchaser or
15 transferee against "the seller" with whom there is no privity of contract. It does not deal with
16 obligations created under 2-404. See §2-401 for the definitions. The section operates as follows:

17 Subsection (a). Under subsection (a), the seller's warranty made to an immediate buyer is
18 extended to a foreseeable purchaser or transferee (i.e., a person who obtains title to or an
19 insurable interest in the goods) who is damaged by the breach. The warranty under this draft,
20 however, is not extended to other persons who might be expected to use or be affected by the
21 goods. Thus, the warranty extension is vertical, not horizontal.

22 **At the ALI Council meeting in December, 1996, the Council supported a motion that**
23 **foreseeable users or persons affected who suffer economic loss from breach of an express**
24 **warranty should be restored to subsection (a). Does the Drafting Committee agree?**

25 The protected remote person's rights against the seller are defined and limited by the
26 terms of the contract between the seller and the immediate buyer and the terms of this Act. It is,
27 in short, a derivative warranty and the beneficiary stands in the shoes of the immediate buyer.

28 Moreover, the seller is not liable to a remote purchaser or transferee for "consequential
29 damages" as that term is used in 2-806. Thus, a remote and otherwise protected buyer could not
30 recover consequential lost profits resulting from the breach and could not recovery for injury to
31 person or property.

32 Although protected persons may be called beneficiaries, the warranty extension is based
33 more upon policy than intention of the parties. The seller should be responsible to foreseeable
34 buyers and transferees for the quality of the goods warranted to the immediate buyer. But since
35 the warranty is derivative, the protected purchaser or user is bound by the terms and conditions

1 of the contract between the seller and immediate buyer. Thus, disclaimers and agreed limited
2 remedies in that contract bind the beneficiaries as well. **A motion to restore the “three
3 alternatives” approach of former 2-318 was defeated at the November, 1996 meeting.**
4

5 Subsection (b).

6 Subsection (b) states two things that are not displaced by 2-409.
7

8 Subsection (b)(1) clarifies that Section 2-409 supplements rights and remedies of third
9 party beneficiaries and assignees under contract law and transferees by operation of law. For
10 example, Subsection (a) should be distinguished from cases where an immediate buyer to whom
11 a warranty has been made by the seller assigns the warranty or rights under it to a remote
12 purchaser under §2-503. In these cases, the remote purchaser's rights against the seller are based
13 upon the assignment rather than subsection (a) and are subject to the contract and relevant
14 defenses between the seller and the immediate buyer. They should be treated under §2-503
15 rather than §2-410(a). A leading case is *Collins Co. v. Carbonline Co.*, 864 F.2d 560 (7th Cir.
16 1989).

17 Subsection (b)(2), taken from 2A-316, states that 2-409 does not displace “principles of
18 law and equity that might extend a warranty beyond the immediate buyer. Thus, a court might
19 conclude that a remote commercial or consumer buyer has a direct claim against the seller for
20 damage resulting from breach of an implied warranty of merchantability, see, *Hininger v. Case*
21 *Corp.*, 23 F.3d 124 (5th Cir. 1994)(reviewing Texas law), or that there were sufficient direct
22 dealings between the seller and the remote buyer before and after the contract to establish privity,
23 see *U.S. Roofing, Inc. v. Credit alliance Corp.*, 279 Cal. Rptr. 533 (Cal.App. 1991).

24 Subsection (c) states that the “operation of this section cannot be varied by agreement,
25 distinguishing agreements limiting the rights and remedies of the parties before the section
26 begins to operate.
27

28 3. The definition of "the seller" in §2-401 is broad enough to include a seller whose sale
29 is governed by the Convention on the International Sale of Goods. Under CISG, the seller's
30 liability for non-conforming goods extends only to the immediate buyer. Lack of privity is a
31 defense. But if the CISG seller's immediate buyer resells to a buyer in a state governed by the
32 UCC, the CISG seller could be liable to the non-CISG remote buyer under §§2-404 and 2-410.
33 Complex federal preemption issues aside, a foreign seller is not insulated from warranty
34 extensions to remote non-CISG buyers under the UCC. See Richard E. Speidel, *The Revision of*
35 *UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the*
36 *International Sale of Goods*, 16 Nw. U. J. of Int'l Law & Bus. 165, 178-188 (1995).

37 4. Section 2-410(b) in the November, 1996 draft has been deleted. See 2-404(e).

38 5. Section 2-411 in the November, 1996 Draft, dealing with “Injury to Person or Property

1 Resulting from Breach of Warranty, has been deleted.

2 **PART 5**

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

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

5 (a) Except as otherwise expressly provided in this article, this article applies whether or
6 not the seller, buyer, or a third party has title to or possession of the goods and notwithstanding
7 any statute or rule of law that possession or the absence of possession is fraudulent.

8 (b) In cases not covered by other provisions of this article, if the location of title is
9 material, the following rules apply:

10 (1) Title to goods does not pass under a contract for sale before their identification
11 to the contract. Unless otherwise expressly agreed, a buyer acquires by their identification a
12 special property interest as limited by this article.

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

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

17 (4) Title passes to the buyer at the time and place at which the seller completes
18 performance with reference to the physical delivery of the goods, despite any reservation of a
19 security interest and even if a document or certificate of title is to be delivered at a different time
20 or place.

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

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

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

6 (c) If delivery is to be made without moving the goods and the seller is to deliver a
7 document of title, title passes when and where the seller delivers the document.

8 (d) If delivery is to be made without moving the goods and the goods are already
9 identified at the time of contracting and no document of title is to be delivered, title passes at the
10 time and place of contracting.

11 (e) Title to goods reverts in the seller upon the buyer's rejection or refusal to receive
12 them, whether or not justified, or upon the buyer's justified revocation of acceptance. Revesting
13 occurs by operation of law and is not a sale.

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

15 **Notes**

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

17 2. Although a sale occurs when title passes from seller to buyer for a price,
18 §2-102(a)(25), the location of title is largely irrelevant under Article 2. The same is true under
19 CISG. See Art. 4(b) which states that CISG is not "concerned with...the effect which the contract
20 may have on the property in the goods sold. Section 2-501 may be relevant to disputes over the
21 location of title arising outside of Article 2. No effort has been made to identify those disputes or
22 determine whether the rules of §2-501 are applicable to them.

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

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

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

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

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

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

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

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

21 (d) This section does not impair an insurable interest recognized as such under any other
22 law.

1 **SOURCE: Sales, Section 2-501.**

2 **Notes**

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

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

8 3. The extent to which a seller retains an insurable interest in identified goods is stated in
9 §2-502(c). No change is made. In light of §2-502(d), the insurable interest of both seller and
10 buyer complements or is in addition to insurable interests recognized by other sources of law.
11 See 2A-218 on "insurance and proceeds."

12 4. Advantages of Identification. The advantages to the buyer of identification and
13 obtaining a "special property interest" are not stated in §2-502. These advantages include: (1)
14 The acquisition of "goods oriented" remedies against the seller under §§2-824 and 2-807; (2)
15 Protection against the seller's creditors under §2-505; (3) Earlier status, in some states, as a buyer
16 in ordinary course of business under §1-201(9); (4) A right to inspect the goods under §2-611(a);
17 and (5) Standing to sue third parties who cause injury to identified goods, §2-813.

18 Similarly, the advantages to the seller of identification are not stated in §2-502. These
19 advantages include: (1) Shipment under reservation, §2-608(a); (2) Resale under §2-819(a); (3)
20 Possible excuse where goods identified at the time of contracting are damaged or destroyed,
21 §2-715; (4) Possible action for the price upon breach by the buyer, even though the goods have
22 not been accepted, §2-822(a)(2); and (6) Standing to sue third parties who cause injury to
23 identified goods, §2-813. In addition, the seller, upon breach, may make a commercially
24 reasonable decision to identify goods to the contract and pursue appropriate remedies. See
25 §2-817.

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

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

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

31 (a) All rights of a seller or buyer, including a right to damages for breach of the whole
32 contract or a right arising out of the assignor's due performance of its entire obligation, may be

1 assigned unless the assignment would materially change the duty of the other party, increase the
2 burden or risk imposed on that party by the contract, or impair that party's likelihood of obtaining
3 return performance.

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

8 (c) Acceptance of a delegation of duties by an assignee constitutes a promise by the
9 assignee to perform those duties. The promise is enforceable by the assignor or the other party to
10 the original contract. The other party may treat any assignment or transfer that delegates
11 performance as creating reasonable grounds for insecurity and, without prejudice to the party's
12 rights against the assignor, may demand assurance of due performance from the assignee.

13 (d) An assignment or transfer of "the contract" or "all my rights under the contract", or an
14 assignment or transfer in similar general terms, is an assignment of rights. Unless the language or
15 the circumstances indicate the contrary, as in an assignment for security, the assignment or
16 transfer is a delegation of performance of the duties of the assignor.

17 (e) If a contractual term prohibits the assignment of rights otherwise assignable under
18 subsection (a), the assignment is effective, but, whether or not the contract so provides, the
19 assignment is a breach of contract for which damages under this article are available.

20 (f) A contractual term prohibiting the delegation of duties otherwise delegable under
21 subsection (c) is enforceable, and an attempted delegation is not effective. A prohibition of
22 assignment or transfer of "the contract" must be construed as precluding only the delegation to

1 the assignee or transferee of the assignor's duty to perform.

2 **SOURCE: Sales, Section 2-210; Leases, Section 2A-303; Licenses, Sections 2B-502, 2B-507.**

3 **Notes**

4 1. This section reintegrates 2-211 (July, 1996) with 2-403 (July, 1996) and revises the
5 integration to deal more specifically with terms that prohibit assignments and delegations that are
6 otherwise enforceable. See 2A-303.

7 2. Subsection (a) states the default rule on an assignment of rights. They are enforceable
8 unless... (see the “unless” clause). Rights are broadly defined (“all”). See also, subsection
9 (d)(rules of interpretation). Subsection (e), however, provides that a term prohibiting an
10 otherwise permissible assignment of rights is not enforceable, i.e., the assignment is effective.
11 The prohibited assignment is a breach of contract for which damages can be recovered under the
12 general principles of 2-804.

13 3. Subsection (b) states the default rule for a delegation of duties: They are enforceable
14 “unless” (first sentence). The second sentence of subsection (b) states the effect of a delegation of
15 duties on the duty of the delegator to a non-consenting party and subsection (c) states the effect
16 of the delegatee’s acceptance of the duties delegated. There are no changes from Section 2-210
17 of the 1990 Official Text. Subsection (f) makes clear that, unlike a prohibition of assignment of
18 rights, a term prohibiting the delegation of duties is effective and provides some rules of
19 interpretation.

20 4. Because of differences in the underlying transaction, 2-503 is less complex than 2A-
21 303. For example, there is no need for a special treatment of “residual interests” in goods, 2A-
22 303(2), and a provision on terms which prohibit the creation and perfection of security interests,
23 2A-303(3), appears to be unnecessary. Moreover, Section 2-503 is consistent with the basic
24 principles of assignment and delegation law (although not an exhaustive statement) and has
25 survived an occasional testing in the courts. See *Baxter Healthcare Corp. V. O.R. Concepts, Inc.*,
26 69 F.3d 785 (7th Cir. 1995); *Sally Beauty Co. v. Nexxus Products Co.*, 801 F.2d 1001 (7th Cir.
27 1986).

28 5. If a contract contains warranties and the buyer either transfers the contract or assigns
29 the rights to a third party, the third party can usually enforce the warranties against the seller. See
30 §2-409(b).

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

33 (a) Except as otherwise provided in this section, a purchaser of goods acquires rights and

1 title identical to those the transferor had or had power to transfer. A purchaser of a limited
2 interest in goods acquires rights and title only to the extent of the interest purchased.

3 (b) A person with voidable rights or title acquired in a purchase from a seller that has
4 relinquished possession or control has power to transfer good title to a good-faith purchaser for
5 value until the seller regains possession or control.

6 (c) For purposes of this section, a purchase includes a transaction in which:

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

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

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

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

11 (d) The entrusting of possession of goods to a merchant that deals in goods of that kind
12 gives the merchant power to transfer all rights and title of the entruster and to transfer the goods
13 free of any security interest perfected by the entruster under Article 9 to a buyer in the ordinary
14 course of business.

15 (e) Entrusting includes any delivery and any acquiescence in retention of possession,
16 regardless of any condition expressed between the parties to the delivery or acquiescence or
17 whether the procurement of the entrusting or the possessor's disposition of the goods was
18 punishable under criminal law.

19 **SOURCE: Sales, Section 2-403.**

20 **Notes**

21 1. Section 2-504, formerly §2-403 of the 1990 Official Text, has been revised to clarify
22 the cases where a purchaser of goods gets better rights or title than the transferor had power to
23 transfer. Section 2-504(a) states the nemo dat principle in a separate subsection. Without more,

1 a buyer gets no more rights and title to goods than that of its seller. Section 2-504(b) states the
2 good faith purchaser exception to the nemo dat principle. The BFP's seller must obtain voidable
3 rights or title in a transaction of purchase from the purported true owner before there is power to
4 transfer good title. The purported true owner must give up possession and control of the goods in
5 that transaction, but not necessarily to the BFP's seller. See *Inmi-Etti v. Aluisi*, 492 A.2d 917 (Ct.
6 App. Md. 1985)("voidable title cannot be obtained unless there is a voluntary transfer of the
7 goods).

8 The power to pass good title includes but is not limited to the four situations stated.
9 Remaining questions about the scope of "transaction of purchase", when title or rights are
10 voidable, and who is a good faith purchaser for value are left to the courts. See *Johnson &*
11 *Johnson Prod. v. Dal Intern. Trading Co.*, 798 F.2d 100 (3d Cir. 1986)(good faith purchaser of
12 voidable title protected).

13 2. Section 2-504(c) clearly states that a secured party who entrusts goods to a merchant
14 who did not create the security interest, see §9-307(1), will lose the security interest to a buyer in
15 the ordinary course of business. See §2-502(c)(1). See *Sears Consumer Fin. Corp. v.*
16 *Thunderbird Prods.*, 802 P.2d 1032 (Ariz. 1990).

17 3. An assumption is that the "shelter" principle is in operation. Thus, if goods are
18 entrusted to a merchant for repair and the merchant sells them to a non-merchant, the
19 non-merchant has power to transfer good title to a good faith purchaser for value.

20 4. This section is subject to applicable certificate of title legislation. Section 2-104(a)(1).
21 If that legislation clearly states that title passes to covered goods only upon the delivery of a
22 proper certificate of title, Section 2-503 does not apply. Otherwise, the certificate may be
23 presumptive evidence of title but the ultimate question of "good title" is determined under
24 Section 2-503.

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

26 **SOLD.**

27 (a) Except as otherwise provided in subsections (b) and (c), the rights of creditors of the
28 seller with respect to goods identified to a contract for sale and retained by the seller are subject
29 to the buyer's rights under Sections 2-824, 2-807, and 2-822(b) if the buyer's rights vest before a
30 creditor's claim in rem attaches to the goods.
31

32 (b) A creditor of a seller in possession of goods subject to a contract for sale may treat the

1 contract as void or voidable if, as against the creditor, retention of possession by the seller is
2 fraudulent or void or voidable under any statute or rule of law. However, it is not fraudulent for a
3 seller, for a commercially reasonable time after the contract becomes enforceable, to retain
4 possession in good faith and in current course of trade.

5 (c) Except as otherwise provided in subsection (a) or Section 2-504(d), this article does
6 not impair rights of a creditor of the seller under Article 9 or in a case in which an identification
7 to the contract or delivery is made other than in current course of trade but in satisfaction of or as
8 security for a preexisting claim for money, security, or the like, and under circumstances that the
9 transaction would constitute a fraudulent transfer or voidable preference under any statute or rule
10 of law other than this article.

11 **SOURCE: Sales, Section 2-402.**

12 Notes

13 1. Under revised subsection (a), the rights of "creditors of the seller" not just "unsecured
14 creditors" are now subject to the buyer's right to possession of the goods under §§2-824 (formerly
15 §2-502) and 2-807 (formerly Section §2-716). This change expands the buyer's goods oriented
16 remedies against creditors of the seller, including secured and lien creditors. The right to
17 possession alone, however, does not determine priorities over those creditors in the goods or the
18 proceeds. The language in subsection (a) (proposed by the ABA Task Force) states the priority
19 rule: The buyer's rights must vest before the creditor's in rem claim attaches.

20 2. The rights of an Article 9 secured creditor of the seller against a buyer are preserved
21 under subsection (c)(1), unless stated otherwise in §§2-824 and 2-807 or §2-504(c) is involved.
22 Revised subsection (a) simply protects the buyer's right to recover the goods against the creditor:
23 It does not provide that a security interest is "cut off" or that the buyer has priority. If, however,
24 the buyer is a buyer in the ordinary course of business, the security interest might be cut off under
25 §9-307(1), §2-505(d) or 2-807.

26 A few illustrations reveal the broad operation of this provision. In all, assume that the
27 buyer is entitled to the possession of goods retained by the seller (rights "vest ") under either
28 §§2-824 or 2-807.

1 #1. C becomes an unsecured creditor of S either before or after the contract for sale. C
2 loses to B unless the retention is fraudulent under §2-505(b) or subsection (c)(2) applies.

3 #2. LC obtains a judicial lien on the goods either before or after B has a special property
4 interest in and right to possession of the goods. If before, B takes subject to the judicial lien. If
5 after B is protected under subsection (a).

6 #3. SP creates a security interest in the goods either before or after the buyer's rights
7 vest. If before, a buyer in the ordinary course of business may take free of that security interest
8 under §9-307(1) or §2-504(c). If after, SP may take subject to buyer's rights in the collateral, even
9 though the buyer has not perfected a security interest.

10 **Since December, 1995 representatives of the Article 2 and Article 9 Drafting**
11 **Committees have met twice to discuss this and other overlap problems between sales and**
12 **secured transactions. Moreover, the problem sparked interest at the 1996 Annual Meeting**
13 **and discussion continued at the September, 1996 meeting of the Drafting Committee**
14 **(where a motion to give the buyer a "super" priority under Article 2 was narrowly**
15 **defeated). Although a general consensus has emerged on some issues, others remain for**
16 **decision. More specifically, when does the buyer protected under Article 2 become a**
17 **BIOCB? The right to possession (which protects the buyer's need for the goods) is**
18 **undercut unless the BIOCB status arises when the buyer has a right to possession against**
19 **the seller, not when possession is actually taken. In effect, this right arises when the buyer**
20 **has a special property interest in the goods and the right to possession arises under 2-724 or**
21 **2-707.**

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

24 (a) If delivered goods conform to the contract and may be returned by the buyer, the
25 transaction is:

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

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

28 (b) Under a sale on approval:

29 (1) the risk of loss and the title to goods identified by the contract do not pass to
30 the buyer until acceptance;

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

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

6 (c) Under a sale or return:

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

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

10 (d) An "or return" term of a contract for sale negates the sale aspect of a contract within
11 the provisions of this article on parol or extrinsic evidence.

12 (e) Goods held on approval are not subject to claims of a buyer's creditors until
13 acceptance. However, goods held on sale or return are subject to those claims if delivered to a
14 merchant buyer and in that buyer's possession.

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

16 **Notes**

17 1. Section 2-506 has been revised to include all material on the nature and the special
18 incidents of "sale or return" and "sale on approval" in one section. Thus, old §2-327 has been
19 rolled into §2-506 and the material on consignments and creditor's rights, previously in §2-326,
20 was contained in a new §2-407. **Note, however, that the Drafting Committee, at the March,
21 1996 meeting, voted to move the rights of a consignor against creditors of a consignee from
22 §2-407 to Article 9. Thus, except for 2-504(c) on entrusting, Article 2 has nothing to say
23 about either a bailment or a consignment transaction, whether or not creditor's rights are
24 involved. Is this wise?**

25 2. New §2-506(e) preserves the traditional creditor's rights distinction between
26 "approval" and "return." With the deletion of 2-407 in an earlier draft,[see below], Article 2 says

1 nothing about what those creditor rights are and what the seller can do trump them. A possible
2 solution, included in revised subsection (e), makes creditor's rights (whatever they are) depend
3 upon whether the seller in a sale or return delivered them to a merchant buyer. Does this make
4 sense? In principle, the "sale or return" from the creditor's standpoint should be treated the same
5 as a consignment. But where is consignment treated? Article 9.

6 To illustrate, suppose a brewery sells beer to a retailer to be "returned" if the beer is not
7 sold before the "freshness" expiration date. In this "sale or return" 2-506 deals with the rights
8 between the parties and states that the beer, while in the buyer's possession, is subject to the
9 rights of the buyer's creditors. Which creditors, what rights and what precautions the seller can
10 take are not stated. If, instead, the beer is "consigned" to the retailer, Article 2 says nothing
11 about anything. Where secured creditors are involved, Article 9 will have something to say, but
12 exactly what is still not clear.

13 3. Former Section 2-326 (1990 Official Text), renumbered 2-407 in the July, 1995 Draft,
14 was deleted by the Drafting Committee at the March, 1996 Meeting. The UCC will treat the
15 consignment problem in Article 9. Under tentative proposals, revised Article 9 now: (1) Defines
16 consignment and defines security interest to include a consignment, whether or not for security;
17 (2) Applies to "any consignment"; (3) Requires perfection of a consignment security interest and
18 prescribes how a consignor may file a financing statement; (4) Defines the rights of creditors of
19 and purchasers from the consignee; and (5) Defers consideration of the duties and remedial rights
20 of the consignor upon default by the consignee.

21 PART 6

22 PERFORMANCE

23 SECTION 2-601. GENERAL OBLIGATIONS. Parties to a transaction subject to this
24 article are obligated to perform in accordance with the contract ~~and this article~~.

25 SOURCE: Sales, Section 2-301.

26 Notes

27 1. Section 2-601 is taken from §2-301 of the December, 1994 Draft. See CISG Art. 30 &
28 53. This phrasing of the parties' obligations is broader than that stated in former §2-301. The
29 broader phrasing is intended to encompass all of the obligations of the parties' contract, not
30 merely those related to delivery and payment for the goods. The words "substantial impairment
31 in the caption are deleted to reflect the change made from the July 1996 draft described below.
32 The phrase "and this article" is deleted as unnecessary. The definition of contract in §1-201(11)

1 means the total legal obligation of the parties from their agreement, the U.C.C. and any other
2 applicable rule of law. Thus the requirements of Article 2 are already part of the parties' contract.

3 2. Subsections (b) and (c) in the July, 1996 Draft of 2-601 have been deleted: They
4 simply restated general principles of contract law. Subsection (b) stated that subject to this
5 Article (and unless otherwise agreed) one party's duty to perform was contingent upon the other
6 party's substantial performance of its obligations if the other party is to perform first. See
7 Restatement (Second) Contracts §237. The effect of a non-material breach, which followed
8 general contract law, was stated in subsection (c).

9 ~~SECTION 2-602. SERVICE AGREEMENT RELATING TO GOODS SOLD.~~

10 **Notes**

11 Pursuant to the decision to return the scope of the draft article 2 to the scope of current
12 article 2, this section on performance obligations for service agreements is no longer necessary.
13 It has been deleted. At the November 1996 Drafting Committee meeting, there was some
14 sentiment to deal with service obligations when they were provided in lieu of the other remedies
15 under Article 2. For example, a seller may promise to repair as the exclusive agreed remedy. The
16 issues represented by that promise are (i) what is the level of performance of that repair
17 obligation, (ii) what are the remedies of the buyer if the repair remedy is not provided (failure of
18 essential purpose). Those two issues are addressed in draft § 2-810. The remainder of the
19 sections in part 6 have been renumbered to reflect the deletion of this section.

20 ~~SECTION 2-603. WAIVER OF OBJECTION.~~

21 **Notes**

22 This section has been moved to part 7 to place all of the waiver of breach concepts in one
23 section for a harmonious approach to when the aggrieved party has to object and the degree of
24 particularization of the objection to the breaching party. The remaining sections in part 6 have
25 been renumbered to reflect this move.

26 ~~SECTION 2-604~~ 2-602. MANNER OF SELLER'S TENDER OF DELIVERY.

27 (a) To tender delivery, a seller shall put and hold conforming goods at the buyer's disposal
28 and give any notification reasonably necessary for the buyer to take delivery. Tender must be at a
29 reasonable hour. A tender of goods must be kept available for the period reasonably necessary to

1 enable the buyer to take possession. The buyer shall furnish facilities reasonably suited to
2 receive the goods.

3 (b) If the seller is required or authorized to send the goods to the buyer but the agreement
4 does not require delivery at a particular destination, tender requires that the seller deliver
5 conforming goods to the carrier and comply with Section ~~2-605~~ 2-603.

6 (c) If the agreement requires the seller to deliver at a particular destination, tender
7 requires compliance with subsection (a) and, in an appropriate case, the tender of documents as
8 described in subsections (d) and (e). The seller need not deliver at a particular destination unless
9 required by a specific agreement or by the commercial understanding of the terms used by the
10 parties.

11 (d) If conforming goods of a seller are in the possession of a bailee and are to be delivered
12 to a buyer without being moved, the following rules apply:

13 (1) Tender requires the seller to tender a negotiable document of title covering the
14 goods or to procure an acknowledgment by the bailee to the buyer of the buyer's right to
15 possession of the goods.

16 (2) Tender to the buyer of a nonnegotiable document of title or of a record
17 directing the bailee to deliver is sufficient unless the buyer seasonably objects. However, risk of
18 loss of the goods and of any failure by the bailee to honor the document or to obey the direction
19 remains on the seller until the buyer has had a reasonable time to present the document or
20 direction. A refusal by the bailee to honor the document or to obey the direction voids the tender.
21 Receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee
22 and all third parties.

1 (e) If an agreement requires a seller to deliver a document, the following rules apply:

2 (1) All required documents must be tendered in correct form, except as provided
3 in this article with respect to bills of lading in a set.

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

6 **SOURCE: Sales, Section 2-503.**

7 **Notes**

8 1. Three minor changes were made in former §2-503. First, a test for interpreting
9 delivery terms was added to subsection (c): Delivery to a particular destination must be required
10 by "specific agreement" or the commercial understanding of the terms used. Second, the phrase
11 "to the buyer" was added to subsection (d)(1). Third, a "tender" for purposes of ~~§2-604~~ 2-602
12 requires conforming goods.

13 2. With the repeal of the delivery terms in former §§2-319 through 2-323 in favor of a
14 flexible interpretation standard, see §2-309, ~~§2-504~~ 2-602 becomes an important interpretive
15 source for determining disputes over risk of loss under ~~§2-614~~ 2-612.

16 3. The seller's tender of delivery has two important consequences: First, it satisfies a
17 condition to the buyer's duty to accept and to pay for the goods. See ~~§2-608~~ 2-606(a). Unless
18 otherwise agreed, the buyer is not in breach until there is a tender of delivery. Compare ~~§2-609~~
19 2-607, dealing with the buyer's tender of payment. Second, it is an essential ingredient in the
20 passage of risk of loss under ~~§2-614~~ 2-612, in that tender either passes the risk or is an essential
21 first step to transfer of possession of the goods. In either the case, the tender "rules," in the
22 absence of contrary agreement, must be clear and adapt to variations in delivery patterns, i.e.,
23 where seller has no obligation to ship the goods, or seller is authorized or required to ship the
24 goods, or the goods are in the possession of a bailee. Interpretation of these requirements will be
25 more difficult, since the delivery terms in former §§2-319 through 2-324 have been deleted.

26 4. Definition of bailee. Article 2 uses the word "bailee" in four sections, ~~§§2-604~~ 2-
27 602(d), ~~2-614(2)~~ 2-612(c), 2-816(c) and 2-818(c), but does not define it. Neither does Article
28 2A. Article 1 uses the word in a broader definition of document of title. §1-201(15). Article 7
29 defines "bailee" for "purposes of "this Article" as "the person who by a warehouse receipt, bill of
30 lading or other document of title acknowledges possession of goods and contracts to deliver
31 them." "Bailee" is used 11 times in Article 7. However, the concept of "bailee" is broader in
32 Article 2 than in Article 7 since it is not limited to third persons in possession of goods who issue
33 a document of title.

1 5. The Haystack Hypo. At the January, 1994 meeting, the following problem was posed.
2 Suppose that the seller sells to the buyer a haystack located at a place other than the seller's place
3 of business and controlled by the seller's agent (not a bailee.) The buyer intends to resell the hay
4 to a third party, who will then take delivery. The current rules appear to be adequate for this
5 problem. The place for tender is the place where the goods are located, §2-305(2), [CISG Art.
6 31(b) is in accord] and the adequacy of the tender of delivery is governed by ~~§2-604~~ 2-602(a). In
7 the resale between the buyer and the resale buyer, since the goods are in the possession of a
8 bailee (original seller's agent) and are to be delivered without being moved, tender by the buyer
9 (now a seller) is governed by ~~§2-606~~ 2-602(d). No revisions are required.

10 **6. CISGA.** Under Article 30, the seller must "deliver the goods, hand over any
11 documents relating to them and transfer the property in the goods, as required by the contract and
12 this Convention." Articles 31-34 then state when and how this is to be done, with Article 31 the
13 counterpart of ~~§2-606~~ 2-602 and Article 32 the counterpart of ~~§2-607~~ 2-603.

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

20 Where that place is controlled by the seller, the same result can be reached through
21 §2-305(a) and ~~2-604~~ 2-602(a).

22 7. It should be noted that draft §9-311(c) proposes a change from current §9-304 and §9-
23 305 which provide that a secured party may perfect its security interest in the goods in the hands
24 of a bailee who has not issued a negotiable document of title for the goods by mere notification
25 to the bailee. Draft §9-311(c) provides that the secured party does not perfect its security
26 interest in goods in the hands of the bailee who has not issued a negotiable document for those
27 goods until the bailee acknowledges that it holds the goods for the secured party. Are the policy
28 issues different in this context that mere notification should fix rights as against third parties
29 under §2-603(d)(2)?

30 **SECTION ~~2-605~~ 2-603. SHIPMENT BY SELLER.**

31 (a) If a seller is required or authorized to send the goods to the buyer and the contract
32 does not require delivery at a particular destination, the following rules apply:

33 (1) The seller shall put the goods in the possession of a carrier. However, unless
34 requested by the buyer or required by usage of trade, the seller need not make a contract for their

1 transportation or obtain and deliver any documents necessary to enable the buyer to obtain
2 possession of the goods.

3 (2) The seller shall promptly notify the buyer of the shipment if the goods are not
4 clearly identified to the contract by markings on the goods, shipping documents, or otherwise.

5 (b) A seller's failure to notify the buyer of the shipment or to make a proper contract for
6 transportation, when so required by subsection (a), is a ground for rejection only if material delay
7 or loss results.

8 **SOURCE: Sales, Section 2-504.**

9 **Notes**

10 1. At the January, 1994 meeting of the Drafting Committee, however, former §2-504 was
11 criticized as being out of step with commercial practice. Normally, the seller is not expected to
12 make arrangements for shipment unless required by the contract or commercial usage and
13 practice. It was suggested that CISG Art. 31(a) and 32 were more consistent with current
14 practice. In response to further discussion at the September, 1996 meeting of the Drafting
15 Committee, ~~2-605~~ 2-603 was revised to follow CISG, described below.

16 Note that ~~2-605~~ 2-603 states the rules of tender when the seller is not obligated to deliver
17 at a particular destination. The rules for tender in destination contracts are stated in ~~2-604~~ 2-
18 602(c) and assume that the seller bears the cost and risk of making an appropriate contract for
19 shipment with the carrier.

20 **2. CISGA.** Many international contracts for sale involve "carriage of the goods." In the
21 absence of agreed delivery terms, such as the Incoterms of the International Chamber of
22 Commerce, Articles 31(a) and 32 determine what the seller must do to deliver the goods. In the
23 absence of agreement to deliver at "any other particular place," delivery consists of "handing the
24 goods over to the first carrier for transmission to the buyer." Art. 31(a). If the goods are "clearly
25 identified to the contract" the seller need not notify the buyer of the "consignment." Art. 32(1).
26 More to the point, unless the seller is "bound to arrange for carriage of the goods" it need not
27 make any contracts for carriage. Art. 32(2). Even if the seller is not bound to obtain insurance on
28 the carriage, it must "at the buyer's request, provide...all available information necessary to
29 enable [the buyer] to effect such insurance." Art. 32(3).

30 **SECTION ~~2-606~~ 2-604. SELLER'S SHIPMENT UNDER RESERVATION.**

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

3 (1) Procurement of a negotiable bill of lading to the seller's order or otherwise
4 reserves in the seller a security interest in the goods. Procurement of the bill to the order of a
5 financing agency or of the buyer indicates in addition only the seller's expectation of transferring
6 that interest to the person named.

7 (2) Procurement of a nonnegotiable bill of lading to the seller or its nominee
8 reserves possession of the goods as security. However, except in a case of conditional delivery, a
9 nonnegotiable bill of lading naming the buyer as consignee does not reserve a security interest,
10 even if the seller retains possession of the bill of lading. The consignee is the person named in
11 the bill of lading to which or to whose order the bill promises delivery.

12 (b) A shipment by a seller with reservation of a security interest which breaches the
13 contract for sale constitutes an improper contract for transportation under Section ~~2-605~~ 2-603.
14 However, rights given to the buyer by shipment and identification of the goods to the contract
15 and the seller's powers as a holder of a negotiable document are not thereby impaired.

16 **SOURCE: Sales, Section 2-505.**

17 **Notes**

18 1. There are no changes of substance in former §2-505.

19 **2. CISGA.** There is no comparable provision in CISGA. Article 58(1) & (2), however,
20 permits a seller in cases where documents are involved to make payment a condition for handing
21 over the goods or the documents. Nevertheless, the buyer may still examine the goods before
22 payment unless otherwise agreed. Art. 58(3).

23 **SECTION ~~2-607~~ 2-605. RIGHTS OF FINANCING AGENCY.**

1 (a) A financing agency, by paying or purchasing for value a draft that relates to a
2 shipment of goods, acquires, to the extent of the payment or purchase and in addition to its own
3 rights under the draft and any document of title securing it, any rights of the shipper in the goods,
4 including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

5 (b) The right to reimbursement of a financing agency that in good faith has honored or
6 purchased the draft under commitment to or authority from a buyer is not impaired by later
7 discovery of defects in any relevant document that was apparently regular on its face.

8 **SOURCE: Sales, Section 2-506.**

9 **Notes**

10 There are no changes in former §2-507.

11 **SECTION ~~2-608~~ 2-606. EFFECT OF SELLER'S TENDER; DELIVERY ON**
12 **CONDITION.**

13 (a) Tender of delivery is a condition to a buyer's duty to accept and pay for the goods.
14 Tender entitles the seller to acceptance of the goods and payment according to the agreement.
15 The seller shall tender first but does not have a duty to complete delivery until the buyer has
16 tendered payment.

17 (b) Subject to Section 2-816, if payment is due and demanded on the delivery of goods or
18 documents of title, a buyer's right against the seller to retain or dispose of them is conditional
19 upon the buyer's making the payment due.

20 **SOURCE: Sales, Section 2-507.**

21 **Notes**

22 1. There are two substantive changes in revised §~~2-608~~ 2-606.

1 First, the second sentence in ~~§2-608~~ 2-606(a) provides that the seller rather than the buyer
2 shall tender first, unless otherwise agreed. See ~~2-609~~ 2-607. But the seller has no duty to transfer
3 possession until the buyer has tendered payment. If no time for tender is agreed, it must be made
4 within a reasonable time.

5 Second, subsection (b) preserves the seller's right to reclaim from the buyer upon
6 conditional delivery in a cash sale, but refers to §2-816 for limitations on their exercise against
7 the buyer and third persons. These limitations are consistent with the recommendations in PEB
8 Commentary #1, cited in Official Comment 3.

9 **2. CISGA.** Article 58(1), in accord, provides that if the buyer is "not bound to pay the
10 price at any other specific time, he must pay it when the seller places either the goods or
11 documents controlling their disposition at the buyer's disposal in accordance with the contract
12 and this Convention." If, however, the buyer must pay "on the date fixed by or determinable
13 from the contract and this Convention," it must pay "without the need for any request or
14 compliance with any formality on the part of the seller." Thus, if no time is fixed to pay the seller
15 must tender first. But if a time for payment is fixed, the buyer must pay at that time whether the
16 seller tenders or not.

17 **SECTION ~~2-609~~ 2-607. TENDER OF PAYMENT BY BUYER; PAYMENT BY**
18 **CHECK.**

19 (a) Subject to Section ~~2-608~~ 2-606(a), tender of payment by a buyer is a condition to the
20 seller's duty to complete a delivery.

21 (b) Tender of payment by a buyer is sufficient if made by any means or in any manner
22 current in the ordinary course of business unless the seller demands payment in money and gives
23 any extension of time reasonably necessary to procure it.

24 (c) Subject to Section 3-310, payment by check is conditional and is voided as between
25 the parties by dishonor of the check on due presentment.

26 **SOURCE: Sales, Section 2-511.**

27 **Notes**

28 1. There are no revisions of substance in ~~§2-609~~ 2-607. Under revised ~~§2-608~~ 2-606(a),
29 however, unless otherwise agreed the seller must tender delivery before the buyer has a duty to

1 tender payment and under ~~§2-611~~ 2-609(a) the buyer has a right to inspect the goods before
2 payment or acceptance.

3 2. **CISGA.** Article 53 provides that the buyer "must pay the price for the goods...as
4 required by the contract and this Convention." It is frequently agreed that payment shall be by a
5 letter of credit, a method of payment not within the scope of the Convention. In the absence of
6 contrary agreement, questions about the time of payment are answered in Articles 58 and 59. If a
7 time for payment has not been fixed, the duty to pay arises when the seller tenders delivery. Art.
8 58(1) & (2). If a time for payment is fixed, the buyer must pay at the time "without the need for
9 any request or compliance with any formality on the part of the seller."

10 **SECTION ~~2-610~~ 2-608. PAYMENT BY BUYER BEFORE INSPECTION.**

11 (a) If a contract requires payment before inspection, nonconformity of the goods does not
12 excuse the buyer from so making payment unless:

13 (1) the nonconformity appears without inspection; or

14 (2) despite tender of the required documents, the circumstances would justify
15 injunction against honor under Article 5.

16 (b) Payment pursuant to subsection (a) is not an acceptance of goods and does not impair
17 a buyer's right to inspect or other remedies of the buyer.

18 **SOURCE: Sales, Section 2-512.**

19 **Notes**

20 1. There are no changes of substance in former §2-512. See 5-109 ~~(2)~~(b)(injunction
21 against dishonor).

22 2. **CISG.** Article 58(3) protects the buyer's right to examine the goods before paying the
23 price "unless the procedures for delivery or payment agreed upon by the parties are inconsistent
24 with his having such an opportunity." Assuming such agreement, there is no provision
25 comparable to ~~§2-610~~ 2-608.

26 **SECTION ~~2-611~~ 2-609. BUYER'S RIGHT TO INSPECT GOODS.**

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

1 payment or acceptance, has a right to inspect them at any reasonable place and time and in any
2 reasonable manner. If the seller is required or authorized to send the goods to the buyer, the
3 inspection may be after their arrival.

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

6 (c) Subject to Section ~~2-610~~ 2-608(a), a buyer is not entitled to inspect the goods before
7 payment of the price if the contract provides for:

8 (1) delivery "C.O.D.", or on similar terms, such as "C.I.F. or "C. & F. ; or

9 (2) payment upon tender of required documents of title, unless payment is due
10 only after the goods become available for inspection.

11 (d) A place or method of inspection fixed by the parties is presumed to be exclusive.
12 However, unless otherwise expressly agreed, the fixing of a place or method of inspection does
13 not postpone identification or shift the place for delivery or for passing the risk of loss. If
14 compliance becomes impossible, inspection must be made as provided in this section unless the
15 place or method fixed was clearly intended as an indispensable condition the failure of which
16 avoids the contract.

17 **SOURCE: Sales, Section 2-513.**

18 **Notes**

19 1. There are no changes of substance in former Section 2-513. The meaning of the
20 phrase payment "against documents of title" in former 2-513(3), however, is now less certain
21 because the phrase has been removed from the Incoterms of the International Chamber of
22 Commerce and the delivery terms, "C.I.F. and C. & F. terms, both of which seemed to define
23 the phrase, have been deleted from revised Article 2. See former 2-320(4) and 2-321(1). To
24 emphasize that the phrase depends upon what the contract requires (it could a delivery term of
25 not) rather than a customary meaning, the phrase upon "tender of documents" has been

1 substituted for “payment against documents.

2 **2. CISGA.** Unless otherwise agreed, the buyer has a right to examine the goods upon
3 tender and before payment. Art. 58(3). If carriage of the goods is involved, examination "may be
4 deferred until after the goods have arrived at their destination." Art. 38(2). A special rule applies
5 when the goods are redirected or redispached in transit. Art. 38(2).

6 The buyer must act fast to examine the goods, Art. 38(1), and may lose the right to rely
7 upon a non-conformity if timely notice, as defined in Article 39, is not given. The buyer,
8 however, is protected from the rigors of Articles 38 and 39 if the seller knew "or could not have
9 been aware of" the non-conformity and did not disclose it, Art. 40, and is entitled to damages if
10 "he has a reasonable excuse for his failure to give the required notice."

11 **SECTION ~~2-612~~ 2-610. WHEN DOCUMENTS DELIVERABLE ON**

12 **ACCEPTANCE OR PAYMENT.** Documents against which a draft is drawn must be delivered
13 to the drawee on acceptance of the draft if it the draft is payable more than [a reasonable time]
14 [three days] after presentment. Otherwise, delivery is required only on payment.

15 **SOURCE: Sales, Section 2-514.**

16 **Notes**

17 1. There are no revisions of substance in former §2-514. "Acceptance" in the text of
18 §~~2-612~~ 2-610 means "acceptance" as defined in §3-409(a)--a "signed agreement to pay a draft as
19 presented"--rather than "acceptance" as defined in §~~2-707~~ 2-706. See §4-503(1), dealing with
20 documentary drafts presented to a bank.

21 This section is a default rule for when the person presenting the draft to the buyer may
22 surrender the documents to the buyer. The two possibilities are when the draft is accepted by the
23 buyer under §3-409 or when the draft is paid by the buyer. Under §4-503, when the presenter is a
24 bank, the presumption is that if the draft is payable more than 3 days after presentment, then the
25 buyer's acceptance is sufficient for the presenting bank to surrender the documents to the buyer.
26 The following issues should be resolved: First is there a need to allow more flexibility in the
27 default rule as to whether an acceptance is all that is required to surrender the documents in a
28 case not covered by §4-503? Second, if more flexibility is needed here, then what should the rule
29 be when §4-503 applies because the presenting person is a bank? The key language is taken
30 from 5-108(b). The “seventh business day outer limit, however, was not added. This is more
31 flexible than three days (the former time) but may still not be instructive enough. Suggestions?

32 2. There is no comparable provision in either Article 2A or **CISGA**.

1 (1) If the contract does not require delivery at a particular destination, the risk of
2 loss passes to the buyer when the goods are tendered and delivered to the carrier as required by
3 Sections ~~2-604~~ 2-602 and ~~2-605~~ 2-603, even if the shipment is under reservation.

4 (2) If the contract requires delivery at a particular destination and the goods arrive
5 there in the possession of the carrier, the risk of loss passes to the buyer when the goods are
6 tendered as required by Section ~~2-604~~ 2-602.

7 (c) If goods are held by a bailee to be delivered without being moved, the risk of loss
8 passes to the buyer:

9 (1) on the buyer's receipt of a negotiable document of title covering the goods with
10 any required indorsement;

11 (2) on acknowledgment by the bailee to the buyer of the buyer's right to
12 possession of the goods ; or

13 (3) after the buyer's receipt of a nonnegotiable document of title or record
14 directing delivery, as provided in Section ~~2-604~~ 2-602(d)(2).

15 (d) If a tender of delivery of goods or documents fails to conform to ~~this article~~ or to the
16 contract, the risk of loss remains on the seller until cure or acceptance. If the buyer rightfully and
17 effectively revokes acceptance . . . [see note 4]

18 ~~(d)~~ (e) This section is subject to Section 2-506(b) & (c).

19 **SOURCE: Sales, Sections 2-509, 2-510.**

20 **Notes**

21 A number of changes have been made in former §2-509. In addition, §2-510 dealing with
22 the effect of breach on risk of loss has been repealed.

1 1. The basic principle, now stated in subsection (a), is that risk of loss passes when the
2 buyer receives or takes control of the goods, whether the seller is a merchant or not. Previously,
3 former §2-509(3) drew an unpersuasive distinction between the merchant and non-merchant
4 seller. Under revised subsection (a), risk remains on the seller, who is in the best position either
5 to avoid the loss or insure against it, until the buyer takes possession or control of the goods.

6 To illustrate, suppose that S contracts to sell B a haystack located in a field and controlled
7 by S's agent, who is not an independent bailee. The goods are identified to the contract but B
8 never expects to take possession. Rather, B expects to resell the hay to a third person, who will
9 then take possession. In this case, when S tenders delivery under ~~§2-604~~ 2-602(a), B, although
10 not in possession, has control of the goods and the risk of loss has passed. The fact that B may be
11 in breach of contract after tender but before possession is taken is irrelevant.

12 2. Subsection (b) applies in shipment contracts and risk of loss depends upon whether the
13 contract requires delivery to a particular destination or not. This determination is made less
14 certain by the deletion of the shipment terms in former §2-319, see §2-309, but is assisted by a
15 new provision in ~~§2-604~~ 2-602(c) which, in effect, creates a presumption against the destination
16 interpretation.

17 Risk of loss will not pass in a shipment contract unless the tender requirements of
18 ~~§§2-604 2-602~~ and ~~2-605 2-603~~ have been satisfied. Since tender requires conforming goods or
19 documents, the delivery of non-conforming goods to the carrier will not pass the risk, even
20 though ~~the or on similar terms~~ other requirements of ~~§2-605 2-603~~ are satisfied. Thus, the risk
21 remains on the seller until "cure or acceptance." Subsection (d) ~~(a)(3)~~. ~~After acceptance, the risk~~
22 ~~remains on the buyer even though there is a rightful revocation of acceptance and the loss occurs~~
23 ~~thereafter. See §2-510(2) of the 1990 Official Text, which has been repealed.~~

24 For risk of loss purposes, the term "carrier" in ~~§2-614~~ 2-612(1) does not include
25 transportation facilities operated or controlled by the parties to the contract. Rather, the term
26 "carrier" refers to independent methods of transportation by ground, air or water and could
27 include the United States Postal Service. Otherwise, the risk of loss could shift to the buyer while
28 the seller still has possession and control of the goods.

29 3. Subsection ~~(d)~~ (c)(2) now provides that risk of loss passes on acknowledgment by the
30 bailee "to the buyer" that the buyer has a right to possession. This phrase did not appear in
31 former §2-509(3). A similar requirement appears in ~~§2-604~~ 2-602(c)(1). See *Jason's Foods, Inc.*
32 *v. Peter Eckrich & Sons, Inc.*, 774 F.2d 214 (7th Cir. 1985).

33 For risk of loss purposes, the term "bailee" usually refers to a third person (neither seller
34 nor buyer) who is in possession of the goods sold at the time of contracting. That person may be
35 a warehouse or a carrier who has issued a document of title, see §7-102(1)(a), or another person
36 who satisfies the requirements of a bailment. It is clear that a seller, after the contract for sale,
37 may become a bailee of the goods either before or after the buyer takes possession. For example,

1 suppose that S sells B a horse. B pays the price, but instead of taking delivery, B contracts with S
2 to board the horse for an agreed price. S is now a bailee. Whether B has the risk of loss,
3 however, should not be determined by ~~§2-614 2-612~~(b). Instead, the question is whether B has
4 the risk of loss under either ~~§2-614 2-612~~(a) or ~~§2-614 2-612~~(c) before S becomes a bailee. Since
5 no shipment was contemplated and B never received the goods, risk remains on S unless S has
6 obtained a contrary agreement. ~~per §2-614(d)~~. Although the language from former §2-509(4)
7 that provided that the parties could agree to alter the risk of loss rules in that section has been
8 deleted, that is not a substantive change as any of the default rules in Article 2 can be altered by
9 agreement unless expressly provided otherwise. Draft § 2-109.

10 4. Former §2-510, dealing with the effect of breach on risk of loss, has been repealed.
11 The only remnant is former §2-510(1), which now appears in subsection ~~(a)(3)~~ (d), where the
12 seller retains the risk of loss to nonconforming goods until "cure or acceptance." This alteration
13 of the normal passage of the risk of loss rules is important in all of the situations covered by draft
14 §2-612, not just in the carrier contract situation.

15 Assume a contract where the risk passes to the buyer upon the buyer's physical receipt of
16 the goods under subsection (a). The buyer, although in physical possession of the goods, does
17 not accept the goods because the goods do not conform to the contract. The buyer properly and
18 effectively rejects the goods. At that point, the buyer has the duties specified in draft §§ 2-704
19 and 2-705 regarding proper care of the goods. Assume the buyer has fulfilled those duties and
20 through no fault of the buyer, the goods are destroyed before the seller has picked up the goods.
21 Under current law, the buyer would not have the risk of loss for those goods. See former §2-
22 510(1). If the buyer has the risk of loss, then the buyer has to perform its obligations under the
23 contract or be in breach. That does not make sense when the seller is in breach because of a
24 nonconforming tender of goods which the buyer has effectively and rightfully rejected. Because
25 risk of loss passage under subsections (a) and (c) does not depend upon a conforming tender
26 (unlike subsection (b) where the risk cannot pass if the tender is non-conforming given the
27 incorporation of the conforming tender concept from §2-602), moving the remnant of former §2-
28 510(1) to its own subsection to apply beyond the subsection (b) context is important. Beyond
29 this the normal risk of loss rules apply.

30 Except for a tender of non-conforming goods, the assumption that a breach by either the
31 seller or the buyer should, in cases of a deficiency in insurance coverage, reallocate the risk of
32 loss otherwise assigned by ~~§2-614 2-612~~ is dubious, especially where there is no causal
33 connection between the breach and the loss itself. Absent a causal connection, the non-breaching
34 party is still in the best position, cost considered, to avoid or insure against the loss.

35 Moreover, application of the "breach" standard in old §2-510 produced unexpected
36 difficulties. For example, under §2-510(2), suppose the buyer in possession discovers a
37 nonconformity in the goods and "rightfully" revokes acceptance before the loss occurs. Assuming
38 that the buyer exercised ordinary care and did not owe the price, the operation of §2-510(2) was
39 unclear. Suppose that the fair market value of the goods was \$1,000 and the buyer was either (a)

1 fully insured, or (b) half insured or (c) not insured at all. Since B, after revocation, must return
2 the goods or their fair market value to the seller, the practical solution is that buyer pays seller
3 \$1,000 in (a), \$500 in (b) and nothing in (c). But there is nothing in the text of or comments to
4 §2-510(2) that dictated this result.

5 Similarly, under §2-510(3), suppose the buyer breaches while the goods are in the seller's
6 or a bailee's possession and before the risk of loss has passed. It is unlikely that the buyer owes
7 the price of the goods. Suppose the fair market value of the goods is \$1,000, the seller is not
8 insured at all, and wants to recover that deficiency in "effective insurance coverage" from the
9 buyer. Does §2-510(3) support an action against the buyer for \$1,000 and, if so, on what theory?
10 Again, neither the text nor the comments are helpful.

11 Finally, §2-510 was an anti-subrogation provision, since insurance "deficiency" was
12 determined without regard to subrogation rights. Once the chips have fallen in the reallocation
13 process, the insurance company, if any, must live with the outcome. But there is little evidence
14 that insurance companies were aware of §2-510, much less that they calculated premiums with
15 the availability of subrogation in mind.

16 Even though insurance coverage should not have any bearing on the allocation of risk of
17 loss, the theory of this section is that control of the goods should have a bearing on who has the
18 risk of loss. The provision on the action for the price, §2-822, covers the situation where the
19 goods are destroyed shortly after the risk of loss has passed to the buyer when the goods conform
20 to the contract and the seller has regained possession. The seller can get the price but only if the
21 destruction or damage has occurred within a reasonable time after the risk passed to the buyer. In
22 effect, the seller is unable after that reasonable time to recover the price even though the risk of
23 loss was on the buyer. This is an oblique manner of transferring the risk of loss back to the seller
24 in that situation.

25 Assume the goods are non-conforming, the buyer has accepted and the buyer has
26 possession or control of the goods. In that situation the risk of loss has passed to the buyer. If the
27 buyer rightfully and effectively revokes acceptance, the buyer has the duty to properly care for
28 the goods under §2-704 and §2-705. If the goods are destroyed after a rightful and effective
29 revocation of acceptance, who should bear the risk of loss of the goods? If the buyer is in
30 possession after such a revocation and the buyer has complied with its duty of proper care, but
31 nonetheless the goods are lost or destroyed, does it make sense to place the risk of loss on the
32 buyer in that situation? Upon an effective justified revocation of acceptance, the buyer is treated
33 as not having accepted the goods and is not liable for the price under §2-822 (former §2-709,
34 comment 5). Would placing the risk of loss on the buyer in that situation create a conflict
35 between the provisions of §2-704, §2-822 and this section?

36 If the seller regains possession of the goods after the rightful and effective revocation and
37 then the goods are destroyed, does it make sense for the buyer to have the risk of loss in that
38 situation? If the reason for allocating the risk of loss is based upon who is in the better position to

1 prevent the loss, it seems that the seller in control of goods after an effective and rightful
2 revocation of acceptance should have the risk of loss.

3 Subsection (d) is a possible place to clarify who bears the risk of loss in the situations
4 posited above.

5 **5. CISGA.** "Passing of Risk" is treated in Articles 66-70.

6 Art. 67(1), dealing with "carriage of the goods," is comparable to ~~§2-614~~ 2-612(b). The
7 distinction between "origin" and "destination" contracts, however, is not made. The question is
8 whether the seller agreed to deliver to a carrier at a "particular" place. The answer may come
9 from Incoterms used by the parties.

10 Art. 68, dealing with goods sold in transit, has no exact counterpart in ~~§2-614~~ 2-612, the
11 closest provision being ~~§2-614~~ 2-612(b). Furthermore, there is no provision like ~~§2-614~~ 2-612(c),
12 which treats goods in the possession of a bailee.

13 Cases not otherwise covered are picked up in Art. 69, which is CISG's equivalent to old
14 §2-509(3). Even between commercial parties, the buyer, in some cases, may have the risk of loss
15 before taking possession of the goods. See Art. 69(2). Article 69 presumably covers the
16 "haystack" hypo and bailment cases.

17 Breach of contract is relevant to passage of risk under CISGA. For example, if risk has
18 passed to the buyer and the goods are lost or damaged thereafter, the obligation to pay the price is
19 discharged if "the loss or damage is due to an act or omission of the seller." Art. 66. Also, under
20 Art. 69(1) risk passes to the buyer before possession is transferred regardless of any deficiency in
21 insurance coverage if the buyer "commits a breach of contract by failing to take delivery." But a
22 breach by the seller apparently does not prevent or reallocate the passage of risk. Rather, risk
23 passes if the conditions of Articles 67-69 are satisfied but the "remedies available to the buyer on
24 account of the breach" are not impaired. Art. 70.

25 **PART 7**

26 **BREACH, REPUDIATION, AND EXCUSE**

27 **SECTION 2-701. BREACH OF CONTRACT GENERALLY.**

28 (a) Whether a party is in breach of contract is determined by the terms of the contract.

29 (b) A breach of contract occurs in the following circumstances, among others:

30 (1) A seller is in breach if it fails to deliver or to perform an obligation, makes a

1 nonconforming tender of performance, repudiates the contract.

2 (2) A buyer is in breach if it wrongfully rejects a tender of delivery, wrongfully
3 revokes acceptance, repudiates the contract, or fails to make a required payment or to perform an
4 obligation, or [exceeds a contractual limitation].

5 (c) In determining whether the value of an installment or the whole contract have been
6 substantially impaired by a breach of contract, the court may consider whether:

7 (1) the aggrieved party has been deprived of the benefit that it reasonably expected
8 under the contract;

9 (2) cure of the breach is permitted and likely;

10 (3) adequate assurance of due performance has been given; and

11 (4) the breaching party acted in good faith.

12 (d) Individual breaches of contract that alone are not material may be treated as material if
13 cumulatively they substantially impair the value of the whole contract to the other party.

14 **SOURCE: Sales, Sections 2-703, 2-711; Licenses, Section 2B-108(a).**

15 **SOURCE: Licenses Section 2B-108(a), (September, 1996); Sales Section 2-701**
16 **(December, 1994).**

17 Notes

18 1. Section 2-701 brings the definition of breach previously found in §2-701 (May, 1994
19 Draft) to Part 6 and revises it slightly for broader application. Thus, definitions of breach are no
20 longer contained in the statement of seller's and buyer's remedies in §§2-815 and 2-823. The
21 word "default" is not used in Article 2.

22
23 Breach includes a failure to pay before or after acceptance. If the failure to pay after
24 acceptance is also a default under a security agreement, Article 9 applies when the seller or other
25 secured party attempts to enforce the security interest.

1 required unless the waiver has induced the other party to change its position reasonably and in
2 good faith.

3 (d) A buyer's failure to state, in connection with a rejection under Section 2-703 ~~or a~~
4 ~~revocation of acceptance under Section 2-709~~, a particular nonconformity that is ascertainable by
5 reasonable inspection precludes reliance on the unstated defect to justify rejection ~~or revocation~~
6 ~~of acceptance~~ or to establish a breach of contract if:

7 (1) the seller, upon a seasonable particularization, had a right to cure under
8 Section ~~2-710~~ 2-709 and would have cured the nonconformity; or

9 (2) between merchants, the seller after rejection or revocation of acceptance has
10 made a request in a record for a full and final statement in a record of all nonconformities on
11 which the buyer proposes to rely.

12 **SOURCES: Sales, Section 2-605; Licenses, Section 2B-620 .**

13 Notes

14 1. ~~This section~~ Subsections (a) and (c), which ~~are~~ is new, ~~is~~ are based upon 2B-620. It
15 operates between the waiver or renunciation of a claim for breach in 1-107 and the acceptance of
16 an allegedly nonconforming performance under explicit reservation of rights in 1-207(1). It also
17 complements 2-210, dealing with agreed modifications and waivers of terms in the contract for
18 sale. Further coordination may be needed.

19 2. The preclusion in subsection (a) is limited to the remedy of cancellation. Notice for the
20 remedy of revocation of acceptance is stated in ~~2-704 and 2-709~~ 2-708(b). Moreover, a claim
21 for damages resulting from an accepted nonconforming performance may be barred under ~~2-608~~
22 2-707(1)(c). The notice required in subsection (a), however, should also satisfy the notice
23 requirements of ~~2-708~~ 2-707(1)(c).

24 To illustrate, suppose the seller has agreed to deliver the goods in 12 monthly
25 installments and the parties have agreed that no modification of the contract terms shall be
26 enforceable unless contained in a signed record. The seller meets the first six installments but is
27 late in the next three, which the buyer accepted without objection. Later, the buyer insisted that
28 the seller deliver the final three installments on time. Subsection ~~2-603~~ 2-702 rather than 2-210

1 applies to this dispute. Unless the buyer has given reasonable notice of objection to the delay,
2 the remedy of cancellation is barred under subsection (a) and the damage remedy for the three
3 installments may be barred under ~~2-708(c)(1)~~ 2-707(c)(1). However, nothing on the facts
4 supports the seller's claim that timely, future performance has been waived.

5 3. ~~Section 2-704~~ Subsection (d) is taken from §2-605 of the 1990 Official Text. The move
6 places it in closer proximity to the general notice required for an effective rejection, §2-703(b) and
7 places it in the context of the general waiver standard in subsection (a).

8 4. This section on waiver of breach is an attempt to answer three questions. First, in
9 what circumstances must the aggrieved party notify the breaching party or be deemed to have
10 waived the nonconforming performance. Second, in those circumstances where the aggrieved
11 party must notify the breaching party, what must that notice say, i.e. how particular and complete
12 must that notice be. Third, if the notice is required and not given, or if notice is given but not
13 particular or complete enough, what is the effect of the aggrieved party's failure. A fourth
14 question that this section does not answer but which must be considered is whether this section is
15 an explicit displacement of common law waiver and estoppel that would otherwise be very
16 relevant to resolving those questions.

17 Assume that the buyer is the aggrieved party. The buyer must notify the seller in three
18 situations, when rejecting goods, when revoking acceptance of goods, and as a prerequisite to
19 recovery for breach when goods have been accepted.

20 When the buyer rejects goods, subsection (d) specifies the circumstances where the buyer
21 must state defects or be unable to rely on those defects either to justify rejection or to establish a
22 breach of contract. Subsection (d) is the same as former §2-605(1).

23 When the buyer revokes acceptance of the goods, the buyer must give notice to the seller.
24 Should the buyer have to particularize defects in that notice of revocation and what defects
25 should be particularized? If the buyer is required to particularize defects justifying the revocation,
26 subsection (d) in that situation does not seem to make much sense. A seller can only revoke
27 acceptance in two situations: first if the buyer had the reasonable assumption that the
28 nonconformity could be cured and second if the nonconformity was not discovered due to
29 difficulty of discovery before acceptance or the seller's assurances. In the first situation, the
30 buyer could not have the reasonable assumption of cure unless there had been some
31 particularization of the defect before the acceptance. The reasons for particularization stated in
32 (d)(1) has already been met. In the second situation, having to state reasonably ascertainable
33 nonconformities when the nonconformity for which one is revoking was not discovered prior to
34 acceptance due to difficulty of discovery seems illogical. Nonetheless, there could be a situation
35 not covered by subsection (d) where nonconformities substantially impair the value to the buyer
36 sufficient to justify revocation and where the seller has a right to cure. In that situation, there
37 may be some utility to requiring the buyer to fully particularize the nonconformities which justify

1 revocation. Obviously, this depends upon the extent to which cure is expanded in the revocation
2 context.

3 In the revocation context, should the buyer be required to particularize nonconformities
4 that do not substantially impair the value of the contract to the buyer or be barred from
5 “establishing breach (language currently in subsection (d)) as to those nonconformities? Is there
6 some reason to require particularization of those types of “insubstantial nonconformities in the
7 revocation situation when such a detailing is not required when the buyer is claiming breach as to
8 accepted goods under §2-707? It seems unfair to penalize the buyer who seeks to revoke for not
9 stating nonconformities that do not support the revocation.

10 Finally, the buyer has to give notice when the buyer has accepted goods and the buyer
11 wants to recover for breach of contract. While there is some debate in the cases about how
12 particular that notice has to be, the standard in subsection (d) does not apply as it is a rejection
13 only standard, and the standard in subsection(a) is not particularly helpful as the only
14 consequence of failing to object is the inability to cancel or to sue for damages if the breaching
15 party has changed position in reliance on the failure to object. In the accepted goods context,
16 cancellation is not generally an option and the changed position standard merely echos the need
17 to establish prejudice in failing to give the notice. Neither this section or §2-707 require any
18 degree of particularization of the nonconformities. or any inference that the nonconformities
19 stated are the only ones the buyer is asserting. If the drafting committee wanted to require the
20 buyer to particularize all nonconformities in order to have a remedy in the accepted goods
21 situation, this section or §2-707 could provide the place to do so.

22 When the seller is the aggrieved party, subsection (a) states the effect of failing to object
23 to the buyer’s nonconforming performance and the penalty for failing to object. Again, a
24 standard of particularization for the nonconformity is not stated nor is there any inference that the
25 objected to performance is the only nonconformity upon which the seller proposes to rely.
26

27 5. **CISG.** Article 39(1) provides that the buyer "loses the right to rely on a lack of
28 conformity of the goods if he does not give notice to the seller specifying the nature of the lack of
29 conformity within a reasonable time after he has discovered it or ought to have discovered it."
30 Presumably, this failure to specify bars the use of that alleged non-conformity for all remedial
31 purposes. Other related Articles include Art. 39(2), Art. 40 and Art. 44.

32 The Drafting Committee rejected a motion to incorporate the provisions of Article 40,
33 which provides that the seller is "not entitled to rely on the provisions of articles 38 and 39 if the
34 lack of conformity relates to facts of which he knew or could not have been unaware and which
35 he did not disclose to the buyer."

36 **SECTION 2-703. BUYER'S RIGHTS ON NONCONFORMING DELIVERY;**
37 **RIGHTFUL REJECTION.**

1 (a) Subject to Sections ~~2-605~~ 2-603, ~~and 2-711~~ 2-710, 2-809, and 2-810, if the goods or
2 the tender of delivery fail in any respect to conform to the contract, a buyer may:

3 (1) reject the whole;

4 (2) accept the whole; or

5 (3) accept any commercial units and reject the rest.

6 (b) A rejection under subsection (a) is not effective unless the buyer notifies the seller ~~the~~
7 ~~seller is notified~~ within a reasonable time after tender or delivery. [the nonconformity was or
8 should have been discovered]

9 **SOURCE: Sales, Section 2-601 (December, 1994)**

10 Notes

11 1. Revised §2-703(a) states when the buyer can reject a non-conforming tender and
12 §2-703(b), previously found in former §2-602(1), requires timely notice for an effective rejection.
13 A rejection not permitted under §2-703(a) is wrongful and a breach, see §§2-701(a)(1) and 2-815,
14 even though prompt notice is given. A rejection that is rightful under §2-703(a) but not effective
15 under §2-703(b) may be an acceptance under ~~§2-707~~ 2-706(a)(2). The first rephrasing in
16 subsection (b) is to make sure that the effectiveness of the notice is from when the buyer sends it
17 under 1-201(26). The second rephrasing is to highlight the issue of when the time for notice
18 should start to run. Former §2-602(1) stated that rejection must take place within a reasonable
19 time after tender or delivery. If the reasonable time does not start to run until the nonconformity
20 was or should have been discovered, the buyer has very little incentive to discover quickly the
21 non-conformity and the courts will have to resolve in each case when the nonconformity should
22 have been discovered. The drafting committee needs to make a policy choice here as to when the
23 reasonable time for making an effective rejection should start to run.

24 2. Subject to various limitations stated in §2-703 and elsewhere, §2-703(a) preserves the
25 perfect tender rule. Section 2B-609(a) (Sept. 1996), however, requires a material breach. There
26 are several limitations on the power to reject for an admitted non-conformity.

27 In addition to the notice requirement in subsection (b), subsection (a) permits the parties
28 to vary the rejection standard by agreement. Sections 2-809 and 2-810(a). In addition, because
29 the “contract incorporates usage of trade, course of dealing and course of performance, the
30 ability to state that the goods don’t conform to the contract will be limited by the facts relevant to
31 those concepts. Further, the power to reject is limited by ~~§§2-605~~ 2-603(b) and ~~2-711~~ 2-710,
32 both of which require non-conformity of a more substantial nature.

33 Another statutory limitation is §1-203, which imposes an "obligation of good faith" in

1 the "enforcement" of the contract. Since rejection is clearly "enforcement" of the contract, its
2 exercise is subject to the duty of good faith.

3 A practical limitation arises when the buyer fails to discover a non-conformity and
4 accepts the goods. ~~§2-707~~ 2-706(a)(2). To revoke acceptance under ~~§2-709~~ 2-708, the
5 non-conformity must substantially impair the value of the lot or unit accepted to the buyer.

6 Finally, even if the rejection is rightful and effective, the seller has a ~~broad~~ power to
7 "cure" under revised ~~§2-710~~ 2-709. This limits the buyer's options to cancel the contract or to
8 "cover" from a third party. Thus, for example, a buyer who in good faith rejects for a
9 non-conformity and the seller has a right to cure under §2-709 will not be able to cancel the
10 contract until the seller has had a reasonable opportunity to cure.

11 3. CISG. Under CISG, buyer remedies are triggered when the seller "fails to perform any
12 of his obligations under the contract," Art. 45(1), and preserved when proper notice of the
13 nonconformity is given under Article 39(1). There is no rejection remedy, however, and the
14 buyer is required to pay the price as agreed unless the contract can be avoided for a
15 "fundamental" breach. See Art. 25. Upon finding non-conforming goods, the buyer's remedial
16 options include requiring the seller to deliver substitute goods or repair them under Article 46,
17 fixing an additional length of time for the seller to perform under Article 47 and avoiding the
18 contract for "fundamental breach" under Article 49. In addition, the seller has broad power to
19 "cure" under Article 48.

20 Thus, although a minor non-conformity may be a breach for which rights and remedies
21 are provided, the buyer cannot buy replacement goods (cover) under Art. 75 unless the contract is
22 avoided for fundamental breach.

23 **~~SECTION 2-704. WAIVER OF BUYER'S OBJECTION BY FAILURE TO~~**
24 **~~PARTICULARIZE.~~**

25 **Notes**

26 This section has been consolidated with §2-603 from the November draft to place all of
27 the waiver provisions in one section. This consolidated new section has been moved to §2-702
28 right after the explanation of breach.

29 **~~SECTION 2-705~~ 2-704. EFFECT OF RIGHTFUL REJECTION AND**
30 **JUSTIFIABLE REVOCATION OF ACCEPTANCE.**

31 (a) Subject to Sections ~~2-706~~ 2-705 and 2-823(c), after an effective rightful rejection or
32 justifiable revocation of acceptance, a buyer that takes delivery of the goods, shall hold the goods
33 with reasonable care at the seller's disposition for a sufficient time to permit the seller to remove

1 them. However, the buyer has no further obligation with regard to the goods.

2 (b) If a buyer uses the goods after a rightful rejection or justifiable revocation of
3 acceptance, the following rules apply:

4 (1) Any use by the buyer which is inconsistent with the seller's ownership or with
5 the buyer's claim of rejection or revocation of acceptance and is unreasonable under the
6 circumstances is an acceptance if ratified by the seller.

7 (2) If use of the goods is reasonable under the circumstances and is not an
8 acceptance, the buyer, upon returning or disposing of the goods, shall pay the seller the
9 reasonable value of the use to the buyer. This value must be deducted from the sum of the price
10 paid to the seller, if any, and any damages to which the buyer is otherwise entitled under this
11 article.

12 (c) A buyer in possession which wrongfully rejects but does not accept goods is subject to
13 subsection (b)(1) and the duty of care in subsection (a).

14 **SOURCE: Sales, Sections 2-603 and 2-604.**

15 **Notes**

16 1. Subsection (a), which was subsection (2) in an earlier draft, is taken from §2-602(2)(b)
17 & (c) of the 1990 Official Text. It states the duty of care of a non-merchant buyer in possession
18 of goods after a rightful rejection or justified revocation of acceptance that is effective under §2-
19 703 or §2-708. That duty of care also applies when it also covers a buyer is in possession of
20 wrongfully rejected but not accepted goods, i.e., a buyer who had no ground for rejection under
21 §2-703(a) but effectively rejected under §2-703(b). See §2-705(d) 2-704(c).

22 A buyer who first accepts the goods and then wrongfully revokes acceptance is treated as
23 having accepted the goods and is liable for their price. A buyer who rightfully but ineffectively
24 rejects also may be treated as accepting the goods under §2-706(a)(3) and would be liable for the
25 price.

26 2. Subsection (b)(1) is taken from §2-602(2)(a) of the 1990 Official Text. The seller has

1 the option to treat the listed unreasonable acts of ownership or control by the buyer as either an
2 acceptance under ~~§2-707~~ 2-706(a)(4) or the tort of conversion.

3 3. Subsection (b)(2) is new. There was considerable discussion about the proper standard
4 at the January, 1994 and March, 1995 meetings of the Drafting Committee. Although a
5 reasonable use is not an acceptance, the buyer must pay the seller the reasonable value to the
6 buyer of the use. One possible measure of value, not stated in the text, is what it would cost the
7 buyer to obtain a comparable use from a similarly situated person in the seller's position. See
8 Restatement, Second, Contracts §371(a). But the buyer may offset or deduct that value from the
9 sum of the price paid to the seller and any damages otherwise resulting from the breach. See
10 §2-823(a), which permits the buyer to recover these amounts. See also, Note, Article 2:
11 Revocation of Acceptance. . . Should a Seller be granted a Set off for the Buyer's Use of Goods,
12 30 N. Eng. L. Rev. 1073 (1996).

13 To illustrate, suppose the buyer, after testing, discovered that machinery supplied by the
14 seller would not perform to its warranted capacity. A rightful and effective rejection was made.
15 The seller elected not to cure and directed the buyer to dismantle and return the machine. The
16 buyer, however, used the machine for three months and, because cover was not available during
17 that time, the use was reasonable under the circumstances. Assuming that the reasonable value of
18 the three months use to the buyer was \$5,000, the seller recovers nothing if the sum of the
19 buyer's part performance (down payment plus interest) and damages resulting from the breach
20 exceeds \$5,000. The buyer, of course, can recover that excess as damages, including provable
21 incidental and consequential damages under §2-806.

22 4. Subsection (c) does not apply to a buyer who unjustifiably revokes acceptance because
23 the buyer has already accepted goods to which title has passed and owes the price. A buyer who
24 attempts to revoke acceptance, however, bears the loss of goods not properly cared for if a court
25 subsequently holds that the revocation was justified.

26 5. **CISG.** See Articles 86-88, dealing with the buyer's duty to preserve the goods in
27 certain circumstances.

28 **SECTION ~~2-706~~ 2-705. MERCHANT BUYER'S DUTIES; BUYER'S OPTIONS AS**
29 **TO SALVAGE.**

30 (a) Subject to a buyer's security interest under Section 2-823(c), if the seller does not have
31 an agent or place of business at the market where the goods were rejected or acceptance was
32 revoked, a merchant buyer, after rejection or revocation of acceptance, shall follow any
33 reasonable instructions received from the seller with respect to goods in the buyer's possession or

1 control and in the absence of such instructions shall make a reasonable effort to sell or otherwise
2 dispose of the goods for the seller's account if they threaten to decline speedily in value.

3 Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

4 (b) A merchant buyer that sells goods under subsection (a) is entitled to reimbursement
5 from the seller or out of the proceeds for the reasonable expenses of caring for and selling them.

6 If the expenses do not include a sales commission, the buyer is entitled to a commission usual in
7 the trade or, if there is none, to a reasonable sum not exceeding 10 percent of the gross proceeds.

8 (c) Subject to subsection (a), if a seller does not give instructions within a reasonable time
9 after notification of rejection or revocation of acceptance, ~~the~~ a merchant buyer, ~~whether a~~
10 ~~merchant or not, or a non-merchant buyer in any case,~~ may store the rejected goods for the
11 seller's account, reship them to the seller, or resell them for the seller's account, with
12 reimbursement as provided in subsection (b).

13 (d) In complying with this section, a buyer shall act in good faith. Conduct in good faith
14 under this section does not constitute acceptance or conversion and may not be the basis of a
15 claim for damages.

16 **SOURCE: Sales, Section 2-603.**

17 Notes

18 1. Section ~~2-706~~ 2-705 integrates in one section various strands of the buyer's post
19 rejection and revocation duties with regard to the goods not otherwise covered in ~~§2-705~~ 2-704.
20 Except for the addition of "revocation of acceptance" in subsections (a) and (c), no substantive
21 changes are made in the 1990 Official Text. Subsection (a), taken from §2-603(1), and subsection
22 (b), taken from §2-603(2), are limited to merchant buyers. Subsection (c), taken from §2-604,
23 and subsection (d), taken from §2-603(3), apply to all buyers. See 2B-610 (Sept. 1996), stating
24 the licensee's duties following a rightful refusal of a defective tender.

25 The language added to subsection (c) is intended to clarify that a non-merchant buyer

1 need not follow instructions given by the seller.

2 **2. CISG.** See Articles 86-88.

3
4 **SECTION ~~2-707~~ 2-706. WHAT CONSTITUTES ACCEPTANCE OF GOODS.**

5 (a) Goods are accepted if a buyer:

6 (1) states to the seller at any time that the goods are accepted;

7 (2) after a reasonable opportunity to inspect the goods, signifies to the seller that
8 the goods conform or will be taken or retained in spite of their nonconformity;

9 (3) after a reasonable opportunity to inspect the goods, fails to make an effective
10 rejection; or

11 (4) either before or after rejection or after revocation of acceptance, does any
12 unreasonable act inconsistent with the seller's ownership or the buyer's claim of rejection or
13 revocation of acceptance and that act is ratified by the seller as an acceptance.

14 (b) Acceptance of a part of a commercial unit is acceptance of the entire unit.

15 **SOURCE: Sales, Section 2-606.**

16 **Notes**

17 1. Section ~~2-707~~ 2-706 (former §2-606) states what constitutes an acceptance of goods by
18 the buyer.

19 Under subsection ~~(a)(1)~~ (a)(2), the buyer must first have a reasonable opportunity to
20 inspect the goods and then objectively signify to the seller that they will be taken or retained. The
21 buyer may or may not have discovered a nonconformity.

22 Under subsection ~~(a)(2)~~ (a)(3), the buyer must first have a reasonable opportunity to
23 inspect the goods and then fail to make an effective rejection under §2-703(b). The classic case is
24 where the buyer discovers a nonconformity but fails to notify the seller of rejection within a
25 reasonable time after delivery. A rejection would have been rightful under §2-703(a) but it was
26 not effective under §2-703(b). Conversely, it is not an acceptance where the buyer effectively
27 rejects for reasons not permitted under §2-703(a). Unless the buyer does an act of unreasonable

1 ownership or control over the goods, see subsection ~~(a)(3)~~ (a)(4), a wrongful but effective
2 rejection is a breach under ~~§2-815 2-701~~ but not an acceptance under ~~§2-707 2-706~~.

3 Does this make sense? Why not state simply and clearly that a wrongful rejection under
4 §2-703(a), even though effectively communicated under §2-703(b), is an acceptance. An
5 effective but wrongful rejection gives rise to the seller's action for breach of contract damages. If
6 an effective but wrongful rejection is treated as an acceptance, the seller would have an action for
7 the price.

8 Subsection ~~(a)(3)~~ (a)(4) gives the seller an option to treat certain unreasonable acts by the
9 buyer as an acceptance, whether they occur before or after rejection or revocation and whether
10 the rejection was rightful or the revocation was justified. Thus, unreasonable use of goods during
11 inspection could be an acceptance even though a subsequent rejection was otherwise proper.
12 Similarly, an unreasonable use after a wrongful but effective rejection could also be an
13 acceptance. This section must be read in conjunction with §2-704(b) which provides in effect
14 that reasonable acts that may be inconsistent with the seller's ownership may not be an
15 acceptance although the buyer will have to compensate the seller for the reasonable value of the
16 buyer's use of the goods.

17 2. **CISG.** The remedies of the buyer for breach by a seller do not depend upon whether
18 the buyer has accepted the goods.

19 **SECTION ~~2-708~~ 2-707. EFFECT OF ACCEPTANCE; NOTICE OF BREACH;**
20 **BURDEN OF ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE OF CLAIM**
21 **OR LITIGATION TO PERSON ANSWERABLE OVER.**

22 (a) A buyer shall pay the contract price for any goods accepted.

23 (b) Acceptance of goods by a buyer precludes rejection of the goods accepted but does
24 not by itself impair any other remedy provided by this article for nonconformity.

25 (c) If a tender has been accepted, the following rules apply:

26 (1) The buyer, within a reasonable time after the buyer discovers or should have
27 discovered a breach of contract, shall notify the party claimed against of the breach. However, a
28 failure to give notice bars the buyer from a remedy only to the extent that the party entitled to
29 notice establishes that it was prejudiced by the failure.

1 (2) If a claim for infringement or the like is made against a buyer for which a
2 seller is answerable over, ~~the party claimed against~~ the buyer shall notify the seller within a
3 reasonable time after receiving notice of the litigation or be barred from any remedy over for
4 liability established by the litigation.

5 (d) A buyer has the burden of establishing a breach of contract with respect to goods
6 accepted.

7 (e) In a claim for breach of a warranty, indemnity, or other obligation against the buyer
8 for which another party is answerable over, the following rules apply:

9 (1) The buyer ~~party claimed against~~ may give notice of the litigation to the other
10 party in a record, and the person notified may then give similar notice to any other person who is
11 answerable over. If the notice invites the person notified to intervene in the litigation and defend
12 and states that failure to do so will bind the person notified in any action later brought by the
13 buyer ~~person claimed against~~ as to any determination of fact common to the two actions, the
14 person notified is so bound unless, after seasonable receipt of the notice, the person notified
15 intervenes in the litigation and defends.

16 (2) If the claim is one for infringement or the like, the original seller may demand
17 in a record that its buyer turn over control of the litigation, including settlement, or otherwise be
18 barred from any remedy over. If the seller also agrees to bear all expense and to satisfy any
19 adverse judgment, the buyer is so barred unless, after seasonable receipt of the demand, control is
20 turned over to the seller.

21 (f) Subsections (c), (d), and (e) govern an obligation of a buyer to hold the seller harmless
22 against infringement or the like.

1 SOURCE: Sales, Section 2-607.

2 Notes

3 1. At the January, 1994 meeting, the Drafting Committee approved the following
4 revisions in the draft before it:

5 (a) Delete "materially" from ~~§2-708~~ 2-707(c)(1). Thus, the buyer who fails to give timely
6 notice of breach is barred from any remedy to the extent that the seller is "prejudiced thereby."
7 The statute provides no guidance on when a seller is prejudiced. Presumably, the failure to notify
8 must prejudice the seller's efforts to inspect the goods, preserve other evidence or prepare for
9 settlement or trial.

10 (b) Restore the original language in §2-607(3)(b) to revised Section ~~2-708~~ 2-707(c)(2).
11 The "prejudice" limitation was rejected for infringement claims.

12 (c) Replace "prove" with "establish" in ~~§2-708~~ 2-707(d), since "establish" is defined in
13 §1-201.

14 (d) Clarify the relationship of the parties in the "vouching in" provision, ~~§2-708~~ 2-
15 707(e)(1). See subsection (e)(1). The Drafting Committee has rejected a suggestion that the
16 "vouching" provision be deleted.

17 2. The word "contract" has been inserted in subsection(a) to make clear that the buyer is
18 obligated to pay the contract price as opposed to the market price for the goods. The word
19 "buyer" have been substituted in subsections (b)(2) and (e)(1) to make clear that these obligations
20 apply to a buyer who has accepted goods. To the extent that the Drafting Committee thinks that
21 any part of the concept of this section regarding vouching in should apply when someone else
22 other than a buyer who has accepted goods is sued, then those provisions should probably be
23 located in the code in the context of those other rights and not placed in this section.

24 3. Notice by the buyer to the seller is important in three situations involving remedies:
25 First, to make an effective rejection under §2-703(b); Second, to revoke acceptance under ~~§2-709~~
26 2-708(b); and Third, to preserve a damage remedy for accepted goods under ~~§2-708~~ 2-707(b)(1).
27 In the first case, the notice should state that the buyer is rejecting a non-conforming tender and
28 the grounds for a possible cure by the seller, see ~~§2-704~~ 2-702(d). In the second case the notice
29 should state that the buyer is revoking acceptance and the limited grounds for possible cure, see
30 ~~§2-709~~ 2-708(b). But see note 4 after 2-702. In the third case the notice need state only that the
31 buyer is claiming a breach, see ~~§2-708~~ 2-707(c)(1). Since neither cure nor the remedies of
32 rejection and revocation are available when the third type of notice is given, the task of
33 determining the impact on the seller of a failure to give notice is more complicated.

34 Subsection (c)(1), which imposes a statutory notice condition, states that a failure bars a

1 remedy to the extent that the seller "establishes" that it was prejudiced by the failure. This is a
2 middle position between an absolute bar and requiring proof of material prejudice. See
3 Restatement, Second, Contracts §229, excusing a condition precedent where the failure is not
4 material and implementation would result in "disproportionate forfeiture." The issue was
5 discussed again at the October, 1995 meeting of the Drafting Committee but no changes were
6 adopted.

7 See the notes following §2-702 for issues posed by the requirements to give notice.

8 3. **CISG.** Although the buyer is obligated to take delivery and pay the price "as required
9 by the contract and this Convention," Art. 53, the concept of acceptance is irrelevant to the
10 obligations of either party. Thus, there is no need to state the "effect" of acceptance.

11 **SECTION ~~2-709~~ 2-708. REVOCATION OF ACCEPTANCE.**

12 (a) A buyer may revoke acceptance of a lot or commercial unit whose nonconformity
13 substantially impairs its value to the buyer if the lot or unit was accepted:

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

16 (2) without discovery of its nonconformity if acceptance was reasonably induced
17 by the difficulty of discovery before acceptance or by the seller's assurances.

18 (b) To be effective, a buyer's acceptance must be revoked within a reasonable time after
19 the buyer discovers or should have discovered the ground for it and before any substantial change
20 in condition of the goods which is not caused by their own defects. The revocation is not
21 effective until the buyer notifies the seller of it.

22 (c) A buyer that justifiably revokes acceptance has the same rights and duties involved
23 under Sections ~~2-705~~ 2-704 and ~~2-706~~ 2-705 with regard to the goods as if they had been
24 rejected.

25 **SOURCE: Sales, Section 2-608.**

1 **Notes**

2 1. There are no revisions of substance in ~~§2-709~~ 2-708 (formerly §2-608). Under ~~§2-710~~
3 2-709(a), however, the seller now has power to cure a nonconformity when acceptance is
4 revoked under subsection (a)(2). See notes after §2-702 for issues regarding what the notice must
5 say in the accepted goods context.

6 2. Notes: (1) For when a breach substantially impairs the value of the lot or commercial
7 unit to the ~~other~~ buyer, see ~~§2-702(b)~~ 2-710; (2) Although a wrongful rejection of acceptance is a
8 breach of contract, the buyer is still liable for the price; and (3) When the revocation remedy
9 survives a "failure" of essential purpose is determined under ~~§2-809~~ 2-810.

10 3. Upon a justifiable revocation of acceptance, the seller has a right to cure as defined in
11 ~~§2-710~~ 2-709. Note, however, that ~~§2-709~~ 2-708(a)(1) provides that revocation is proper when
12 the goods were accepted on the reasonable assumption that a nonconformity would be cured and
13 it is not cured. In this case, the seller would not have a second opportunity to cure under ~~§2-710~~
14 2-709.

15 **SECTION ~~2-710~~ 2-709. CURE.**

16 (a) If the buyer rightfully rejects a tender of delivery under Section 2-703 or justifiably
17 revokes an acceptance under Section ~~2-709~~ 2-708(a)(2) and the agreed time for performance has
18 not expired, the seller, upon reasonable notice to the buyer and at its own expense, may cure any
19 breach by making a conforming tender of delivery within the agreed time. ~~as follows:~~

20 _____ (1) ~~If the agreed time for performance has not expired, the seller may tender a~~
21 ~~conforming delivery within the agreed time.~~

22 _____ (2) ~~If the agreed time for performance has expired, the seller may provide a cure~~
23 ~~that is appropriate and timely under the circumstances.~~

24 (b) If the buyer rightfully rejects goods or a tender of delivery under Section 2-703 and if
25 the agreed time for performance has expired, the seller upon reasonable notice to the buyer and at
26 its own expense, may cure a breach by making a tender of conforming goods within a reasonable
27 time if

1 Alternative A

2 such tender does not substantially impair the value of the contract to the buyer.

3 Alternative B

4 the seller had reasonable grounds to believe that a nonconforming tender would be acceptable to
5 or be accepted by the buyer.

6 (c) If the buyer has justifiably revoked acceptance under 2-708(a)(2) and if the time for
7 performance has expired, the seller upon reasonable notice to the buyer and at its own expense,
8 may cure any breach by making a tender of conforming goods within a reasonable time if

9 Alternative A

10 such retender does not substantially impair the value of the contract to the buyer.

11 Alternative B

12 the seller establishes that the buyer will not be harmed if it accepted the retender.

13 **SOURCE: Sales, Section 2-508; Unidroit Principles, Art. 7.1.4.**

14 **Notes**

15 1. The November 1996 draft of Section 2-710, which is was taken from Art. 7.1.4 of the
16 Unidroit Principles, both expanded and simplified the seller's cure opportunity. This Section was
17 approved in principle by the Drafting Committee at the March, 1996 meeting and minor changes
18 were recommended at the September, 1996 meeting. Thus, the phrase permitting the buyer to
19 reject a proper cure where there are "legitimate reasons has been deleted: The buyer does not
20 have a double right to reject. The Drafting Committee also rejected a motion to preclude cure by
21 the seller after a revocation of acceptance and to require a substantial impairment of the buyer's
22 interest before a cure can be rejected under paragraph (2).

23 2. This draft of §2-709 is an attempt to respond to the discussion of the drafting
24 committee at the November 1996 meeting. Based upon that discussion, the above draft in
25 subsection (a) allows a cure to be made by a conforming tender before the time for performance
26 has expired in cases where the buyer has rejected and in cases where the buyer has revoked
27 acceptance. That expands former §2-508(1) to the revocation of acceptance situation.

1 Subsection (b) addresses cure when the time for performance has expired and the buyer
2 has rejected the goods. In that situation the issue is whether the former §2-508(2) needs to be
3 revised to allow for an expanded right to cure and the effect an expanded right to cure has on the
4 seller's incentive to make a conforming tender in the first instance. Under former § 2-508(2)
5 some of the issues that had arisen in the cases are rejecting for minor defects, surprise rejections
6 and unknown defects. Bad faith rejections are already dealt with under the perfect tender rule as
7 stated in § 2-703 and the concept of good faith in making that rejection. Usage of trade, course
8 of performance and course of dealing are already incorporated into the concept of conformity to
9 the "contract. Three alternative endings are stated for subsection(b). Alternative A creates a
10 tension with the perfect tender concept and is a backhanded way of stating a substantial
11 performance standard for tender. Alternative B is the standard from former §2-508(2) without the
12 "money allowance language. That language was deleted given the Drafting Committee's
13 discussion that any cure had to be a tender of conforming goods, not merely a discount for taking
14 non-conforming goods. Alternative B is stated in the alternative.

15 Subsection (c) deals with the situation where the time for performance has expired and
16 the buyer has revoked acceptance. In that situation, the buyer has to demonstrate that the original
17 tender was nonconforming, the nonconformity substantially impairs the value of the contract to
18 the buyer and that the nonconformity was not discovered prior to acceptance because it was
19 difficult to discover or acceptance was induced by the seller's assurances. Subsection (c) states
20 two alternatives. The drafting committee briefly discussed Alternative A in principle at the
21 November 1996 meeting. Under Alternative A, the retender would be allowed over the buyer's
22 protest if the retender does not substantially impair the value of the contract to the buyer. Under
23 Alternative B, the seller would have to demonstrate that the buyer is not harmed by the retender.
24 Alternative B is more protective of the buyer than Alternative A. Cure in the revocation of
25 acceptance situation does not present the same tension with the perfect tender rule as does cure in
26 the rejection situation. Rather, the issue in revocation situations is whether the buyer has already
27 "suffered enough and what additional hurdles do we make the buyer jump through in order to
28 get rid of the goods and sue for damages. Presumably if the seller has a right to cure in the
29 revocation situation and the buyer does not allow the cure, the tables have turned and now it is
30 the buyer that is in breach. Another alternative is to delete subsection (c). That action would
31 mean that the seller has no right to cure if the buyer revokes acceptance and the time for
32 performance has expired.

33 3. The problem of cure in installment contracts, ~~§2-711~~ 2-710 (previously treated in
34 §2-612(2) of the 1990 Official Text), is treated in ~~§2-711~~ 2-710. Note that cure is not available
35 for substantial delay in performing an installment. Furthermore, the buyer must accept a
36 non-conforming tender of goods if the seller "gives adequate assurance" of cure.

37 4. Note that a rejection must be rightful under §2-703(a) and effective under §2-703(b)
38 before ~~§2-710~~ 2-709 becomes operative. The phrase "rightful rejection" is used to signal a proper
39 rejection. A wrongful rejection is a breach of contract, see ~~§2-815~~ 2-701, and an ineffective

1 rejection is an acceptance. If the rejection is proper and the seller gives notice of cure, the buyer
2 must wait for the reasonable time necessary to evaluate the cure. If the cure is effective, the buyer
3 must accept the tender and seek any damages resulting from the breach. If the cure is ineffective,
4 the buyer may pursue its remedies under §2-823(1), including cancellation.

5 The buyer breaches if it deprives the seller of its statutory right to cure under ~~§2-710~~ 2-
6 709 or fails to cooperate in good faith when the seller attempts to cure. See §2-307. Thus, if the
7 buyer had a right to reject under §2-703(a) but canceled the contract without making an effective
8 rejection, a breach has occurred. Similarly, the buyer fails to cooperate if, after the seller gives
9 notice of an intention to cure, access to the goods is prohibited.

10 **4. CISGA.** Under CISGA, the buyer has no remedy of rejection for a nonconforming
11 tender and cannot "avoid" the contract unless the seller has committed a "fundamental breach,"
12 see Art. 49(1)(a) and Art. 25. Upon a non-conforming tender however, the buyer can, in certain
13 circumstances, require the seller to "cure" by delivering substitute goods, Art. 46(2)(must have a
14 fundamental breach), or by repair, see Art. 46(3). In addition, the buyer may "fix" an additional
15 period of time for the seller to perform, Art. 47(1), and the seller has a broad, unified right to cure
16 under Article 48(1).

17 **SECTION ~~2-711~~ 2-710. INSTALLMENT CONTRACT: BREACH.**

18 (a) In this section, "installment contract" means an agreement in which the terms require
19 or the circumstances permit the delivery of goods in separate lots to be separately accepted, even
20 if the agreement requires payment other than in installments or contains a term stating "Each
21 delivery is a separate contract" or words of similar import.

22 (b) A buyer may reject any nonconforming installment of delivery of goods [or
23 documents] in an installment contract if the nonconformity substantially impairs the value of that
24 installment to the buyer [or if the nonconformity is a defect in the required documents].
25 However, if a nonconforming tender by the seller is not a breach of the whole contract and the
26 seller gives adequate assurance of its cure, the buyer shall accept that installment.

27 (c) If a nonconformity with respect to one or more installments in an installment contract
28 is a breach of the whole contract, the aggrieved party may cancel the contract. However, the

1 power to cancel the contract for breach is waived, or a canceled contract is reinstated, if the
2 aggrieved party accepts a nonconforming installment without seasonably giving notice of
3 cancellation, brings an action with respect to only past installments, or demands performance as
4 to future installments.

5 **SOURCE: Sales, Section 2-612.**

6 **Notes**

7 1. Subsection (a) clarifies the definition of installment contract. First, the definition
8 includes cases where "circumstances give either party the right to make or demand delivery in
9 lots." §2-302. Second, the definition includes cases where the goods are to be delivered and
10 accepted in separate lots but payment is to be made in one lump sum. A contract where the goods
11 are to be delivered in one lot but payment is to be made in installments, however, is not an
12 installment contract under subsection (a).

13 2. After the July, 1996 Draft, Subsection (b) was revised to exclude nonconforming
14 installment payments by the buyer. Although a nonconforming installment payment is a breach,
15 see 2-701(b)(2), the seller does not have power to reject it under subsection (b). The seller can,
16 however, demand adequate assurance of due performance under ~~2-712~~ 2-711 and to withhold
17 future deliveries under 2-815(1). The seller can also cancel the contract under subsection (c) if
18 the failure to pay one or more installments is a material breach of the whole contract. ~~2-702(a).~~
19 Subsection (d).

20 Unlike breach by the seller, the buyer has no statutory right to cure a breach in payment.
21 Realistically, the seller will probably accept a late or deficient payment and reserve rights to
22 damages or cancellation under §1-207. Allowing delays or deficiencies to cumulate may result in
23 a breach of the whole contract under subsection (c).

24 The bracketed language in subsection (b) is to call attention to the change from former
25 §2-612(2). The issue is whether a defect in documents should be tested under the substantial
26 impairment test or tested by a stricter performance standard. The phrasing of former § 2-612(2)
27 suggested that a defect in documents was tested by a stricter standard than substantial
28 impairment.

29 3. Under subsection (c), the seller or the buyer may cancel an installment contract if
30 breach by the other amounts to a breach of the whole contract. Breach of the "whole" is defined
31 in 2-701(c) in terms of substantial impairment of the value of the contract to the plaintiff.
32 Subsection (c) is clarified by stating that the power to cancel the contract is waived and a
33 canceled contract is reinstated by certain conduct by the aggrieved party. §2-612(3) stated only

1 that the contract was "reinstated" by the aggrieved party's conduct, suggesting that the contract
2 must first be canceled. See §~~2-603~~ 2-702 dealing with "waiver" of a breach by failing to object.

3 **4. CISGA.** Article 73 governs a contract for "for delivery of goods by installments."
4 Either party may avoid either a particular installment or the entire contract in defined cases of
5 fundamental breach. See Art. 25. The concept is consistent with §~~2-611~~ 2-710 but the
6 terminology is somewhat different.

7 5. A material breach of an installment may be a breach of the "whole" contract. ~~2-711~~ 2-
8 701(c). If so, the remedy of cancellation is available. See 2-815(8) & 2-823(a)(2).

9 **SECTION ~~2-712~~ 2-711. RIGHT TO ADEQUATE ASSURANCE OF**
10 **PERFORMANCE.**

11 (a) A contract imposes an obligation on each party not to impair the other's expectation of
12 receiving due performance. If reasonable grounds for insecurity arise with respect to the
13 performance of either party, the other may demand in a record adequate assurance of due
14 performance and, until that assurance is received, if commercially reasonable, may suspend any
15 performance for which the agreed return has not already been received.

16 (b) Between merchants, the reasonableness of grounds for insecurity and the adequacy of
17 any assurance offered is determined according to commercial standards.

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

20 (d) After receipt of a demand under subsection (a), failure to provide within a reasonable
21 time, not exceeding 30 days, assurance of due performance which is adequate under the
22 circumstances of the particular case is a repudiation of the contract under Section ~~2-713~~ 2-712(a).

23 **SOURCE: Sales, Section 2-609.**

1 **Notes**

2 1. There are no revisions in Section ~~2-712~~ 2-711 [formerly 2-609]. Subsection (c) states
3 that acceptance of a past nonconforming performance does not preclude the ability to demand
4 adequate assurance of future performance. Section 2-702(c) provides that failure to object to a
5 past breach does not preclude objecting to future breaches. These two subsections address two
6 different aspects of accepting nonconforming performance.

7 **2. CISG.** See Article 71(a), which recognizes a more limited principle of performance
8 insecurity. A party suspending performance under Art. 71(a) must notify the other party
9 "immediately" and must continue with performance "if the other party provides adequate
10 assurance of his performance." Art. 71(3).

11 **SECTION ~~2-713~~ 2-712. ANTICIPATORY REPUDIATION.**

12 (a) If either party to a contract repudiates a performance not yet due and the loss of
13 performance will substantially impair the value of the contract to the other, the aggrieved party
14 may:

15 (1) await performance by the repudiating party for a commercially reasonable
16 time, or resort to any remedy for breach of contract, even if it has urged the repudiating party to
17 retract the repudiation or has notified the repudiating party that it would await the agreed
18 performance; and

19 (2) in either case under paragraph (1), suspend its own performance or proceed in
20 accordance with Section 2-817.

21 (b) Repudiation includes but is not limited to language that one party will not or cannot
22 make a performance still due under the contract or voluntary affirmative conduct that reasonably
23 appears to the other party to make a future performance impossible.

24 **SOURCE: Sales, Section 2-610.**

25 **Notes**

1 1. Revised ~~§2-713~~ 2-712 (formerly §2-610) makes two important changes.

2 First, a working but not exclusive definition of repudiation, taken from §250 of the
3 Restatement, Second of Contracts, is provided in subsection (b). This is in addition to that
4 provided in ~~§2-712~~ 2-711(d) (formerly §2-609) and would include an unqualified statement that
5 one party will not perform the contract unless the other agrees to an unjustified modification of
6 the contract. Less clear are qualified statements, such as "I will not perform the next installment
7 of the contract until a good faith dispute over contract interpretation is resolved." Arguably such
8 qualified statements are repudiations which do not substantially impair the value of the contract
9 to the other.

10 Second, it is now clearer that repudiation of a part performance (an installment) may
11 constitute a substantial impairment of the whole contract to the other. Previously, the language
12 of ~~§2-710~~ 2-712 stated that when "either party repudiates **the contract** with respect to a
13 performance not yet due the loss of which will substantially impair the value of **the contract** to
14 the other," the aggrieved party could take remedial action. Under the revision, repudiation of an
15 installment " performance not yet due" can constitute a substantial impairment of the entire
16 contract. See ~~§2-711~~ 2-710(c) (formerly §2-612). Such a substantial impairment is a material
17 breach of the whole contract. See ~~2-702(a)~~ 2-710(d).

18 2. **CISG.** Article 72(1) states that if "prior to the date for performance of the contract it is
19 clear that one of the parties will commit a fundamental breach of contract, the other party may
20 declare the contract avoided." Unless that party has "declared that he will not perform his
21 obligations," Art. 72(3), however, the other must give reasonable notice of an intention to avoid
22 the contract in order to permit that party "to provide adequate assurance of his performance."
23 Art. 72(3). Adequate assurance presumably requires more than just a simple retraction of the
24 repudiation.

25 **SECTION ~~2-714~~ 2-713. RETRACTION OF ANTICIPATORY REPUDIATION.**

26 (a) A repudiating party may retract a repudiation until its next performance is due unless
27 the aggrieved party, after the repudiation, has canceled the contract, materially changed its
28 position, or otherwise indicated that the repudiation is considered to be final.

29 (b) A retraction may be by any method that clearly indicates to the aggrieved party that
30 the repudiating party intends to perform the contract. However, a retraction must contain any
31 assurance demanded under Section ~~2-712~~ 2-711.

32 (c) Retraction reinstates a repudiating party's rights under the contract with due excuse

1 and allowance to the aggrieved party for any delay caused by the repudiation.

2 **SOURCE: Sales, Section 2-611.**

3 **Notes**

4 1. There are no revisions in ~~§2-714~~ 2-713 (formerly §2-611).

5 2. **CISG.** There is no comparable provision in CISG. Under Articles 71 and 72,
6 however, a party suspending performance for an apparent inability of the other to perform a
7 substantial part of the contract, Art. 71(3), or intending to declare the contract avoided for a
8 repudiation, Art. 72(2), must give immediate notice to the other. At that point, the other has the
9 chance to provide adequate assurance of performance. Presumably that adequate assurance will
10 include a retraction.

11 **SECTION ~~2-715~~ 2-714. CASUALTY TO IDENTIFIED GOODS.**

12 If the parties to a contract assume the continued existence and eventual delivery to the buyer of
13 goods identified when the contract is made and the goods suffer casualty without the fault of
14 either party before the risk of loss passes to the buyer, the following rules apply:

15 (1) The seller shall seasonably notify the buyer of the nature and extent of the loss.

16 (2) If the loss is total, the contract is avoided.

17 (3) If the loss is partial or the goods no longer conform to the contract, the buyer may
18 nevertheless demand inspection and may treat the contract as avoided or accept the goods with
19 due allowance from the price for the nonconformity but without further right against the seller.

20 **SOURCE: Sales, Section 2-613.**

21 **Notes**

22 1. The phrase "contract requires" in §2-613 of the 1990 Official Text has been replaced
23 with the phrase "parties assume the continued existence of goods." Thus, if both parties intend
24 the continued existence of identified goods, those goods are the equivalent of "specific goods."

25 Section ~~2-715~~ 2-714 provides a default rule and applies only if the parties have not
26 otherwise agreed. Thus, evidence relevant to whether the parties assumed the continued existence

1 of identified goods should then be considered. For example, even if the contract contemplates
2 but does not expressly require the delivery of crops growing on the seller's land, a drought might
3 still excuse the seller if both parties assumed the continued existence of those crops for
4 performance. Support for this assumption might be derived from the capacity of the seller (i.e., a
5 grower or a dealer), whether this farmer and others similarly situated historically have grown and
6 sold only their own crops and any relevant prior course of dealing or usage of trade. The parol
7 evidence rule, §2-202, does not exclude evidence introduced to establish what both parties
8 assumed would not happen.

9 2. The phrase "or in a proper case under a "no arrival, no sale" term, former §2-324" is
10 deleted, pursuant to the Drafting Committee's decision to delete §§2-319 - 2-324 from revised
11 Article 2.

12 3. The notice requirement in ~~2-715~~ 2-714(1) was added to achieve parity with ~~§2-718~~ 2-
13 717(b)(2). The seller's defense is avoided if the notice required in paragraph (1) is not given.

14 4. Excuse for casualty to goods identified after contract formation is determined under
15 ~~§2-715~~ 2-716.

16 5. **CISG.** Article 79(1) provides that a "party is not liable for a failure to perform any of
17 his obligations if he proved that the failure was due to an impediment beyond his control and that
18 he could not reasonably be expected to have taken the impediment into account at the time of the
19 conclusion of the contract or to have avoided or overcome it or its consequences." Article 79(2)
20 also provides limited excuse where a party's failure is "due to the failure by a third person."
21 Arguably, this provision provides as much excuse from performance as does ~~§2-712~~ 2-
22 714(formerly §2-613).

23 **SECTION ~~2-716~~ 2-715. SUBSTITUTED PERFORMANCE.**

24 (a) If, without the fault of either party, agreed berthing, loading, unloading facilities or an
25 agreed type of carrier becomes unavailable, or an agreed manner of delivery otherwise becomes
26 commercially impracticable, an aggrieved party may claim excuse under Section ~~2-717~~ 2-716
27 unless a commercially reasonable substitute is available. In that case, reasonable substitute
28 performance must be tendered and accepted.

29 (b) If an agreed means or manner of payment fails because of domestic or foreign
30 governmental regulation, the seller may withhold or stop delivery until the buyer provides a

1 means or manner of payment which is commercially a substantial equivalent. If delivery has
2 already been made, payment by the means or in the manner provided by the regulation discharges
3 the buyer's obligation unless the regulation is discriminatory, oppressive, or predatory.

4 **SOURCE: Sales, Section 2-614.**

5 **Notes**

6 1. There are no revisions of substances in ~~§2-716~~ 2-715 (formerly §2-614).

7 2. **CISGA.** See Article 79(1).

8 **SECTION ~~2-717~~ 2-716. EXCUSE BY FAILURE OF PRESUPPOSED**
9 **CONDITIONS.**

10 (a) Subject to Section ~~2-716~~ 2-715 and subsection (b), delay in performance or
11 nonperformance by the seller is not a breach of contract if the seller's performance as agreed has
12 been made impracticable by:

13 (1) the occurrence of a contingency whose nonoccurrence was a basic assumption
14 on which the contract was made; or

15 (2) compliance in good faith with any applicable foreign or domestic
16 governmental regulation, statute, or order, whether or not it later proves to be invalid:

17 (b) A party claiming excuse under subsection (a) shall seasonably notify the other party
18 that there will be delay or nonperformance. If the claimed excuse affects only a part of the seller's
19 capacity to perform, the seller shall also allocate production and deliveries among its customers
20 in a manner that is fair and reasonable and notify the buyer of the estimated quota made
21 available. However, the seller may include regular customers not then under contract as well as
22 its own requirements for further manufacture.

1 (b) If, after receipt of notification under Section ~~2-715~~ 2-714 or ~~2-717~~ 2-716, a party fails
2 to terminate or modify the contract within a reasonable time not exceeding 30 days, the contract
3 lapses with respect to any performance affected.

4 (c) This section may be varied by agreement only to the extent that the parties have
5 assumed a different obligation under Section ~~2-717~~ 2-716.

6 **SOURCE: Sales, Section 2-616.**

7 **Notes**

8 1. Section ~~2-718~~ 2-717 has been revised to provide for cases where the buyer notifies the
9 seller of a material delay or non-performance in payment and to apply to the notice required
10 under section 2-714 on specific goods.

11 2. **CISG.** There is no comparable provision in CISG. Article 79(4), however, requires
12 that the party who fails to perform "must give notice to the other party of the impediment and its
13 effect on his ability to perform." The penalty for failure to notify is damages. Also, Article 79(3)
14 provides that the excuse or exemption provided by Art. 79(1) "has effect for the period during
15 which the impediment exists." These requirements provide a framework within which the parties
16 can negotiate over allocations and adjustments.

17 **SECTION ~~2-719~~ 2-718. PRESERVING EVIDENCE OF GOODS IN DISPUTE.**

18 To further the adjustment of a claim or dispute, the following rules apply:

19 (1) Either party to a sale, on reasonable notification to the other, has a right to inspect,
20 test, and sample the goods for the purpose of ascertaining the facts and preserving evidence. This
21 right includes goods that are in the possession or control of the other.

22 (2) Parties to a sale may agree to an inspection or survey by a third party to determine the
23 conformity or condition of the goods and may agree that the findings will be binding upon them
24 in any later litigation or adjustment.

25 **SOURCE: Sales, Section 2-514.**

1 **PART 8**

2 **REMEDIES**

3 **A. IN GENERAL**

4 **SECTION 2-801. SUBJECT TO GENERAL LIMITATIONS.**

5 The remedies of the seller, buyer, and other protected persons under this article are subject to the
6 general limitations and principles stated in subpart 8A.

7 **SOURCE:** New.

8 **Notes**

9 1. Section 2-801 states that remedies of the seller and buyer and other protected persons
10 are subject to the general remedial policies expressed in subpart A of Part 8. Some of these
11 policies were expressed in §2-801 of the May, 1994 Draft. Particular remedies for the seller are
12 stated in subpart B and remedies for the buyer are stated in subpart C. This organization for
13 remedies, which is new in the October, 1995 Draft, follows that in Article 2A, Part 5. See
14 Article 2B, Part 7.

15 Despite a recommendation by the Committee on Style that §2-801 be deleted as a
16 superfluous "road map", the Drafting Committee, at the September, 1996 meeting, voted to retain
17 it. The section directs that remedies under Part 8 are subject to the policies in subpart A.

18 2. **CISG.** Revised Part 8 is consistent with the remedial structure in CISG. Chapter II
19 states the obligations of the seller (Articles 30-44) and the remedies of the buyer upon breach of
20 contract by the seller. Article 45. Buyer's remedies include the "rights" provided in Articles
21 46-52, which are unique to the buyer, and "damages" claimed under Articles 74-77, which are
22 common to the buyer and the seller. Similarly, Chapter III states the obligations of the buyer
23 (Articles 53-59) and the remedies of the seller upon breach by the buyer. Article 61. Seller's
24 remedies include the "rights" provided in Articles 62-65, which are unique to the seller, and
25 "damages" claimed under Articles 74-77, which are common to both parties. In general, the
26 prefers specific performance over damages and states applicable damage principles in general
27 terms.

28 **SECTION 2-802. BREACH OF CONTRACT; PROCEDURES.**

29 If a party is in breach of a contract, the party seeking enforcement:

30 (1) has the rights and remedies provided in this article and, except as limited by this part,

1 in the agreement;

2 (2) may reduce its claim to judgment or otherwise enforce the contract by any available
3 administrative or judicial procedure, or the like, including arbitration if agreed to by the parties;
4 and

5 (3) may enforce the rights and remedies available to it under other law.

6 **SOURCE: Licenses, Section 2B-701; Leases, Section 2A-501.**

7 **Notes**

8 This section, which was §2-501 in the May, 1995 Draft, states the general remedial
9 options available upon breach of contract. Breach is defined in §§2-701 and 2-710. Arbitration is
10 available only if agreed to in writing by the parties. See Federal Arbitration Act, 9 U.S.C. §2.
11 Clearly, the parties can always agree to mediate or otherwise settle the dispute by agreement.

12 **SECTION 2-803. REMEDIES IN GENERAL.**

13 (a) Subject to Section 1-106, the remedies provided in this article must be liberally
14 administered with the purpose of placing the aggrieved party in as good a position as if the other
15 party had fully performed.

16 (b) Except as otherwise provided in part 8, an aggrieved party may not recover that part of
17 a loss resulting from a breach of contract that could have been avoided by reasonable measures
18 under the circumstances. The burden of establishing a failure to take reasonable measures under
19 the circumstances is on the party in breach.

20 (c) The rights and remedies provided in this article are cumulative, but a party may not
21 recover more than once for the same injury. Unless the contract provides for liquidated damages
22 or a limited remedy enforceable under sections 2-809 or 2-810, a **court** may deny or limit a
23 remedy if, under the circumstances, it would put the aggrieved party in a substantially better

1 position than if the other party had fully performed.

2 (d) This article does not impair a remedy for breach of any obligation or promise
3 collateral or ancillary to a contract for sale.

4 **SOURCE: Licenses, Section 2B-701; Sales, Section 2-701.**

5 **Notes**

6 1. The remedial policies in §2-803 are derived from §2-502 of the May, 1995 Draft and
7 §2-801 of the May, 1994 Draft. The breaches which trigger these remedies are defined in
8 §2-701 and ~~2-702~~ 2-710.

9 2. Subsection (a) directs the courts to protect the so-called "expectation" interest. This
10 restates the principle in §1-106(1) without intending to escape the other limitations of that
11 Section, i.e., that punitive damages and consequential damages are not allowed unless permitted
12 by Article 2 or another rule of law. The expectation interest is designed to place the aggrieved
13 party in the position it would have been in if the contract had been performed. Instead of
14 requiring actual performance of the contract, the value of that actual performance is measured
15 and provided in the form of damages to the aggrieved party. Oftentimes as part of that
16 expectation compensation, the aggrieved party will be entitled to both general damages and
17 consequential damages as the full measure of the position the aggrieved party would have been in
18 if the breaching party had performed the contract. It is the measure of that full performance
19 position that the succeeding sections in subparts 8B and 8C address.

20 Other remedial interests, such as reliance and restitution, are protected under the general
21 damage measure in §2-804.

22 3. Subsection (b) states a general mitigation of damages requirement and is consistent
23 with CISG Art. 77. It supplements the mitigation principles built into particular remedy sections
24 of Part 7, see, e.g., §§2-806 and 2-817, and is broad enough to include conduct by one party that
25 prevents the other from curing a nonconforming performance. However, a party who satisfies
26 the mitigation requirements of a particular section, such as ~~§2-706~~ 2-819(a) on resale, or
27 enforces an agreed remedy, such as liquidated damages, is not subject to subsection (d). This
28 relationship is clarified in the text.

29 A failure to mitigate means only that the aggrieved party cannot recover the preventable
30 loss resulting from a breach. In most cases, the burden of establishing a failure to mitigate
31 damages is on the defendant.

32 4. Subsection (c) reiterates the policy favoring a cumulation of remedies by the aggrieved
33 party. Giving the aggrieved party a relatively free choice of remedies, despite possible

1 inconsistency, is supported by variables at the time of the breach, such as the stage of
2 performance, condition and location of the goods, market stability and availability, and the
3 importance of protecting the value of the bargain as agreed at the time of contracting through
4 price, quantity and duration terms.

5 Nevertheless, this choice of remedies must be made in good faith and be consistent with
6 the general remedial policy of subsection (a). Accordingly, the court [including an arbitral
7 tribunal], if requested by the defendant, may deny a particular choice when that remedy under
8 the circumstances puts the aggrieved party in a substantially better position than full
9 performance would have done. [Reinstated by Drafting Committee, 9/96.] In most cases, this
10 will occur when the aggrieved party's choice of damages based upon the difference between
11 contract and market price exceeds the profits that would have been made by full performance.

12 At common law, the courts presumed that the best measure of the aggrieved party's full
13 performance position was the market price measurement. Thus if either a buyer or seller
14 breached a contract, the usual general damage remedy was contract price minus market price.
15 When Article 2 was adopted, one of its innovations was to allow for a "substitute transaction to
16 provide the basis for the measurement of the full performance position. Thus a buyer's cover or
17 a seller's resale could be used to determine the general damage measurement even if those
18 measurements when used exceeded the amount of damages the aggrieved party would get if the
19 market price was used. Subsection (a)'s explicit adoption of the full performance position and
20 subsection (c)'s reinforcement of that position by asking the court to make sure that the
21 aggrieved party is not receiving more than the full performance raises an issue of what measure
22 accurately reflects that full performance position, market price or "substitution price."

23 If the market price-contract price differential is more than the cover/resell price -contract
24 price differential, does this sentence mean that the aggrieved party is overcompensated by its
25 choice of the market price-contract price measure of damages? This question is realistically
26 limited to sellers given the language in §2-825 that says a covering buyer may not choose market
27 based damages. Thus if a seller resells should the seller be able to choose market price based
28 damages if those damages are a higher number than the resell price based damages? In other
29 words, how is a court to know what is the appropriate basis of measurement of the full
30 performance position in this circumstance?

31
32 If the market price-contract price differential is less than the cover/resell price -contract
33 price differential, is the aggrieved party overcompensated by its choice of the cover/resell price -
34 contract price differential? Assume a buyer breaches a contract in a falling market where the
35 market price used to measure damages is \$20 and the resell price when the seller resells is \$10.
36 The contract price is \$25. The market price - contract price differential is \$5, the resell-contract
37 price differential is \$15. Under a common law approach to expectation general damages, the \$5
38 damages based upon the market price would be seen as full compensatory and the \$15 damages
39 based upon resell price would be seen as over compensatory. Assume a seller breaches a contract
40 in a rising market. The market price is \$20, the buyer's completely reasonable cover takes place

1 several days later at the price of \$30. The contract price is \$15. The market price-contract price
2 differential is \$5, the cover-contract price differential is \$15. Under a common law approach to
3 damages, the market price measure would be assumed to be the full performance position and the
4 cover differential would be seen as over compensatory.

5 The policy of the section is clear, don't overcompensate the aggrieved party by giving it
6 more than the full performance position. What is unclear is what is the "most accurate measure
7 of that full performance position. The common law presumed market price damages was the
8 most accurate. Article 2 has historically shown a preference for cover based damages if a cover
9 is undertaken and a preference for resell damages if a resale is undertaken under the code section
10 on resales. Finally, if the seller is an aggrieved party, another possible "accurate measure of the
11 full performance position is the "lost profit on the transaction (former §2-708(2)).

12 If the text or comments say nothing about a hierarchy of "accurate measurements of the
13 full performance position, the risk is that the common law presumptions on damage measurement
14 will control this issue. In that case, the common law courts will have a strong disposition to
15 evaluate "full performance measurement against the market price baseline. That will be a
16 significant change for those covering buyers and reselling sellers who under Article 2 did not
17 have to worry about that market price baseline.

18 _____
19 The drafting committee should decide:

- 20 1. what measurement choices should this sentence police?
- 21 2. what measurement choices should this sentence **not** police? (once those decisions are
22 made, then the statutory language can be tailored more closely to those choices)
- 23 3. to the extent there is a necessity to police certain measurement choices, should the court
24 have any discretion about that policing? (may vs. shall)
- 25 4. even if certain choices need to be policed, should there be any exceptions (example,
26 agreed remedies)

27 The limitation would not apply to enforceable agreed remedies, such as liquidated
28 damages, or to remedies which seek to restore the plaintiff to the position occupied at the time of
29 contracting or breach, such as restitution and reliance claims. The underlined language in
30 subsection (c) is designed to implement an exception for agreed remedies as stated above.

31 **SECTION 2-804. MEASUREMENT OF DAMAGES IN GENERAL.**

32 To the extent that a breach of contract is not material under section 2-710 or the remedies in this
33 part fail to put the aggrieved party in as good a position as if the other party had fully performed,
34 the aggrieved party may:

- 35 (1) recover compensation for the loss resulting in the ordinary course from the breach as

1 determined in any reasonable manner, together with incidental damages and consequential
2 damages, less expenses and costs avoided as a result of the breach; and

3 (2) exercise any rights or remedies provided in the agreement.

4 **SOURCE: Sales, Section 2-714(a); Licenses, Section 2B-702.**

5 **Notes**

6 1. This section, which is derived from §2-801 of the May, 1994 Draft, provides a general
7 damage measurement to supplement more particular applications. It is comprehensive enough to
8 protect all of the interests of an aggrieved party, especially where the expectation interest alone is
9 inadequate. Those other interests of the aggrieved party might be the reliance interest, where the
10 aggrieved party would be if the contract had not been entered into, or the restitution interest,
11 restoration of the unjust gains of the defendant to the plaintiff. Thus, the buyer might recover
12 reliance damages as an alternative if expectation cannot be proved with reasonable certainty.

13 To illustrate, suppose the seller agrees to manufacture goods to meet the buyer's particular
14 purposes. The seller repudiates and goes into bankruptcy. Section 2-804 applies if specific
15 performance is not available, the buyer cannot find another seller willing to supply the goods and
16 a market price for goods of that kind cannot be proved.

17 2. An aggrieved party who is unable to establish general or "direct" damages may still
18 recover incidental and consequential damages as permitted under §§2-805 and 2-806. Direct
19 damages typically protect the plaintiff's investment in and expectation from receiving the
20 bargained for performance. Consequential damages typically protect the plaintiff's investment in
21 and expectation from using the promised performance.

22 3. An issue that the drafting committee might address is whether there should be a
23 limitation on reliance based damages or restitution based damages when those damages exceed
24 the expectancy. One situation where those damages may exceed the expectancy is noted above,
25 when the expectancy is too speculative or cannot be proven. Another situation where those
26 damages may exceed the expectancy measure is when the contract is a losing contract. That is,
27 expectancy is a negative number. The reliance or restitution measurement will provide a higher
28 measurement. Should the code allow a person to be better off if the other person breaches than if
29 the person performs the contract? This could lead to the person with a negative expectancy into
30 "goading the other party into breaching in order to recover reliance or restitution damages.

31 **SECTION 2-805. INCIDENTAL DAMAGES.**

32 Incidental damages resulting from breach of contract include compensation or any commercially

1 reasonable charges, expenses, or commissions incurred with respect to:

2 (1) inspection, receipt, transportation, care, and custody of the goods after the other
3 party's breach;

4 (2) stopping delivery or shipment;

5 (3) effecting cover, return, or resale of the goods; ~~and~~

6 (4) reasonable efforts otherwise to minimize or avoid the consequences of breach; and

7 (5) otherwise dealing with the goods or effectuating other remedies.

8 **SOURCE: Sales, Sections 2-715(1), 2-710.**

9 **Notes**

10 1. Section 2-805 combines the incidental damages of seller and buyer into a single
11 section. It replaces §§2-710 and 2-715(1) of the 1990 Official Text.

12 2. Incidental damages are reasonable expenses incurred in anticipation of or after a
13 breach to mitigate damages, perform duties with regard to the goods and to effect other
14 remedies. They should be distinguished from consequential damages, which result from
15 expenditures or commitments made before the breach to enable the aggrieved party to use the
16 other party's performance. This distinction was observed in *Fertico Belgium S.A. v. Phosphate*
17 *Chemicals Export Association, Inc.*, 510 N.E.2d 334 (N.Y. 1987), where the buyer recovered
18 "incidental" damages for arranging a "cover" after the seller's delay in delivery and was entitled
19 to consequential damages for additional costs incurred in getting the goods to resale buyer after
20 the time for performance had passed. Subsection (5) was added to provide more of a catchall
21 category.

22 **SECTION 2-806. CONSEQUENTIAL DAMAGES.** Consequential damages to a
23 seller, buyer, or other person under this article are ~~compensation for all losses, including injury to~~
24 ~~person or property,~~ resulting from a breach of contract which:

25 (1) the party in breach at the time of contracting had reason to know would probably
26 result from the aggrieved party's general or particular requirements and needs,

27 (2) ~~could not have been avoided by the aggrieved party or the party in breach by~~

1 reasonable measures under the circumstances, and

2 (3) except for injury to the person, the party in breach establishes are not unreasonably
3 disproportionate to the risk assumed by the party in breach under the contract.

4 **SOURCE: Sales, Sections 2-710(b), 2-715(b) (March, 1995).**

5 **Notes**

6 As a result of considerable discussion of consequential damage during the drafting
7 process, the following changes, reflected in §2-806, have been made. **[The November, 1996**
8 **further clarifies and integrates the section in light of continuing discussions. The main**
9 **change is that injury to “person or property” is now subject to the general limitations on**
10 **any consequential damage rather than the requirement, previously in paragraph (2), that**
11 **they be “proximately” caused by a breach of warranty.**

12 1. Seller's recovery. Sellers may now recover consequential damages under the same
13 standards applicable to buyers. The Drafting Committee rejected the interpretation that former
14 §2-810, in combination with §1-106(1), denied consequential damages to sellers.

15 The following examples illustrate the application of §2-806 to sellers. Assume that the
16 foreseeability and mitigation requirements have been satisfied.

17 (a) Seller makes a special expenditure in preparation to perform which will not be
18 reimbursed by Buyer's full performance. After breach, Seller is unable to salvage the investment.
19 The unreimbursed expenditure is recoverable as consequential damages.

20 (b) Seller has a profitable business opportunity the capture of which depends upon
21 prompt payment by Buyer of the contract price. Buyer, who knew of the opportunity at the time
22 of contracting and that substitute financing would be difficult, fails to pay and Seller is unable,
23 after reasonable efforts, to obtain substitute financing. The lost profits, if proven with reasonable
24 certainty, are recoverable as consequential damages. If Seller had been able to obtain a loan at
25 8% interest to capture the opportunity, the interest paid would be consequential rather than
26 incidental damages. See Restatement, Second, Contracts §351, Comment (e).

27 (c) Seller borrowed money at 8% interest to finance performance of the particular
28 contract. The loan was to be repaid from the contract price. Buyer was late in payment and Seller
29 could not obtain more favorable financing to pay off the loan. Consequential damages include
30 the interest paid on the loan between the time when Buyer promised to pay the price and the time
31 when it was paid. If, however, the loan was obtained to finance general business operations
32 rather than a particular contract, the interest is fixed costs or overhead rather than consequential
33 damages. See *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358 (7th Cir. 1985).

1 2. "Unreasonably disproportionate." In addition to the usual limitations on the recovery
2 of consequential damages, i.e., foreseeability, mitigation of damages, cause in fact, and proof
3 with reasonable certainty, subsection (a) also excludes from consequential damages losses which
4 are "unreasonably disproportionate" to risks fairly assumed under the contract by the breaching
5 party. This limitation, which the breaching party must prove, is derived from §351 of the
6 Restatement, Second, of Contracts.

7 After discussion at the January, 1996 meeting of the Drafting Committee, the limitation
8 was placed in subsection (a) rather than in a separate subsection (b) to clarify that the test was to
9 be applied by the finder of fact in the first instance rather than subsequently by a court in what
10 looked like a remittitur. Thus, claimed consequential damages are either within the limitation or
11 not under subsection (a) and there is no reason to give the court power to "limit damages by
12 excluding or limiting recovery for loss of profits, by allowing recovery only for loss incurred in
13 reliance, or otherwise." §2-806(b) (January, 1996).

14 After discussion at the November 1996 meeting, two additional changes were made.
15 First, the unreasonably disproportionate limitation does not apply to consequential losses which
16 are personal injury damages. Second, the unreasonably disproportionate limitation is something
17 that the breaching party must establish as part of an "affirmative defense to the consequential
18 damage case of the aggrieved party rather than requiring the aggrieved party to establish in every
19 case that the consequential losses were not unreasonably disproportionate.

20 The background of the "unreasonably disproportionate" limitation should be clear,
21 especially where the buyer is the plaintiff. Consequential damages result where the buyer is
22 deprived of timely use of conforming goods because of repudiation, non-delivery or breach of
23 warranty. They usually include lost business profits, but courts will occasionally award damages
24 for loss of good will, unreimbursed reliance and various disruption losses caused to the buyer or
25 third parties. The potential scope of consequential damages is influenced by the purpose for
26 which the goods are purchased, the nature of the breach, and the type of loss caused. Where the
27 purpose is to use the goods in a business or to resell them and breach is by non-delivery, the loss
28 is profits (opportunity costs) that would have been made if delivery were timely. See *Hydraform*
29 *Products Corp. v. American Steel & Aluminum Corp.*, 498 A.2d 339 (N.H. 1985). Where the
30 purpose is resale or the goods are intended as components for use in or with other goods sold to
31 third parties and a breach of warranty occurs, (i.e., the goods are unmerchantable) more than the
32 buyer's lost profits are involved. Third parties now have claims for breach of warranty against the
33 buyer, including possible damage to person and property, which can be asserted cumulatively by
34 the buyer against the seller as consequential damages for breach of warranty. Finally, the liability
35 potential may be exacerbated if there is a product recall. Thus, the risk of uncertain and
36 potentially heavy consequential damages is a matter of continuing concern to sellers. Although
37 this limitation is intended to control this risk, its application should be limited to cases where
38 there is an extreme disparity between the price charged by the seller and the foreseeable loss
39 caused to the buyer (this suggests that the price was not intended to cover the risk) or there is an
40 "informality of dealing, including the absence of a detailed written contract, which indicates that

1 there was no careful attempt to allocate all of the risks." Restatement, Second, §351, Comment
2 (f).

3 3. Buyer's Recovery. Section 2-806 a complex default rule which tends to favor the
4 buyer but which is easy to limit or exclude by agreement. In the current jargon, it is a "penalty"
5 default rule because the buyer is penalized (no recovery) if it fails to inform the seller of
6 particular circumstances or losses of which the seller would otherwise have no reason to know.
7 So if the foreseeability test is not satisfied or the contract contains an excluder clause, the risk of
8 consequential losses is on the buyer.

9 Even without an excluder clause, the buyer must satisfy four conditions to recover:

10 (a) The loss must result from (be caused by) the breach. This cause-in-fact requirement is
11 common to all breach of contract claims, but may be more difficult to establish when the loss is
12 remote from the breach.

13 (b) The loss must result from general or particular requirements of the buyer of which the
14 seller had notice (knowledge or reason to know) at the time of contracting. This is Article 2's
15 version of the famous principle in Hadley v. Baxendale. In addition, 2-806 now requires the
16 breaching party to have reason to know at the time of contracting that the loss "would probably
17 result from the breach." See Restatement, Second, Contracts §351. This occupies the middle
18 ground between losses that are "likely to result" and losses that are simply "in the cards," and is
19 unlikely to change the operation of this section.

20 (c) An otherwise foreseeable loss is not recoverable if, after the breach, it could have been
21 prevented by either the aggrieved or the breaching party through "reasonable measures under the
22 circumstances." This limitation, which is a specific application of §2-803(b), works best where
23 the buyer can cover to minimize or avoid lost profits.

24 Normally, the breaching party must establish that the plaintiff failed to mitigate. See
25 §2-803(b). In cases where both parties could have avoided the loss by the same or similar acts
26 and it is "equally reasonable" to expect the breaching party to minimize damages, the defendant
27 is in no position to contend that the plaintiff failed to mitigate." See, e.g., Nezperce Storage Co.
28 v. Zenner, 670 P.2d 871 (Id. 1983).

29 (d) The plaintiff must prove the loss with reasonable certainty. This limitation
30 controls loss in complex cases of remote or speculative damage, (e.g., loss of good will, new
31 businesses) but is not an insuperable barrier in most cases.

32 4. The Drafting Committee rejected an alternative to subsection (a)(1), taken from
33 §4A-305(d), which provided that between merchants, no consequential damages are recoverable
34 unless they are expressly agreed to in a record.

1 This rejected alternative is a simple but extreme penalty default rule. Under it, the seller
2 has no liability for consequential damages unless the buyer bargains for protection that is
3 expressly agreed to. This default rule may work well in an Article 4A funds transfer, where the
4 low cost of the transfer has no relationship to the dollar amount transferred or the risk that a
5 payment order will be late, improperly executed or not executed at all and commercial parties
6 with relatively equal bargaining power are involved. Given the varieties and complexities of
7 contracts for the sale of goods, the appropriateness of the Article 4A model was doubted by the
8 Drafting Committee.

9 **5. CISG:** There is no specific provision permitting the recovery of incidental damages,
10 but both seller and buyer can recover foreseeable consequential damages. Article 74.

11 **SECTION 2-807. SPECIFIC PERFORMANCE.**

12 (a) A court may enter a decree for specific performance if the parties have expressly
13 agreed to that remedy, the goods or the agreed performance of the party in breach are unique, or
14 in other proper circumstances. However, if specific performance is expressly agreed to, a decree
15 for the price may not be entered unless the conditions of Section 2-822 are satisfied.

16 (b) A decree for specific performance may contain terms and conditions as to payment of
17 the price, damages, or other relief the court considers just.

18 (c) A buyer may recover from the seller goods identified to a contract if, after reasonable
19 efforts, the buyer is unable to effect cover for the goods or the circumstances indicate that an
20 effort to obtain cover would be unavailing, or if the goods have been shipped under reservation
21 and satisfaction of the security interest in them has been made or tendered.

22 **SOURCE: Licenses, Section 2-2506 (September, 1994); Section 2A-521; Sales, Section 2-716**
23 **(December, 1994).**

24 **Notes**

25 1. There are two changes in subsection (a):

26 First, specific performance is not limited to the buyer [former §2-716(1) applied only to

1 buyers]. A seller may obtain specific performance of the buyer's agreement to accept and to pay
2 for the goods in appropriate cases. This simply affirms what some courts have always done,
3 especially in long term supply contracts. Specific performance is an alternative to the seller's
4 action for the price under §2-822. Unlike an action for the price, however, specific performance
5 preserves the contract and acts in personam to enforce the agreement for future performance.

6 Second, the parties may expressly provide for the remedy of specific performance in the
7 contract. The expectation is that a court will enforce the agreed remedy even though legal
8 remedies at the time of the breach are entirely adequate. This expectation is consistent with a
9 growing consensus that specific performance is, in most cases, a more efficient remedy than
10 damages. See, e.g., Alan Schwartz, The Myth That Promisees Prefer Supra Compensatory
11 Remedies: An Analysis of Contracting For Damage Measures, 100 Yale L. J. 369 (1990).

12 Note that subsection (a) gives the court discretion ("may") to award specific performance
13 if the parties have so agreed. Thus, the court might decline to make the award where the remedy
14 is burdensome to administer. Further, the assumption is that a court will condition the specific
15 performance decree upon full performance by the aggrieved party. Thus, a seller cannot obtain
16 specific performance of the buyer's agreement to pay the price in the future unless the seller
17 tenders goods that conform to the contract. See §2-822.

18 On the other hand, concern was expressed that under an agreed specific performance
19 remedy a buyer, particularly a consumer buyer, could be forced to take and pay for goods that it
20 did not need or want. This result is inconsistent with the policy expressed in §2-822(a)(3) that
21 unless resale is not reasonably available the seller cannot recover the price of identified goods
22 that the buyer has not accepted. In these cases, the court "may, at its discretion," deny the
23 remedy. **The last sentence in subsection (a) was agreed to by the Drafting Committee at the**
24 **September, 1996 meeting.**

25 2. Subsection (c) has only one change from former §2-716(3), the word "replevin
26 has been changed to "recover. By stating replevin, the former §2-716(3) made clear that the
27 buyer had a legal, not equitable, process to obtain possession of the goods in that circumstance.
28 With the word "replevin changed to recover, it may no longer be clear that this right is any
29 more than a particularization of a circumstance where the equitable remedy in subsection (a)
30 might be appropriate. Is that what the drafting committee intends? In addition, since this
31 subsection is a buyer's remedy that is supposedly not an equitable specific performance remedy,
32 should this subsection be moved to the subpart on buyer's remedies? This section and §2-824
33 now overlap to a considerable extent. See notes following §2-824.

34 **3. CISG.** Specific performance is the preferred remedy for sellers and buyers under the .
35 See Articles 46 and 62. See also, Steven Walt, For Specific Performance Under the United
36 Nations Sales, 26 Tex. Int'l L. J. 211 (1991). Article 28 provides, however, that if under CISG
37 "one party is entitled to require performance of any obligation by the other party, a court is not
38 bound to enter a judgment for specific performance unless the court would do so under its own

1 law in respect of similar contracts of sale not governed by this ."

2 **SECTION 2-808. CANCELLATION; EFFECT.**

3 (a) Except as provided in section 2-702, the aggrieved party may cancel the contract if
4 there is a breach under §2-701, or in the case of an installment contract, a breach of the whole
5 contract under § 2-701(c), or the agreement so provides.

6 (b) Cancellation is not effective until the canceling party sends notice of cancellation to
7 the other party.

8 (c) Except as otherwise provided in subsection (e), upon cancellation, all obligations that
9 are still executory on both sides are discharged.

10 (d) The following survive cancellation:

11 (1) a right based on previous breach;

12 (2) a limitation on the scope, manner, method, or location of the exercise of rights
13 in goods;

14 (3) a limitation on disclosure of information;

15 (4) an obligation to return goods, if one exists, which obligation must be promptly
16 performed; and

17 (5) a remedy for breach of the whole contract or any unperformed balance.

18 (†) (e) Unless a contrary intention clearly appears, language of cancellation, rescission, or
19 avoidance of the contract or similar language are not a renunciation or discharge of any claim in
20 damages for an antecedent breach of contract.

21 **SOURCE: Sales, Sections 2-106(3)(4); Licenses, Section 2B-704.**

22 **Notes**

1 1. This section, which is new, is derived from several existing sources and presents a
2 coherent approach to the self-help remedy of cancellation for breach by: (1) stating the grounds
3 for cancellation; (2) requiring notice of cancellation; (3) stating the obligations and duties of the
4 parties upon cancellation; (4) stating what obligations are discharged and what survive upon
5 cancellation; and (5) preserving, in most cases, damage claims for antecedent breach.

6 Subsection (a) is subject to the waiver exceptions gathered in section 2-702. The
7 previous language on the conditions in sections 2-815 and 2-823 was unclear about what
8 conditions were stated on the right to cancel. Both of those sections provide that the aggrieved
9 party has a right to cancel if there is a breach or if there is a breach of the whole contract in an
10 installment contract. Those conditions are stated directly in subsection (a) instead of by reference
11 to sections 2-815 and 2-823.

12 Where there is a breach with regard to an installment, a lot or a commercial unit
13 cancellation is limited by the provision on installment contracts, ~~2-711~~ 2-710, and, where the
14 buyer is involved, by the seller's expanded right to cure after a rejection or revocation of
15 acceptance, ~~2-710~~ 2-709.

16 2. Subsection (c) dealing with restitution after cancellation, was been deleted for the
17 following reasons. Conceptually, cancellation is not rescission of the contract. Thus merely
18 because a contract is canceled does not mean that each side should return the other sides'
19 performance.

20 When an aggrieved party rightfully and effectively cancels the contract, there are two
21 related issues. The first issue is whether future performance is required. The answer to that is
22 clearly no. Neither party is obligated to render future performance. Former subsection (d), now
23 (c) so provides. Thus if a buyer is the aggrieved party and cancels, the seller need not deliver
24 goods and the buyer does not have to pay for those undelivered goods. If the seller is the
25 aggrieved party and cancels, the seller need not deliver the goods and the buyer does not have to
26 pay for those undelivered goods. Even if the goods have been identified to the contract, thus
27 giving the buyer a special property interest in the goods, the seller can resell the goods without
28 having to account to the buyer for those goods. For example, assume seller has not yet tendered
29 the goods to buyer. Buyer, the aggrieved party, cancels. By canceling the contract, the buyer is
30 giving up the right to obtain those goods from the seller even if the buyer might have otherwise
31 had the right to obtain those goods under 2-824 or 2-807. The seller can go ahead and sell the
32 goods to someone else and need not account to the buyer. Assume the seller is the aggrieved
33 party and cancels. The seller can resell the goods under 2-819 or can resell them without
34 complying with that section and obtain market price damages without accounting to the buyer
35 even if the goods were identified to the contract for sale. Thus subsection (c) was over broad.

36 The second issue is what to do about performance already rendered. If the goods are
37 already delivered and the contract is cancelled, what is the effect of that cancellation on the
38 already performed portion of the contract? Assume the seller has delivered the goods to the

1 buyer, the seller is the aggrieved party and cancels the contract. When the seller has delivered
2 the goods, the buyer will have to do one of two things to be in breach (thus making the seller an
3 aggrieved party and able to cancel the contract), either wrongfully reject or fail to pay. If the
4 buyer wrongfully rejects, the seller gets the goods back and can sue the buyer for breach. The
5 seller gets the goods back because of the rejection, not because of the “cancellation. The seller
6 could seek specific performance or damages. Seeking specific performance seems inconsistent
7 with the remedy of cancelling the contract. The seller who seeks damages may well then sell the
8 goods under 2-819.

9 _____ If the buyer fails to pay, the seller may seek reclamation and get the goods back. If the
10 seller gets the goods back in that situation, it has little to do with the cancellation and everything
11 to do with the reclamation right. If the buyer fails to pay, the buyer may (by passage of time or
12 otherwise) be deemed to have accepted the goods. If acceptance happens the buyer has no
13 obligation to hold the goods for the seller but is instead obligated for the price. If that happens,
14 even though there is a “cancellation , if there is no future performance due from the seller, the
15 cancellation is meaningless.

16 _____ Assume the seller has delivered the goods to the buyer, the buyer is the aggrieved party
17 and cancels the contract. If the buyer effectively and rightfully rejects or revokes acceptance, the
18 buyer has to return the goods to the seller subject to the buyer’s rights under 2-823(c) to sell the
19 goods to satisfy price paid and expenses incurred. Cancellation is irrelevant to the buyer’s
20 obligation to return the goods. If the buyer attempts to cancel but has accepted the goods, the
21 cancellation is meaningless because the buyer will be liable for the price and have an action for
22 damages under 2-707. If an acceptance happens, the buyer has no obligation to account to the
23 seller for the goods.

24 _____ 3. _____ Former subsection (d), now subsection (c), is the provision which allows each
25 party to the contract to not perform their future obligations. Subsection (d)(5) preserves the
26 cancelling party’s remedies for breach of the contract including the breaching party’s failure to
27 perform after the cancellation.

28 4. CISG. CISG's equivalent to "cancellation" is "avoidance" for a fundamental breach of
29 contract. See Art. 25, 49(1) and 64(1). The effects of a proper avoidance are stated in Art.
30 81-84. In general, it is more difficult to avoid the contract under CISG than it is to cancel under
31 Article 2. Moreover, the seller's remedies of contract-market price damages or resale and the
32 buyer's remedies of contract-market price damages and "cover" depend upon avoidance. Art. 75
33 and 76.

34 **SECTION 2-809. LIQUIDATION OF DAMAGES; DEPOSITS.**

35 (a) Damages for breach of contract may be liquidated but only in an amount that is
36 reasonable in the light of either the actual loss or the then anticipated loss caused by the breach

1 and the difficulties of proof of loss in the event of breach. If a term liquidating damages is
2 unenforceable under this subsection, the aggrieved party has the remedies provided in this article.

3 (b) If a seller justifiably withholds or stops performance because of the buyer's breach of
4 contract or insolvency, the buyer is entitled to restitution of the amount by which the sum of
5 payments exceeds:

6 (1) the amount to which the seller is entitled under a term liquidating damages in
7 accordance with subsection (a); or

8 (2) in the absence of such terms, 20 percent of the value of the total performance
9 for which the buyer is obligated under the contract or \$500, whichever is less.

10 (c) A buyer's right to restitution under subsection (b) is subject to offset to the extent that
11 the seller establishes a right to recover damages under the provisions of this article other than
12 subsection (a) and the amount or value of any benefits received by the buyer directly or indirectly
13 by reason of the contract.

14 (d) If a buyer has received payment in goods, their reasonable value or the proceeds of
15 their resale are payments for the purposes of subsection (b).

16 **SOURCE: Sales, Section 2-718. See Licenses, Section 2B-706.**

17 Notes

18 1. Subsection (a) preserves former Section 2-718(1) with the following exceptions: The
19 liquidation need only be reasonable in light of either the actual or then anticipated loss (ex ante
20 breach) and the difficulties in proof of loss, not also in light of the difficulties in obtaining a
21 remedy. After the September, 1996 meeting, a sentence in the July, 1996 Draft stating that a term
22 liquidating damages in an unreasonably large or small amount is unenforceable was deleted. At
23 the January, 1996 meeting, the Drafting Committee had voted to delete a special rule for
24 consumer contracts and to approve subsection (a) in the July, 1996 Draft. A suggestion that a
25 court should have power to fix damages if the liquidation clause was unenforceable was not acted
26 on.

1 3. Section 2-809 (2-710 in the July, 1996 Draft) deals with the liquidation of damages
2 not the limitation of damages by agreement. The limitation agreements are covered by §2-810.
3 To illustrate, suppose commercial parties negotiated a reasonable liquidated damage amount of
4 \$5,000 under subsection (a) but the actual damages were \$100,000. This agreement may be
5 enforceable as a reasonable liquidated damages, even though damages were under liquidated.
6 There is no need to ask whether enforcement of the under liquidated damage clause is
7 unconscionable. On the other hand, suppose, without any effort to liquidate, the parties agreed
8 that under no circumstance will the seller's damages for breach exceed \$5,000. This is a
9 limitation (an arbitrary fixing) rather than an attempt to fix a reasonable amount and its
10 enforceability is governed by §2-810(c).

11 4. Subsections (b), (c) and (d) have been revised to clarify a breaching party's right to
12 restitution after the aggrieved party's damages have been calculated and paid. The breaching
13 buyer's right to restitution under subsection (b)(2) is subject to a penalty offset if there is no
14 liquidated damages term. The PEB study committee recommended that this provision be
15 eliminated. Previous drafts had eliminated this mandatory offset. Does this mandatory offset
16 make sense?

17 **5. CISG:** There is no provision dealing with liquidated damages in the . Restitution
18 claims are permitted in certain cases of avoidance for fundamental breach. See Articles 81(2), 82
19 and 84.

20 **SECTION 2-810. CONTRACTUAL MODIFICATION OF REMEDY.**

21 (a) Subject to Section 2-809, the following rules apply:

22 (1) An agreement may add to, limit, or substitute for the remedies provided in this
23 article, limit or alter the measure of damages recoverable for breach of contract, or limit the
24 buyer's remedies to return of the goods and repayment by the seller of the price or to repair and
25 replacement of nonconforming goods or parts by the seller.

26 (2) An agreed remedy under paragraph (1) may not operate to deprive the
27 aggrieved party of a minimum adequate remedy under the circumstances[,such as restitution for
28 any benefits conferred on the party in breach].

29 (3) Resort to an agreed remedy under paragraph (1) is optional. However, if the
30 parties expressly agree that the agreed remedy is exclusive, it is the sole remedy.

1 (b) Subject to subsection (a)(2), if, because of a breach of contract or other circumstances,
2 an exclusive, agreed remedy fails substantially to achieve the intended purposes of the parties,
3 the following rules apply:

4 **~~Alternative A~~**

5 ~~—————(1) In a contract other than a consumer contract, the aggrieved party, to the extent~~
6 ~~of the failure, may resort to remedies provided in this article but is bound by any other agreed~~
7 ~~remedy that is not dependent upon the failed remedy.~~

8 **~~Alternative B~~**

9 (1) In a contract other than a consumer contract, the aggrieved party may resort to
10 all remedies provided in this article, but an agreement expressly providing that incidental or
11 consequential damages, including those resulting from the failure to provide the limited remedy,
12 are excluded is enforceable to the extent permitted under subsection (c).

13 **~~{END OF ALTERNATIVES}~~**

14 (2) In a consumer contract, an aggrieved party may reject the goods or revoke
15 acceptance and, to the extent of the failure, ~~has other remedies under Section 2-823~~ may resort to
16 all remedies provided in this article notwithstanding the terms of the agreement.

17 (c) Subject to subsection (b), consequential damages, ~~including compensation for injury~~
18 ~~to property, but not for injury to a person~~, and incidental damages may be limited or excluded by
19 agreement, unless the limitation or exclusion is unconscionable. Limitation of consequential
20 damages for injury to the person in the case of consumer goods [consumer contract] is prima
21 facie unconscionable.

22 **SOURCE: Sales, Section 2-719; Licenses, Section 2b-706.**

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Notes

1. Section 2-810(a) validates agreements modifying or limiting remedies. The unstated assumption is that such agreements must be conscionable at the time of contracting, §2-105, and not otherwise subject to the defenses of fraud, mistake or duress. See §1-103. Due to the deletion of §2-602 on service contracts, Article 2 does not provide a standard of performance for service promises. The classic service promise is the seller promising to repair or replace nonconforming goods. The issue is what level of performance is required. If the seller has a right to cure, the cure provision specifies that the cure must result in conforming goods. §2-709. A repair or replacement promise as an exclusive agreed remedy for breach of a warranty of quality should also result in conforming goods. This point could be made in the comments to this section. If the repair or replacement promise is breached and repair or replacement is the exclusive agreed remedy, that situation should be treated as a failure of the essential purpose of the agreed remedy under subsection (b).

An unanswered question is how far such agreements may go in varying the standard remedies for breach of contract. At what point does an agreed remedy become a penalty (too much) or sink below some minimum adequate remedy (too little)? In commercial cases where exclusive, limited remedies have been agreed, the courts have given the parties wide latitude. See Canal Electric Co. v. Westinghouse Electric Corp., 973 F.2d 391 (1st Cir. 1992), upholding an allocation of risk between "highly sophisticated business entities." On the other hand, the aggrieved party, despite the agreement, should be entitled at the very least to some minimum adequate remedy, presumably not less than restitution. See McDermott, Inc. v. Iron, 979 F.2d 1068 (5th Cir. 1992). This suggested limitation has been added to subsection (a)(2). Once concern with adding the restitution language to subsection (a)(2) is that a very traditional agreed remedy is the repair or replace remedy. That is not a restitutionary remedy but in many circumstances a quite adequate remedy. Will the bracketed phrase throw doubt on the adequacy of those traditional agreed remedies?

After discussion at the January and March, 1996 meetings, the Drafting Committee approved the language in §2-810(a)(2) as a limitation on the agreed remedies permitted in §2-810(a)(1). What is and what is not a minimum adequate remedy depends upon the circumstances of each case.

2. The "failure of essential purpose" problem in subsection (b) continues to plague the courts and challenge the commentators. In these cases, the seller, either directly or through a dealer, obtains an agreement with the buyer that may: (1) Make a limited express warranty, (2) Exclude or limit implied warranties, (3) Promise, on breach of express warranty, to repair, replace parts or otherwise cure the breach for a stated period of time, and (4) Exclude liability for consequential damages. These clauses, typically, are well drafted and are stated to be "exclusive." Problems start when a breach occurs and the seller is unable or unwilling to perform the limited, agreed remedy. Here there is one (the express warranty) and probably two (the agreement to "cure") breaches by the seller. What are the buyer's remedies? Should they differ

1 when the buyer is a consumer? Subsection (b) answers these questions.

2 Beyond a breach of contract, no attempt is made to define when "circumstances" cause a
3 failure. Clearly, the inability of the seller after reasonable efforts to comply with the agreed
4 remedy is a prime example. This may also be a second breach of contract for which independent
5 remedies are available. See §§2-103(a)(3), ~~2-602~~ & 2-804. Other "circumstances" are left to the
6 courts. A failure, however, leaves the buyer facing a breach of warranty or breach of an
7 agreement to repair by the seller and usually in possession of nonconforming goods.

8 Non-consumer contracts. Subsection (b)(1), Alternative A, provides a mainstream
9 solution for non-consumer contracts. The starting point is clear: To the extent that the agreed
10 remedy has failed the aggrieved party has the remedies provided by Article 2. In short, the
11 "default" remedies fill the gap caused by failure. The court, therefore, must determine (1) the
12 intended scope of the agreed remedy, (2) the extent to which the agreed remedy has failed, and
13 (3) and the "default" remedies available to the aggrieved party. This may or may not include
14 revocation of acceptance.

15 What about agreed remedies, such as limitations or exclusions of consequential damages,
16 which are outside of and not dependent upon the failed agreed remedy? If a term excluding
17 consequential damages is found to be independent of the failed remedy, enforceability depends
18 upon whether it was unconscionable under §2-810(c). Stated another way, subsections (b) and (c)
19 are independent of each other unless the excluder clause under subsection (c) depends upon a
20 functioning agreed remedy under subsection (b). See Colonial Life Insurance Co. of America v.
21 Electronic Data Systems Corp., 817 F. Supp. 235 (D. N.H. 1993)(supporting this analysis). But
22 see International Financial Services, Inc. v. Franz, 534 N.W.2d 261 (Minn. 1995), holding that
23 the "excluder" clause is deemed to be independent in contracts between merchants even though it
24 is lumped together with the failed agreed remedy.

25 Nevertheless, lingering problems not easily resolved in legislation remain. Suppose, for
26 example, that the excluder term appears to be independent of the failed remedy and conscionable
27 at the time of contracting but the seller committed fraud or acted in bad faith in dealing with the
28 failed remedy package. Or suppose that after the agreed remedy failed, the buyer has no adequate
29 remedy if the excluder term were enforced. These circumstances have prompted some courts to
30 deny enforcement to the excluder clause, presumably because either the seller was in some way
31 at fault or the buyer had no minimum adequate remedy, such as restitution. This latter problem is
32 addressed in subsection (a)(2), to which subsection (b) is subject. The underlined language in
33 subsection (b) makes that clear. Issues of fraud and bad faith are left to the courts.

34 After the January, 1996 meeting, subparagraph (b) was redrafted to add that an aggrieved
35 party is bound to an agreed remedy under subparagraph (a) that was not dependent upon and thus
36 survives the failed agreed remedy. The effect of that surviving agreed remedy, however, will be
37 tested under subparagraph (a)(2). To illustrate, suppose that an agreed repair-replacement
38 remedy fails but a clause excluding consequential damages survives. This clause may first be

1 tested for unconscionability under subparagraph (c). Even if the clause was conscionable at the
2 time of contracting, it may be unenforceable if its effect is to deprive the aggrieved party of a
3 minimum adequate remedy under subparagraph (a)(2). In commercial cases, however, neither of
4 these outcomes is probable.

5 At the September, 1996 meeting of the Drafting Committee, Alternative B was proposed
6 by the ABA/UCC Subcommittee and is was included for consideration at the next meeting
7 November meeting. At the November 1996 meeting the drafting committee voted in favor of
8 Alternative B. Accordingly Alternative A has been deleted. Also at the November meeting, the
9 committee discussed whether a clause excluding incidental damages should be enforced after an
10 agreed remedy has failed. The underlined phrase in subsection (b)(1) is included for discussion
11 and decision.

12 Consumer Contracts. Subsection (b)(2) [subsection (d) in the March, 1995 Draft],
13 redrafted after the March, 1996 meeting of the Drafting Committee, provides a somewhat
14 different remedy for consumers. At the January, 1996 meeting, a motion to delete subsection (d)
15 was supported 21-5 by the observers but failed to pass (5-5) the Drafting Committee. At the
16 March, 1995 meeting another motion to delete subsection (d) was made and rejected by both the
17 observers and the Drafting Committee (0-7). After further discussion, a motion to approve the
18 essence of revised subsection (b)(2) was passed by the Drafting Committee (8-2). At the
19 November 1996 meeting, the drafting committee voted for the opposite presumption in consumer
20 contracts as in commercial contracts. That is, in consumer contracts, the consequential and
21 incidental damages excluder clauses would **not** be enforceable in the situation where the agreed
22 remedy failed. The consumer advocates expressed some concern that the draft did not clearly
23 express that choice. The underlined language in subsection (b)(2) is intended to make that policy
24 choice clear.

25 3. Subsection (c), which is subject to subsection (a)(2), provides that except for injury to
26 person, see [§2-411], consequential or incidental damages can be limited or excluded by
27 agreement unless the agreement is unconscionable. "Damage" includes economic loss and
28 damage to the goods sold and "injury" includes other property owned by the buyer. The phrase
29 permitting the exclusion of "incidental damages" was approved at the January, 1995 meeting of
30 the Drafting Committee. Thus, in commercial cases the parties may agree that the aggrieved
31 party assumes the risk of both losses resulting from investments made before the breach
32 (consequential damages) and expenses incurred to mitigate loss (incidental damages). Such an
33 agreement was enforced in McNally Wellman Co. v. New York State Electric & Gas Corp., 63
34 F.3d 1188 (2d Cir. 1995)(New York law).

35 The January, 1996 draft of subsection (d) provided that a conspicuous term in a record
36 excluding consequential damages for commercial loss and injury to property is presumed to be
37 conscionable. This provided a limited safe harbor against attack. That language was deleted by
38 the Drafting Committee at the January, 1996 meeting. Further, the Drafting Committee deleted
39 the phrase "where the loss is commercial, consequential injury to property" which was found at

1 lines 20-21 of the January, 1996 Draft of subsection (c). The effect is that all agreements
2 excluding or limiting consequential damage or injury to property in commercial cases are tested
3 under subsection (c) and that there is no statutory "safe harbor." At the November 1996 meeting
4 the drafting committee voted to restore the principle from the last sentence of former §2-719(3).
5 The underlined language in subsection (c) is taken from former §2-719(3). The committee should
6 decide whether to apply that principle to "consumer goods or "consumer contracts.

7 **5. CISG:** There is no comparable provision in the . Is ~~§2-709~~ 2-810 a rule of validity
8 within Article 4(a)? If so, should Article 2 say so?

9 **SECTION 2-811. REMEDIES FOR MISREPRESENTATION OR FRAUD.**

10 Remedies for material misrepresentation or fraud include all remedies available under this article
11 for nonfraudulent breach of contract. Rescission or a claim for rescission of a contract for sale
12 and rejection or return of the goods do not bar, ~~and are not inconsistent with,~~ a claim for damages
13 or other consistent remedy.

14 **SOURCE: Sales, Section 2-721.**

15 **Notes**

16 There are no revisions of substance to former §2-721.

17 **SECTION 2-812. PROOF OF MARKET PRICE.**

18 (a) If evidence of a price prevailing at a time or place described in this article is not
19 readily available, the following rules apply:

20 (1) The price prevailing within any reasonable time before or after the time
21 described may be used.

22 (2) The price prevailing at any other place that in commercial judgment or usage
23 of trade is a reasonable substitute may be used, making proper allowance for any cost of
24 transporting the goods to or from the other place.

25 (3) Evidence of a relevant price prevailing at another time or place offered by one

1 party is not admissible unless the party has given the other party notice that the court finds
2 sufficient to prevent unfair surprise.

3 (b) If the prevailing price or value of goods regularly bought and sold in any established
4 commodity market is in dispute, reports in official publications or trade journals or in
5 newspapers, periodicals, or other means of communication in general circulation and published
6 as the reports of that market are admissible in evidence. The circumstances of the preparation of
7 such a report may affect the weight of the evidence but not its admissibility.

8 **SOURCE: Sales, Sections 2-723, 2-724.**

9 **Notes**

10 1. Section 2-812 is an integration of former §§2-723 and 2-724, with one exception.
11 Former §2-723(1), dealing with the time for measuring damages for repudiation when the case
12 came to trial before the time for performance, has been deleted. This issue was covered in
13 §§2-721 and 2-727 in the March, 1995 Draft. At the March, 1995 Meeting, the Drafting
14 Committee rejected the theory underlying §§2-721 and 2-727 and directed a redraft.

15 2. Historical Note: The reasons for the proposed and now rejected revision are as
16 follows. Original §2-723(1) dealt with the proof of market price when an action based on
17 repudiation came to trial "before the time for performance with respect to some or all of the
18 goods." In order to reduce uncertainty regarding proof of future prices (a sound objective),
19 market price was determined at the time when the seller or buyer "learned of the repudiation."
20 Original §2-723(1), however, created several dilemmas:

21 First, it appeared to be inconsistent with the provision for repudiation damages in
22 §2-713(1) of the 1990 Official Text, which were measured at the time the buyer "learned of the
23 breach." Similarly, it seemed to ignore §2-610(a) of the 1990 Official Text, which provided that
24 an aggrieved party could wait for performance for a "commercially reasonable time" after the
25 repudiation.

26 Second, it stated that "any" damages based on market price were subject to the "learned of
27 the repudiation" test, even though the time for delivery of some goods under the repudiated
28 contract had passed at the time of trial. If the purpose of original §2-723(1) was to deal with
29 uncertainty in the proof of future prices, the "any" damages language made no sense at all.

30 Third, the original §2-723(1) did not clearly provide for the special problems of

1 repudiated long-term contracts. For example, no distinction was drawn between goods sold on
2 the "spot" market and the market price of goods sold under long-term contracts and there was no
3 explicit requirement that profits awarded for repudiation of long-term contracts be discounted to
4 present value.

5 **3. CISG.** Article 76 states the time when and place where the current price for damages
6 is to be determined, but makes to provision for proof of market price.

7 **SECTION 2-813. LIABILITY OF THIRD PARTIES FOR INJURY TO GOODS.**

8 If a third party deals with goods identified to a contract for sale and causes actionable injury to
9 the goods, the parties to the contract have the following rights and remedies:

10 (1) A party with title to, or a security interest, special property interest, or insurable
11 interest in, the goods has a right of action against the third party.

12 (2) If the goods have been destroyed or converted, the party that had the risk of loss under
13 the contract for sale, or since the injury has assumed that risk as against the other, also has a right
14 of action against the third party.

15 (3) If at the time of the injury the plaintiff does not bear the risk of loss as against the
16 other party to the contract for sale and there is no arrangement between them for disposition of
17 the recovery, any recovery or settlement is subject to the plaintiff's interest as fiduciary for the
18 other party to the contract.

19 (4) Either party, with the consent of the other, may maintain an action for the benefit of a
20 concerned party.

21 **SOURCE: Sales, Section 2-722.**

22 **Notes**

23 There are no changes of substance in former §2-722 of the 1990 Official Text.

24 **SECTION 2-814. STATUTE OF LIMITATIONS.**

1 (a) An action for breach of a contract under this Article, must be commenced within four
2 years after the right of action has accrued. The parties to the original agreement may not extend
3 the four year limitation period. Except in a consumer contract or an action for indemnity, the
4 parties to the original agreement may reduce the period of limitation to not less than one year ~~but~~
5 ~~the four year period of limitation not be extended.~~

6 (b) Except as otherwise provided in subsection (c), sections 2-402(e), 2-410 and [2-411],
7 a right of action for breach of contract accrues when the breach of contract occurs, even though
8 the aggrieved party did not have knowledge of the breach. For purposes of this section, a breach
9 by repudiation occurs when the aggrieved party learns of the repudiation.

10 (c) If a breach of warranty occurs, the following rules apply:

11 (1) Subject to paragraph (2), a right of action for breach of warranty accrues when
12 the seller has tendered delivery of, [or has completed any agreement to assemble or install,]
13 ~~nonconforming~~ the goods, whichever is later.

14 (2) If a warranty expressly extends to performance of the goods after delivery, a
15 right of action accrues when the buyer discovers or should have discovered the breach.

16 (d) A right of action for indemnity accrues when the act or omission on which the claim
17 for indemnity is based is or should have been discovered by the indemnified party, [whichever is
18 later.]

19 (e) If an action commenced within the applicable time limitation is terminated but a
20 remedy by another action for the same breach of contract is available, the other action may be
21 commenced after the expiration of the time limitation and within six months after the termination
22 of the first action unless the termination resulted from voluntary discontinuance or from

1 dismissal for failure to prosecute.

2 (f) This section does not alter the law on tolling of the statute of limitations and does not
3 apply to a right of action that accrued before this article took effect.

4 **SOURCE: Sales, Section 2-725.**

5 **Notes**

6 1. Subsection (a) retains the time of breach rather than the time of discovery rule for all
7 but certain breach of warranty claims. See subsection (c)(2). Thus, an action must commence
8 within four years of the breach, unless commercial parties have agreed to a shorter time not less
9 than one year. In repudiation cases, the right of action accrues when the aggrieved party learned
10 of the repudiation even though damages may be measured at a different time. The sections
11 referenced in subsection (a) state different accrual rules, not exceptions to the limitations time
12 period. Thus, those exceptions have been moved to subsection (b) which addresses the general
13 accrual rule.

14 At the January, 1996 meeting, the Drafting Committee rejected a motion to delete the
15 second sentence in subsection (a) but agreed to add the phrase "except in consumer contracts."
16 Thus, agreements in consumer contracts to reduce the four year period to not less than one year
17 are unenforceable. A further motion to state that a commercial agreement to reduce the four year
18 period must not operate in an "unconscionable manner" was rejected by the Drafting Committee.
19 Agreements to extend the limitation are unenforceable. The changes to that subsection are to
20 clarify that result.

21 At the January, 1996 meeting of the Drafting Committee, the Reporter was asked to
22 include indemnity claims in 2-824. The language in subsection (d) is based upon 2A-506. The
23 language "whichever is later" is bracketed. Even though taken from §2A-506, does it make
24 sense that a party would be able to argue that the later (should have been discovered time) is the
25 time the cause of action accrued if the party actually discovered the act or omission earlier, say
26 by not following normal procedures, even though if followed normal procedures the party would
27 not have (should have) discovered the act or omission until later?

28 2. For breach of warranty claims, two alternatives were proposed in the May, 1995 Draft.
29 Alternative A preserved the "time of breach" rule and clarified when the limitation period is
30 tolled. Alternative B, following §2A-506(2), adopted a "discovery" test for when the cause of
31 action accrues and preserved the four year time limitation thereafter. The "discovery" test
32 responds to the real risk that where certain types of manufactured goods are involved a buyer
33 might not know or have reason to know of a breach of warranty until the limitation period has
34 expired. The effect of this risk is exacerbated by the so-called "economic loss" rule, which
35 prevents access to the "discovery" statute of limitations applicable to tort claims. This issues was

1 raised at the December, 1996 meeting of the ALI Council and the Council, by a vote of 20-11
2 expressed a preference for a “discovery rule where building materials and similar products were
3 involved.

4 At the January, 1996 meeting the Drafting Committee adopted Alternative A in principle.
5 Several issues raised at that meeting have been resolved in the November, 1996 Draft. The
6 bracketed words in subsection (c)(1) are to raise the issue of whether that timing is appropriate
7 given the decision to not include seller service contracts within article 2. Subsection (c)(2)
8 leaves the “warranty extend to future performance test as under current law. Under current law,
9 courts treat these two promises differently for statute of limitations purposes. Promise 1 is a
10 promise that the goods will be free of defects for a period of time and that the seller will repair or
11 replace the goods if a defect arises during that time. Promise 2 is a warranty of quality coupled
12 with a promise to repair or replace the goods for one year if the warranty is breached. Courts
13 treat Promise 1 as a warranty explicitly extending to future performance and the discovery
14 accrual rule applies. Courts treat promise 2 as not a warranty that explicitly extends to future
15 performance, rather the goods must conform at time of tender and the promise to repair is good
16 for a year. The cause of action for breach of warranty accrues upon tender of delivery, and the
17 cause of action for failure to repair would accrue upon the seller’s failure to do so. Is this a
18 distinction the code should continue to foster?

19 3. **CISG.** The has no statute of limitations. Parties must rely upon the on the Limitation
20 Period of the International Sale of Goods (1974), which the United States has now ratified.

21 [B. SELLER'S REMEDIES]

22 SECTION 2-815. SELLER'S REMEDIES IN GENERAL.

23 _____ (a) If a buyer is in breach of contract, Section 2-701, the aggrieved seller, with respect to
24 any goods directly affected and, if the breach is a breach of the whole contract, ~~Section 2-802~~ 2-
25 701(c), with respect to an undelivered balance, may:

- 26 (1) withhold delivery of the goods;
- 27 (2) stop delivery of the goods by any carrier or bailee pursuant to Section 2-818(b);
- 28 (3) proceed under Section 2-817 with respect to goods still unidentified to the contract;
- 29 (4) reclaim under Section 2-816(2) when payment is not made;
- 30 ~~(4)~~ (5) obtain specific performance under Section 2-807 or recover the price under

1 Section 2-822;
2 ~~(5)~~ (6) resell and recover damages under Section 2-819;
3 ~~(6)~~ (7) recover damages for repudiation or nonacceptance under Section 2-821;
4 ~~(7)~~ (8) recover incidental and consequential damages under Sections 2-805 and 2-806; or
5 ~~(8)~~ (9) cancel the contract under Section 2-808.
6 (b) If the buyer is insolvent, the seller may reclaim goods under Section 2-816(1) or
7 stop delivery under Section 2-818.

8 **SOURCE: Sales, Section 2-703.**

9 **Notes**

10 1. Subject to the general policies in Part 8, subpart A, this section states the seller's
11 remedial options that are triggered by the breaches defined in §§2-701 and ~~2-702~~ 2-710.
12 Although not all remedies are available in every case, they are stated cumulatively. Remedial
13 choices are limited by §2-803(c). See the notes to that section regarding what remedial choices
14 should be policed. Subsection (b) collects the two remedies based upon the buyer's insolvency
15 and not the buyer's breach.

16 Breach by wrongful rejection or wrongful revocation of acceptance are, in fact, breaches
17 by non-acceptance. See §2-821. Breach by failure to make a payment due includes failures to pay
18 before, at or after delivery, and may or may not entitle the seller to the price under §2-822 or
19 reclamation under § 2-816(2).

20 Whether the seller can resort to remedies under this section for repudiation, depends
21 initially upon ~~§2-713~~ 2-712: The seller may not resort to §2-815 unless the buyer "repudiates the
22 contract with respect to a performance not yet due the loss of which will substantially impair the
23 value of the contract to the other." Thus, a partial repudiation of an installment that does not
24 substantially impair the value of the whole contract would not be actionable. It would, however,
25 justify a demand for adequate assurance of due performance.

26 2. Relationship to Article 9. Several of the catalogued remedies for breach are
27 "self-help" remedies. Depending on the nature of the breach, the seller can withhold delivery,
28 stop delivery by a carrier or bailee, identify goods to the contract or salvage unfinished goods,
29 resell the goods or cancel the contract without judicial intervention. So long as the seller has
30 possession or control of the goods the remedies are effective against the buyer who is in breach.

1 What about purchasers from or creditors of the breaching buyer? Can they take an
2 interest superior to the seller? Until the buyer has possession or control of the goods, the answer
3 is no. This is consistent with §9-113, which treated some of these remedies as security interests
4 arising under Article 9, and the fact that what ever interest to buyer has in the goods before
5 delivery is subject to the seller's right to withhold delivery. Although the Article 2 and Article 9
6 Drafting Committees agree on what the answer should be, a clear statement in the relevant
7 sections must still be made. A different answer may be required where the seller is in breach and
8 the buyer has the right to obtain possession as against the seller under the buyer's remedy
9 sections even though the buyer does not yet have physical possession of the goods.

10 These remedies are supplemented by the power to suspend performance after a demand
11 for adequate assurance, ~~§2-712~~ 2-711 or where the buyer is insolvent. §2-818(a). The exercise of
12 self-help remedies may fully protect the seller, lead to an agreed settlement of the dispute or
13 simply be a prelude to litigation. The unjustified exercise of a self-help remedy is a breach by the
14 seller.

15 3. The seller's judicial remedies include specific performance, §2-807, an action for the
16 price, §2-822, damages based upon the difference between the contract and market price,
17 §2-821(a), and damages measured by lost profits, 2-821(b). Claims for incidental damages are
18 made under §2-805 and claims for consequential damages, to which the seller is now entitled, are
19 made under §§2-805 and 2-806.

20 4. **CISG.** Article 61(1) provides a general guide to the Articles dealing with the seller's
21 rights and damages on breach by the buyer. Article 61(2) states that the seller is "not deprived of
22 any right he may have to claim damages by exercising his right to other remedies."

23 **SECTION 2-816. SELLER'S RIGHT TO RECLAIM GOODS AFTER DELIVERY**
24 **TO BUYER.**

25 (a) Under this article, a seller may reclaim goods delivered to a buyer under a contract for
26 sale only in the following circumstances:

27 (1) A seller that discovers that the buyer has received goods on credit while
28 insolvent may reclaim the goods upon a demand made within 10 days after receipt. If a
29 misrepresentation of solvency was made in a record to the reclaiming seller less than 90 days
30 before delivery, the demand is timely if made within a reasonable time after delivery.

31 (2) If payment is due and demanded on delivery to the buyer, a seller may reclaim

1 the goods delivered upon a demand made within a reasonable time after the seller discovers or
2 should have discovered that payment was not made.

3 (b) Reclamation is subject to the rights under this article of a buyer in ordinary course of
4 business or other good-faith purchaser for new value that arise before the seller takes possession
5 under a timely demand for reclamation. Successful reclamation of the goods precludes all other
6 remedies with respect to them.

7 **SOURCE: Sales, Sections 2-507(2), 2-702.**

8 Notes

9 1. Revised 2-816 combines in one section the two historical grounds for seller
10 reclamation, insolvency in a credit sale and the so-called "cash sale" doctrine. These grounds,
11 which are exclusive for Article 2, are in addition to the repossession right given to a secured
12 party under §9-503. See also, §2A-525. They are, however, limited to the goods and do not
13 extend to the proceeds of the goods. But see *United States v. Westside Bank*, 732 F.2d 1258 (5th
14 Cir. 1984)(proceeds within scope of reclamation). Moreover, since public notice of the
15 reclamation right has not been given, it is a mistake to treat this historical Article 2 lien as if it
16 were a non-possessory security interest. Reclamation here is exceptional and limited.

17 2. Subsection (a) states the grounds for reclamation and fixes a time within which the
18 reclamation must be made that fits the particular case. These grounds are in the nature of a lien,
19 but since possession has been transferred to the buyer, they do not constitute a security interest
20 arising under Article 2. See §9-113.

21 Subsection (a)(2) does not apply where, after delivery in a "cash" sale, the buyer
22 discovers a nonconformity in the goods and stops payment of the check.

23 At the January, 1995 meeting of the Drafting Committee it was suggested that subsection
24 (b)(2) be amended to add the phrase "but not less than 10 days" after the phrase "within a
25 reasonable time." No action was taken.

26 3. Subsection (b) determines the priority between the rights of reclaiming seller and the
27 rights of a "buyer in the ordinary course or other good faith purchaser" under §2-403. At the
28 March 18, 1994 meeting of the Drafting Committee, it was argued that subsection (b) gave
29 inadequate protection to the reclaiming seller. Motions were made to delete secured parties from
30 the list of creditors with potential priority over the seller and to expand the seller's protection to
31 proceeds. The votes were inconclusive, so no change was made in the draft. See *In re Blinn*

1 Wholesale Drug Co., Inc., 164 B.R. 440 (E.D.N.Y. 1994)("good faith purchaser" includes
2 secured party with after acquired security interest). At the March, 1996 meeting of the Drafting
3 Committee, a decision to require "new value" before a good faith purchaser (with a perfected
4 security interest) takes priority over the reclaiming seller was made. **This decision was**
5 **questioned at the 1996 Annual Meeting of NCCUSL and should be coordinated with**
6 **Article 9.**

7 The provision in the 1990 Official Text of §2-702 that a successful reclamation by the
8 seller "excludes all other remedies with respect" to the goods was, after a vote of the Drafting
9 Committee, deleted in the May, 1994 Draft. The issue rose again at the January, 1995 meeting of
10 the Drafting Committee, where it was argued that the deletion was improper and would change
11 the law. This concern was also expressed at the December, 1995 meeting of the Reporter with
12 the Article 9 Drafting Committee. Thus, the phrase was reinstated, subject to further discussion.

13 In that discussion, it is helpful to distinguish between reclamations under subsection (1)
14 and reclamations under subsection (2). Reclamations under subsection (1) do not involve a
15 breach of contract by the buyer. Reclamations under subsection (1) are based upon a special
16 remedy triggered solely by the buyer's insolvency not the buyer's breach. Reclamations under
17 subsection (2) do involve a breach of contract by the buyer. Thus it may be inappropriate in a
18 reclamation under subsection (2) to limit the seller to reclaiming the goods and not having any
19 further remedies. Compare what happens if the buyer refuses to pay prior to delivery. The seller
20 has the goods and all remedies under the code, including the right to damages measured either by
21 resale or contract price. If the seller delivers and the buyer does not pay because of a bounced
22 check, the seller has the right to reclaim the goods. It is not at all clear that the seller should be
23 limited to getting the goods back and not getting any further damages.

24 Finally, after considerable discussion, a decision not to grant the reclaiming seller the
25 remedy of "self help" was made at the March, 1996 meeting of the Drafting Committee.

26 4. Assuming that grounds for reclamation exist, consider the following cases.

27 Case #1. Seller makes a timely demand and takes possession from the buyer before any
28 rights of buyers or purchasers arise. Seller clearly wins.

29 Case #2. Seller makes a timely demand after the rights of buyers or purchases arise and
30 they have taken possession of the goods. This is easy. Buyer or purchaser wins.

31 Case #3. Seller makes a timely demand after the rights of buyers or purchases arise but
32 before they take possession. Seller then takes possession. If a first to possess test applies, Seller,
33 as the first to take possession, wins. If a "right" to possession test applies, the purchasers should
34 win, even if that right is conditional or possession has not been transferred.

35 As a policy matter, a "right to possession" test should apply and that right arises, at the

1 earliest, when the competing party becomes a buyer in the ordinary course of business or a good
2 faith purchaser.

3 Case #4. Consider the following variations on Case #3.

4 (a) A buyer otherwise in the ordinary course of business has a special property
5 interest in identified goods but has not taken possession when the seller's timely reclamation
6 demand is received.

7 (b) A good faith buyer for value has either a special property interest or title in the
8 goods but has not taken possession when the seller's timely reclamation demand is received.

9 (c) A secured party (a good faith purchaser) who has given new value has an
10 enforceable security interest in the buyer's after-acquired property which attaches to the goods but
11 the secured party has not repossessed them before the reclamation demand is made.

12 Seller should lose in each case. The status of the purchasers is clear and the right to
13 possession has arisen, even though still conditional. The seller, on the other hand, has given up
14 possession without public notice of its Article 2 reclamation right and has not regained
15 possession before the rights of the others arise. To win, the seller must both give timely notice
16 of reclamation and retake possession from the buyer before the right to possession of good faith
17 buyers and purchasers arises.

18 5. A reclamation right under §2-816 may or may not be enforceable against a trustee in
19 bankruptcy under revised Section 546(c) of the Bankruptcy Act. No attempt has been made to
20 conform revised §2-816 to the requirements of Section 546(c). See, e.g., *In re Julien Co.*, 44 F.3d
21 426 (6th Cir. 1995)(no reclamation under §546(c) where buyer not insolvent and demand not in
22 writing).

23 6. Former §2-702(1) of the 1990 Official Text now appears in revised §2-818(a).

24 7. **CISG.** Under the , a seller who avoids a contract for fundamental breach can reclaim
25 delivered goods from the buyer. Although goods delivered either for cash or on credit can be
26 reclaimed, there are no express limitations on the time or method of reclamation. See Art. 64(1),
27 81(2), and 84(2).

28 **SECTION 2-817. SELLER'S RIGHT TO IDENTIFY GOODS TO CONTRACT**
29 **NOTWITHSTANDING BREACH OR TO SALVAGE UNFINISHED GOODS.**

30 (a) An aggrieved seller may:

31 (1) identify to the contract conforming goods not already identified if they are in

1 the seller's possession or control at the time the seller learned of the breach of contract; and

2 (2) resell goods that are shown to have been intended for the particular contract,
3 even if they are unfinished.

4 (b) If goods are unfinished at the time of breach of contract, an aggrieved seller, in the
5 exercise of reasonable commercial judgment to minimize loss and for the purpose of effective
6 realization, may complete the manufacture and wholly identify the goods to the contract, cease
7 manufacture and resell for scrap or salvage value, or proceed in any other reasonable manner.

8 **SOURCE: Sales, Section 2-704.**

9 **Notes**

10 1. No changes of substance have been made in former §2-704 of the 1990 Official Text.

11 2. Section 2-817 gives an aggrieved seller several choices if goods are conforming but
12 not identified or identified but unfinished at the time of breach.

13 Subsection (a)(1) permits the seller to identify conforming goods to the contract, §2-502,
14 and pursue appropriate remedies. Subsection (a)(2) permits the seller to resell identified but
15 unfinished goods, a remedy that already exists under §2-819(b). Neither option explicitly requires
16 the exercise of "reasonable commercial judgment" but both are subject to the general mitigation
17 requirement in §2-803.

18 Subsection (b) assumes that goods to be manufactured by the seller are unfinished at the
19 time of breach and gives the seller a choice to either complete the manufacturing process (and
20 resell) or stop manufacturing and salvage. The choice must be made in the exercise of
21 "reasonable commercial judgment" To illustrate, suppose the contract price is \$1,000 and the
22 buyer repudiates when the manufacturing process is 50% completed. It would cost \$600 to finish
23 the goods and the resale price of the completed goods is estimated to be \$100. On the other hand,
24 if the seller stopped manufacturing and salvaged, the estimated damages under §2-821(b) would
25 be \$400. All things being equal, §2-817(b) requires the seller to stop and salvage. The
26 post-breach decision to invest \$600 to realize \$100 on resale of the completed goods, or the full
27 contract price if resale is not possible, enhances the seller's damages and is not commercially
28 reasonable.

29 **3. CISG.** The does not have a comparable provision.

1 **SECTION 2-818. SELLER'S REFUSAL TO DELIVER BECAUSE OF BUYER'S**
2 **INSOLVENCY; STOPPAGE IN TRANSIT OR OTHERWISE.**

3 (a) A seller that discovers that the buyer is insolvent may refuse to make delivery except
4 for cash, including payment for all goods previously delivered under the contract.

5 (b) Subject to subsection (d), a seller may stop delivery of goods in the possession of a
6 carrier or other bailee if the buyer is insolvent or repudiates or fails to make a payment due
7 before delivery or if, for any other reason, the seller has a right to withhold or reclaim the goods.

8 (c) As against a buyer under subsection (b), the seller may stop delivery until:

9 (1) receipt of the goods by the buyer;

10 (2) acknowledgment to the buyer by any bailee of the goods, other than a carrier,
11 or by a carrier by reshipment or as warehouseman, that the bailee holds the goods for the buyer;
12 or

13 (3) negotiation to the buyer of any negotiable document of title covering the
14 goods.

15 (d) If notice to stop delivery has been given, the following rules apply:

16 (1) The notice must afford the carrier or bailee a reasonable opportunity to prevent
17 delivery of the goods.

18 (2) After notification, the carrier or bailee shall hold and deliver the goods
19 according to the directions of the seller. The seller is liable to the bailee or carrier for any
20 resulting charges or damages. A carrier or bailee is not obligated to stop delivery if the seller
21 does not provide indemnity for charges or damages upon the carrier's or bailee's demand.

22 (3) If a negotiable document of title has been issued for goods, the carrier or bailee

1 need not obey a notification to stop until surrender of the document.

2 (4) A carrier or bailee that has issued a nonnegotiable document need not obey a
3 notification to stop received from a person other than the person named in the document as the
4 person from which the goods have been received for shipment or storage.

5 **SOURCE: Sales, Section 2-705.**

6 **Notes**

7 1. There are two revisions of substance in §2-818.

8
9 First, the power of a seller to refuse delivery to an insolvent buyer except for cash,
10 previously stated in former §2-702(1) of the 1990 Official Text, is now expressed in §2-818(a).

11 Second, the limitation that the shipment must be at least a "carload, truckload or
12 planeload" before a seller can stop delivery in transit for breach by the buyer is deleted. The seller
13 may now stop delivery of any shipment where the buyer is insolvent or has breached the contract.
14 There is no requirement that the buyer's breach be substantial.

15 The Drafting Committee concluded that the "carload, truckload or planeload" limitation
16 was unrealistic in light of changing shipping methods and practices. For example, why should a
17 seller not be able to stop delivery of a packet of goods shipped by, say, Federal Express, upon
18 breach by the buyer, especially since the location of the goods can quickly be determined by
19 computer? In most cases, the carrier or bailee's interest is protected by subsection (d)(1), which
20 provides that the carrier must, after receiving notice from the seller, have a "reasonable
21 opportunity to prevent delivery." This flexible standard takes into account the type of goods,
22 their location and the carrier's ability to find them and promptly stop delivery at the time notice is
23 received. In addition, under subsection (d)(2), similar to § 2-705, the carrier or bailee need not
24 stop delivery unless the seller provides indemnity for damages or charges upon the carrier's or
25 bailee's demand. Given the deletion of the limitation of carload, truckload, or planeload, the
26 carrier or bailee could be under the obligation to stop and incur damages to third parties for delay
27 while the one package is dug out of the conveyance. A right to indemnity after the fact is merely
28 the right to sue the seller for damages. This sentence gives the carrier or bailee the right to get
29 indemnity up front before the harm is caused to anyone else.

30 2. The seller's power under subsection (b) to stop delivery is limited by subsection (c). In
31 short, the stop delivery notice is too late if any of the events listed has occurred. Other conditions
32 upon the power to stop are stated in subsection (d). Thus, the seller may have effectively stopped
33 delivery against the buyer under subsection (c) but failed to satisfy the conditions of subsection
34 (d), which protect the interest of the carrier or bailee.

1 Note that creditors of or purchasers from the buyer are subject to the seller's right to stop
2 under this section. See *In re Morrison Industries, L.P.*, 175 B.R. 5 (W.D.N.Y. 1994)(right to stop
3 effective against buyer in bankruptcy).

4 **3. CISG.** Article 71(1) states when a party may suspend performance of obligations and
5 Article 71(2) carries that right over to cases where the goods have been "dispatched." These
6 provisions have little detail. Article 71(3), however, requires the party suspending performance to
7 give immediate notice of suspension to the other and to continue performance if the other
8 provides adequate assurance of his performance. These latter requirements are not found in
9 Article 2.

10 **SECTION 2-819. SELLER'S RESALE.**

11 (a) If a buyer has breached a contract and the goods concerned are in the seller's
12 possession or control, the seller may resell them or the undelivered balance. If the resale is made
13 in good faith, within a commercially reasonable time, and in a commercially reasonable manner,
14 the seller may recover the contract price less the resale price together with any consequential and
15 incidental damages, less expenses avoided as a result of the breach.

16 (b) A resale:

17 (1) may be at a public auction or private sale including sale by one or more
18 contracts to sell or by identification to an existing contract of the seller;

19 (2) may be as a unit or in parcels and at any time and place and on any terms, but
20 every aspect of the sale, including the method, manner, time, place, and terms, must be
21 commercially reasonable; and

22 (3) must be reasonably identified as referring to the breached contract, but the
23 goods need not be in existence or have been identified to the contract before the breach.

24 (c) If the resale is at a public auction, the following rules apply:

25 (1) Only identified goods may be sold unless there is a recognized market for the

1 public sale of futures in goods of the kind.

2 (2) The resale must be made at a usual place or market for public sale if one is
3 reasonably available. Except in the case of goods that are perishable or which threaten to decline
4 in value speedily, the seller shall give the buyer reasonable notice of the time and place of the
5 resale.

6 (3) If the goods are not to be within the view of persons attending the sale, the
7 notification of sale must state the place where the goods are located and provide for their
8 reasonable inspection by prospective bidders.

9 (4) The seller may buy the goods.

10 (d) A good-faith purchaser at a resale takes the goods free of any rights of the original
11 buyer, even if the seller fails to comply with this section.

12 (e) A seller is not accountable to the buyer for any profit made on a resale. However, a
13 person in the position of a seller or a buyer which has rightfully rejected or justifiably revoked
14 acceptance shall account for any excess over the amount of the claim secured by the security
15 interest as provided in Section 2-823(c).

16 **SOURCE: Sales, Section 2-706.**

17 **Notes**

18 1. The phrase "public auction" in subsection (c) replaces "public sale" in the 1990
19 Official Text and defines the type of sale to which those conditions apply. The consensus was
20 that for all practical purposes a public sale and a public auction were one and the same.

21 2.] At the January, 1995 meeting, the Drafting Committee reaffirmed the earlier decision
22 to delete §2-706(3) of the 1990 Official Text, which required the seller to give the buyer
23 reasonable notification of its intention to resell at a private sale. Previously, notice was treated as
24 a condition precedent to a proper resale just as it was required in a disposition by public or
25 private sale to enforce a security interest under §9-504(3). Since a seller in possession may have

1 a security interest arising under Article 2, §9-113, and the resale remedy is similar to the rights of
2 a secured party, §9-113, comment 1, a common notice requirement seemed to make sense,
3 especially when the interest of the buyer or debtor was considered.

4 The Drafting Committee, however, decided to limit the notice requirement to sales made
5 to enforce a security interest created by agreement or clearly imposed by statute. See §2-823(c).
6 Notice in the latter cases is more important because the debtor has an interest in the goods sold
7 (title) and owes a fixed amount of money. In the typical resale under §2-819, the buyer is
8 normally not a debtor (the price is not yet due) and has no interest in the goods. In the view of the
9 Drafting Committee, therefore, the deletion of former subsection (3) is not likely to harm the
10 buyer and would avoid undermining an otherwise commercially reasonable resale and creating
11 uncertainty about follow up remedies if the resale were not proper. In short, if the private resale
12 is in good faith and is commercially reasonable under subsection (a), the seller is entitled to
13 resale damages even though the buyer was not notified.

14 3. The relationship between §2-819 and §2-821 is important. Consider these variations
15 where the goods are in fact resold:

16 (a) Resale in good faith and in a commercially manner. Section 2-819(a) is
17 probably the preferred remedy. §2-821(b), however, is available in a lost volume situation.
18 Section 2-821(a) might be available, but only if those damages do not put the seller in a better
19 position than if the buyer had fully performed. See §2-803(c). Thus, the fact that the seller has
20 complied with §2-819(a) should not automatically foreclose the choice of market damages under
21 §2-821(a). The question is, considering the resale, whether that choice puts the seller in a
22 substantially better position than full performance would have. See notes after §2-803 regarding
23 the difficulties posed by having to decide the “appropriate measure of the aggrieved party’s full
24 performance position.

25 (b) Resale in good faith but not in a commercially reasonable manner. Although
26 §2-819(a) is not available, §2-821(a) may be used and, in a case of lost volume, damages under
27 §2-821(b) are available.

28 (c) Resale in bad faith. Although not stated in the text, damages under §2-821(a)
29 should be ~~are~~ available only if they are the substantial equivalent of damages that would have
30 been available if the seller complied with §2-819(a). Should this principle be placed in the text or
31 the comments?

32 4. If an action for the price is not available, §2-822(a), the seller may prefer to resell the
33 "goods concerned or the undelivered balance." The buyer, of course, must be in breach and the
34 resale process is subject to the general remedial policies in ~~Chapter 1, Part 5~~ Article 1 and §2-803
35 as well as the particular requirements of §2-819. The goods "concerned" can include those which
36 at the time of the breach are: (1) existing and identified; (2) existing and not identified but
37 identified thereafter; (3) unfinished but finished and identified thereafter, §2-817(b); and (4) not

1 existing and not completed until after the resale contract. ~~See subsection (3)(b).~~

2 **5. CISG.** Article 75 permits the seller to resell the goods after the contract has been
3 avoided for fundamental breach, but contains none of the detail in §2-819. If the seller resells,
4 damages are measured by the "difference between the contract price and the price in the
5 substitute transaction." Furthermore, if the seller resells, damages measured by the difference
6 between the contract price and the market price are not available. Article 76.

7 **SECTION 2-820. PERSON IN POSITION OF SELLER.**

8 A person in the position of a seller:

9 (1) includes, as against a principal, an agent that has paid or become responsible for the
10 price of goods on behalf of the principal or any person that otherwise holds a security interest or
11 other right in goods similar to that of a seller;

12 (2) has the same remedies as a seller under this article.

13 **SOURCE: Sales, Section 2-707.**

14 **Notes**

15 There are no changes of substance in former §2-707 of the 1990 Official Text.
16 Subsection (2) has been reworded to make clear that a person in the position of the seller has all
17 of the remedies of the seller and not just those few remedies listed in former §2-707.

18 **SECTION 2-821. SELLER'S DAMAGES FOR NONACCEPTANCE, FAILURE**
19 **TO PAY, OR REPUDIATION.**

20 (a) ~~Subject to Section 2-812,~~ If a buyer breaches a contract, the seller may recover
21 damages based upon market price as follows:

22 (1) If the case comes to trial after the agreed time for performance, the measure of
23 damages is the contract price less the market price of comparable goods at the time and place for
24 tender, together with any incidental and consequential damages, less expenses avoided as a result
25 of the breach.

1 (2) If the case comes to trial before the agreed time for performance, the measure
2 of damages is the contract price less the market price of comparable goods at the place for tender
3 at the time when [a commercially reasonable period after] the seller learned of the repudiation
4 [has expired], together with any incidental and consequential damages, less expenses avoided as
5 a result of the breach.

6 (b) A seller may recover damages measured by other than the market price including:

7 (1) lost profits, including reasonable overhead, resulting from the breach of
8 contract determined in any reasonable manner, together with incidental and consequential
9 damages; and

10 (2) reasonable expenditures made in preparing for or performing the contract if,
11 after the breach, the seller is unable to obtain reimbursement by salvage, resale, or other
12 reasonable measures.

13 **SOURCE: Sales, Section 2-708.**

14 **Notes**

15 Revised §2-821 makes several important changes.

16 1. Subsection (a), which measures damages based upon market price, is subject to
17 §2-803. Thus, a seller cannot choose subsection (a) if market damages (objective) puts it in a
18 substantially better position than full performance by the buyer would have done (subjective). To
19 illustrate, suppose the seller resells identified goods under §2-819(a) at or above the contract
20 price or actually recovers the price under §2-822. Section 2-821(a) is not available because any
21 recovery would put the seller in a better position than full performance would have done.
22 Similarly, if the difference between the contract price and the resale price under 2-819(a) was
23 \$1,000 and the difference between the contract price and the market price under 2-821(a) was
24 \$1,200, the \$1,000 amount will control. Finally, if damages under §2-821(a) substantially exceed
25 the profits that the seller would have made by full performance under subsection (b), subsection
26 (b) controls. See the notes after §2-803 regarding the difficulties in determining what measure
27 accurately reflects the full performance position.

1 Note that the seller's choice of §2-821(a) controls unless the buyer proves from actual
2 figures that the market price recovery puts the seller in a better position than full performance.
3 Hypothetical figures will not do. In all probability, market damages should be limited to the case
4 where the seller has identified goods on hand and does not resell them. Here market damages
5 serve as a surrogate for resale damages.

6 The introductory phrase of subsection (a) is stricken as this subsection is subject to all of
7 the sections in part 8A, not just §2-812. §2-801.

8 2. The measure of damages in subsection (a)(1) applies when the case comes to trial after
9 the agreed time for performance of all or part of the contract has passed. Proof of contract price
10 and market price prevailing at those times will be simplified. See *Trans World Metals, Inc. v.*
11 *Southwire Co.*, 769 F.2d 902 (2d Cir. 1985). Note that the text awards damages based upon the
12 "contract price less the market price of comparable goods." The "difference between" language in
13 the 1990 Official Text has been deleted. Also, damages are measured by the full contract price
14 not the "unpaid" contract price. Whether a breaching buyer can recover all or part of any contract
15 price paid to the seller is determined under §2-810(b). Finally, the phrase "comparable goods"
16 includes both the goods themselves and the type of contract under which they are sold. Thus, the
17 market price for the same type of goods sold on the "spot" market and those sold under a
18 long-term contract would not be comparable. See *Manchester Pipeline Co. v. Peoples Natural*
19 *Gas Co.*, 862 F.2d 1439 (10th Cir. 1988).

20 Subsection (a)(1) applies in a case of breach by repudiation even though the seller waits
21 until the agreed time for performance has passed before taking action. Undue speculation by the
22 seller in a changing market is controlled by the mitigation policy in §2-803(b) and the duty to
23 enforce the contract in good faith.

24 3. Subsection (a)(2) applies when the case comes to trial before the agreed time for
25 performance. This will be a long-term supply contract, where some of the performance comes
26 due before and some of the performance comes due after the case comes to trial. Here the
27 primary concern is the uncertain proof of future market prices and, when the contract contains
28 various escalation provisions, future contract prices.

29 The time for measuring the market price is when a commercially reasonable time after the
30 seller learned of the repudiation has expired. See ~~§2-713~~ 2-712, which permits an aggrieved
31 party to "await performance by the repudiating party for a commercially reasonable time." The
32 judgment is that this is a reasonable time to forecast what future market prices will be for goods
33 of that kind and that the seller should not be permitted to speculate on uncertain markets after
34 that period--the time when the seller should have resold or otherwise mitigated damages--has
35 expired. This is somewhat different from §2-723(1) of the 1990 Official Text, which measured
36 damages for the unperformed balance at the time when the seller "learned" of the repudiation.
37 See *Roye Realty Co. v. Arkla*, 863 P.2d 1150 (Okla. 1993). The bracketed words in subsection
38 (a)(2) are designed to call attention to the issue of whether this measure and the measure under

1 §2-826(a)(2) should be parallel. See the notes under that section for further discussion.

2 The "contract price" is not tied to when a commercially reasonable time after the seller
3 learned of the repudiation has expired. Unless the contract price is a fixed price, the parties
4 should have the benefit of any escalation or flexibility to which they have agreed.

5 4. At the March, 1994 and January, 1995 meetings of the Drafting Committee, a number
6 of concerns were voiced about the subsection (a) as it appeared in the May, 1995 Draft. At the
7 March, 1996 meeting of the Drafting Committee, the current subsection (a) was adopted. As a
8 result:

9 (a) The so-called "snap shot" approach has been rejected in cases that come to trial
10 before the agreed time for performance. The time for determining the contract price is not the
11 same as the time for measuring market price.

12 (b) In cases that come to trial after the agreed time for performance, the
13 uncertainty of when a commercially reasonable time has expired and whether the buyer actually
14 repudiated has been eliminated. What the seller does or does not do does not turn on whether the
15 buyer repudiated or not.

16 (c) In any case, there was a consensus among the Drafting Committee that any
17 recovery for future profits should be reduced to present value. See §2A-102(1)(u).

18 (d) Other concerns about measuring damages for breach of a long-term supply
19 contract remain. For example, suppose there is no market for goods sold under long-term
20 contracts at the relevant time. Should the court then use a "spot market" price and, if so, wouldn't
21 that price tend to over or undercompensate?

22 5. Subsection (b) measures damages by profits that the seller would have made upon full
23 performance rather than the market price. It is a subjective test.

24 First, the seller's choice of subsection (b) is limited by §2-803(c), not the nature of the
25 buyer's breach. Thus, the seller can choose subsection (b) where the buyer breaches unless the
26 buyer establishes that the choice puts the seller in a substantially better position than full
27 performance. See notes after §2-803 on the uncertainties of what is the most accurate measure of
28 the full performance position. This will be highly unlikely in three cases: (1) The seller does not
29 have completed goods on hand; (2) Upon repudiation, the seller stops work and salvages under
30 §2-817(b); and (3) The seller is a "lost volume" seller.

31 The buyer may require a seller who has selected subsection (a) to use subsection (b) when
32 the contract price less market price substantially exceeds the profits that would have been made
33 by full performance. As a practical matter, this will be limited to a seller, such as a jobber or
34 middleman, who does not have completed goods on hand but has hedged bets by making forward

1 contracts for them. The cases have concluded that a seller who does not take the risk of market
2 fluctuations is overcompensated when market damages under subsection (a) exceed the profits
3 that would have been made under subsection (b). See, e.g., *Nobs Chemical, U.S.A., Inc. v.*
4 *Koppers Co., Inc.*, 616 F.2d 212 (5th Cir. 1980); *Union Carbide Corp. v. Consumers Power Co.*,
5 636 F. Supp. 1498 (E.D. Mich. 1986).

6 Second, damages under subsection (b) include lost profits and, in appropriate cases,
7 unreimbursed reasonable expenditures in preparation or part performance.

8 In most cases, lost profits, including reasonable overhead, are determined by subtracting
9 the seller's total variable cost to perform, whether actual or estimated, from the contract price.
10 The result should adequately compensate most lost volume sellers and sellers who have no
11 completed goods on hand.

12 A seller who stops work and salvages under 2-817(b), may have both lost profits and
13 unreimbursed reliance expenditures. Subsection (b)(2) allows recovery of those expenditures as
14 well, provided that the seller has made reasonable efforts to mitigate losses. Thus, in this case,
15 the amount needed to put the seller in as good a position as full performance includes both lost
16 net profits, reasonable overhead and unreimbursed reliance.

17 Third, no effort is made to state when a seller has lost volume because of the buyer's
18 breach or to provide a measurement standard for that complex situation. Recovery for lost
19 volume, however, is still possible under the flexible standards of subsection (b). As before, the
20 problems of definition and measurement are left to the courts. See *R.E. Davis Chemical Corp. v.*
21 *Diasonics, Inc.*, 826 F.2d 678 (7th Cir. 1987), on appeal from remand, 924 F.2d 709 (7th Cir.
22 1991). See also, John M. Breen, *The Lost Volume Seller and Lost Profits Under UCC 2-708(2):*
23 *A Conceptual, Linguistic Critique*, 50 U. Miami L. Rev. 779 (1996).

24 SECTION 2-822. ACTION FOR PRICE.

25 (a) If a buyer fails to pay the price as it becomes due, the seller may recover, together
26 with any incidental and consequential damages, the price of:

27 (1) goods accepted;

28 (2) conforming goods lost or damaged after risk of their loss has passed to the
29 buyer, but if the seller has retained or regained control of the goods, the loss or damage must
30 occur within a commercially reasonable time after the risk of loss has passed to the buyer; and

31 (3) goods identified to the contract, if the seller is unable after a reasonable effort

1 to resell them at a reasonable price or the circumstances reasonably indicate that this effort would
2 be unavailing.

3 (b) A seller that remains in control of the goods and sues for the price shall hold for the
4 buyer any goods identified to the contract. If the seller is entitled to the price and resale becomes
5 possible, the seller may resell the goods under Section 2-819 at any time before the collection of
6 the judgment. The net proceeds of the resale must be credited to the buyer. Payment of the
7 judgment entitles the buyer to any goods not resold.

8 (c) If a buyer has breached the contract by failing to make a payment when due, a seller
9 that has sued for but is held not entitled to the price under this section may still be awarded
10 damages for nonacceptance under Section 2-821.

11 **SOURCE: Sales, Section 2-709.**

12 **Notes**

13 1. No revisions of substance have been made in §2-822(a), which states the limited and
14 exclusive conditions for recovering the price. Subsection (a)(2) has been revised to clarify that
15 the commercially reasonable time limitation applies only where the seller has retained or
16 regained possession of the goods.

17 It is assumed that the price may be recovered where the buyer accepts the goods and then
18 makes a wrongful revocation of acceptance under ~~§2-709~~ 2-708.

19 The underlined language in subsection (b) makes it clear that the seller's resale is subject
20 to the requirements of §2-819.

21 2. Note that former §2-710 of the 1990 Official Text, which was revised in the May,
22 1994 Draft to include consequential damages for the seller, now appears as §§2-805 and 2-806.

23 3. The seller may now claim specific performance under §2-807(a). If justified by the
24 circumstances, the buyer may be ordered to accept and pay for the goods in exchange for the
25 seller's conforming performance. Are there circumstances where this would be improper? For
26 example, suppose the agreement for specific performance is in a standard form? Presumably,
27 §2-206 deals with this problem. Or, suppose that there is an agreement for specific performance

1 and the goods could easily be resold to a third person. Arguably specific performance is
2 inefficient in this situation and the court could be persuaded to exercise its discretion and not
3 enforce the agreement.

4 **To resolve these concerns, 2-807(a) has been revised to provide that if the parties**
5 **agree to specific performance as a remedy, a decree for the price may not be made unless**
6 **the conditions of 2-822(a) are satisfied. (November, 1996).**

7 **4. CISG.** Under Article 62, the seller may "require the buyer to pay the price, take
8 delivery or perform his other obligations, unless the seller has resorted to a remedy which is
9 inconsistent with this requirement." There are no conditions, such as those found in §2-822, and
10 there is no specific provision permitting recovery of the price.

11 [C. BUYER'S REMEDIES]

12 SECTION 2-823. BUYER'S REMEDIES IN GENERAL; BUYER'S SECURITY 13 INTEREST IN REJECTED GOODS.

14 (a) If a seller is in ~~material~~ breach of the ~~whole~~ contract, Section 2-701, or in breach of
15 the whole contract under Section 2-710, the aggrieved buyer, with respect to ~~the undelivered~~
16 ~~balance due for~~, any goods involved may:

- 17 (1) recover the price paid or deduct damages from price paid under Section 2-828;
- 18 (2) cancel the contract under Section 2-808;
- 19 (3) cover and obtain damages as to all the goods affected, whether or not they
20 have been identified to the contract, under Section 2-825;
- 21 (4) recover damages for nondelivery or repudiation under Section 2-826; ~~and~~
- 22 (5) if an acceptance of goods has not been justifiably revoked, recover damages
23 for breach with regard to accepted goods under Section 2-827.

24 ~~—— (b) If a seller fails to deliver or repudiates, the buyer may also:~~

- 25 ~~(+) (6) recover identified goods under Section 2-824; or~~

1 the buyer's rights as a secured party and its duties as a bailee, and the right of resale. Compare
2 §9-504. Note that the buyer resells under 2-819(e) to protect a security interest in goods in which
3 the seller has the ownership interest. The buyer must account to the seller for any excess over the
4 claims secured and must give reasonable notice of the intended resale to the seller. The buyer's
5 rights under §2-823(b) are not subject to the buyer's rights to hold the goods for the seller under
6 §§ 2-704 and 2-705. Rather, the buyer's obligation under those sections is subject to the buyer's
7 rights under this subsection. Therefore, the subject to language in subsection (b) is deleted.

8 **SECTION 2-824. PREPAYING BUYER'S RIGHT TO GOODS.**

9 (a) A buyer that pays all or a part of the price of goods identified to the contract, whether
10 or not they have been shipped, on making and keeping good a tender of full performance, has a
11 right to recover them from the seller if the seller repudiates or fails to deliver as required by the
12 contract.

13 (b) If the requirements of subsection (a) are satisfied, the buyer's right vests upon
14 identification of the goods to the contract for sale, even if the seller has not repudiated the
15 contract or failed to deliver as required by the contract.

16 **SOURCE: Sales, Section 2-502.**

17 **Notes**

18 1. The scope of former §2-502 has been expanded. Previously, a pre-paying buyer could
19 recover identified, conforming goods from a seller who became insolvent within 10 days after
20 receipt of the first payment. Under revised §2-824, a pre-paying buyer can recover identified
21 goods, whether or not conforming, from a seller, whether or not insolvent, who repudiates or fails
22 to delivery "upon making and keeping a tender of full performance." Moreover, subsection (b)
23 states that the buyer's rights vest upon identification, even though the seller is not in breach. Put
24 differently, the rights vest conditionally but, if there is a breach, relate to the time of
25 identification.

26 What about creditors of the seller? Revised 2-505(a) (Nov. 1996) states that the rights of
27 creditors of the seller with respect to goods identified to the contract and retained and subject to
28 the buyer's rights under 2-824 if those rights vest prior to the time when a creditor's in rem claim
29 (judgment lien or security interest) attaches to the goods. Thus, if the buyer's rights vest (upon
30 identification) before the creditor's claims attach, buyer gets possession from the seller free of
31 creditor claims. If, however, the rights vest after attachment, the buyer is subject to the attached

1 interests unless it qualifies as a buyer in the ordinary course of business under Article 9.

2 2. Revision history. Both the PEB Study Group and the ABA Task Force favored the
3 repeal of former §2-502 because tying the buyer's right to the goods to the seller's insolvency
4 created an unacceptable risk of invalidation in bankruptcy. See 16 Del. J. of Corp. Law 981 at
5 1128-1129. If §2-502 were repealed, however, a pre-paying or financing buyer would have no
6 right to the goods under Article 2 unless a right to specific performance or replevin under §2-807
7 were established. See §2-505(a). Beyond that, protection would depend upon compliance with
8 Article 9, which, in practice, may be difficult to do.

9 The Drafting Committee concluded, however, that pre-paying buyers, especially
10 consumer buyers, should have some protection under Article 2. An early revision of §2-824
11 broadened protection by substituting "repudiation or fails to deliver" for "insolvency" as the
12 trigger for recovery and eliminating the 10 day time limitation. It also deleted §2-502(2) of the
13 1990 Official Text and limited the scope of buyer's right to "conforming," identified goods,
14 regardless of which party identified them. See §2A-522(2), in accord. Under this version,
15 therefore, identified but nonconforming goods were not covered by §2-502.

16 At the January, 1994 meeting, the Drafting Committee expanded the scope of §2-824 by
17 eliminating the requirement that the identified goods be conforming and conditioning the right to
18 recover upon tender by the buyer of "full performance" rather than tender of any "unpaid portion
19 of the price." The result is a specific performance remedy for the pre-paying buyer that parallels
20 that in §2-807.

21 The buyer rights under §2-807(c) and §2-824 now look very similar. Under §2-807(c),
22 the buyer may recover goods from the seller that are identified to the contract if the buyer is
23 unable to get cover. Presumably if the buyer gets the goods, the buyer must pay the seller the
24 contract price, i.e. render the buyer's performance. Under §2-824, if goods are identified to the
25 contract, the buyer that has paid the price in part or full can recover the goods from the seller.
26 What situation covered by §2-807(c) would not already be subsumed under §2-824? In addition,
27 should the principle of §2-824(b) apply under §2-807(c) as well?

28 **The November, 1996 Draft of 2-505 and 2-824, influenced by recommendations of**
29 **the ABA/UCC Subcommittee, clarified when the buyer's right to possession vested so as to**
30 **take free of the attached claims of the seller's creditors.**

31 3. The difference between a pre-paying and a financing buyer is that the former usually
32 pays part of the price before receiving goods that are identified and conforming to the contract
33 and the latter pays to finance the manufacture or processing of goods that are likely to be
34 unfinished at the time of identification. Revised §2-824, by applying to both situations, requires
35 the buyer to tender the full contract price before identified but unfinished goods can be
36 recovered. The extent to which a financing buyer can perfect a purchase money security interest
37 in non-conforming goods in process is determined under Article 9. See Report, PEB Study

1 Group, Uniform Commercial Code, Article 9 194-198 (1992).

2 **5. CISGA** CISGA has no provision dealing with a buyer's right to goods on the seller's
3 insolvency and, in general, does not deal with the claims of the seller's creditors to those goods.
4 But see Articles 41-43. Article 46(1), however, states that the "buyer may require performance by
5 the seller of his obligations" without regard to whether the buyer has prepaid the price. Revised
6 §2-824 is now closer to Article 46(1) in granting the buyer what amounts to specific
7 performance. See CISG Art. 28, which states that a court is not "bound" to specifically enforce a
8 contract under CISG "unless the court would do so under its own law in respect of similar
9 contracts of sale not governed by this ."

10 **SECTION 2-825. COVER; BUYER'S PURCHASE OF SUBSTITUTE GOODS.**

11 (a) If a seller breaches a contract, the buyer may cover by making in good faith and
12 without unreasonable delay any reasonable purchase of, contract to purchase, or arrangement to
13 procure, comparable goods to substitute for those due from the seller.

14 (b) A buyer that covers in the manner required by subsection (a):

15 (1) may recover damages measured by the cost of covering less the contract price,
16 together with any incidental or consequential damages, less expenses avoided as a result of the
17 seller's breach; and

18 (2) may not recover damages under Section 2-826.

19 (c) A buyer that does not cover or that covers in good faith but fails to cover in a manner
20 required under subsection (a) is not barred from any other available remedy.

21 **SOURCE: Sales, Section 2-712.**

22 **Notes**

23 1. There are no changes of substance in former §2-712 of the 1990 Official Text.

24 2. If, after a breach, specific performance is not available and the buyer still needs the
25 goods, "cover" is the preferred remedy. Subsection (a) authorizes "cover" and promotes
26 flexibility in the sources and nature of that action. Thus, a buyer may cover in good faith by
27 making the goods itself, purchasing from the breaching party or purchasing from third parties if

1 those transactions are reasonable. Similarly what is "reasonable" may vary with whether the
2 aggrieved party is a commercial or a consumer buyer. Finally, the phrase "comparable goods"
3 suggests that the goods obtained by "cover" need not conform exactly to those promised under
4 the breached contract.

5 3. Subsection (b) conditions the "cover" measure of damages upon satisfying subsection
6 (a). "Cover" damages would not be available if the buyer acted in bad faith, delayed unreasonably
7 or made an unreasonable purchase or arrangement. Presumably, the burden is on the buyer to
8 prove that it is entitled to damages under subsection (b).

9 4. Subsection (c) states that a buyer who either fails to cover at all or covers in good faith
10 but fails to satisfy the other conditions in subsection (a) is not barred from "any other remedy."
11 However, a buyer who "covers" and satisfies subsection (a) is barred from recovering damages
12 under 2-826. This follows the case law and is a change from the July, 1996 Draft, which
13 provided that the buyer who covered could sue for market damages unless those damages put it
14 in a substantially better position than

15 As in §2-819, a buyer who covers in bad faith may be limited to the damages that would
16 have been recovered by a good faith cover under §2-825(b). See §2-803(c). To make that
17 exception to subsection (c), the underlined language in that section has been added.
18

19 5. **CISG.** Under Article 75, if the contract is avoided and the buyer has "bought goods in
20 replacement," damages are measured by the "difference between the contract price and the price
21 in the substitute transaction" as well as any further damages under article 74. If the buyer has
22 made a purchase under Article 75, damages under Article 76 are not available.

23 **SECTION 2-826. BUYER'S DAMAGES FOR NONDELIVERY OR**
24 **REPUDIATION.**

25 (a) If a seller breaches a contract, the buyer may recover damages based on market price
26 as follows:

27 (1) If the case comes to trial after the agreed time for performance, the measure of
28 damages is the market price for comparable goods at the time of the breach or when the buyer
29 learned of the breach, whichever is later, less the contract price, together with any incidental and
30 consequential damages, less expenses avoided in consequence of the seller's breach.

31 (2) If the case comes to trial before the agreed time for performance, the measure

1 of damages is the market price of comparable goods at the time [when a commercially reasonable
2 period] after the buyer learned of the breach [expired] less the contract price, together with any
3 incidental and consequential damages, less expenses avoided in consequence of the seller's
4 breach.

5 (b) Market price is determined at the place for tender. However, in cases of rejection after
6 arrival or revocation of acceptance, it is determined at the place of arrival.

7 **SOURCE: Sales, Section 2-713.**

8 Notes

9 1. Section 2-826, like §2-821 for the seller, is the buyer's "fall back" remedy. It is a
10 surrogate for "cover," in that damages are measured by the difference between the contract price
11 and the market price of comparable goods at a time when "cover" could have or should have been
12 made. Like §2-821(a), choice by the buyer of §2-826(a) is limited by the remedial policy in
13 §2-803(c): It must not put the buyer in a substantially better position than full performance would
14 have. This approach rejects cases like *Tongish v. Thomas*, 840 P.2d 471 (Kan. 1992), holding
15 that the specific terms of §2-713(1) of the 1990 Official Text control the general remedial
16 limitations in §1-106(1). The reference to §2-812 is deleted in subsection (a) as all of the
17 principles in part 8A control the specific remedial provisions in parts 8B and 8C, not just the
18 principles in §2-812. §2-801. See the notes following §2-803 on the most "accurate measure of
19 the full performance position. The mitigation principle in §2-803 also serves to control the
20 buyer's remedial choices.

21 On the other hand, a buyer who properly covers under 2-825(a) is precluded from seeking
22 damages under 2-826(a). See 2-825(a)(2).

23 2. Subsection (a)(1) follows the approach to damages taken in §2-821(a)(1) where the
24 case comes to trial after the agreed time for performance. The objective is to tie the market price
25 to the time of the breach (whether by repudiation or non-performance) unless the buyer did not
26 learn of the breach until later. Thus, if the seller failed to ship as agreed on October 1 but the
27 buyer did not learn of that failure until October 4, market price is determined on October 4.
28 Similarly, if the seller repudiated on September 15 and the buyer did not learn of the repudiation
29 until October 1, October 1 is the date to measure damages. These are the first times when the
30 buyer could have taken remedial action, even though no action was taken.

31 (3) Subsection (a)(2) follows §2-821(a)(2) when the case comes to trial before the agreed
32 time for performance. In the July, 1996 Draft, the time for measuring market price was when a

1 "commercially reasonable time after the buyer learned of the repudiation has expired." See
2 §2-713. Thus, market price was measured at the time when the buyer should have covered. See
3 *Cosden Oil v. Karl O. Helm Aktiengesellschaft*, 736 F.2d 1064, rehearing denied, 750 F.2d 69
4 (5th Cir. 1984). Under this approach, whether the buyer had a valid reason for not covering is
5 irrelevant. See also, *Trinidad Bean & Elevator Co. v. Frosh*, 494 N.W.2d 347 (Neb.App. 1992),
6 holding that the time for determining market price is the time the buyer learned of the repudiation
7 if it was commercially reasonable to cover on that date. For further discussion, see the Notes to
8 §§2-811 and 2-821.

9 **The November, 1996 Draft simplifies by selecting the time when the buyer learned**
10 **of the breach (invariably a repudiation) regardless of whether the buyer had a valid reason**
11 **for not covering or cover was reasonable on that date. There are no nuances here and the**
12 **tool for combating strategic behavior is left to that valiant soldier, good faith.** The bracketed
13 words in subsection (a)(2) parallel §2-821 in this draft. At issue is whether the buyer and seller
14 situations should be treated differently. Under former §2-713 and §2-723(1), if the case came to
15 trial before the time for performance, the market price was measured when the buyer learned of
16 the breach. This was criticized as being inconsistent with the anticipatory repudiation sections
17 which allowed an aggrieved buyer to await the seller's performance for a commercially
18 reasonable time. Thus, the policy issue is whether the default for measuring market price should
19 be at the time the buyer learned of the repudiation or at the end of the commercially reasonable
20 time after the repudiation when the case comes to trial before the time for performance. One
21 possibility is that both §2-821 and §2-826 provide that the market price should be measured at
22 the time the aggrieved party learned of the breach unless the aggrieved party awaited
23 performance a commercially reasonable time after the repudiation. In that situation where the
24 aggrieved party actually awaited the time, the market is measured at the end of that time period.
25 If that approach is adopted, then perhaps the anticipatory repudiation section needs to have a
26 notice provision in it so that the aggrieved party notifies the breaching party of the aggrieved
27 party's intention as to declaring breach immediately and not waiting, or waiting that
28 commercially reasonable time for the breaching party to perform. Keep in mind the overriding
29 mitigation principle stated in §2-803 that should help to control strategic behavior to some
30 extent.

31 3. In cases where the case comes to trial before the agreed time for performance (breach
32 by repudiation), neither 2-821 nor 2-826 use the phrase "contract price" in a restrictive sense.
33 There are no "snap shots" here. Thus, if the agreed price contains escalation provisions, the court
34 must attempt to interpret and apply them to the case.

35 **4. CISG.** Under Article 76, if the contract has been avoided and there has been no
36 "purchase" under Article 75, the buyer may recover the difference between the contract price and
37 "current price at the time of avoidance as well as any further damages recoverable under article
38 74."

39 SECTION 2-827. BUYER'S DAMAGES FOR BREACH REGARDING

1 **ACCEPTED GOODS.**

2 (a) A buyer who has accepted goods and given notice pursuant to Section ~~2-708~~ 2-
3 707(c)(1) may recover as damages for any nonconforming tender the loss resulting in the
4 ordinary course of events from the seller's breach as determined in any reasonable manner.

5 (b) The measure of damages for breach of a warranty of quality is the value of the goods
6 as warranted less the value of the goods accepted at the time and place of acceptance, unless
7 special circumstances show proximate damages of a different amount.

8 (c) A buyer may also recover incidental and consequential damages.

9 **SOURCE: Sales, Section 2-714.**

10 **Notes**

11 1. There are no changes of substance in subsections (a) and (c) of former Section 2-714
12 of the 1990 Official Text. Subsection (b), however, is stated as "a" measure of damages rather
13 than "the" measure of damages and is limited to breaches of a warranty of quality. Thus,
14 damages for breach of a warranty of title are measured under subsection (a) rather than
15 subsection (b).

16 2. Section 2-827 applies when the buyer has accepted the goods, ~~§2-707~~ 2-706, and has
17 not justifiably revoked acceptance under ~~§2-709~~ 2-708. Subsection (a) states the general damage
18 rule, see §2-804, and subsection (b) states one measure of damages for breach of a warranty of
19 quality, unless "special circumstances" justify a different amount. Subsection (c) states simply
20 that incidental and consequential damages under §§2-805 and 2-806 are recoverable in addition
21 to damages under §2-827.

22 3. Subsection (b) has been frequently litigated, with sometimes puzzling results. The key
23 measure for breach of a warranty of quality, i.e., §§2-403, 2-2-406 and 2-407, is the difference
24 between the market value (not the contract price, although that may be prima facie evidence of
25 market value) of the goods as warranted and the market value of the goods delivered at the time
26 of acceptance rather than the time of tender. Damages have been determined in at least three
27 ways: (a) If the goods are non-conforming but usable without repairs, the court simply
28 determines the relevant differences in the market value at the time of acceptance; (b) If the goods
29 are not usable without repairs, the court determines the market value as delivered plus the
30 reasonable cost of repairs, which constitutes the market value of the goods as warranted; (c) If
31 the goods are not usable under any circumstances, the court determines the difference in market

1 value of the goods as scrap and the cost to purchase (market value) goods as warranted. See
2 Schroeder v. Barth, Inc., 969 F.2d 421 (7th Cir. 1992).

3 4. It is not always clear what "special circumstances" show damages of a different
4 amount and what the different amount should be. For example: (1) Suppose a seller warrants to a
5 farmer that seeds are X when in fact they are Y, but the contract excludes liability for
6 consequential damages. As a result of the breach of warranty, the farmer loses the crop because
7 Y won't grow on the land. The market value of X and Y at the time of acceptance are the same.
8 Some courts have found "special circumstances" on these facts and awarded the farmer the value
9 of the lost crop. The lost crop, however, is really consequential damages liability for which was
10 excluded by the contract. (2) Suppose that the seller warranted that a specific computer system
11 would satisfy the buyer's particular purposes. The specific system, however, failed to meet those
12 purposes and another, more expensive system was required. Again, special circumstances suggest
13 that damages should be measured by the difference in the market value of the system delivered
14 and the market value of a hypothetical or replacement system that would satisfy the particular
15 purposes rather than the specific system promised. See Hospital Computer Systems, Inc. v.
16 Staten Island Hospital, 788 F. Supp. 1351 (D. N.J. 1992). (3) Another category where special
17 circumstances frequently exist is damages for breach of warranty of title. See First Valley
18 Leasing, Inc. v. Goushy, 795 F.2d 693 (D. N.J. 1992). These damages are now to be measured
19 under subsection (a).

20 5. **CISG.** Under the , a buyer has more power to "require" the seller to perform and the
21 seller has more power to "cure" non-conformities than under Article 2. After delivery where the
22 seller has failed to cure, however, Article 50 provides that if the goods "do not conform with the
23 contract and whether or not the price has already been paid, the buyer may reduce the price in the
24 same proportion as the value that the goods actually delivered had at the time of delivery bears to
25 the value that conforming goods would have had at that time." Thus, Article 50 combines the
26 measurement standard in 2-827(b) with the buyer's power to reduce the price granted in §2-828.

27 **SECTION 2-828. DEDUCTION OF DAMAGES FROM PRICE.** A buyer, on so
28 notifying a seller, may deduct all or any part of the damages resulting from any breach from any
29 part of the contract price still owed under the same contract.

30 **Source: Sales, Section 2-717.**

31 **Notes**

32 There are no changes of substance in former §2-817 of the 1990 Official Text. Compare
33 CISG Art. 50.