

November 1, 1996

To: Article 2 Drafting Committee, ALI Consultants, Observers and the Loyal Opposition
From: Richard E. Speidel, Reporter
Re: Status of Article 2 revision

Here is a section by section review of the November, 1996 Draft of Article 2. It builds on the August 1, 1996 Memo to the Drafting Committee and incorporates decisions made at the September, 1996 meeting of the Drafting Committee... More importantly, it highlights decisions to be made at the November 15, 1996 meeting of the Drafting Committee.

When nothing appears after a particular section, assume that I have incorporated recommended changes into the Text (including recommendations of the Coordinating Committee) and concluded that no major questions remain. This assumption is rebuttable by clear and convincing evidence. See the Notes to each section for more detail.

I have received several long analyses of the July, 1996 Draft from interested observers and other people who have not attended meetings of the Drafting Committee. I will review and evaluate these in time for our meeting in Salt Lake City.

Program Notes: The November, 1996 Draft was styled by Jim McKay before the November 1-3 (1996) meeting of the Style Committee at O'Hare. Style changes made at that meeting are not included. Moreover, the November, 1996 Draft was sent (October 28, 1996) to the American Law Institute for review by the Article 2 Consultative Group in Tampa on November 20, 1996 and by the ALI Council in New York in December. Substantive changes made by the Article 2 Drafting Committee in Salt Lake City are not in that Draft. Thus, the January, 1997 Draft will have to pick up all style and substantive changes after November 1, 1996 for the January, 1997 meeting of the Drafting Committee. Changes thereafter must be reflected in the Draft for subsequent meetings of the Drafting Committee and for the ALI Meeting in May. After that, another draft will be prepared for the 1997 annual meeting of NCCUSL. After that??????

Part 1. General Provisions

Section 2-101. Short Title

Section 2-102. Definitions

(a)(7). Conspicuous. The last sentence in the July, 1996 definition has been deleted.

(a)(19). Good faith. *The Conference approved a version of Alternative C: "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing. The phrase "in the conduct or transaction concerned" was deleted.*

(a)(20). Goods. Obligations created by "foreign exchange transactions" are not goods and are excluded from A. 2 in 2-104(d). *A definition is still in process.*

The definitions of "manifests assent" and "opportunity to review" are expanded and combined in Section 2-103.

Section 2-103. Manifesting Assent; Opportunity to Review.

These important definitions are combined and elaborated in one section. *Please review them carefully.*

Revised Article 2 now has three tests to determine assent: (1) Agreement; (2) Manifests Assent; and (3) Express Agreement, see 2-207(c).

Section 2-104. Scope.

Sub. (a) (1): Relevant factors used by courts to determine whether a sale of goods "predominates" will be identified in the comments.

Sub. (a)(3): The phrase "collateral agreement" has been deleted. Section 2-502 now deals with service agreements of this limited type.

Sub. (b). Software embedded in goods is within the scope of Article 2. 2B-103(d).

Section 2-105. Transactions Subject to Other Law.

Article 2 is subject to applicable certificate of title statutes. 2-105(a)(1).

Section 2-106. Unconscionable Conduct, Contract or Clause.

The Annual Meeting rejected a motion to delete the "induced by unconscionable conduct" clause by a 84-38 vote. There was no motion to limit the clause to consumer contracts. Some illustrations are provided in the Notes.

A motion to delete the phrase "court finds as a matter of law" was also defeated. The jury does not get these cases. There was some resistance to this, as well as concern that sub. (b) improperly allocates functions between judge and jury.

Although 2-105 states that the court is the decision maker, there is no intention to exclude other adjudicative processes, such as arbitration. *Should we have a definition of courts that expressly so provides?*

Section 2-107. Allocation or Division of Risks

Section 2-108. Interests and Part Interests in Goods.

Section 2-109. Goods to be Severed from Realty

A number of questions came up in reading this section at the 1996 Annual Meeting. See the Notes for discussion. *Is the "sale and leaseback" analysis in Note 3 sound?*

Section 2-110. Effect of Agreement.

Subsection (b) of the July, 1996 Draft has been deleted. Subsection (a) has been retained. The result is that agreements purporting to vary the terms of the Article are enforceable unless otherwise provided but the provisions of Article 2 can be varied even though the phrase "unless otherwise agreed" does not appear in the provision to be varied..

Part 2. Formation, Terms, and Readjustment of Contracts.

Section 2-201. No Formal Requirements.

Once again, the Annual Meeting (faced with a unanimous Drafting Committee) rejected a motion to restore the statute of frauds. The vote was 65-52. Given the recurring discomfort with this move, arguments for repeal should be bolstered in the comments.

Section 2-202. Final Written Expression; Parol or Extrinsic Evidence.

Despite the recommendation of Coordination, the Drafting Committee voted to retain sub. (b)(1). The Drafting Committee, however, voted to add sub. (b)(2).

Section 2-203. Formation in General.

Formation questions arise in structured and unstructured deals and may or may not involved records, standard forms or standard terms. Sec. 2-203 and 2-205 are designed to deal with all formation questions, including the structured deal contemplated by 2-206 where all of the terms of the agreement are contained in a standard form (the offer) to which the adhering party manifests assent (the acceptance). See 2-203(a).

Under basic contract law, a party can condition willingness to deal upon the other's agreement to proposed terms. Subsection (d) requires that such a condition in a standard form be conspicuous. See 2-207(1) (1990 Official Text). Since the condition may be in either an offer or an acceptance, the "conspicuous" requirement is placed in 2-203 rather than 2-205.

2-204. Firm Offers.

The last sentence follows the recommendation of Coordination: If the assurance is in a standard form supplied by the offeree, the offeror must manifest assent to it.

2-205. Offer and Acceptance in Formation of Contract.

In subsection (a)(1), the italicized language states the principle contained in 2-207(1) (1990 Official Text).

In subsection (a)(2), the phrase "conforming or nonconforming" has been deleted from before the word "goods." Thus, the offer is construed as inviting acceptance by either a promise to ship or by shipment and the assumption is that the promise or shipment will conform to the offer. What happens if the offeree ships non-conforming goods? Without more, this is a counteroffer. But the "however" sentence suggests that a shipment of nonconforming goods is an acceptance unless the shipment is an accommodation. Does this make sense? [KNL intended to regulate the seller's option to ship less than the goods ordered so as to preserve freedom to exit the deal before the buyer accepted the goods. Thus, the nonconforming shipment was both an acceptance of the offer and a breach of contract. Or, the nonconforming shipment might be treated as an acceptance by part-performance from which a promise to ship the balance was implied.] Is this departure from usual contract principles still needed?

Subsection (b) provides that if you have reasonably accepted by commencing performance and you don't notify the offeror within a reasonable time, the offer is treated as "having lapsed before acceptance." Shouldn't we say that the offeror's contractual duty is "discharged"? See Restatement (Second) Contracts sec. 54(2).

2-206. Standard Form Records.

This section got considerable attention at the Annual Meeting.

1. The crucial definitions of "standard forms" and "standard terms" in Part 1 conform to 2B.

2. The definitions of "manifests assent" and "opportunity to review" now appear in 2-103 and conform in substance to 2B..

3. Subsection (a) now applies where "all or part of an agreement" is in a standard form. This was intended to conform to 2B but the September, 1996 Draft of 2B was revised to apply where "all" of the agreement is in a standard form. *Renvoi*. How this revision operates and the relationship to 2-207 are spelled out in the notes.

4. A separate test for consumers was apparently approved at the 1996 Annual Meeting since a motion to delete sub. (b) was defeated by a voice vote. There is a revision to emphasize that the expectation of a reasonable consumer controls.

5. On the "mass marketing" transaction, see Note 7. On the "warranty in the box" problem, see 2-313, 2-314 and 2-315 (new numbering). Do Sections 2-206 and the new warranty provisions adequately deal with the issues in *Procd, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)?

Section 2-207. Effect of Varying Terms.

Even as I write this, there are several memos about revised 2-207 (November, 1996) on my desk. If those suggestions are not worked into this draft, I will be prepared to discuss them in Salt Lake City. The effect of 2-207 is discussed in the Notes immediately after the text.

Section 2-208. Electronic Transactions: Formation

Section 2-209. Course of Performance or Practical Construction.

Section 2-210. Modification, Rescission, and Waiver

Commentators see "conceptual confusion" in 2-210 because the line between modification or rescission by agreement, sub. (a), and modification by waiver is not clear. *To improve clarity, the first sentence in sub. (d) was deleted.*

The terms of an agreement may be modified by a "good faith agreement", sub. (a), subject to sub. (b). Both parties must agree. The terms of an agreement (usually an express condition) may also be modified by a waiver by one party. An agreement is not necessary for this type of modification. This distinction is made in 2-210, but there is no attempt to fill out or completely define the concept of waiver.

Section 2-211. Electronic Messages; Attribution.

Conform to 2B.

Section 2-212. Intermediaries in Electronic Messages.

Conform to 2B.

Section 2-211 in the July, 1996 Draft, "Delegation of Performance," has been integrated with 2-403 and conformed, to the extent practicable, with 2A-403.

Part 3. General Obligation and Construction of Contract.

Note that Sections 2-301 through 2-311 were not read at the 1996 Annual Meeting and did not receive extensive treatment at the September, 1996 meeting of the Drafting Committee.

Section 2-301. How Price Payable.

The italicized language in sub. (c) conforms to 2-103(a)(3).

Section 2-302. Transfer at a Single Time.

See Note 1.

Section 2-303. Open Contract Price Term.

See Note 2.

Section 2-304. Output, Requirements, and Exclusive Dealing.

The italicized language in sub. (a) makes it clearer that if there are no output or requirements is good faith the "unreasonably disproportionate limitation does not apply.

Query: Should further revisions be made in light of *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, ___ S.W.2d ___, 29 UCCRep.Serv.2d 759 (Tx. 1996)? Arguably not, since the disputed (endlessly) issue was whether the take or pay contract was an output contract.

Section 2-305. Absence of Specified Place for Delivery.

Section 2-306. Time for Performance Not Specified.

See Note 1.

Section 2-307. Options and Cooperation Respecting Performance.

Section 2-308. "Letter of Credit"; "Confirmed Credit".

Section 2-309. Shipment Terms; Source of Meaning.

Section 2-310. Termination; Survival of Obligations.

Coordination says to conform 2 to 2B-628 to the extent relevant to sales.

Section 2-311. Termination; Notice.

See Note 1.

Section 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

Subsection (e) states a separate statute of limitations for breach of the warranty of title. See Note 3.

Section 2-313. Express Warranties.

After the September, 1996 meeting of the Drafting Committee, there are now three sections dealing with express warranties: Section 2-313 deals with express warranties that are part of an agreement of sale; Section 2-314 deals with warranties that are made by a seller to a remote buyer through a person in the chain of distribution but are not part of an agreement of sale with the seller; and 2-315 deals with warranty obligations arising from communications to the public. The scope of and reasons for these changes are discussed in the notes after 2-313.

Note that we have gone from a section that tried to cover too much in too little language to three sections that, arguably, have too much repetitive language.

Section 2-314. Warranties Other than as Part of Agreements of Sale.

See Notes to 2-313.

Section 2-315. Warranty Obligations Arising from Communications to the Public.

See Notes to 2-313.

Section 2-316. Implied Warranty: Merchantability; Usage of Trade

See Note 2 for a proposed comment dealing with the tension between merchantability and defect where goods cause injury to person or property. That part of 2-319 in the July, 1996 Draft that attempted to resolve this tension has been deleted.

Section 2-317. Implied Warranty: Fitness for Particular Purpose.

This section was not read at the annual meeting.

Section 2-318. Exclusion or Modification of Warranties.

1. I have adopted Commissioner Burdick's suggestion that "negated" rather than "excluded" should be used for implied warranties and "disclaimed" not "excluded" should be used for express warranties. What do you think?

2. The general principle for commercial contracts is stated in sub. (b)(1). The language "as is" would work here, even though not specifically identified.

3. The "safeharbor" for language of negation or modification contained in a record is stated in sub. b(2). In addition to the manifests assent requirement in 2-206(a), the language must be conspicuous. Finally, there is a "safeharbor" for used goods as well. This is an humble effort to pierce the cacophony of sound and produce something that makes sense.

Section 2-319. Cumulation and Conflict of Warranties.

Section 2-320. Extension of Express or Implied Warranties.

This section has been revised and simplified in light of the new warranty sections and

decisions made at the September, 1996 meeting of the Drafting Committee, See the Notes.

[Section 2-320. Injury to Person or Property Resulting from Breach of Warranty.]

This bracketed section provides two alternatives where a breach of warranty results in injury to person or property. It assumes that the tension between warranty and tort liability has been resolved in favor of warranty (i.e., not preempted, see 2-316, comment 2), and delineates the consequences of that decision. This approach was recommended by the Drafting Committee in September, 1996. See Notes.

Note that is not the same as Section 2-319 of the July, 1996 Draft. It provides alternative approaches to the consequences of concluding that the plaintiff has a claim for damage to person or property resulting from a breach of warranty.

Section 2-320. Sale by Auction.

The new notes raise some questions for decision. This neglected section should get some treatment before next July.

Part 4. Transfers, Identification, Creditors, and Good Faith Purchasers.

Not all of the sections in Part 4 were read at the annual meeting.

Section 2-401. Passing of Title; Reservation for Security.

Not read. Unique to Article 2.

Section 2-402. Insurable Interest in Goods; Manner of Identification of Goods.

Not read.

Section 2-403. Assignment of Rights.

This revised section integrates 2-211 of the July, 1996 Draft and conforms in part to 2A-303.

Subsections (a), (b) and (c) are, in the main, former Section 2-209 (1990 Official Text). Subsections (e) and (f) state when attempts to prohibit assignment of rights and delegation of duties by agreement are effective and the consequences of such attempts. Beyond that, 2-403 does not go.

Section 2-404. Power to Transfer; Good-Faith Purchase of Goods.

Section 2-404 is subject to state certificate of title laws through the operation of 2-104(a). The assumption is that 2-404 determines when good title passes unless the certificate of title law clearly provides otherwise. Should this assumption be stated in 2-404?

Section 2-405. Rights of Seller's Creditors Against Goods Sold.

At the suggestion of the ABA Group, subsection (a) now states when the buyer's rights under 2-724, 2-707 and 2-722(b) are effective against creditors of the seller who has retained identified goods. In essence, it is a first to attach or vest solution. One must look to 2-724, 2-707

and 2-722(b) to determine when the rights vest.

If the buyer's rights vest first, creditors of the seller take subject to them. If the buyer's rights vest after a judicial lien or security interest has attached, the buyer is subordinate unless qualifying as a buyer in the ordinary course of business.

Section 2-406. Sale on Approval and Sale or Return; Special Incidents.

The rights of a seller to goods sold and delivered on approval or under a "sale or return" term against creditors of the buyer are stated in 2-406. Subsection (e) preserves the distinction between "approval" and "return."

Section 2-407 in the July, 1996 Draft has been deleted. Article 2 does not treat consignments, whether for security or not. Assignment issues are resolved under either non-code law or Article 9.

Part 5. Performance

Sections 2-501 through 2-507 and 2-510 were read at the annual meeting. There was little discussion.

Section 2-501. General Obligations; Substantial Performance.

Subsections (b) and (c) in the July, 1996 Draft have been deleted. See Notes.

Section 2-502. Service Agreements Relating to Goods.

This new section integrates Sections 2-502, 503 and 504 in the July, 1996 Draft. It is based upon a proposal by the ABA Group. See Notes.

Section 2-503. Waiver of Objection.

See Notes.

Section 2-504. Manner of Seller's Tender of Delivery.

Section 2-505. Shipment by Seller.

See Notes for revisions made after the September, 1996 meeting of the Drafting Committee.

Section 2-506. Seller's Shipment Under Reservation.

Section 2-507. Rights of Financing Agency.

Section 2-508. Effect of Seller's Tender; Delivery on Condition.

Section 2-509. Tender of Payment by Buyer; Payment by Check

Section 2-510. Payment by Buyer Before Inspection.

Section 2-511. Buyer's Right to Inspect Goods.

Section 2-512. When Documents Deliverable on Acceptance or Payment.

Section 2-513. Open Time for Payment or Running of Credit; Authority to Ship Under Reservation.

Section 2-514. Risk of Loss.

Part 6. Breach, Repudiation, and Excuse

Section 2-601. Breach Generally.

Section 2-602. Material Breach.

This revision of 2-602 uses the concept of “material breach” and defines it in terms of “substantial impairment” of the value of the contract to the other party. It conforms in terminology with 2B but varies on the amount of detail.

The phrase “material breach” has been substituted where applicable in Parts 6 and 7. See Notes.

Section 2-603. Buyer's Rights on Nonconforming Delivery; Rightful Rejection.

_____ The “perfect tender rule”, such as it is, has survived.

Section 2-604. Waiver of Buyer's Objections by Failure to Particularize.

See Notes.

Section 2-605. Effect of Rightful Rejection and Justifiable Revocation of Acceptance.

Section 2-606. Merchant Buyer's Duties; Buyer's Options as to Salvage.

Section 2-607. What Constitutes Acceptance of Goods.

Section 2-608. Effect of Acceptance; etc.

Subsection (c)(1) has been revised for clarity.

Subsection (e) has been revised to conform in linguistic style to 3-119.

Section 2-609. Revocation of Acceptance.

Section 2-610. Cure.

Section 2-610, revised again after the September, 1996 meeting of the Drafting Committee, contains a simplified and somewhat broader right to cure than the 1990 Official Text. In essence, a buyer who notifies the seller of a proper rejection or revocation of acceptance cannot cancel the contract until the seller’s cure opportunity is exercised or not.

Some questions:

1. Suppose the seller is one minute late in tendering conforming goods and the buyer

rejects because of the delay.. Can the seller cure the delay? No. If the rejection was in good faith then the delay is a sufficient reason to cancel.

2. Suppose the tender is late, the goods are non-conforming and the buyer rejects because of the non-conformity not the delay. When may the seller cure? If the seller gives seasonable notice and bears the expense of the cure, when conforming goods (appropriate) are delivered promptly (timely) after the notice of rejection is received. It is not clear, however, when a prompt tender of conforming goods would not be appropriate. Suppose, for example, that the non-conformity was substantial and a tender of different conforming goods did not allay the buyer's concerns over quality or suppose that the seller tendered repaired goods. Presumably, these cures might not be appropriate, but the burden is on the buyer to prove this.

3. Are consumer interests adequately protected? The answer turns on how 2-610(2) is interpreted.

4. Does the buyer have a right to cure a late payment? Not under Article 2.

5. Why preserve a perfect tender rule and then introduce flexibility in the option to cure? The answer, I suppose, is that the remedy of rejection with notice represents a demand for cure and that the cure step must be passed before the buyer can cancel the contract for breach. Perfect tender can be justified at the rejection stage but flexibility is needed for the cure process itself. But 2-610 introduces delay and uncertainty into the remedial process. Clearly, a buyer who deprives a seller of its cure right has breached the contract. 2-601(a)

Section 2-611. Installment Contract; Breach.

Issues arising from the buyer's breach of an installment contract to pay have been deleted from subsection (b).

The phrase "material breach of the whole contract" is used in subsections (b) and (c). See 2-602(a).

Section 2-612. Right to Adequate Assurance of Performance.

Section 2-613. Anticipatory Repudiation.

See Notes.

Section 2-614. Retraction of Anticipatory Repudiation.

Not read. 2A and 2B should conform to 2-614.

Section 2-615. Casualty to Identified Property.

See Notes. The more flexible excuse standard could provide more protection to a seller (farmer) who expects to supply the goods from its own land and other sources.

Section 2-615. Substituted Performance.

Section 2-616. Excuse by Failure of Presupposed Conditions.

The buyer's excuse claims based upon frustration of purpose and similar defenses have

been removed from 2-616 and left to the common law. See Notes.

Section 2-618. Procedure on Notice Claiming Excuse.

Part 7. Remedies

[A. In General]

All of Part 7 was read at the annual meeting.

Section 2-701. Subject to General Limitations.

Style wants to delete this section on the grounds that it is a surplus "roadmap." The Drafting Committee disagrees. Section 2-701 is a general limitation upon the remedies in subparts 7B and 7C. This limitation has to be expressed somewhere, and 2-701 seemed like the place to do it.

Section 2-702. Breach; Procedures.

Section 2-703. Remedies in General.

See Notes, particularly Note 4.

Section 2-704. Damages in General.

This interesting discussion generated by Pat Fry's memo on damages should be continued here. The issues are important and the lines are hard to draw. The distinctions between direct, consequential and incidental damages make sense if the following is kept in mind. Consider this analysis.

Direct Damages. Direct damages measure the losses resulting from the plaintiff's investment in earning the other party's performance. The buyer pays the price to get the goods and the seller tenders the goods to get the price.

For the buyer, direct damages protect the value of the bargain when when the seller fails to perform as agreed. They can include lost profits, reliance and restitution. But the baseline is the expenditures the buyer must make (pay price, costs of transportation and delivery) to obtain the seller's performance. The buyer's best remedy here is specific performance. Other remedies that protect the value of the bargain are "cover" and contract/market price damages. Reliance is usually the price paid and, to this extent, overlaps with the restitution interest.

For the seller, direct damages protect the value of the bargain when the buyer breaches. The baseline is the performance which the seller must make to earn the price. The seller's best remedy is an action for the price. Other remedies protecting the value of the bargain are resale and contract/market price damages. Restitution is normally not available to a seller who has delivered the goods. The seller's reliance interest in performing the contract is expressly recognized in Section 2-721.

These damages are called "direct" because they result from the promised performance.

They are rarely too remote or speculative. They are now controlled by Section 2-703 and supplemented by Section 2-704.

Consequential damages. Consequential damages are the damages that result from the plaintiff's inability to use the performance promised by the other party. For the seller, that performance is the agreed price. For the buyer, that performance is conforming goods on time. Sometimes those losses are the profits that would have been made if a conforming performance was timely. If profits cannot be proved with reasonable certainty, the plaintiff may recover foreseeable reliance invested in preparing the use the performance. Since these damages are more remote and speculative, the limitations of 2-706 are appropriate.

To illustrate, suppose the seller agreed to deliver equipment to be used in the buyer's factory by November 1 for \$100,000. In reliance on the contract, the buyer took out a loan to pay the price and spent \$10,000 to install a platform upon which the equipment would rest. The seller repudiated the contract and the buyer "covered" for \$120,000. There was a four month delay in installing the new equipment. The buyer's direct damages are \$20,000, the value of the seller's promised performance. The buyer's consequential damages are the net profits that would have been made if the equipment had been delivered on time, subject to 2-706. If those profits cannot be proved with reasonable certainty, the buyer may recover the \$10,000 expended in building the platform (reliance), subject to 2-706.

Incidental damages. Incidental damages are neither direct nor consequential as discussed above. Rather, they are reasonable expenditures incurred to minimize the consequences of a breach and to facilitate continuing operations. They are closely tied to the mitigation of damages policy.

In sum, Article 2 does not define direct damages for a simple reason: If damages are neither incidental nor consequential they are, in effect, direct. Because I buy into this general analysis, the current Article 2 breakdown seems to be sensible and fair. See Notes to 2-706.

Section 2-705. Incidental Damages.

Section 2-706. Consequential Damages.

The "unreasonably disproportionate" language in 2-706(1), although subject to extensive discussion, survived a sense of the house motion to delete it.

The current draft tries to state in one sentence what has been agreed to by the Drafting Committee. The first clause states what consequential damages are, the but clause announces the unreasonably disproportionate exclusion and the which imposes a focuses mitigation requirement. In short, the "but" and "which" clauses exclude damages otherwise provable, foreseeable and resulting from the breach.

By including injury to "person and property" in the statement of what consequential damages are, the link between breach and injury is now the phrase "resulting from" rather than the phrase "proximately caused."

Section 2-707. Specific Performance.

The limitation of 2-722 (action for the price) on the agreed remedy of specific performance is now stated in the text.

Section 2-708. Cancellation; Effect.

Section 2-709. Liquidation of Damages; Deposits.

The order of Sections 2-709 and 2-710 in the July, 1996 Draft has been reversed to conform to the 1990 Official Text.

Subsection (a) was revised to conform the decisions made at the September, 1996 Drafting Committee meeting. See Note (1). No distinction between consumer and commercial contracts is made and the court must test the reasonableness of projections made ex ante breach.

Subsection (b)(2) is restored.

Section 2-710. Contractual Modification of Remedy.

The underlined language in subsection (a)(2) illustrates the nature of a minimum adequate remedy.

Alternative B was added after the September, 1996 meeting of the Drafting Committee as the result of a proposal by the ABA Group. See Note 2.

Section 2-711. Remedies for Misrepresentation and Fraud.

Section 2-712. Proof of Market Price.

Section 2-713. Liability of Third Parties for Injury to Goods.

Section 2-714. Statute of Limitations.

Subsection (a): (1) Identifies three other sections where different statutes of limitations are stated; (2) Includes actions for breach of indemnity or breach of service agreements in Section 2-714; and (3) Clarifies that in "no case" may the four year statute be extended by agreement.

Subsection (c)(3) states when a cause of action for breach of indemnity occurs.

[B. Seller's Remedies]

Section 2-715. Seller's Remedies in General.

The seller's remedial options are subject to Part 7, supart A. See 2-701.

The phrase "material breach of the whole contract" is substituted for breach of the "whole" contract and the section referenced is 2-602 rather than Section 2-611.

On the relationship of the seller's possessory remedies to Article 9, see Note 2.

Section 2-716. Seller's Right to Reclaim Goods After Delivery to Buyer.

Commissioner Ed Smith questioned the requirement of "new value" in sub. (b) and suggested that this limitation upon the priority of after-acquired security should be coordinated with the asset based lenders in the Article 9 process. Compare 2-724.

Section 2-717. Seller's Right to Identify Goods to Contract Notwithstanding Breach or to Salvage Unfinished Goods.

Section 2-718. Seller's Refusal to Deliver Because of Buyer's Insolvency; Stoppage in Transit or Otherwise.

Section 2-719. Seller's Resale.

Section 2-720. Person in Position of Seller.

Section 2-721. Seller's Damages for Nonacceptance, Failure to Pay, or Repudiation.

This section was revised after the March, 1996 meeting of the Drafting Committee and has not been reviewed by the Drafting Committee. Some of the Notes may lag behind the revision. For history, see Note 4.

The measure of damage for repudiation by the buyer of a long-term contract is stated in subsection (a)(2). See Note 3.

The “lost profits” measure is stated in subsection (b). Subject to 2-703, the seller has a relatively free choice between subsection (a) and subsection (b). The lost volume cases fit under subsection (b)(1), but the details are left to the courts. See Note 5.

Section 2-722. Action For Price.

[C. Buyer's Remedies]

Section 2-723. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods.

See the comments to 2-715, which apply here as well.

Section 2-724. Prepaying Buyer's Right to Goods.

This section states when a prepaying buyer has a right to recover identified goods from the seller, subsection (a), and when the right to recover vests, subsection (b). Creditors of the seller who claims attach to the goods after the buyer's rights vest take subject to the buyer. If creditor claim attach before the buyer's right vests, the buyer loses until it is a BIOCB. See 2-405.

2A-522 is the counterpart to revised 2-724. The extent to which it should conform has not been decided.

Section 2-725. "Cover"; Buyer's Purchase of Substitute Goods.

Under 2-703(c), a seller who covered could still sue for damages under 2-726 unless that remedy put the seller in a substantially better position than full performance. Subsection (a)(2), however, reflects the ABA Group's position that a buyer who covers properly under subsection (a) is barred from damages under 2-726. Presumably, the seller must establish the bar as a defense.

Section 2-726. Buyer's Damages for Nondelivery or Repudiation.

This section was revised after the March, 1996 meeting and has not been reviewed by the Drafting Committee. See Notes to current draft.

Subsection (a)(1) measures damages for repudiation of a long-term contract. See Note 3. The question is whether the phrase “learned of the breach (repudiation)” adequately responds to the efficiency and fairness concerns expressed when the buyer, after the repudiation, waits until the time for performance to take remedial action.

Section 2-727. Buyer's Damages for Breach Regarding Accepted Goods.

This section was slightly revised after the March, 1996 meeting and has not been reviewed by the Drafting Committee. See Notes.

Section 2-728. Deduction of Damages From Price.