

DRAFT

FOR DISCUSSION ONLY

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

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MAY 1, 1998

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

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REVISED ARTICLE 2-SALES

**NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

May 1, 1998 Draft

PART 1

GENERAL PROVISIONS

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

Source: Section 2-101.

Notes

The phrase “shall be known and” has been deleted from former 2-101 to conform to Revised Article 3, Revised Article 4, Article 4A, Article 5 and Article 8.

SECTION 2-102. DEFINITIONS.

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

(1) “Authenticate” means to sign, or to execute or adopt a symbol or sound, or encrypt a record in whole or in part, with intent to (i) identify the party; (ii) adopt or accept a record or term; or (iii) establish the authenticity of a record or term that contains the authentication or to which a record containing the authentication refers. Unless the circumstances

indicate that a party intends less than all of these effects, authentication is intended to establish the party's identity, its adoption and acceptance of the record or term, and the authenticity of the record or term as of the time of the authentication.

[Source: 2B-102(a)(3) (December, 1997), further revised in 2B-102(a)(3) (March, 1998).]

(2) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

[Source: Conforms to 2-104(3)]

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

[Source: 2-103(1)(a). "That" substituted for "who."]

(4) "Cancellation" occurs when either party puts an end to a contract for breach by the other party.

[Conforms to 2-106(4), first clause. See 2-808 (May, 1998) for when a party may cancel and the effect of cancellation.]

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

[Follows 2-105(6), with revisions to provide more definite references, such as "which by" rather than "as." The word "bale" is omitted to conform to 2A-103(1)(c). The word "relevant" in the first sentence is added to conform to usage in the second sentence.]

(6) "Conforming" goods or conduct, including any part of a performance, means

goods or conduct that are in accordance with the obligations under the contract.

[Follows 2-106(2).]

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

(B) In a written record:

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

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

_____ (iii) Any term or clause in a telegram or other similar communication is conspicuous.

(C) In an electronic record or display a term or clause is conspicuous if it is so positioned that a party cannot proceed without taking some additional action with respect to the term or any prominent reference thereto.

Notes

1. The general definition of "conspicuous" in sub (A) conforms to the first sentence in 2B-102(a)(7) (Dec. 1997), as revised (March, 1998). Unlike current UCC 1-201(10), neither 2B nor revised 2 state that "whether a term or clause is 'conspicuous' or not is for decision by the court. Revised 1-201(11) (July, 1997) is in accord.

2. The Drafting Committee agreed that there should be a "safe harbor" for conspicuous and that the safe harbor should vary depending upon the medium used in the record. Thus, sub

(B) proposes a safe harbor for a written record and sub (C) proposes a safe harbor for an electronic record. The safe harbor language is derived from but is somewhat narrower than UCC 2B-102(a)(8) (Dec. 1997), as revised (March, 1998).

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

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

[New. Follows the first sentence of 2B-102(a)(9) (Dec. 1997), as revised, March, 1998.]

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

(10) "Contract for sale" means both a present sale of goods and a contract to sell existing or future goods at a future time.

[Follows 2-106(1), with a clarification that "contract for sale" includes a contract to sell future goods.]

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

[New.]

(12) "Electronic agent" means a computer program or other automated means used, selected, or programmed by a party to initiate or respond to electronic messages or performances in whole or in part without review by an individual.

[2B-102(a)(16)(Dec. 1997, revised 2B-102(a)(18) (March, 1998.)

(13) "Electronic" means [includes] electrical, digital, magnetic, optical, electromagnetic, or any other form of wave propagation, or by any other technology that entails

capabilities similar to these technologies.

[2b-102(a)(15) (Dec. 1997), revised 2B-102(a)(17) (March, 1998).]

(14) "Electronic message" means a record that is stored, generated, or transmitted by electronic, optical, or similar means for purposes of communication to another person. The term includes electronic data interchange, electronic or voice mail, electronic display, facsimile, telex, telecopying, scanning, and similar communications.

[2B-102(a)(17) Dec. 1997, revised 2B-102(a)(19) (March, 1998).]

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

[2B-102(a)(18) Dec. 1997. Deleted from March, 1998 Draft of 2B).]

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

[Follows 2-104(2), with slight revisions in punctuation and style.]

(17) "Foreign exchange transaction" means a transaction in which one party agrees to deliver a quantity of a specified money or unit of account in consideration of the other party's agreement to deliver another quantity of different money or unit of account either

currently or at a future date, if delivery is to be through funds transfer, book entry accounting, or other form of payment order, or other agreed means to transfer a credit balance. The term includes a transaction of this type involving multiple moneys and spot, forward, option, or other products derived from underlying moneys and any combination of these transactions. The term does not include a transaction involving multiple moneys in which one or both of the parties is obligated to make physical delivery, at the time of contracting or in the future, of banknotes, coins, or other form of legal tender or specie. **[New.]**

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

[Follows 2-105(2)]

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

[Follows 3-103(a)(4). Accord: 2B-102(a)(21) (March, 1998).]

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

[Follows 2-105(1), with revisions for greater clarity and to broaden the exclusion of various forms of Article 9 collateral. See 9-102(a)(29) (March, 1998)]

(21) "Letter of credit" means an irrevocable letter of credit as defined in Section

5-102(a)(10), issued by a financing agency of good repute and, if the shipment is overseas, of good international repute.

[Follows 2-325(3), first sentence. See 5-102(a)(10). The term “confirmed credit” is not defined in Revised Article 2.]

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

[Follows 2-105(5). See 2A-103(1)(s).]

(23) "Merchant" means a person that deals in goods of the kind involved in the transaction, a person that by occupation purports to have knowledge or skill peculiar to the practices or goods involved in the transaction, or a person to which knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary that purports to have the knowledge or skill.

[Follows 2-104(1), with minor revisions to neutralize gender and to achieve parallel structure. Accord: 2B-102(a)(32) (March, 1998).]

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

[Follows 2-106(1)]

(25) "Receipt":

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

(B) with respect to an electronic record, means when it enters an information processing or storage system or a part thereof in a form capable of being processed by or perceived from a system of that type, and the recipient uses, has designated or otherwise holds out that system or the part thereof as a place for the receipt of such communications. [In addition, a person receives a notice or notification when it comes to his attention.] “Receive

has an analogous meaning.

[Subsection (A) follows 2-103(1)(c) and supplements the definition of “receives” in 1-201(26). “Delivery” is defined in 2-102(a)(11). Subsection (B) follows 2b-102(a)(34) (Dec. 1997), which uses the word “receive” and states when a person receives notice or notification. But see 2B-102(a)(36) (March, 1998)]

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

[5-102(a)(14), 2b-102(a)(37) (March, 1998).]

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

[Follows 2-106(1). “Means” is substituted for “consists in.”]

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

[Follows 2-103(1)(d). Gender changes.]

(29). “Termination” means to end a contract or a part thereof by an act by a party under a power created by agreement or law, or by operation of the terms of the agreement for a reason other than for breach by the other party. Terminate has a corresponding meaning.

[Source: 2-106(3). Follows 2B-102(a)(44) (Dec. 1997), with change to active voice, revised in 2B-102(a)(45).]

(b) Other definitions applying to this Article or to specified Parts thereof and the sections in which they appear are: **[Conforms to 2-103(3).]**

“Acceptance of goods. Section 2-706

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

“Assignment. Section 2-503(a).

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

“Breach of contract. Sections 2-701(a), (b).

“Consequential damages. Section 2-806.

“Cover. Section 2-825(a).

“Delegation. Section 2-503(b).

“Entrusting. Section 2-504(c).

“Incidental damages. Section 2-805.

“Identification. Section 2-502.

“Immediate buyer. Section 2-401(a).

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

“Insurable interest. Section 2-502.

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

“Remote purchaser. Section 2-401(a).

“Repudiation. Section 2-712(b).

“Sale on approval. Section 2-506(a).

“Sale or return. Section 2-506(a).

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

“Waiver. Sections 2-210, 2-702.

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

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

“Computer program. 2B-102(a)(5).

“Dishonor. Section 3-502.

“Draft. Section 3-104(e).

“Information. Section 2B-102(a)(22) (Dec. 1997).

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

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

(d) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article. **[Conforms to 2-103 (4).]**

SECTION 2-103. SCOPE.

(a) This article applies to transactions in goods.

(b) If a transaction involves a license, software contracts and goods, this article applies to the contract issues regarding the goods [the aspects of the transaction which involve standards of performance of or rights in the goods] other than the physical medium containing the information, its packaging, and its documentation. However, this article applies to a sale of a computer program that was not developed specifically for the transaction and that is embedded in goods, other than a copy of the program or an information processing system, if the program was not the subject of a separate license with the buyer.

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

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

Notes

1. Subsection (a) follows the first clause of 2-102 except that the phrase “Unless the context otherwise requires, the meaning of which was unclear, is deleted. The second clause is treated in subsection (c).

The phrase “transactions in goods” means contracts for the sale of goods in sections

where the word “contract” or the phrase “contract for sale” are used. In other settings, “transaction” could include a sale, a bailment or consignment or a contract where both goods and services are provided, such as a contract to deliver and install goods or an agreement to maintain, service and repair goods after installation. The May, 1998 Draft provides no guidance on when Article 2 should apply to these transactions: The issue is left for judicial inclusion or exclusion.

2. Subsection (b) is new and follows 2B-103(c), (d)(4) (December, 1997). Section 2B-103, however, was substantially revised in the March, 1998 Draft. Thus, subsection (b) tries to follow the line drawn in revised 2B-103 and provides some bracketed language for choice.

From the standpoint of Article 2B, disputes over goods are ceded to Article 2 even though information and services may predominate. Under Article 2, however, the “predominate purpose” test developed by the courts in mixed goods and services contracts still controls. Thus, if services predominate, the entire transaction is outside of Article 2 even though the gravamen of the dispute involves goods.

3. Subsection (c) is new and replaces the language after the colon in 2-102 up to the word “nor” : “[I]t does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a secured transaction.

Subsection (c) follows an earlier version of 2B-103(b). The bracketed language is taken from the December, 1997 Draft of 2B. The final phrasing of subsection (c) will depend upon the final draft of Article 2B.

4. Subsection (d) is new. “Foreign exchange transaction” is defined in 2-102(a)(17).

SECTION 2-104. TRANSACTION SUBJECT TO OTHER LAW.

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

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

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

(3) any other law of this State to which the subject matter of this article is subject, such as laws dealing with the sale of agricultural products, the transfer of blood, blood products,

human tissues and organs, the consignment or transfer by artists of works of art or fine prints, distribution agreements, franchises and other relationships through which goods are sold, liability for products which cause injury to person or property, the making and disclaimer of warranties, the misbranding or adulteration of food products and drugs, and dealers in particular products, such as automobiles, motorized wheelchairs, agricultural equipment and hearing aids.

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

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

Notes

1. Subsection (a), which follows the form but not the substance of 2A-104(1), is new. See 2B-104 (March, 1998).

Subsection (a)(1) coordinates Article 2 with state certificate of title statutes.

Subsection (a)(2) and subsection (a)(3) replace the language beginning with “nor” in 2-102: “[N]or does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers. Thus, (a)(2) cedes authority to “any applicable law establishing a different rule for consumers and (a)(3) gives a complete but not exhaustive list of other possible state law that might provide different rules. Unless stated otherwise, “law includes any statute, regulation, administrative ruling, judicial decision, etc., in the state.

2. Subsection (b), which is new, provides a rule of priority in cases of conflict. Subsection (c), on the other hand, states that failure to comply with an applicable law “has only the effect stated therein.

SECTION 2-105. UNCONSCIONABLE CONTRACT OR TERM.

(a) If a court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may

enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.

[(b) In a consumer contract [contract between and individual and a merchant], non-negotiable [non-negotiated] terms in a record which the [consumer] [individual] has authenticated or to which it has agreed by conduct are unconscionable if:

(1) the consumer [individual] had no knowledge of them; and

(2) the term:

(A) varies unreasonably from applicable industry standards or commercial practices;

(B) substantially conflicts with one or more negotiated terms in the agreement; or

(C) substantially conflicts with an essential purpose of the contract.

This subsection does not apply to a term disclaiming or modifying an implied warranty in accordance with another section of this article.]

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

Notes

1. Subsection (a) conforms to 2-302(1), except that the word “term, which is defined in 1-201, is substituted for the word “clause, which is not defined. But for this exception, subsection (a) conforms to 2B-110(a) (March, 1998). The Drafting Committee deleted the phrase “induced by unconscionable conduct, which was in the July, 1997 Draft of 2-105(a).

When may a court determine that a contract or a term is unconscionable? Comment 1 to 2-302 stated: “The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.

Further: “The principle is one of the prevention of oppression and unfair surprise...and not of disturbance of allocation of risks because of superior bargaining power. Finally, the determination is to be made after a hearing where the “parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination. 2-302(2).

2. Subsection (b), formerly 2-206 in the March, 1998 Draft, is new. The bracketed language raises the possibility that 2-105(b) might apply to a contract between a merchant and an individual rather than just to consumer contracts. **Neither its content nor its insertion into 2-105 has been approved by the Drafting Committee.** Former 2-206 has been bracketed for further discussion, see Note 4.

As the following analysis suggests, subsection (b) will clarify when a term is unconscionable and but, in the process, provide more protection than some courts have given under the standards of subsection (a) when interpreted to require oppression or extreme one-sidedness.

Analysis.

Subsection (b) states more clearly what terms are unconscionable without stating a rule that applies in every case. A case by case approach will still be required.

Although not specifically so limited, the subsection will be invoked most frequently where a consumer [individual] has assented to a record containing terms that are either “boilerplate and not specifically disclosed through negotiation or are non-negotiable, i.e., offered on a take it or leave it basis. The phrase “non-negotiable is consistent with the content of unfair surprise under 2-302 and is easier to understand than the phrase “non-negotiated. What does it mean to negotiate a term? Even if the concept includes a simple discussion of the term by the parties, that surely would give the other party “knowledge of the term and foreclose the application of subsection (b).

Under this subsection, the consumer [individual] will be bound to terms in the record to which it agreed unless three conditions are satisfied:

(1) The term is not negotiable. This is a core element of the so-called contract of adhesion and signals the potential absence of meaningful choice. A negotiable term is not likely to be contained in the fine print. Presumably it will be easier to determine whether a term in a record is non-negotiable than whether the term has been negotiated.

(2) The consumer [individual] had no knowledge of the term. This minimal disclosure requirement is intended to protect against unfair surprise. The requisite lack of knowledge is most likely to occur when a non-negotiable term is buried in the fine print of a form. Disclosure is satisfied, however, if the consumer [individual] has actual knowledge of the term. It is enough

that the consumer [individual] knows about the arbitration clause in the record even though he or she does not understand what arbitration is or does. The downside is that knowledge of the term is just one factor considered by courts in determining whether there was unfair surprise. For example, courts typically consider the capacity of the consumer [individual] (age, education, intelligence, experience), the relative bargaining power of the parties and the comprehensibility of the terms as well as knowledge. See *NEC Technologies, Inc. v. Wilson*, 478 S.E.2d 769, 771 (Ga. 1996).

(3) If the consumer [individual] has no knowledge of the non-negotiable term, the term is unconscionable if it fails to conform to the requirements of subsection (b)(2), even though it would survive under subsection (a). In short, if there is procedural unconscionability because the consumer [individual] has no knowledge of the term, a term which shocks the conscience as defined in subsection (b)(2) will not be enforceable. However, if a consumer [individual] has knowledge of the term in a record to which it has agreed, the term is enforceable under 2-105(b) even though it is harsh, or substantially conflicts with negotiated terms, or eliminates the essential purpose of the contract. The downside of this is that the term of which the consumer [individual] has knowledge may survive even though it materially varied the usual default rules in a commercially unreasonable manner, unless it is otherwise unconscionable under subsection (a).

The additional requirement in the March, 1998 Draft of 2-206 that a reasonably consumer would not reasonably expect to find the term in the record is deleted.

Subsection (b) does not apply where a term excluding or modifying an implied warranty satisfies the requirements of 2-406. Even if 2-406 is satisfied, however, the broader requirements of subsection (a) may still be applicable, especially where questions of meaningful choice still remain. See *Martin v. Joseph Harris Co., Inc.*, 767 F.2d 296 (6th Cir. 1985).

3. Subsection (c) follows 2-302(2). See 2B-110(b) (March, 1998).

4. Subsection 2-206 of the March, 1998 draft is stated below:

[SECTION 2-206. CONSUMER CONTRACTS; RECORDS.

Alternative A

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

(b) Before deciding whether to exclude a term under subsection (a), the court, on motion of a party or its own motion, shall afford the parties a reasonable and expeditious opportunity to present evidence on whether the term should be included or excluded from the contract. The court may exclude a term under this section only if it finds that the term is bizarre or oppressive [harsh or “one-sided] by industry standards or commercial practices, abrogates or substantially conflicts with other negotiated terms, eliminates the dominate purpose of the contract, or conflicts with other consumer protection laws.

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

Alternative B

(a) In a consumer contract, a consumer adopts the terms of a [standard form] record by manifesting assent to the record [2B-112] after having an opportunity to review. [2B-113]. However, a term does not become part of the contract if it is unconscionable or conflicts with any negotiated term of the agreement between the parties. [2B-208(a)]

(b) This section shall not operate to exclude an otherwise enforceable term disclaiming or modifying an implied warranty.]

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

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

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

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

(d) An undivided share in an identified bulk of fungible goods is sufficiently described to

be sold even if the quantity of the bulk is not determined. Any proportion of the bulk or quantity agreed upon by number, weight, or other measure, may, to the extent of the seller's interest in the bulk, be sold to the buyer, who then becomes an owner in common.

Notes

1. Subsection (a) follows 2-105(2), first sentence. The underlined phrase “can pass” is somewhat dated and is replaced by the phrase “may be transferred.”
2. Subsection (b) follows 2-105(3), and is stated in the active voice.
3. Subsection (c) follows 2-105(a)(2), the last sentence. The phrase is revised to clarify the referent and to replace “operates as” with “is.” “Future goods” are defined in 2-102(a)(18).
4. Subsection (d) follows 2-105(4). For clarity, the reporters substituted “described” for “identified” and deleted the word “agreed.”

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

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

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

severance by identification of the goods.

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

Notes

Section 2-107 of Revised Article 2 follows former 2-107. The phrase “real property” has been substituted for words like “realty” and “land” for consistency. Other revisions in style, grammar and punctuation are for clarity.

SECTION 2-108. EFFECT OF AGREEMENT.

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

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

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

Notes

1. Subsection (a) restates the principle of variance by agreement contained in 1-103(3) and is subject to the limitations stated in that subsection. The principle is also subject to any specific exceptions stated in Article 2 but, unlike 2B-106(a)(1) (March, 1998), those exceptions are not stated in the statute.

Unlike Article 6 of CISG, this section does not state that the parties can contract out of Article 2 when it applies. Nor does it state that the parties can contract into Article 2 when it does not apply. Presumably the parties have some power to contract in or contract out, but the limitations of that power are not clear. See 2B-107(a) (March, 1998), providing broad validation to choice of law agreements.

2. Subsection (b) states affirmatively the “unless otherwise agreed” principle in 1-102(4): The “absence” of such a phrase does not by itself preclude variance by agreement.

3. Subsection (c) follows 2-303 and is repositioned in 2-108, which deals with the effect of an agreement. . The phrase “unless otherwise agreed” is deleted from the original 2-303 because Revised Article 2 does not use that phrase. See 2B-107(a) (March, 1998), in accord.

PART 2

FORM, FORMATION, TERMS, AND READJUSTMENT OF CONTRACT

[A. In General]

SECTION 2-201. FORMAL REQUIREMENTS.

(a) A contract for sale for the price of \$5,000 or more is not enforceable by way of action or defense against a person that denies that a contract for sale was made, unless there is a record authenticated by the party against which enforcement is sought or its authorized agent as the record of that person and which is sufficient to indicate that a contract has been made between the parties. A record is not insufficient merely because it omits or incorrectly states a term agreed upon, including a quantity term. If the record contains a quantity term, however, the contract is not enforceable beyond that quantity.

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

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

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

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

(3) the party against whom enforcement is sought admits in pleading or testimony in court or otherwise under oath that a contract for sale was made.

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

SOURCE: Section 2-201.

Notes

1. The PEB Study Group recommended that the statute of frauds should be either repealed or revised. See Executive Summary, 46 Bus. Lawyer 1874 (1991). Early drafts of revised Article 2 repealed the statute and motions to restore it were defeated at the 1995 and 1996 annual meetings of the Conference. The statute of frauds, however, was restored by the Drafting Committee at the January, 1997 meeting and a revised version, which made the statute easier to satisfy, was prepared. At the May, 1997 annual meeting of the ALI a motion to retain the statute passed but a motion to delete subsection (d), repealing the one-year clause, was defeated. More recently, the Drafting Committee again agreed that Article 2 should have a statute of frauds.

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

First, the floor amount favored by a plurality of the Drafting Committee is \$5,000 rather than \$500.

Second, the March, 1998 Draft stated in brackets that the defense cannot be raised unless

the person against whom a claim or defense is asserted denies that an agreement was made. **At the March, 1998 meeting of the Drafting Committee, it was agreed that the defendant must deny “facts from which an agreement can be found.”**

Third, an authenticated record is not insufficient simply because it omits a quantity term. Although there is no Article 2 “gap filler” for quantity, the term may be established by relevant evidence, including trade usage and course of dealing. If, however, a quantity term is included in the record the claim is not enforceable beyond the quantity stated. This follows the recommendation of the PEB Study Group. Similarly, there is no longer a quantity restriction where there is conduct by both parties establishing an agreement or facts from which a contract can be found are admitted in court or under oath. See subsection (c).

3. Subsection (b) retains the confirmation principle in 2-201(2), but the text now states that only the recipient of the confirmation must be a merchant. The text does not say whether a merchant may or may not be a farmer. The conclusion that farmers can never be a merchant, however, is rejected. See 2-201 (1995), comment 2, paragraph 2, which states that the merchant concept under 2-201(2) rests “on normal business practices which are or ought to be typical of and familiar to any person in business.

4. Subsection (c) states when a claim under a contract barred under subsection (a) is “nevertheless enforceable.

Subsection (c)(1) follows §2-201(3)(a).

Subsection (c)(2) expands the “part performance” exception in 2-201(3)(c). Conduct by both parties, including part performance, takes the case out of the statute and proof of agreed quantity is not limited to the quantity represented by part performance. This follows the theory of subsection (a).

Subsection (c)(3) of the July, 1997 Draft, which recognized that reliance on representations or an agreement by one party “may estop” the other from raising the statute of frauds defense, is deleted. The comments will state that revised 2-201 does not preclude the estoppel defense, which depends upon principles of law outside of this Act. See Revised 1-102(b) (April 1997). Presumably, the court will be guided by Restatement (Second) Contracts § 139, one factor of which is the extent to which the reliance “corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence. See Subsection (2)(c). **By stating some exceptions to subsection (a), there is no intention to foreclose the estoppel exception in appropriate cases.**

Subsection (c)(4) follows former UCC 2-201(3)(b), with two changes: the admission (1) may be made by testimony in court or “otherwise under oath”, and (2) an admission that a contract was made removes the statute of frauds bar and permits evidence of the agreed quantity even though the quantity was not admitted. **This subsection was approved at the March, 1998**

meeting of the Drafting Committee.

5. Subsection (d), which is new, survived a motion to delete at the ALI meeting in May, 1997. The phrase “any other applicable period” recognizes that some state statutes apply to periods longer than one year. The confused and contradictory interpretations under the so-called “one year” clause are illustrated in *C.R. Klewin, Inc. v. Flagship Properties, Inc.*, 600 A.2d 772 (Conn. 1991) (Peters, J).

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

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

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

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

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

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

SOURCE: Sales, Section 2-202.

Notes

1. Section 2-202 follows former §2-202 with the following exceptions.

First, the text has been revised to state that terms in an integrated record, whether partial or total, may be explained by any credible evidence, including evidence from a course of performance, usage or trade or course of dealing, and may be supplemented to the extent permitted in 2-202(1). This phrase is intended to moderate the so-called “plain meaning” rule in interpretation cases where the extrinsic evidence comes from sources other than trade usage or prior course of dealing. The comments should state that when the court holds a preliminary hearing on the admissibility of evidence for purposes of interpretation the court should follow the interpretation process set forth in Section 212 and Sections 200-203 of the Restatement, Second, of Contracts. See *Winet v. Price*, 6 Cal. Rptr.2d 554, 557 (Cal. App. 1992), where the court said:

The decision whether to admit parol evidence [to interpret a term] involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions to determine “ambiguity, i.e., whether the language is “reasonably susceptible” to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is “reasonably susceptible” to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step--interpreting the contract.

Second, if the parties intend a partial integration, evidence of a non-contradictory term will be admitted to add to the agreement unless the court finds that the term, if agreed to, would certainly have been included in the agreement. See §2-202, Comment 3 (1995). Terms that “certainly” would have been included are not “consistent” additional terms, or would not naturally have been excluded from the record, or are not in “reasonable harmony” with the record. If the integration is total, however, even non-contradictory terms are excluded.

2. Although the Drafting Committee agrees that a merger clause is presumptive but not conclusive evidence of an intention to integrate, effect of a merger clause will be discussed in the comments rather than treated in the text. If both parties intend the record to be a final and exclusive statement of all terms, evidence of non-contradictory terms will be excluded but credible evidence relevant to interpretation will not.

3. Revised 2-202 still permits evidence from trade usage or prior course of dealing to supplement the terms of a totally integrated record unless the usage or course of dealing is “carefully negated” in the contract. See former §2-202, comment 2.

4. **CISG.** There is no comparable provision in CISG. See UPICC Art. 2.17 (effect of a merger clause). CISG Art. 8, however, provides standards for the interpretation of statements by and conduct of parties to a contract for sale.

Section 2-202 was not considered by the Drafting Committee at the March, 1998 meeting.

SECTION 2-203. SEALS INOPERATIVE. The affixing a seal to a record evidencing

a contract for sale or to an offer to buy or sell goods does not make the record a sealed instrument. The law with respect to sealed instruments does not apply to the contract or offer.

Source: Sales 2-203.

SECTION 2-204. FORMATION IN GENERAL.

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

(b) If the parties so intend, an agreement sufficient to constitute a contract may be found even if the time of its making is undetermined, one or more terms are left open or to be agreed upon, the records of the parties do not otherwise establish a contract, or one party reserves the right to modify terms.

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

(d) Conspicuous language in a record which expressly conditions the intention of the proposing party to contract upon agreement by the other party to terms proposed in the record prevents contract formation unless the required agreement is given.

[(e) Subject to Sections 2-207 and 2-209(a), if, after the buyer has become obligated to pay for or has taken delivery of the goods, the seller proposes terms in a record that vary those already disclosed or agreed to and to which the buyer agrees, the varying terms become part of the contract unless they are unconscionable under Section 2-105.]

SOURCE: Sales, Section 2-204; Article 2B.

Notes

1. Subsection (a) follows former §2-204(1), except that the phrase “offer and acceptance” is added. This makes explicit what is clearly intended in Part 2 and conforms with usage in the Restatement, Second, of Contracts and Part II of CISG. The word “offer”, however, is not defined.

2. Subsection (b) is derived from but amplifies former §2-204(2). The phrase “even though the records do not establish a contract” is taken from former §2-207(3) and implements the decision to separate the treatment of contract formation from the question of “what are the terms.”

3. Subsection (c) follows former 2-204(3).

4. Subsection (d) is derived from former §2-207(1), where contract formation was prevented if an apparent acceptance with terms that varied the offer was “expressly made conditional” on assent to the varying terms. The condition must be “express” and the language of condition must be conspicuous.

5. Subsection (e), which is new, adopts the “rolling contract” concept. See 2B-207, note 5 (March, 1998). The objective is to reduce the risk of unfair surprise when a buyer receives previously undisclosed terms after paying for or taking delivery of the goods. The question is whether they are unconscionable under 2-105. Further, if a contract is formed by conduct and both parties have records, terms upon which the records do not agree may be “knocked out” under 2-207.

Subsection (e) responds to the so-called “*Gateway*” problem, [*Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), cert. denied, 1997 WL 250455 (S.Ct. 1997)] and has not been approved by the Drafting Committee. The Drafting Committee favors some statutory solution, perhaps a solution adapted in part from 2B, but does not support a “mass market” concept for Article 2. See 2B-208 (March, 1998). Proposed subsection (e) provides a possible solution based on the revised concept of unconscionability under 2-105 rather than the 2B model.

6. **CISG.** Articles 14 through 24 of CISG deal with formation of the contract. The primary formation model is offer and acceptance. There is no provision comparable to 2-203(a) in CISG, although Article 18(1) provides that “conduct of the offeree indicating assent to an offer is an acceptance.”

SECTION 2-205. FIRM OFFERS.

(a) An offer by a merchant to buy or sell goods made in an authenticated record that by its terms gives assurance that the offer will be held open is not revocable for lack of consideration

during the time stated. If a time is not stated, the offer is irrevocable for a reasonable time not exceeding 90 days. A term of assurance in a form record supplied by the offeree to the offeror is ineffective unless the term is conspicuous.

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

Notes

1. Subsection (a) follows former §2-205, except that the word “conspicuous” replaces the phrase ‘separately signed by the offeror’. The word “form,” which is used but not defined in §2-205, is retained. Other minor revisions for clarity are made.

“Conspicuous” is defined 2-102(a)(7).

Subsection (a) supplements rather than displaces other methods by which options contracts are created, such as by consideration or reliance.

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

SECTION 2-206. OFFER AND ACCEPTANCE.

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

(1) An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances. Subject to Section 2-204(d), a definite and seasonable expression of acceptance operates as an acceptance even though it contains terms that vary the offer.

(2) An order or other offer to buy goods for prompt or current shipment shall be construed to invite acceptance by either a prompt promise to ship or a prompt or current shipment of conforming goods. If under the circumstances the order or offer is construed to invite acceptance by the shipment of non-conforming goods, the non-conforming shipment is not an

acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation.

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

SOURCE: Sales, Section 2-206.

Notes

1. The second sentence in subsection (a)(1) follows former §2-207(1) up to the comma, except references to confirmations are deleted, see revised 2-207(c), and the phrase “terms that vary the offer” replaces “terms additional to or different from those offered.” This change implements the decision to separate issues of contract formation from issues of what terms are in the contract. Note that an offeree can condition contract by formation under 2-204(d) by expressly conditioning in conspicuous language its willingness to deal unless the offeror agrees to the varying terms.

2. Subsection (a)(2) through the first sentence follows former 2-206(1)(b).

The second sentence changes the language in §2-206(1) after the comma. Former 2-206(1)(b) stated that an offer for prompt shipment could be accepted by the shipment of non-conforming goods unless the seller seasonably notified the buyer that the shipment was offered only as an accommodation. Comment 4 suggested that the non-conforming shipment is “normally to be understood as intended to close the bargain, even though it proves to have been at the same time a breach.” The revision makes this rather bizarre result, conduct that is both an acceptance and a breach, depend upon the construction of the offer in the circumstances. Unless the offer is so construed, the normal rules apply, i.e., a shipment of non-conforming goods is a counteroffer.

3. Subsection (b) follows former §2-206(2) except that the offeror who is not promptly notified of acceptance by beginning performance may treat the contract formed as discharged rather than the offer as having lapsed. This is consistent with the Restatement, Second, of Contracts, which treats performance invited by the offeror as an acceptance by promise, §62, but treats the failure of the offeree to notify the offeror of the acceptance as a discharge of the offeror’s contractual duty. §54(2).

4. **CISG. Article 18(1) recognizes** that an offer may be accepted by a “statement...or other conduct by the offeree indicating assent” to the offer. Subsection (2) states when an

acceptance by a statement (promise) becomes effective and subsection (3) deals with when the offeree may “indicate assent by performing an act. In the former case, an acceptance by statement or promise is usually effective when received (there is no “mailbox rule), and in the latter case the acceptance is effective when the act is performed if the offeror has indicated or the parties have agreed that notice to the offeror is not required. Apparently, an acceptance by an act is ineffective if notice to the offeror is not dispensed with.

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

_____ (a) This section is subject to Sections 2-202 and 2-105.

(b) If a contract is formed by offer and acceptance and the acceptance is by a record containing terms varying from the offer or by conduct of the parties that recognizes the existence of a contract but the records of the parties do not otherwise establish a contract for sale, the contract includes:

- (1) terms in the records of the parties to the extent that the records agree;
- (2) terms not in the records to which the parties have otherwise agreed;
- (3) terms supplied or incorporated under any provision of this [Act]; and
- (4) terms in a [form] record supplied by a party to which the other party has expressly agreed.

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

- (1) terms agreed to prior to the confirmation;
- (2) terms in a confirming record that do not materially vary the prior agreement and are not seasonably objected to;
- (3) terms in confirming records to the extent that they agree; and
- (4) terms supplied or incorporated under any provision of this [Act].

Notes

1. Revised 2-207, which is derived from former §2-207, has a long and interesting drafting history. See Note 1, Drafting History (July, 1997). In essence, the revision helps to determine the terms of a contract that is formed under other sections. Put differently, revised 2-207 is limited to determining what the terms of an existing contract are regardless of how that contract was formed.

2. Subsection (a) states that 2-207 is subjects to sections 2-202, the “parol evidence rule, and 2-105(b), consumer contracts.

3. Subsection (b) is the core of revised 2-207. If a contract has been formed under the circumstances stated in the language up to the colon, the terms of that contract are determined by the language after the colon. The two most important principles are in b(1), which excludes terms in the records of the parties to the extent that the records do not agree, and (b)(4), which includes terms in one party’s form record otherwise excluded under (b)(1) to which the other party has expressly agreed. The phrases “form record” and “expressly agreed” are used without definition because in over 35 years of litigation under former 2-207 the courts have always been able to distinguish form contracts from others and to decide when a party has expressly agreed to a term in a form. See former 2-205 and 2-209(2) where the word “form” is used without definition and the comments to 2-207 where both “forms” and “expressly agreed” are used.

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

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

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

Revised Section 2-207 was not considered by the Drafting Committee at the March, 1998 meeting.

Revised Section 2-207: A Road Map.

Assume that some contract has been formed under Article 2, Part 2. What are its terms?

Note that some of the terms will be agreed at the time of contract formation and other terms may be included later. Even though terms included later are modifications, Section 2-207 rather than Section 2-210(a) may provide the applicable principles for inclusion. In short, 2-207 and 2-209(a) must be read together.

(a) All terms are expressed in one record.

Section 2-207 does not apply here. The single record is probably integrated and subject to 2-202. For consumer contracts, see 2-105(b). For commercial contracts, the usual principles of agreement apply, subject to Section 2-105(a).

(b) No terms are expressed in a record.

Section 2-207 does not apply here. Since the agreement is oral, the statute of frauds probably applies. See 2-201. If not, the usual principles of agreement apply. If a confirmation is made in a record, however, 2-207(c) will apply.

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

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

For example, suppose the buyer makes an oral offer and the seller makes a definite acceptance in a record that contains terms that vary from the offer. A contract is formed, see 2-206(a)(1), and the varying terms are not part of the agreement.

Suppose, further, that the seller ships and the buyer accepts the goods. Does the buyer's conduct in accepting the goods equal agreement to the seller's varying terms? Under subsection (b)(4), the answer is no where there is a form record: The buyer must expressly agree to the term. As a practical matter, the courts have distinguished between negotiated and "boilerplate" terms and have required a higher quality of assent to incorporate the boilerplate.

Suppose, further, that the seller's offer is made in a record and the buyer accepts orally or by conduct and states other terms that vary from the offer. This is a highly unlikely version of the "first shot" problem and subsection (b)(4) applies. Again, terms in the seller's form record are not part of the contract unless the buyer has expressly agreed to them.

(d) Both parties exchange records.

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

Subsection (b) also applies if the contract is formed by conduct rather than by offer and acceptance. Again, if terms in the records are excluded because the records do not agree in substance, those excluded terms are not brought into the agreement by ambiguous conduct. Thus, if the seller seeks to include a term in its record and the buyer also has a record, the seller's term is out to the extent that the records do not agree. The would not agree unless both parties had a term on the same matter, e.g., notice time for breach of warranty, and the terms agreed in substance, e.g., 20 days vs. 18 days. This is the "knock out" rule in current 2-207(3) and Article 2.22 of the UNIDROIT Principles, except that the "knock out" does not depend upon standard terms. Hence, revised 2-207 deals with the "battle of the records." In these cases, the crucial question is how to treat the excluded terms. Can they still become part of the agreement? The answer is found in subsection (b)(4): If a form record is involved, the answer is yes if, after their initial exclusion, the parties expressly agree to them.

(e) Confirmations.

Section 2-207(c) deals specifically with records that confirm a contract previously made. Compare 2-201(b), dealing with confirmations for purposes of the statute of frauds.

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

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

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

(f) "My way or no way."

Section 2-204(d) recognizes that a party may condition its willingness to contract upon the other party's agreement to terms proposed and states that conspicuous language in a record that will prevent the formation of a contract on the exchange of records with varying

terms but will not prevent a contract if there is “conduct of both parties recognizing the existence of a contract. 2-204(a). In cases of mutual conduct, what is the effect of the “my way or no way provision? If the drafter cannot claim there is no contract, can it claim that the contract (based upon conduct) is on the terms in its record?

The reporters believe that the default rule in 2-207(b) should prevail over the express condition. The “knockout rule eliminate terms upon which the writings do not agree and the requirement of express agreement prevents terms that were excluded from being incorporated simply because the parties have performed part or all of the agreement.

How should this result be implemented in the statute? In principle a party who expressly conditions its willingness to contract on agreement to specific terms and then ships the goods or accepts the goods without first obtaining that agreement should be precluded from relying on the condition.

In essence, the primary reason for a 2-207 is to prevent unfair surprise and advantage taking by the use of forms in transactions where all of the terms are not contained in a single record. See UPICC Art. 2.18 - 2.22.

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

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

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

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

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

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

(c) Except as otherwise provided in subsection (d), the express terms of an agreement and

any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such construction is unreasonable:

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

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

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

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

SOURCE: Sales, Section 2-208; Revised 1-304 (September, 1997).

Notes

Revised Section 2-208 is derived from former §2-208 and follows Revised 1-304. Ultimately, 2-208 will be deleted from Article 2 and appear only in Article 1.

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

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

(b) [Except in a consumer contract,] an authenticated record that excludes modification or rescission except by an authenticated record may not be otherwise modified or rescinded. Such an exclusion in a form record supplied by a merchant to a non-merchant must be conspicuous. However, a party whose language or conduct is inconsistent with the exclusion term is precluded from asserting it if the language or conduct induced the other party to change its position reasonably and in good faith.

(c) A condition in a contract may be waived by the party for whose benefit it was

included. Language, conduct or a course of performance between the parties is relevant to show a waiver. A waiver affecting an executory portion of a contract, however, may be retracted by reasonable notification received by the other party that strict performance will be required of any term waived, unless the waiver induced the other party to change its position reasonably and in good faith.

SOURCE: Sales, Section 2-209.

Notes

1. Subsection (a) follows former §2-209(1), except that the requirement of a good faith modification, previously found in a comment 2, is explicitly stated in the statute. This follows the cases, see, e.g., *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983), and avoids the argument that a contract modification is neither the "performance or enforcement" of a contract under §1-203. See 2B-303(a), where the revision is rejected.

2. Second, subsection (3) of former 2-209 has been deleted. That subsection stated that the requirements of the statute of frauds "must be satisfied if the contract as modified is within its provisions. After the deletion it is clear that if the original agreement satisfies the statute the modification is enforceable even though it is within the statute and does not comply. It is less clear what happens if neither the original agreement nor the modification were in excess of \$5,000 but together they are. Arguably, the phrase "contract for sale" in 2-201(a) is broad enough to include a contract as modified and the statute of frauds would apply.

3. Subsection (b) follows former §2-209(2), except as follows.

First, consumer contracts are excepted. The Drafting Committee should reconsider whether the consumer exception is needed in light of revised 2-105(b) and the estoppel or reliance exception.

Second, a NOM term in a form supplied by a merchant to a non-merchant must be conspicuous. This follows the last clause of former 2-209(2), but changes the requirement of "between merchant and substitutes "conspicuous" for "separately signed. See 2-204(a).

Third, the party for whose benefit the NOM term was included is precluded from enforcing it if language or conduct inconsistent with the NOM clause have induced reasonable, good faith reliance by the other party on an oral modification. See *Brookside Farms v. Mama Rizzo's, Inc.*, 873 F. Supp. 1029 (S.D. Tex. 1995).

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

The second sentence of subsection (c) follows former §2-209(5), except that the reliance exception is revised to conform to subsection (b). In this so-called reliance waiver, the party for whose benefit a condition is included states that he will not insist upon the occurrence of a condition in the future. Here, however, the waiver may be retracted unless the other party has changed its position "reasonably and good faith." Subsection (c), last sentence.

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

To illustrate, suppose the contract contains a NOM clause and a schedule for installment deliveries by the seller. The seller encounters production problems, misses a due date and requests an extension of delivery time from the buyer.

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

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

[B. Electronic Contracts]

Prefatory Note: Sections 2-210 through 2-217, dealing with electronic contracts, are taken from the February, 1998 draft of Article 2B. Substantial changes were made in the March, 1998 draft of 2B and, presumably, further changes will be made before Article 2B is finally approved. At the same time, the drafting of a Uniform Electronic Transactions Act is underway and this statute also covers electronic contracting. See Draft, November,

1997.

In light of these ongoing developments, no revisions have been made in these sections for the May, 1998 draft of Article 2. Rather, Article 2 will wait until 2B and the ETA are final. At that point, the choices will be either to (1) follow 2B, (2) follow ETA, or (3) modify 2B in light of ETA for a blend best suited for contracts for sale.

SECTION 2-210. LEGAL RECOGNITION OF ELECTRONIC RECORDS AND SIGNATURES. A record or authentication may not be denied legal effect, validity, or enforceability solely on the ground that it is electronic.

Source: 2B-113 (Feb. 1998).

SECTION 2-211. ATTRIBUTION PROCEDURE.

(a) Except as otherwise provided in Section [2B-115 (a)], if a person requires use of a procedure that would be an attribution procedure if it were commercially reasonable and a loss to the other person occurs because the procedure was not commercially reasonable:

(1) The person that required use of the procedure bears the loss unless it disclosed the nature of the risk to the other person and offered reasonable alternatives that the other person rejected.

(2) The liability of the person that required use of the procedure does not include losses that could have been prevented by the exercise of reasonable care by the other person.

(b) The commercial reasonableness of an attribution procedure is determined by the court. In making that determination, the following rules apply:

(1) An attribution procedure established by law or regulation is commercially reasonable for the purposes for which it was established.

(2) Except as provided in subsection (b)(1), commercial reasonableness is

determined in light of the purposes of the procedure and the commercial circumstances at the time the parties agree to or adopt the procedure.

(3) An attribution procedure may require the use of any security devices that are reasonable under the circumstances, such as algorithms or other codes, identifying words or numbers, encryption, callback procedures, or any other reasonable security device.

Source: 2B-114 (Feb. 1998)

SECTION 2-212. ATTRIBUTION OF ELECTRONIC RECORD, MESSAGE, OR PERFORMANCE TO A PARTICULAR PERSON.

(a) Subject to subsection (b), an electronic authentication, message, record, or performance is attributable to a person if:

(1) it was in fact the action of that person, a person authorized by it, or the person's electronic agent;

(2) the other party, using an attribution procedure for identifying a person, in good faith concluded that it was an act of the other person, a person authorized by it, or the person's electronic agent; or

(3) it resulted from acts of a person that obtained, from a source under the control of the person to whom it is attributed, access numbers, codes, computer programs, or the like the use of which created the appearance that it came from that person and

(A) occurred because of a failure to exercise reasonable care by that person; and

(B) caused the other party reasonably to rely to its detriment on the apparent source of the message or performance.

(b) Attribution under subsection (a) (2) creates a presumption that the authentication, message, record or performance was that of the person to which it is attributed.

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

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

(2) Reliance that does not comply with an attribution procedure that exists between the parties is not reasonable unless authorized by an individual representing the other party.

(d) Except as provided subsection (a), if a loss occurs because a party relied on an electronic authentication, message, record, or performance as that of another party, as between the parties, the party who relied bears any loss caused by its reliance.

Source: 2B-115 (Feb. 1998)

SECTION 2-113. ATTRIBUTION PROCEDURE FOR DETECTION OF CHANGES AND ERRORS; EFFECT OF USE. If the parties use an attribution procedure to detect errors or changes in the content of an electronic record, between the parties the following rules apply:

(1) An electronic message, record or performance that the attribution procedure shows to have been unaltered since a point in time is presumed to have been unaltered since that time.

(2) An electronic message, record, or performance created or sent pursuant to the attribution procedure to detect error is presumed to have the content intended by the person creating or sending it as to portions to which the procedure applies.

(3) If the sender complied with the attribution procedure and the change or error would have been detected had the other party also complied, the sender is not bound by a change or error.

(4) If the sender receives a notice required by the attribution procedure which describes the content as received, the sender must review the notice and report any error detected by it in a commercially reasonable manner.

Source: 2B-116 (Feb. 1998)

[SECTION 2-114. ELECTRONIC ERROR: CONSUMER DEFENSES.

(a) In this section, "electronic error" means an error created by an information processing system, by electronic transmission of a record, or by an error of the consumer in an electronic system that did not reasonably allow for correction or avoidance of such errors.

(b) In an automated transaction with a consumer, the consumer is not responsible for an electronic message that the consumer did not intend and that was caused by an electronic error if:

(1) promptly on learning of the other party's reliance on the message, the consumer:

(A) in good faith notifies the other party of the error and that it did not intend the message received; and

(B) delivers all copies of any information received to the other party or, deliver or destroy all copies pursuant to any reasonable instructions received from the other party; and

(2) the consumer has not used or received value from the information or caused the information or value to be made available to a third party.]

Source: 2B-117 (Feb. 1998)

SECTION 2-215. AUTHENTICATION PROOF; ELECTRONIC AGENT OPERATIONS.

(a) Operations of an electronic agent constitute the authentication or manifestation of assent of a party if a party used, selected or programmed the electronic agent for the purpose of achieving results of that type.

(b) Compliance with an attribution procedure for authenticating a record authenticates the record as a matter of law. Otherwise, authentication may be proven in any manner including by showing that a procedure existed by which a party or an electronic agent must engaged in conduct or operations that authenticated the record in order to proceed further in the use it made of the information.

Source: 2B-118 (Feb. 1998)

SECTION 2-216. ELECTRONIC MESSAGES: TIMING OF CONTRACT; EFFECTIVENESS OF MESSAGE; ACKNOWLEDGING MESSAGES.

(a) Except as provided in subsection (b), an electronic message is effective when received even if no individual is aware of its receipt. If an electronic message initiated by a party or an electronic agent evokes an electronic message in response, a contract exists:

(1) a response signifying acceptance is received; or

(2) if the response consists of furnishing the information or access to the information, when the information or notice of access is received, unless the originating message prohibited that form of response.

(b) If the originator of an electronic message requests or has agreed with the addressee

that receipt be acknowledged electronically, the following rules apply:

(1) A message expressly conditioned on receipt of an acknowledgment does not bind the originator until acknowledgment is received and expires if acknowledgment is not received within a reasonable time after the message was sent.

(2) If the message was not expressly conditioned on acknowledgment and acknowledgment is not received within the time specified for receipt or, in the absence of a specified time, within a reasonable time after the message was sent, on notice to the other party, the originator may:

(i) treat the message as expired and ineffective; or

(ii) specify a further time for acknowledgment and, if acknowledgment is not received within that time, treat the message as expired and ineffective.

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

Source: 2B-119 (Feb. 1998).

SECTION 2-217. OFFER AND ACCEPTANCE; ELECTRONIC AGENTS.

(a) Operations of one or more electronic agents which confirm the existence of a contract, or indicate agreement, form a contract even if no individual was aware of or reviewed the actions or results.

(b) In an automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents. A contract is formed if the interaction results in the electronic agents engaging in operations that confirm the existence of a contract or indicate agreement. The terms of the contract are determined under

Section 2B-209(b).

(2) A contract may be formed by the interaction of an electronic agent and an individual.

(A) A contract is formed if an individual has reason to know that the individual is dealing with an electronic agent and the individual takes actions that

(i) the individual should know will cause the agent to perform, provide benefits, or permit use of the information or access that is the subject of the contract, or

(ii) are clearly indicated as constituting acceptance regardless of other expressions or actions by the individual to which the electronic agent cannot react.

(B) The terms of the contract are determined under Section 2B-207 or 2B-208, as applicable, but do not include terms provided by the individual in a manner to which the electronic agent could not react.

Source: 2B-120 (Feb. 1998)

PART 3

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

Prefatory note: Part 3 was not considered at the March, 1998 meeting of the Drafting Committee.

SECTION 2-301. HOW CONTRACT PRICE PAYABLE.

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

(b) If the price is payable in whole or in part in goods, each transferor is a seller under this article of the goods transferred.

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

SOURCE: Sales, Section 2-304.

Notes

1. In Part 3, former 2-301 is now 2-601, former 2-302 is now 2-105 and former 2-303 is now 2-108(c).

2. There are no substantive changes in 2-301. The revisions are to improve clarity. Thus, the section is divided into three subsections, the phrase “real property” is substituted for “realty,” see 2-107, and the phrase “this article applies to” is substituted for the phrases “obligations with reference to them” and “obligations in connection therewith.”

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

SECTION 2-302. PERFORMANCE AT SINGLE TIME.

(a) If all of a seller's performance can be rendered at one time, full performance must be tendered. The buyer’s duty to accept and pay arises only on tender of all of the goods or on the completion of full performance.

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

SOURCE: Sales, Section 2-307.

Notes

1. Subsection (a) expands former 2-307 to cover the seller’s performance of the contract, which may include tender of the goods, whether manufactured or not, and their assembly or installation. Full performance at one time by the seller is the default rule, unless there is an

agreement to the contrary, see 2-710(a), or subsection (b) applies, and is a condition to the buyer's duty to accept and pay.

If the seller's performance takes time to complete, the completed performance must be tendered before the buyer has a duty to accept and pay. See 2-606(a).

2. Subsection (b) provides an exception based upon the circumstances of the case. In short, the circumstances may create an installment contract. If circumstances do not justify the exception, subsection (a) applies and payment is not due until the seller has tendered all of the goods or completed full performance.

3. **CISG.** The seller's obligations regarding delivery of the goods are covered in Articles 30 through 33.

SECTION 2-303. OPEN-PRICE TERM.

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

(1) not agreed to or settled;

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

(3) to be fixed in terms of some agreed market or other standard as set or recorded

by a third party or agency and it is not so set or recorded. In these cases, the price is a reasonable price at the time for delivery.

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

(c) If a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party, the other party at its option may treat the contract as canceled or may fix a reasonable price.

(d) Where the parties intend not to be bound unless the contract price is fixed or agreed and it is not fixed or agreed, there is no contract. In that case, the buyer must return any goods already received or, if unable to do so, must pay their reasonable value at the time of delivery, and the seller must return any portion of the contract price paid on account.

SOURCE: Sales, Section 2-305.

Notes

1. There are no changes of substance in former 2-305. There is a slight revision in subsection (a) for clarity. Thus, the first sentence states that a contract may be concluded even though the price is not agreed and the second sentence states what the gap filler price is. Other revisions are made to neutralize gender and to eliminate the dreaded “such a case” phrase.

2. Is a contract “made, concluded, or “formed? Original 2-305 used “concluded. Consistency with terminology in Part 2, however, suggests that “formed” should be used.

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

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

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

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

SOURCE: Sales, Section 2-306.

Notes

1. There are minor revisions for clarity and style. The phrase “unless otherwise agreed” is deleted from subsection (b), as it is deleted where ever it appears in the current Article 2.

2. There is one substantive clarification in subsection (a). Unless there is some output or

requirements in good faith, the “unreasonably disproportionate” limitation does not apply. This is the effect of the second sentence. This change follows the recommendation of the PEB Study Committee and is consistent with recent case law.

3. Should the word “lawful” in subsection (b) be retained? Probably not. The exclusive dealing agreement may or may not be enforceable under code or non-code law and the use of “lawful” in subsection (b) appears to be surplusage.

4. Revised 2-304 accomplishes the following objectives.

First, it states the meaning of “output” and “requirements” terms when used in a contract for sale. Such terms do not cause a contract to fail for indefiniteness. See 2-203(c). The parties may agree upon a fixed quantity or no quantity or something in between. But unless the parties agree to measure all or part of the quantity by “output” or “requirements,” 2-304(a) does not apply. See *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, 925 S.W. 2d 759 (Tex. 1996)(holding that contested term was not a requirements or output contract).

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

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

Fourth, the question when a party with no actual output or requirements has acted in good faith is more difficult to answer. Some courts have drawn the line between decisions made

because the contract is simply unprofitable or too costly (bad faith) and those made because an event external to the contract has adversely affected the viability of the entire enterprise (good faith). The traditional definitions of good faith, see §2-103(1)(b) of the 1990 Official Text, do not clearly respond to this problem. At least one court has held, however, that bad faith is established if the party claiming no actual requirements fails to offer a reason for that situation. See Empire Gas Corp., *supra*.

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

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

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

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

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

SOURCE: Sales, Section 2-308.

Notes

1. There are no substantive changes in former §2-308. The phrase "unless otherwise agreed" is omitted and the section is divided for clarification into three subsections.

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

SECTION 2-306. TIME FOR PERFORMANCE NOT SPECIFIED.

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

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

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

Notes

1. Section 2-306 consists of former 2-309(1) and (2). Former subsection (3), dealing with termination of the contract, is now in 2-311.

2. Subsection (a) is subject to other provisions in this Article. See also 1-204. The word performance, a broader concept, is substituted for the phrase “shipment or delivery.”

3. In both subsections (a) and (b), the word “agreement” is substituted for “contract,” except for the last sentence of subsection (b). The word “agreement” refers to the bargain in fact of the parties and the word “contract” refers to legal effect.

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

SECTION 2-307. OPTIONS AND COOPERATION RESPECTING PERFORMANCE.

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

agreement.]

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

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

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

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

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

SOURCE: Sales, Section 2-311.

Notes

1. Subsection (a) follows former §2-311(1), but is broadened to include a contract that leaves particulars of performance open or to be fixed by agreement. This is consistent with the principle in 2-203(c) and 2-303. The word "enforceable" is substituted for "invalid." If the parties do not intend to form a contract until gaps are filled or particulars are specified, the agreement is not enforceable. 2-203(c).

The bracketed language, which has not been approved by the Drafting Committee, makes clear that if the agreement leaves particulars of performance to be fixed by agreement, the parties shall, at a minimum, make a good faith effort to reach agreement. If they fail to agree in good

faith, the gap can be filled by the court if the parties still intended to contract. Bad faith in negotiating, however, is a breach of contract.

2. Subsection (b) is new. It establishes an objective test for reviewing the exercise of discretion under a condition of satisfaction. Thus, if a party is honestly dissatisfied but a reasonable person would be satisfied, the other party's performance is conforming.

3. Subsection (c) is former 2-311(2), revised to eliminate reference to shipment terms in former 2-319. Those terms have been removed from Article 2.

4. Subsection (d) follows former 2-311(3).

5. There is no comparable provision in **CISG**.

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

(a) In this section, "letter of credit includes the obligation of an issuer or confirmer that is a financing agency.

(b) Failure of a party seasonably to furnish an agreed letter of credit is a breach of a contract for sale.

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

(d) The term "confirmed letter of credit" in a contract for sale means a letter of credit that is confirmed without cost to the beneficiary by a financing agency of good repute.

SOURCE: Sales, Section 2-325.

Notes

Former §2-325 has been revised to conform to the terminology of revised Article 5. The interface between Article 2 and Article 5 is still under review. See 2-102(a)(21).

There is no comparable provision in **CISG**.

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

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

Notes

1. Sections 2-319 through 2-324 are out of date with commercial practice and have been repealed. Revised 2-309 directs the courts to interpret shipping and delivery terms in the same manner as other contract terms, with particular reference to usage of trade, course of performance and course of dealing. The Incoterms of the International Chamber of Commerce, frequently used in international sales, may be relevant to the meaning of these terms.

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

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

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

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

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

(b) The following survive termination of a contract:

- (1) a right based on a previous breach or performance of the contract;
- (2) a term limiting the scope, manner, method, or location of the exercise of rights in the goods;
- (3) an obligation of confidentiality, non-disclosure, or non-competition;
- (4) an obligation to return or dispose of goods;
- (5) a choice of law or forum ;
- (6) an obligation to arbitrate or otherwise resolve disputes through alternative dispute resolution procedures;
- (7) a term limiting the time for commencing an action or for providing notice;
- (8) an indemnity term;
- (9) a limitation of remedy or modification or disclaimer of warranty;
- (10) any term limiting disclosure of information; and
- (11) other rights, remedies, or limitations if in the circumstances such survival is necessary to achieve the purposes of the parties.

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

SOURCE: Licenses, Section 2B-626.

Notes

Section 2-310 is new and follows 2B-626 (Dec. 1997). "Terminate" means "to end a contract or a part thereof by an act by a party under a power created by agreement or law, or by operation of the terms of the agreement for a reason other than for breach by the other party." 2-102(a)(29).

SECTION 2-311. TERMINATION; NOTIFICATION.

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

(b) A term dispensing with notification is invalid if its operation is unconscionable.

However, a term specifying standards for the nature and timing of notification is enforceable if the standards are not manifestly unreasonable.

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

Notes

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

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

There are three exceptions to this important default rule.

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

notice is not required.

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

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

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

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

SECTION 2-312. SALE BY AUCTION.

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

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

(c) A sale by auction is subject to the seller's power to withdraw the goods unless at the time the goods are put up or during the course of the auction it is announced in express terms that

the power to withdraw the goods is not reserved. In an auction where power to withdraw the goods is reserved, the auctioneer may withdraw the goods at any time until completion of the sale is announced. In an auction where power to withdraw the goods is not reserved, after the auctioneer calls for bids on an article or lot, the article or lot may not be withdrawn unless no bid is made within a reasonable time. In either case, a bidder may retract a bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

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

SOURCE: Sales, Section 2-328.

Notes

1. Section 2-311 makes three changes in former 2-328. First, subsection (b) clarifies that the auctioneer's discretion to reopen the bidding applies regardless of the method of completing the sale. Second, at the request of the auction industry, the concept of "power to withdraw the goods" is substituted for the phrase "with reserve" in subsection (c). The meaning of the latter phrase is ambiguous. Finally, subsection (d) clarifies the meaning of a forced sale. There are relatively few cases under former 2-328 and they reveal no significant problems of interpretation. For a focused analysis, see Jorge Contreras, *The Art Auctioneer: Duties and Assumptions*, 13 Hastings Comm./Ent. L. J. 717 (1991); Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 Wm. & Mary L. Rev. 501 (1988).

2. Operation and effect.

Subsection (a). In a "sale by auction" the auctioneer "invites price offers from successive bidders which it may accept or reject." Restatement (Second), Contracts §28(1). Although not specifically stated, an auctioneer can condition delivery upon payment for all goods

sold, even if the sale is in separate lots. If each lot is a separate sale, bidders who arrive late are on constructive notice of the terms of later sales. Restatement (Second), Contracts § 28(2).

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

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

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

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

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

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

added.

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

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

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

Auctions, warranties and disclaimers.

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

An auctioneer who does not disclose that it is acting on behalf of a principal may make any warranty described in Part 4, including a warranty of title. Otherwise, applicable warranties are made to the buyer by the seller, the auctioneer’s principal. Section 2-403 provides that express warranties may be made by a seller (auctioneer or principal) to an immediate buyer (the bidder), both through representations made at or just prior to the auction or in a “medium for communication to the public, including advertising. As a practical matter, implied warranties are rarely made at auctions and, in any event, it is the usual practice of the auction industry to offer goods “as is, where is with no implied warranties made by the auctioneer. This practice is validated and facilitated in revised 2-406.

PART 4.

WARRANTIES

SECTION 2-401. DEFINITIONS. In this part:

(1) "Damage" means all loss resulting from a breach of warranty, including incidental and consequential damages.

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

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

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

(5) "Representation" means a description, an affirmation of fact relating to the goods, or a sample or model of the goods.

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

Notes

1. In Revised Article 2, the warranty provisions, several of which have been extensively revised, are placed in a separate Part 4. The objective in most sections has been to clarify or restate the law of warranty not to expand the seller's liability or to make it more difficult for a seller to control or limit what is said about the goods, whether to an immediate buyer or the public, or to limit or exclude a warranty made.

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

The first is the almost universal acceptance of the so-called "economic loss" rule. Under a common version of this judge-made doctrine, the law of torts does not apply if the non-conforming goods cause only disappointed expectations or damage to the goods sold. In these cases, it is the law of contracts, represented by Article 2, that controls. Thus, the buyer of goods

produced by a remote seller but purchased from a retailer or dealer is limited by the Code's contract rules on privity, notice, disclaimers and the statute of limitations unless it has sufficient bargaining power to protect itself.

The second is the increasing use of advertising and other methods to communication to stimulate sales, whether made directly to buyers or through retailers and dealers. If the original Article 2 was based upon a different model of how contracts for sale were negotiated and concluded, revisions should consider whether the older model of sales law is still viable. For example, since many sales are concluded after advertising to the public or through warranties passed through a dealer by a manufacturer, shouldn't the revised Article 2 codify the developed law in this area rather than leave it to the common law process? New Section 2-408 answers that question in the affirmative.

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

The definition of "damage" includes all direct, incidental and consequential damages available to a buyer for breach of warranty by a seller. See 2-804.

The definition of "representation" in the July, 1997 Draft of 2-401(5) has been narrowed by deleting the phrase "demonstration or depiction."

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

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

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

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

(b) A warranty under subsection (a) may be disclaimed or modified only by specific language or by circumstances which give the immediate buyer reason to know that the seller does not claim title or purports to sell only such right or title as the seller or a third party may have. [In an electronic transaction that does not involve review of the record by an individual, language is

sufficient if it is conspicuous and related to the warranty of title against infringement].

Otherwise, language in a record is sufficient to disclaim or modify warranties under this section if it is conspicuous and states "There is no warranty of title or against infringement in this sale" or words of similar import.

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

[(d) A seller's warranty under this section, made to an immediate buyer, extends to any member of the family or household or a guest of or a transferee from an immediate consumer buyer that may reasonably be expected to use or be affected by the goods and that is damaged a breach of warranty. The rights and remedies of persons protected under this subsection against the seller for breach of warranty are determined by the terms of the contract between the seller and the immediate buyer and Section 2-408(f)(2) and (3).]

_____(e) A right of action for breach of warranty under this section accrues under Section 2-814(b) when the buyer or transferee discovers or should have discovered the breach. [In no event, however, may a claim for breach of warranty under this section be brought against the seller more than [____] years after tender of delivery to the buyer.]

SOURCE: Sales, Section 2-312.

Notes

Section 2-402 was not considered at the March, 1998 meeting of the Drafting Committee.

1. In Section 2-402 and Part 4, seller includes an “auctioneer or liquidator that fails to disclose that it is acting on behalf of a principal. 2-401(6). See *Jones v. Ballard*, 573 So.2d 783 (Miss. 1990). There is no requirement, however, that the auctioneer or liquidator reveal the name of its principal either before or at the time of the auction. See Section 2-312 on auctions.

2. In subsection (a)(1), the phrase starting with “and does is new and clarifies when there is a sufficient cloud on the title to breach the warranty. Subsection (a)(2) follows 2-312(1)(b), except that “received, a defined term, replaces “delivered.

A warranty that the "title conveyed is good and its transfer rightful," see *Sumner v. Fel-Air, Inc.*, 680 P.2d 1109 (Alaska 1984), covers cases where the title is good but the transfer is not rightful but not necessarily those where title is burdened by colorable "clouds" that affect the value of the goods. See, e.g., *Frank Arnold KRS, Inc. v. L.S. Meier Auction Co., Inc.*, 806 F.2d 462 (3d Cir. 1986)(two law suits contest title); *Jeanneret v. Vichey*, 693 F.2d 259 (2d Cir. 1982)(export restrictions in country from which painting was taken affect value); *Colton v. Decker*, 540 N.W.2d 172 (S.D. 1995)(conflicting vehicle identification numbers). As one court put it, there "need not be an actual encumbrance of the purchaser's title or actual disturbance of possession to permit a purchaser to recover for a breach of warranty of title when he demonstrates the existence of a cloud on his title, regardless of whether it eventually develops that a third party's title is superior." The policy is that a purchaser "should not be required to engage in a contest over the validity of his ownership." *Maroon Chevrolet, Inc. v. Nordstrom*, 587 So.2d 514, 518 (Fla.App. 1991)(conflicting vehicle identification numbers).

3. Subsection (b) deals with the disclaimer or modification of the warranty. The first sentence follows 2-312(2), except that “may is substituted for “will, the exclusion or modification operates against the “immediate buyer, 2-401(3), and the word “seller is substituted for “person selling. [The second sentence, which is new, covers disclaimers in an electronic transaction that is not reviewed by an individual. This language is bracketed until Article 2B’s terminology and definitions are finalized.] The third sentence, which is also new, provides a “safe harbor for disclaimers in a record. See 2-406(c).

The Drafting Committee deleted the phrase "in writing" from an earlier draft of subsection (b). The language of disclaimer need not be in a record. If the disclaimer is in a record, however, the language, if conspicuous and following the suggested wording in the second sentence, secures a "safe harbor" for the disclaimer.

4. Subsection (c) follows 2-312(3), except that the phrase “unless otherwise agreed is deleted and minor style changes are made.

5. Subsection (d), which is new, follows 2-409(a) as revised at the March, 1998 meeting of the Drafting Committee. The warranty is extended only to a class of persons associated with or a transferee from an immediate consumer buyer. A protected person’s remedies are determined by the contract between the seller and the immediate buyer and, to the extent not agreed, by the

applicable principles in 2-408(f). The cases are divided on whether lack of privity is a defense in warranty of title suits. See Note, 45 Bus. Lawyer 2289 at 2300 (1995); *Mitchell v. Webb*, 591 S.W.2d 547 (Tex.Civ.App. 1979)(lack of privity no defense).

6. Subsection (e), which is new, states when a cause of action for breach of this warranty accrues for purposes of the statute of limitations, 2-814(2). The answer is when the buyer “discovers or should have discovered the breach not when the goods are tendered. The bracketed language proposes an overall tolling period for the cause of action but leaves the exact time open for decision by the Drafting Committee.

Without more, the statute of limitations for breach of warranty under subsection (a) runs from when the cause of action accrues under 2-814(a). Cf. *Foxley v. Sotheby's, Inc.*, 893 F. Supp. 1224 (S.D.N.Y. 1995)(suit against auctioneer claiming fraud in sale of forged art work). Under the Uniform Sales Act the statute ran from the time of delivery or when quiet possession was disturbed. See *Menzel v. List*, 246 N.E.2d 742 (N.Y. 1969). The question is whether in warranty of title disputes the statute should run from when the breach was or should have been discovered. Arguably, the latter time, capped by an appropriate tolling limitation, is proper. See *Balog v. Center Art Gallery-Hawaii, Inc.*, 745 F. Supp. 1556 (D.Haw. 1990)(warranty that art work "genuine" explicitly extended to future performance). At the March, 1996 meeting, the Drafting Committee agreed upon a "discovery" statute of limitations with a four year period to bring suit after the cause of action accrues. That decision is implemented in subsection (e). Section 2-814, however, still governs all other statute of limitations issues. There is no overall time limitation, such as a provision that no action can be brought ten years after the goods were delivered to the immediate buyer regardless of when the nonconformity was discovered. The reporters recommend that such a limitation be added.

SECTION 2-403. EXPRESS WARRANTY TO IMMEDIATE BUYER.

_____(a) Express warranties by a seller to an immediate buyer are created [only] as provided by this section. Any representation or promise made by the seller to the immediate buyer, including those made in any medium of communication to the public, which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the representation or promise or, with respect to a sample, that the whole of the goods will conform to the sample. The express warranty is breached if the goods do not conform to the representation at the time when the tender of delivery is completed or when a promise that the goods will perform as promised is not performed when due.

_____ (b) It is not necessary to create an express warranty that the seller use formal words such as “warranty” or “guarantee” or have a specific intention to make a warranty. However, an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create an express warranty.

_____ (c) A representation or promise made under subsection (a) becomes part of the basis of the bargain unless:

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

(2) the immediate buyer knew of the representation or promise and did not believe that it was true; or

(3) where the representation or promise was made in a medium for communication to the public, including advertising, the immediate buyer did not know of it at the time of the agreement.

Proposed Comment

_____ 1. A reasonable person in the position of the immediate buyer would not believe that a seller’s representation or promise became part of the basis of the bargain if such a person would not have relied on the representation or promise [in entering the contract or any modification thereof.]

2. Subsection (a) of former 2-404 (March, 1998), stated below, is bracketed for further discussion. The rest of that section is deleted.

_____ [(a) If a seller makes a representation or promise relating to the goods to an immediate buyer, the representation or the promise becomes part of the agreement unless a reasonable person in the position of the immediate buyer would not believe that the representation or promise became part of the agreement or would believe that the representation was merely of the value of the goods or purported merely to be the seller’s opinion or commendation of the goods. It is not necessary to create an obligation under this section that the seller use formal words such as “warranty” or “guarantee” or have a specific intention to make a warranty.]

SOURCE: Sales, Section 2-313.

Notes

1. Section 2-403 was revised and the structure stated above was unanimously approved at the March, 1998 meeting of the Drafting Committee.

2. The first sentence of subsection (a) is new and restricts express warranties to immediate buyers to those created under 2-403. A motion to delete this sentence was defeated by a close vote. The bracketed language [only] and preserves the wisdom of this restriction for further discussion.

The language in the second sentence confirms that express warranties can be made through communications, such as advertising, by sellers to immediate buyers.

The “part of the basis of the bargain” test was restored in subsection (a). Unlike current 2-313, however, subsection (c) states when a representation or promise becomes part of the basis of the bargain. This should help to clarify disagreement over what that phrase means. See e.g., Holdych & Mann, *The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties*, 45 De Paul L. Rev. 781 (1996); Buettner v. R.W. Martin & Sons, Inc., 47 F.3d 116 (4th Cir. 1995) (Virginia law); Tomie Farms, Inc. v. J.R. Simplot, Inc., 862 P.2d 299 (Idaho 1993); Weng v. Allison, 678 N.E.2d 1254 (Ill.App. 1997).

The last sentence of subsection (a) on when an express warranty or promise is breached follows the last sentence of 2-403(b) (March, 1998).

3. Subsection (b) reverts to 2-313(2) of current Article 2. Under subsection (a) of the March, 1998 Draft of 2-403, a representation or promise became part of the agreement “unless a reasonable person in the position of the immediate buyer “would believe that the representation was merely of the value of the goods or purported merely to be the seller’s opinion or commendation of the goods. The reversion, although preserving the distinction between express warranty and puffing, does not provide a test to distinguish the two. Presumably a buyer must still be reasonable under the circumstances in believing that an express warranty rather than puffing was made. Moreover, the revision does not state who has the burden of proof on the puffing issue.

There are a number of factors relevant to drawing the line between affirmations and puffing. For example, the buyer might be unreasonable if the seller's representations taken in context (1) were verbal rather than written, (2) were general rather than specific, (3) related to the consequences of buying rather than the goods themselves, (4) were "hedged" in some way, (5) related to experimental rather than standard goods, (6) concerned some aspects of the goods but not a hidden or unexpected non-conformity, (7) were phrased in terms of opinion rather than fact, or (8) were not capable of objective measurement. See *Federal Signal Corp. v. Safety Factors*,

Inc., 886 P.2d 172 (Wash. 1994), where the court held that the trial court erred in not making findings of fact where the seller stated that a new product was "better than" an earlier, comparable model. See also, *Jordan v. Pascas, Inc.*, 37 F.3d 1181 (6th Cir. 1994)(representations about strength of fiberglass roof which shattered and caused personal injury when the truck rolled over were "puffing" as a matter of law).

4. Subsection (c) states that a representation or promise becomes part of the basis of the bargain unless the stated exceptions are satisfied.

Subsection (c)(1) states a "reasonable person" exception and follows language in the first sentence of 2-403(a) (March, 1998).

Subsection (b)(2) states a subjective exception. An immediate buyer who knows of the representation must also believe that it is true. "Promise" is deleted from this subsection because by definition a promise is not made if the promisee is not justified in understanding that a commitment has been made. Restatement, Second, Contracts §2(1). There is disagreement over whether subsection (b)(2) is either good law or good policy. See *Rogath v. Siebenmann*, 129 F.3d 261 (2d Cir. 1997); Ivan L. Preston, *Regulatory Positions Toward Advertising Puffery of the Uniform Commercial Code and the Federal Trade Commission*, 16 J. Public Policy & Marketing 336 (1997).

Subsection (b)(3) states that an immediate buyer who claims an express warranty created by advertising must know of the representation or promise at the time of the agreement.

5. Revised 2-403 says nothing about who has what burden of proof, although the "unless" phrasing of subsection (c) suggests that the seller must take the initiative to raise the exceptions.

The proposed Comment states that the ultimate question is whether a reasonable person would have relied upon the description, representation or promise in entering the contract or any modification thereof. But relied on it for what purpose? Is this the same as saying as subsection (b)(1) does that a person in the position of the immediate buyer must be reasonable in believing that the description became part of the agreement?

6. "Agreement" is defined as the "bargain of the parties in fact." 1-201(3). So "basis of the bargain" is another way of saying "basis of the agreement." Since agreements can be made both before and after a contract is formed, there is no artificial time at which an express warranty must be made. They may be made to modify a contract if 2-209(1) is satisfied.

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

(a) Subject to Sections 2-406 and 2-407, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

Under this section the serving for value of food or drink to be consumed on the premises or elsewhere is a sale.

(b) Goods to be merchantable must at least:

- (1) pass without objection in the trade under the agreed description;
- (2) in the case of fungible goods, be of fair, average quality within the description;
- (3) be fit for the ordinary purposes for which goods of that description are used;
- (4) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;
- (5) be adequately contained, packaged, and labeled as the agreement or circumstances may require; and
- (6) conform to any promises or affirmations of fact made on the container or label.

(c) Subject to Section 2-408, other implied warranties may arise from course of dealing or usage of trade.

SOURCE: Sales, Section 2-314.

Notes

1. Subsection (a) conforms to 2-314(1). Note that the implied warranty of merchantability may be disclaimed or modified under 2-406(b), (c) and may be subordinated by an express warranty under 2-407(3).

2. Subsection (b) follows 2-314(2) with the following changes: (a) The phrase “agreed description” rather than “contract description” is used in (b)(1); (b) The phrase “goods of that

description rather than “for which such goods is used in (b)(3). This emphasizes the importance of the agreed description in determining fitness for ordinary purposes; (c) The phrase “or circumstances is added after “the agreement in (b)(5). The “circumstances may indicate to the seller that the buyer might be misled about the goods and require an adequate label; and (d) The word “any replaces “the in the first line and the phrase “if any is deleted.

3. Subsection (c) follows 2-314(3).

4. Personal injury: The Continuing Saga.

Without more, a seller who makes and breaches an implied warranty of merchantability can be liable for consequential damages to person or property proximately resulting from the breach, if the conditions of Section 2-806 are satisfied. See 2-806(3), where personal injury damages are excluded from the “disproportion limitation. Except for 2-806(3) and 2-810(c), where an exclusion of liability for consequential injury to person is prima facie unconscionable, revised Article 2 does not distinguish between economic loss and damage to person or property. The special privity rules for personal injury in former 2-318 have been deleted and proposed Section 2-319 in the July, 1996 Draft, which provided special rules for personal injury claims resulting from a breach of warranty, was not approved.

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

The consensus is that the tension should be resolved in a comment to 2-404 rather than in the text of Article 2. The following statement has been approved in principal:

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

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

SECTION 2-405. IMPLIED WARRANTY OF FITNESS FOR PARTICULAR

PURPOSE. Subject to Section 2-406, if a seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods are fit for that purpose.

SOURCE: Sales, Section 2-315.

Notes

Section 2-405 follows 2-315.

SECTION 2-406. DISCLAIMER OR MODIFICATION OF WARRANTY.

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

_____(b) Unless the circumstances indicate otherwise, an implied warranty arising under Sections 2-404 and 2-405 is disclaimed or modified by expressions like “as is” or “with all faults” or other language or conduct which in common understanding [makes it clear that the seller assumes no responsibility or a limited responsibility for the quality or fitness of the goods] [calls the buyer’s attention to the exclusion of warranties and makes it plain that there is no implied warranty.] An implied warranty may also be disclaimed or modified by course of performance, course of dealing, or usage of trade.

(c) In other than consumer contracts, conspicuous language in a record disclaiming or modifying an implied warranty is sufficient if:

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

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

[(d) Conspicuous language in a record disclaiming or modifying an implied warranty is also sufficient if:

(1) in the case of the implied warranty of merchantability, the language states that “unless otherwise provided in this contract, the seller makes no promises about and will not be responsible for the quality of the goods.

(2) in the case of the implied warranty of fitness, the language states that “unless otherwise provided in this contract, the seller makes no promises that the goods will be fit for any particular purpose for which you may be purchasing these goods.]

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

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

SOURCE: Sales, Section 2-316.

Notes

1. Subsection (a) follows 2-316(1), with minor revisions for style and clarity. The words “disclaim and “modify replace “negate and “limit to conform with the section title and usage throughout revised Article 2.

2. Subsection (b), first sentence, is drawn in part from 2-316(3)(a) and states a general standard to which disclaimers and modifications of implied warranties, whether or not in a record, must adhere to be effective. It applies to commercial and consumer contracts, but does not provide a safe harbor. Safe harbors are provided in subsections (c) and (d).

The second sentence follows 2-316(3)(c).

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

3. Beyond the minimum standards expressed in subsection (b), subsections (c) and (d) provide safe harbors for terms disclaiming or modifying implied warranties. Compliance with these safe harbors satisfies the requirements of subsection (b).

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

Safe Harbor #1. Subsection (c) is drawn from 2-316(2) and provides an optional safe harbor to disclaim or modify implied warranties in a record in commercial contracts.

In subsection (c), the language for both types of implied warranty must be conspicuous and contained in a record. In addition, to disclaim merchantability the language must mention merchantability, subsection (c)(1), and to disclaim fitness the language must satisfy subsection (c)(2).

Safe harbor #2. At the March, 1998 meeting, the Drafting Committee agreed that the “plain-English language in subsection (e)(2) of the March, 1998 Draft was not appropriate to provide a safe harbor to disclaim implied warranties in consumer contracts. It has been deleted.

At one point, the bracketed language in subsection (f)(2) [see bracket subsection] was approved. Subsequently, the Drafting Committee voted to displace the bracketed language with a new safe harbor for consumer contracts based upon former 2-316(3)(a).

The Reporters, in an effort to provide a clear draft for further discussion, have deviated in two respects from the Drafting Committee vote. First, the language of former 2-316(3)(a) now appears, with minor revisions, in subsection (b), which applies to all contracts and, because of its open-ended character, is not a safe-harbor. Second, subsection (d) is a revised safe harbor for both consumer and commercial contract based upon the bracketed language in bracketed subsection (f)(2), which at one point received substantial support from the Drafting Committee.

If revised subsection (d) is approved, the complex “pass through disclaimer permitted in yellow subsection (f)(1) will not be necessary.

3. Subsection (e) follows 2-316(3)(b), with revisions to deal with gender issues.

4. Subsection (f) follows 2-316(4).

5. Subsection (f) in the March, 1998 Draft is preserved below for discussion.

[March, 1998 Draft: (f) Words [Language] in a record in a consumer contract are sufficient to disclaim or modify an implied warranty under subsection (b) only if:

(1) At the time of contracting, a seller in good faith passes through to an immediate buyer an express warranty obligation created by a remote seller in the distributive chain [Section 2-408(b)] that [is reasonable in scope, duration and remedies] [satisfies reasonable commercial standards of fair dealing in the trade] and there is conspicuous language stating, for example, “You are receiving an express warranty obligation from another seller instead of any implied warranty that the goods are merchantable [or fit for any particular purpose] from us; or

(2) [Conspicuous language in a record states that “unless otherwise provided in this contract, the seller makes no promises about or will not be responsible for the quality of the goods.]

(3) which language the consumer has separately authenticated states: [“Unless we say otherwise in the contract, we make no promises about the quality or usefulness of the product you are buying. It may not work or it may not be fit for any specific purpose that you may have in mind.]

SECTION 2-407. CUMULATION AND CONFLICT OF WARRANTIES.

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

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

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

(3) [Except in a consumer contract] Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

SOURCE: Sales, Section 2-317.

Notes

This section follows 2-317, with the following exceptions: (a) It is suggested that the word “prevails” is more appropriate than “dominant” in the first sentence; (b) The phrase “or a model” is added in (2) to maintain consistency with language used in (1); and (c) The phrase “except in a consumer contract” in (3) is bracketed for possible deletion. Given the eased requirements for disclaimers in consumer contracts, the question is whether 2-317(3) provides sufficient disclosure through rules of interpretation to consumer buyers.

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

_____ (a) In this section, “goods” means new goods and goods sold as new goods.

(b) If a seller makes a representation or a promise relating to goods in a record packaged with or accompanying the goods and the seller intends the record to be furnished to a remote buyer and the record is so furnished, the following rules apply:

(1) The seller has an obligation to the remote buyer that the goods will conform to the representation and that the goods will perform as promised unless:

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

(B) The representation or promise is merely of the value of the goods or is merely the seller’s opinion of commendation of the goods.

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

(A) any member of the family or household or any guest of a remote

consumer buyer;

(B) a transferee from the remote buyer and any subsequent transferee.

However, for purposes of this subsection, the seller may limit its obligation to the remote buyer or may limit extension to a particular person or transferee or a class of persons or transferees.

Any such prohibition or limitation is not effective unless it is communicated to the remote buyer with the record that creates the obligation.

_____ (c) If a seller makes a representation or a promise relating to the goods in a medium for communication to the public, including advertising, the seller has an obligation to a remote buyer that the goods will conform to the representation or will perform as promised if:

(1) The remote buyer purchased the goods from a person in the normal chain of distribution with knowledge of the representation or promise and with the expectation that the goods will conform to the representation or that the goods will perform as promised, and

(2) A reasonable person in the position of the remote buyer would expect the goods to conform to the representation or that the goods would perform as promised.

(d) An obligation may be created under this section even though the seller does not use formal words, such as “warranty” or “guaranty.”

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

_____ (f) The following rules apply to the remedies for breach of an obligation created under this section and, unless otherwise stated, under Section 2-409:

(1) A seller under this section may modify or limit the remedies available to

persons to whom an obligation is created, provided that the modification or limitation is communicated to the remote buyer with the representation or promise or no later than the time of sale.

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

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

(B) the measure of damages for breach of a promise that the goods will perform as promised is the value of the promised performance less the value of any performance made.

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

(4) An action for breach of an obligation under this section accrues for purposes of Section 2-814 when the obligation is breached as provided in subsection (e).

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

SOURCE: New.

Notes

1. **Overview.** Section 2-408, which was substantially revised at the March, 1998 meeting of the Drafting Committee, follows case law and practice in extending a seller's express warranties regarding new goods to remote buyers and others under subsection (b), dealing with "pass through" warranties, and subsection (c), dealing with advertising and other communications to the public. The structure and test for establishing an obligation follows that stated in 2-403(b). Subsection (e) states when the obligation is breached and subsection (f) states

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

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

3. At the March, 1998 meeting, the Drafting Committee returned to the so-called "Vermont Compromise" for obligations created by sellers to remote buyers through communications [descriptions, representations, promises] to the public, including advertising.

First, the remote buyer must have knowledge of the communication.

Second, the remote buyer must purchase the goods from a person in the normal chain of distribution, usually a retailer.

Third, the remote buyer must have an expectation that the goods will conform to the communication.

Fourth, the seller has an obligation to only the remote seller that the goods will conform unless a reasonable person in the remote buyer would not expect the goods to conform.

Finally, the seller may modify or limit available remedies to the remote buyer for breach if the limitation is communicated to the remote buyer no later than the time of sale. See subsection (f)(1). Otherwise, the seller is directly liable to the remote buyer under subsection (f).

3. Who besides the remote buyer is entitled to protection under 2-408?

Under subsection (b) the warranty extends to the remote buyer and also to the family, household or guests of a remote consumer buyer and to transferees of any remote buyer. This extension, however, is subject to the seller's limitation of user contained in the warranty package.

Under subsection (c), an obligation created by advertising is made only to a remote buyer who qualifies under subsection (c).

4. Subsection (e) states when an obligation created under 2-408 is breached. Assuming that the goods do not conform at the time they left the seller's control, the breach occurs when they are received by the remote buyer or when any promise is not performed. For statute of limitation purposes, the cause of action accrues when the obligation is breached whether or not the remote seller knows of the breach. See 2-814(a).

5. Subsection (f) states the statutory remedies that are available to a remote buyer for breach of an obligation created under 2-408.

Subsection (f)(1) provides that a seller may modify or limit remedies available for breach of the limitation under either subsection (b) or (c) but requires disclosure at the time of the representation or promise or no later than at the time of sale. In short, the benefits and limitations of the express warranty are treated as a package.

The relationship between 2-408(b) and proposed 2-204(e) where, in a direct contractual relationship, the seller can disclose or communicate additional terms after the duty to pay arises which become part of the contract if the buyer assents with knowledge or after an opportunity to review, should be clarified.

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

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

6. The Drafting Committee deleted the "offset" remedy in subsection (f)(4) of the July, 1994 Draft.

7. For statute of limitations purposes, subsection (f)(4) refers to 2-814, subsection (a) of which refers to 2-408(e). Thus, an action under 2-408 accrues is timely under 2-408 if it is commenced within four years of the breach as defined in subsection (e).

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

(a) A seller's express or implied warranty made to an immediate buyer extends to any member of the family or household or a guest of or a transferee from an immediate consumer buyer that may reasonably be expected to use or be affected by the goods and that is damaged by

a breach of warranty.

(b) The scope of any warranty extended under subsection (a) and the remedies for breach may be limited by the enforceable terms of the contract between the seller and the immediate buyer. To the extent not limited, the scope of the warranty is determined by Sections 2-403, 2-404 and 2-405 and the remedies for breach of warranty are determined by Section 2-408(f)(2) and (3).

(c) Nothing in this Article diminishes the rights and remedies of any third party beneficiary or assignee under the law of contracts or of persons to which goods are transferred by operation of law or displaces any other law that extends an express or implied warranty to or for the benefit of a remote buyer, transferee, or other person.

(d) A cause of action arising under this section accrues for purposes of Section 2-814 when the goods are received by the immediate buyer if the goods, at the time they left the seller's control, did not conform to any warranty made.

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

SOURCE: Sales, Section 2-318.

Notes

1. Subsection (a) follows but is narrower than Alternative C to 2-318. Express or implied warranties made by a seller to the immediate buyers are extended horizontally to a defined class around an immediate consumer buyer and transferees from the immediate buyer, whether a consumer or not, if these protected persons “may reasonably be expected to use or be affected by the goods and are “damaged by breach of warranty. The warranties under this section do not extend vertically down the chain of distribution to a remote buyer. Unlike the express warranties and promises extended under 2-408, the warranties under 2-409 derive from and depend upon the contract with the immediate buyer. If no warranties are made to the immediate buyer, no warranties are extended under this section. The derivation, however, is based upon public policy and the presumed intention of the seller and the immediate buyer. Compare 2-402(d) on the warranty of title.

2. Subsection (b) has been added to clarify that the rights and remedies of protected persons under subsection (a) can be limited by enforceable terms in the contract between the seller and the immediate buyer. Thus, a term enforceable against the immediate buyer disclaiming the implied warranty of merchantability or excluding all liability for consequential damages is effective against protected persons. If there are no valid limitations, however, the scope of warranties extended is determined by the warranty sections, 2-403, 404 and 405, and the remedies are determined by the provisions of 2-408(f)(2) and (3). [Subsection (f)(1) is not applicable under 2-408 and the statute of limitations issue in 2-408(f)(4) is covered in subsection (d).] Thus, after it is determined that a warranty is extended and breached under 2-409 and that remedies are not limited by the contract between the seller and the immediate buyer, the protected person has the same remedies against the seller as a protected person would have under 2-408(f), such as the statutory exclusion of liability for consequential lost profits.

3. Subsection (c) states that 2-408 does not diminish or displace other law extending express or implied warranties from a seller to remote buyers and other protected persons. Subsection (c)(1) refers to a well established body of law. Subsection (c)(2) preserves the power of courts and legislatures to extend warranties even though not specifically authorized by this section.

4. Subsections (d), which is new, and (e) further limit the scope of subsection (a).

Under subsection (d), the statute of limitations begins to run no later than when non-conforming goods are delivered to the immediate buyer. The non-conformity, however, must exist at the time the goods left the seller’s control.

Under subsection (e), the parties can by agreement limit the operation of 2-409 if the seller has a “substantial interest based upon the nature of the goods in having a warranty extend only to the immediate buyer.

PART 5

Prefatory note: Part 5 was not considered by the Drafting Committee at the March, 1998 meeting.

TRANSFERS, IDENTIFICATION, CREDITORS, AND GOOD-FAITH PURCHASERS

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

(a) Each section of this article that establishes the rights, obligations, and remedies of the seller, the buyer, purchasers, or other third parties applies regardless of title to the goods or any statute or rule of law that possession or the absence of possession is fraudulent, unless expressly provided otherwise.

(b) Subject to Section 2-104(a)(1), if the location of title to goods is material, the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract. Unless otherwise explicitly agreed, the buyer acquires by their identification a special property interest as limited by this article [Act].

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

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

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

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

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

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

(c) Unless otherwise explicitly agreed, where delivery is to be made without moving goods;

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

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

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

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

Notes

1. Subsection (a) follows the first sentence in 2-401, except that for clarity and precision the underlined language replaces the language in the brackets. For example, “person” rather than “party” is used because “party” is defined as a “person that has engaged in a transaction or made an agreement,” Revised 1-201(28).

Subsection (a) adds the words “or possession” to clarify that the article’s provisions apply regardless of who has title or possession and regardless of whether another rule of law might make possession or its absence fraudulent.

2. Subsection (b) follows 2-401(1), with minimal revisions stated in the text. Note that

the phrase “otherwise explicitly agreed” is retained in this case. See 2-108.

The different concepts in former 2-401(1) and (2) are integrated into one subsection and are broken into sub-subsections out for clarity. There are no changes in substance.

3. Subsection (c) follows 2-401(3)

4. Subsection (d) follows 2-401(4)..

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

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

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

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

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

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

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

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

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

SOURCE: Sales, Section 2-501.

Notes

1. There are no changes of substance in former 2-501. Subsection (a) follows 2-501(1) but starts by stating what identification is and when it occurs. The different situations are broken out for clarity.

2. Subsection (b) follows the first sentence of 2-501(1) and states the consequences of identification. Subsection (c) follows 2-501(2), with minor revisions for clarity, and subsection (d) follows 2-501(3).

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

(a) If a seller or buyer assigns contract rights, the following rules apply:

(1) All rights of a seller or buyer may be assigned unless the assignment would materially change the duty of the other party, increase materially the burden or risk imposed on that party by the contract, or impair materially that party's likelihood of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of its entire obligation can be assigned despite an agreement otherwise. [If there is a conflict between this subsection and Section 9-404 (of Revised Article 9), Section 9-404 governs.]

(2) Subject to Article 9, an assignment of rights under subsection (a)(1) is effective even if a contractual term prohibits the assignment of rights. However, the assignment

is a breach of contract for which damages under this article are available, whether or not the contract so provides.

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

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

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

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

(4) A contractual term prohibiting the delegation of duties otherwise delegable under subsection (b)(1) is enforceable, and an attempted delegation is not effective. Unless the circumstances otherwise indicate, a prohibition of assignment or transfer of "the contract" must be construed as barring only the delegation to the assignee or transferee of the assignor's duty to perform.

(c) An assignment or transfer of "the contract" or "all my rights under the contract", or an assignment or transfer in similar general terms, is an assignment of rights and, unless the language or the circumstances indicate the contrary, as in an assignment for security, is also a

delegation of the assignor's duty to perform the contract.

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

Notes

1. Section 2-503, formerly 2-210, has been revised for clarity and completeness. Subsection (a)(1) follows 2-210(2), with the style revisions noted. The bracketed language coordinates with Section 9-404 of revised Article 9.

Subsection (a)(2), which is new, clarifies that an agreement prohibiting an assignment of rights is not effective to block an assignment but the assignment may be a breach of contract. See 2A-303. See also 9-318(4) (1995 Official Text), Restatement, Second, Contracts §322.

2. Subsection (b) integrates the parts of 2-210 dealing with delegation of duties without any change in substance. Subsection (b)(1), which follows 2-210(1), states when duties may be delegated and the effect of delegation. Subsection (b)(2) follows language after the first comma in 2-210(4), subsection (b)(3) follows 2-210(5), and subsection (b)(4) amplifies 2-210(3).

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

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

(b) A person with voidable rights or title acquired in a purchase of goods from a seller has power to transfer good title to a good-faith purchaser for value to whom the goods have been delivered. Voidable rights or title are acquired under this subsection even if:

- (1) the transferor was deceived as to the identity of the purchaser;
- (2) the delivery was in exchange for a check later dishonored;
- (3) it was agreed that the transaction was to be a cash sale; or
- (4) the delivery was procured through fraud punishable as larceny under criminal

law.

(c) Any entrusting of possession of goods to a merchant that deals in goods of that kind gives the merchant and a buyer from that merchant power to transfer all rights and title of the entruster and to transfer the goods free of any security interest of the entruster under Article 9 to a buyer in the ordinary course of business.

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

SOURCE: Sales, Section 2-403.

Notes

1. Subsection (a), which states the common law rule of *Nemo Dat*, follows the first sentence of 2-403(1). The rule is expanded to include “rights as well as title and its scope is expressly limited to exceptions in 2-504.

2. Subsection (b) follows the second and third sentences in 2-403(1), with the following revisions: (a) The voidable title exception depends upon delivery of the goods to the good faith purchaser and “delivery is now defined in 2-102(a)(11) to mean the “transfer of physical possession or control; and (b) The second sentence clarifies that the exception in the first sentence of subsection (b) is broader than and includes the four listed transactions.

3. Subsection (c), which follows 2-403(2), states the entrustment exception, which depends initially upon the definition of “entrusting. See subsection (d), which follows 2-403(3). There are two revisions of substance: (a) A buyer from a merchant is given the same power to transfer as the merchant to whom the goods were entrusted (a limited shelter), and (b) A merchant to whom goods subject to a perfected security interest were entrusted has power to transfer the goods free of the security interest even though that result would not follow from Article 9.

4. Former 2-403(4), stating the rights of “other purchasers or goods and of lien creditors is deleted as unnecessary.

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

SOLD.

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

(b) A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor a retention of possession or identification by the seller is fraudulent under any law of the state where the goods are situated. However, the retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(c) Except as otherwise provided in subsection (a) or Section 2-504(c), this article does not impair rights of creditors of the seller:

(1) under Article 9; or

(2) where identification to the contract or delivery is not made in current course of trade but is made in satisfaction of or as security for a pre-existing claim for money, security or the like under circumstances which under any law of the state where the goods are situated would, apart from this Article, constitute a fraudulent transfer or a voidable preference.

SOURCE: Sales, Section 2-402.

Notes

Subsection (a) follows 2-402(1) with one important substantive change: The phrase “unsecured creditors” has been replaced with “creditors.” “Creditor” is defined in 1-201 to include unsecured creditors, secured creditors, lien creditors and the trustee in bankruptcy. Thus, a creditor of the seller is subject to the buyer’s rights in the stated Article 2 sections if those rights vest before the creditor’s claim in rem, whether a security interest or a judicial lien, attaches to the goods. One looks to 2-807, 2-822 and 2-824(b) to determine what the buyer’s rights are and when they vest. If the creditor’s claim attaches before the buyer’s rights vest, that claim has priority unless, for example, the buyer is a buyer in the ordinary course of business.

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

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

- (1) a sale on approval, if the goods are delivered primarily for use; or
- (2) a sale or return, if the goods are delivered primarily for resale.

(b) Under a sale on approval:

- (1) the risk of loss and the title to goods identified to the contract do not pass to the buyer until acceptance;
- (2) use of the goods consistent with the purpose of trial is not an acceptance, but a failure seasonably to notify the seller of election to return the goods is an acceptance, and acceptance of any part of conforming goods is an acceptance of the whole; and
- (3) after seasonable notification of election to return, the return is at the seller’s risk and expense, but a merchant buyer shall follow any reasonable instructions.

(c) Under a sale or return:

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

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

(d) An "or return" term of a contract for sale shall be treated as a separate contract for sale within the statute of frauds, Section 2-201, and as negating the sale aspect of a contract within the provisions of this article on parol or extrinsic evidence, Section 2-202.

(e) Goods held on approval are not subject to claims of a buyer's creditors until acceptance. However, goods held on sale or return are subject to those claims while in the buyer's possession.

[(f) Subject to compliance with Article 9, if a person delivers [consigns] goods to a merchant who is not a buyer for purposes of sale to another person and the goods are to be returned if not sold, the goods are subject to claims of the merchant's creditors while they are in the merchant's possession.]

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

Notes

Section 2-506 integrates former sections 2-326 and 2-327.

1. Subsection (a) , following 2-326(1), defines sale on "approval and "sale or return. In both cases, there is a contract for sale between a seller and buyer with a return condition. The reason for the return, however, differs.

2. Subsection (b), which follows 2-327(1), elaborates aspects of the sale on approval other than whether goods are subject to claims of creditors of the buyer. See subsection (e).

3. Subsection (c), which follows 2-327(2), elaborates aspects of the sale or return other than issues of creditor's rights.

4. Subsection (d) follows 2-326(4). The "separate contract language for purposes of the statute of frauds, omitted in the July, 1997 Draft, has been restored.

5. Subsection (e), which follows 2-326(2), deals with creditor's rights against goods in the buyer's possession under an approval or return condition.

6. Subsection (f), which replaces 2-326(3), states that goods delivered to a merchant who is not a buyer for resale are subject to claims of the merchant's creditors while in the merchant's possession unless the provisions of Article 9 are satisfied. The filing provisions are mandatory in a consignment for security but are optional in a "true consignment. Revised Article 9 provides a definition of consignment, 9-102(a)(9B), and provides some guidance on the line between security and "true consignments.

There is more work to do here. For example, if the transaction is a "true consignment and the consignor does not comply with the optional Article 9 filing requirements, should the goods be subject to the merchant's creditors in all cases? Arguably not where the value of the goods is less than \$1,000, the consignor is a consumer or where the creditors know or have reason to know that the merchant is substantially engaged in the business of selling the goods of others. Perhaps these exceptions can be added to subsection (f) to cover a true consignment where the Article 9 filing option is not exercised.

PART 6

PERFORMANCE

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

SOURCE: Sales, Section 2-301.

Notes

1. This section is derived from former section 2-301 which stated that the seller was obligated to transfer and deliver and the buyer's obligation was to accept and pay.

2. This broader phrasing is intended to encompass all of the parties' contractual obligations and is not limited to the delivery of and payment for the goods. This change recognizes contractual practices which couple non-goods related obligations with goods related obligations. Such contracts can be covered by Article 2 if the predominate purpose test is employed in determining the scope of Article 2's application to "transactions in goods. Section 2-103. This provision makes explicit what is implicit throughout Article 2, that each party must perform its obligations as determined by the contract. "Contract" as defined in Section 1-201(11) means the total legal obligation of the parties as determined from their agreement (defined in Section 1-201(3)), the provisions of the U.C.C. or any other applicable rule of law.

3. Compare CISG Article 30 and Article 53; UNIDROIT Article 7.1.1 (defining non-performance as opposed to an affirmative statement of the performance obligation as a "failure by a party to perform any of its obligations under the contract, including defective performance

or late performance.); Section 2B-601(a) (March 1998 draft).

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

(a) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposal and give the buyer any notification reasonably necessary for the buyer to take delivery. A tender of delivery includes the performance of any agreement to install or assemble the goods. The agreement and this article determine the manner, time and place for tender and, in particular;

(1) Tender must be at a reasonable hour.

(2) A tender of goods must be kept available for the period reasonably necessary to enable the buyer to take delivery of the goods.

(3) The buyer shall furnish facilities reasonably suited to receive the goods.

(b) If the seller is required or authorized to send the goods to the buyer, the following rules apply:

(1) If the agreement does not require delivery at a particular destination, tender requires that the seller deliver conforming goods to the carrier and comply with Section 2-603.

(2) If the agreement requires the seller to deliver at a particular destination, tender requires compliance with subsection (a) and, in an appropriate case, the tender of documents of title pursuant to subsections (c) and (d). The seller need not deliver at a particular destination unless required by a specific agreement or by the commercial understanding of the terms used by the parties.

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

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

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

(d) If an agreement requires a seller to deliver a document of title, the following rules apply:

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

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

SOURCE: Sales, Section 2-503.

Notes

1. Section 2-602 is derived from former section 2-503 and continues the rules from that section. Except where otherwise noted, the phrase “document of title” as defined in Section 1-201(15) is used throughout. Compare Section 5-102(a)(6)(broader definition of document).

2. Subsection (a) follows former section 2-503(1). There are two minor changes in the first sentence: First, the sentence has been redrafted to make it gender neutral and second, the

word “disposition” has been changed to “disposal.” The second sentence is a substantive addition to make clear that tender includes agreed installation or assembly. The third sentence is based upon the language in the second sentence of former section 2-503(1), except that it has been drafted in the active voice.

Subsection (1) and subsection (2) are the same as former section 2-503(1)(a) except for two non-substantive changes and one substantive change. First, the sentence has been broken into two sentences and has been redrafted to eliminate the use of the indefinite “it” and to substitute the words “a tender of goods” for the previous ungainly phrase “if it is of goods they.” The substantive change is to substitute the word “delivery,” a term defined to include both possession and control, for “possession.” Revised Section 2-102(a)(11).

Subsection (3) follows former section 2-503(1)(b) with the following non-substantive changes: First, the phrase “unless otherwise agreed” has been eliminated as redundant as all of the rules can be varied by agreement unless designated otherwise. Second, the word “must” has been changed to “shall.” Third, the word “receive” was substituted for “the receipt of.”

3. Subsection (b)(1) is derived from former section 2-503(2) but makes two substantive changes and one non-substantive change to that section. The first substantive change is to clarify the meaning of shipment contract as recommended in the PEB study report to make clear that the rules in section 2-603 only apply to shipment contracts. The second substantive change is to make clear that a tender of delivery in a shipment contract requires conforming goods be delivered to the carrier. This clarification follows from the general principle of tender of delivery set forth in subsection (a) that states the seller must tender conforming goods to have tendered delivery properly. The non-substantive change is to substitute the section number 2-603 for the former language of “next section.”

4. Subsection (b)(2) is derived from former Section 2-503(3). The first sentence of subsection (c) is the same as former section 2-503(3) except for one substantive change and two non-substantive changes. The substantive change is to substitute the phrase “if the agreement requires the seller” for the phrase “Where the seller is required” to make clear that it is the agreement’s requirements of delivery to a particular destination that makes a contract a destination contract. The first non-substantive change is to eliminate the gender pronoun “he” and the second non-substantive change is to change the phrase “and also in any appropriate case” to “and, in an appropriate case.” “Also” following “and” is redundant. Changing “any” to “an” follows NCCUSL’s style rules.

The second sentence of subsection (b)(2) is new and is part of the effort to clarify the difference between a shipment and destination contract as directed in the PEB study report. This approach continues the approach in former section 2-503 comment 5 that the presumption is a shipment as opposed to a destination contract.

5. Subsection (c) follows former subsection 2-503(4) with one substantive clarification and one non-substantive clarification in the first sentence. The phrase “Where goods are” has

been redrafted to add the word “conforming” before goods to make clear that adequate tender requires conforming goods. This is in accord with the general rule of subsection (a). The words “of a seller” and “to a buyer” have been added to make clear that the delivery is of the seller’s goods being delivered to a buyer.

Subsection (c)(1) is the same as former subsection 2-503(4)(a) with one substantive change and one non-substantive change. The substantive change is to add the words “to the buyer” following the word “bailee” to answer the questions raised in the cases about to whom the acknowledgment must be made. This change accords with the PEB study report recommendation. The non-substantive change is to place the two phrases in the subsection in parallel phrasing through the use of the word “to.”

Subsection (c)(2) is the same as former subsection 2-503(4)(b) with several non-substantive changes and only one substantive change. The substantive change is to change “written direction” to “record directing” in order to make the draft medium neutral. The main non-substantive change has been to break up the long paragraph into separate sentences. The other non-substantive changes are to substitute the word “parties” for “persons” and to substitute the word “voids” for “defeats.”

Subsection (d) is limited to documents of title, not other documents, and provides different tender rules for negotiable and non-negotiable documents of title. This follows former section 2-503(4).

Compare revised Article 9, §9-311(c) which states that the secured party does not perfect its security interest in goods in the hands of the bailee who has not issued any documents until the bailee acknowledges in writing that it holds the goods for the secured party. The Article 2 rule is mere notification and fixes rights against third parties. Should Article 2 change its rule to accord with Article 9’s draft rule?

6. Subsection (d) is the same as former subsection 2-503(5) with the following substantive changes and two non-substantive changes. The first substantive change is to change the phrase “where the contract requires” to “if an agreement requires.” This assumes that the proper concept here is agreement rather than contract. The second substantive change is to add the phrase “other demand for payment” after “draft” in subsection (2) to reflect the fact that drafts are not the only way that demand for payment may be made. The first non-substantive change is to redraft subsection (1) to eliminate the gender specific pronoun “he” and the second non-substantive change is to eliminate the cross reference to section 2-323 as that provision has been eliminated from revised article 2. The language bracketed in that section is to reserve for discussion the concept that was embodied in former section 2-323(2) regarding when tendering less than a full set of bills of lading is acceptable.

Former section 2-323 provided:

(1) Where the contract contemplates overseas shipment and contains a

term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded in board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set

(a) due tender of a single part is acceptable within the provisions of this Article on cure of improper delivery (subsection (1) of Section 2-508); and

(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

As "this article no longer has a provision on bills of lading in a set, the bracketed language should either be deleted if the exception is no longer commercially viable or the exception should be textually embodied in this section.

7. Importance of Tender of Delivery. Seller's tender of delivery has three important consequences. First, it satisfies a condition to the buyer's duty to accept and to pay for the goods. See section 2-606(a). Unless otherwise agreed, the buyer is not in breach until there is a tender of delivery. Compare section 2-607, dealing with the buyer's tender of payment.

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

Third, tender of delivery is the time for testing whether goods conform to the contract for the purpose of determining the buyer's right to reject as well as breach of contract. Tender of delivery under former section 2-503 as well as under this section, means that the seller "puts and holds conforming goods for the buyer's disposition. This phrase implies that the goods must conform to the contract throughout the reasonable time that the seller is holding the goods for the buyer to take possession or control. Thus, the seller, not the buyer, has the risk of damage to the

goods during the reasonable time necessary for the buyer to take possession or control of the goods. See section 2-612(b). This approach is consistent with the risk of loss principles stated in section 2-612.

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

8. **CISG.** Under Article 30, the seller must "deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention." Articles 31-34 then state when and how this is to be done, with Article 31 the counterpart of section 2-602 and Article 32 the counterpart of section 2-603.

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

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

9. Compare Section 2B-607 (March 1998 draft).

SECTION 2-603. SHIPMENT BY SELLER.

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

(1) The seller shall put the goods in the possession of a carrier. However, unless requested by the buyer or required by usage of trade, the seller need not make a contract for their transportation or obtain and deliver any documents of title necessary to enable the buyer to obtain possession or control of the goods.

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

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

SOURCE: Sales, Section 2-504.

Notes

1. Section 2-603 is based upon section 2-504 with two substantive changes and several non-substantive changes. This section has been changed to accord with international practice in two ways. First, international practice does not require the seller to make the contract for transportation or to obtain and deliver documents unless the seller has agreed to do so. Second, the seller is obligated to notify the buyer only when the goods are not clearly identified to the contract. CISG Art. 32. See John A. Spanogle, *Incoterms and UCC Article 2-Conflicts and Confusions*, 31 THE INTERNATIONAL LAWYER 111, 129-30 (1997). The phrase "if so required under subsection (a)" is to make the rule in subsection (b) accord with the rule in subsection (a) as revised.

2. The first non-substantive change is to redraft the section to eliminate the gender pronoun "he." The second non-substantive change is to eliminate the phrase "unless otherwise agreed" as surplusage. The effect of all rules may be varied by agreement unless designated as non-variable. The third non-substantive change is to change "where" to "if." This change is made throughout the draft. The fourth non-substantive change is to put the last sentence in active voice and to make clear that it is the seller's responsibility to notify if required. Thus the phrase "Failure to notify" has been changed to "A seller's failure to notify." Finally, the word "ensues" has been changed to "results."

3. **CISG.** Many international contracts for sale involve "carriage of the goods." In the absence of agreed delivery terms, such as the Incoterms 1990 of the International Chamber of Commerce, Articles 31(a) and 32 determine what the seller must do to deliver the goods. In the absence of agreement to deliver at "any other particular place," delivery consists of "handing the goods over to the first carrier for transmission to the buyer." Art. 31(a). If the goods are "clearly identified to the contract" the seller need not notify the buyer of the "consignment." Art. 32(1). More to the point, unless the seller is "bound to arrange for carriage of the goods" it need not make any contracts for carriage. Art. 32(2). Even if the seller is not bound to obtain insurance on the carriage, it must "at the buyer's request, provide...all available information necessary to enable [the buyer] to effect such insurance." Art. 32(3).

4. Compare Section 2B-607(c)(3) (March 1998 draft).

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

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

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

(2) The seller's procurement of a nonnegotiable bill of lading to the seller or its nominee reserves possession of the goods as security. However, except in a case of conditional delivery, a nonnegotiable bill of lading naming the buyer as consignee does not reserve a security interest, even if the seller retains possession of the bill of lading.

(b) If a shipment by a seller with reservation of a security interest breaches the contract for sale, the shipment constitutes an improper contract for transportation under Section 2-603. However, the shipment does not impair the rights given to the buyer by shipment and identification of the goods to the contract or the seller's powers as a holder of a negotiable document of title.

SOURCE: Sales, Section 2-505.

Notes

1. Section 2-604 follows former 2-505 with several non-substantive changes. First, as before "where" has been changed to "if." Second, the gender pronouns have been removed. Third, the words "to his own order or otherwise" from former section 2-505(1)(a) has been eliminated as surplusage. Fourth, in subsection (a)(2), the long sentence has been broken into two sentences. Fifth, the cross reference to former section 2-507 (now section 2-606) has been eliminated. Sixth, the phrase "reserves no security interest" has been changed to "does not reserve a security interest." Seventh, the word "though" has been changed to "if." Eighth, the bracketed language in the July, 1997 Draft defining "consignee" is deleted since the term is defined in section 7-102(1)(b). Ninth, in subsection (b), the long sentence has been broken into two sentences and the following changes have been made to reflect consistent use of terminology

throughout the draft and to eliminate indefinite references. Thus, the word “when” has been changed to “if,” the words “in violation of” have been changed to “breaches,” the word “it” has been changed to “the shipment,” and the reference to the “preceding section” has been changed to reflect the section number. Finally, the last sentence has been changed to place a subject at the beginning of the sentence and to add “of title” to the word document to reflect consistent use of the term “document” to mean document of title, not document in the revised Article 5 sense.

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

SECTION 2-605. RIGHTS OF FINANCING AGENCY.

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

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

SOURCE: Sales, Section 2-506.

Notes

1. Section 2-605 follows former section 2-506 except for two changes to accommodate revisions of Article 5. In subsection (a) the phrase, “honoring a presentation under a letter of credit” and in subsection (b) the phrase “honored a presentation under a letter of credit” have been added. A presentation under a letter of credit under Revised Article 5 need not be accompanied by a draft as defined in Article 3, see section 5-102, comment 11, but the rights should be the same. This section is still under review.

2. The non-substantive changes in this section are to change “which” to “that,” to

substitute the word “later” for “subsequent”, to eliminate the words “with reference” in former subsection 2-506(2) as surplusage, and use the phrase “document of title” to distinguish it from Article 5's broader definition of “document.”

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

(a) The seller's tender of delivery is a condition to a buyer's duty to accept and to pay for the goods. Tender entitles the seller to acceptance of the goods and to payment according to the contract. The seller shall tender first but need not complete delivery until the buyer has tendered payment.

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

SOURCE: Sales, Section 2-507.

Notes

1. Section 2-606 follows former section 2-507 except for two substantive changes. First, the last sentence of subsection (a) states a presumption that the seller will tender first. This changes the current rule in Article 2 of concurrent conditions of tender and payment so that if the parties did not agree otherwise and no one tendered, there was no breach of contract. The PEB study report recommended this change in the rule. Second, subsection (b) makes clear that the buyer's right to retain the goods is subject to the seller's right to reclaim the goods in accord with Section 2-816. The PEB study report recommended that the relationship between conditional delivery and reclamation be addressed specifically.

2. The non-substantive changes are as follows. First, the gender pronouns in both subsections are eliminated. Second, the phrase “unless otherwise agreed” in subsection (a) has been eliminated as surplusage and the sentence redrafted with parallel phrasing. Third, “where” has been changed to “if” in subsection (b).

3. **CISG.** Article 58(1), in accord, provides that if the buyer is “not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention.” If, however, the buyer must pay “on the date fixed by or determinable

from the contract and this Convention," it must pay "without the need for any request or compliance with any formality on the part of the seller." Thus, if no time is fixed to pay the seller must tender first. But if a time for payment is fixed, the buyer must pay at that time whether the seller tenders or not.

4. Compare section 2B-607(b) (March 1998 draft).

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

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

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

SOURCE: Sales, Section 2-511.

Notes

1. Section 2-607 follows former section 2-511 except for the following substantive changes. First, subsection (a) has been revised to conform to the revision in section 2-606 that requires the seller to tender but not complete delivery until the buyer tenders payment. Second, subsection (b) changes "legal tender" to "money." See the definition of money in section 1-201(24) (compare Article 9 revision which in some instances states "money or funds"). Third, subsection (3) in former section 2-511 has been eliminated because Article 3 states the effect of dishonor of a check on the underlying obligation. Section 3-310.

2. There are two non-substantive changes to this section. First, in both subsections (a) and (b) the words "by a buyer" have been added. This makes clear who is tendering payment in accord with the caption. Second, in subsection (b) the word "when" has been changed to "if."

3. The Federal Reserve Bank of New York has identified an inconsistency between subsection (b) and Section 4A-406(b). If the seller demands money for payment and the buyer, instead, transfers payment under Article 4A, is the buyer's duty to pay discharged? The Fed concludes "yes" but worries that revised Article 2 will preserve the seller's option to demand money: "[A] demand for currency is per se commercially unreasonable with respect to a wire transfer unless the narrow grounds where rejection of a wire transfer is commercially reasonable are satisfied. The problem is broader than just section 2-607 and, perhaps, should be solved in Article 1. Does the bracketed phrase "or funds" solve the problem?

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

5 Compare section 2B-607(d) (March 1998 draft).

SECTION 2-608. PAYMENT BY BUYER BEFORE INSPECTION.

(a) If the contract requires payment before inspection, non-conformity of the goods does not excuse the buyer from so making payment unless:

(1) the nonconformity appears without inspection; or

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

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

SOURCE: Sales, Section 2-512.

Notes

1. Section 2-608 follows former section 2-512, with the following non-substantive changes. First, the word “if” has been substituted for the word “where.” Second, the cross reference to Section 5-109 has been shortened to “under Article 5.” See 5-109(b). Third, in subsection (b), the gender pronoun has been eliminated so that the phrase “any of his remedies” has been changed to “other remedies of the buyer.” Fourth, the phrasing of subsection (b) has been changed from “does not constitute an acceptance” to “is not an acceptance” and the phrase “or impair” has been changed to “and does not impair.”

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

3. Compare section 2B-608(c) & (d) (March 1998 draft).

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

(a) Subject to subsection (c), if goods are tendered, delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. If the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(b) Expenses of inspection must be borne by the buyer, but may be recovered as incidental damages if the buyer is entitled to such damages.

(c) The buyer is not entitled to inspect the goods before payment of the price if the contract provides for:

(1) delivery "C.O.D.", "C.I.F.", or "C. & F." or delivery on terms that under applicable course of dealing, usage of trade, or course of performance are interpreted as precluding inspection before payment; or

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

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

SOURCE: Sales, Section 2-513.

Notes

1. Section 2-609 makes three substantive changes to former section 2-513.

First, in subsection (b) the reference to the ability to recover inspection expenses from the seller is broadened to reflect the changes to the definition of incidental damages in section 2-805 which allows inspection expenses to be recovered in the case of any breach not just when the buyer rejects the goods.

Second, subsection (c) has been revised to reflect the decision to delete shipping terms from revised article 2 and to clarify the meaning of “payment against documents” to “payment upon tender of required documents,” given the fact that the phrase “payment against documents” no longer appears in the Incoterms or in article 2 to give meaning to the original phrasing. Subsection (c) states a default rule for determining when the buyer does not have a right to inspect before payment. Former sections 2-319(4), 2-320(4), and 2-321(1) of Article 2 stated presumptions regarding when inspection was not allowed prior to payment. Under subsection (c)(1), whether payment is required before inspection will depend upon the commercial usage of the shipping terms employed. The catch all language added to subsection (c)(1) is designed to dovetail with section 2-309 on shipping terms.

Third, the word “standard” has been added to subsection (d) as one of the conditions which is presumed to be an indispensable condition to performance. An express condition to performance is not the same as a promise to perform up to the standard.

2. The following non-substantive changes have been made. First, “where” and “when” have been changed to “if.” Second, the phrase “unless otherwise agreed” has been eliminated as surplusage. Third, in subsection (a), the phrase “tendered or delivered or identified” has been changed to “tendered, delivered or identified.” Fourth, in subsection (c)(2), the phrase “except where such payment” has been changed to “unless payment” and the phrase “are to become” has been changed to “become.” Fifth, in subsection (d), the first sentence has been broken into two

sentences and the indefinite reference “it” has been replaced with “the fixing.” Sixth, in subsection (d) the phrase “inspection shall be as provided” has been changed to “inspection must be made as provided.”

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

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

4. Compare section 2B-608(a) (March 1998 draft).

SECTION 2-610. WHEN DOCUMENTS OF TITLE DELIVERABLE ON

ACCEPTANCE OR PAYMENT. Documents of title against which a draft is drawn must be delivered to the drawee or to the issuer of a letter of credit that honors the draft on acceptance of the draft if the draft is payable more than [a reasonable time] [three days] after presentment.

Otherwise, delivery of the documents of title is required only on payment.

SOURCE: Sales, Section 2-514.

Notes

1. Section 2-610 continues the rules from former section 2-514 with the following substantive changes. [This section is still under review.]

First, the draft changes “documents” to “documents of title” given the changes to revised Article 5.

Second, the phrase “or to the issuer of a letter of credit that honors the draft” are added to provide a default rule for when the documents must be delivered to the issuer of the letter of credit.

Third, the bracketed language in the first sentence reflects a need to decide what the presumption should be. This section states a default rule for determining when the person holding documents of title must deliver those documents when presenting a draft to the buyer

(drawee) or to an issuer of a letter of credit. The two possibilities are when the draft is accepted by the buyer or issuer under section 3-409 or when the draft is paid by the buyer or issuer. Under section 4-503, if the presenter is a bank, the presumption is that if the draft is payable more than three days after presentment then acceptance of the draft is sufficient to entitle the drawee or issuer to delivery of the documents. If the draft is payable within 3 days of presentment, then the drawee or issuer are not entitled to the documents unless the draft is paid. The 3 day time period is not a rule that determines when the draft must be honored but rather what presumption to apply to determine when documents must be delivered. Compare section 5-108(b). Some have argued that the three day time period should be lengthened to a “reasonable time. That debate is preserved for further decision by the bracketed language at the end of the first sentence.

2. The following non-substantive changes from former section 2-514 are made in this section. First, the phrase “are to be delivered” was changed to “must be delivered. Second, the phrase after the semicolon has been placed in its own sentence.

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

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

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

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

(d) If the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment. However, post-dating the invoice or delaying its dispatch correspondingly delays the starting of the credit period.

SOURCE: Sales, Section 2-310.

Notes

Section 2-611 follows section 2-310. The following non-substantive changes have been made. First the phrase “unless otherwise agreed” has been eliminated as surplusage. Second, the phrase “tender of delivery” has been substituted for the phrase “delivery” which is consistent with the definitions of delivery which means transfer of physical possession and tender of delivery which means that the seller has done what is required under the contract under section 2-602. Third, “documents” has been changed to “documents of title” to reflect the changes in Article 5. Fourth, the gender pronoun in subsection (b) has been eliminated and the cross reference to now section 2-609 is not continued. Fifth, the long sentences in subsection (b) and in subsection (d) have been broken into two sentences to improve readability. Sixth, in subsection (c) the phrase “delivery is authorized and made by way of documents” has been changed to “delivery is agreed to be made by way of documents.” This makes clear that authorization happens through the agreement of the parties. Seventh, “though” in subsection (a) and “where” in subsection (d) have been replaced with “if.” Eighth, the phrase “will correspondingly delay” has been changed to “correspondingly delays.”

SECTION 2-612. RISK OF LOSS.

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

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

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

(2) If the contract requires or authorizes the seller to ship goods by carrier, the following rules apply:

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

(B) If the contract requires delivery at a particular destination and the goods arrive there in the possession of the carrier, the risk of loss passes to the buyer when

goods are tendered in the manner required by Section 2-602.

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

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

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

(C) after the buyer's receipt of a nonnegotiable document of title or record directing delivery, as provided in Section 2-602(c)(2).

(c) A breach of contract by either party affects risk of loss only in the following cases:

(1) If the buyer rightfully and effectively rejects the goods or revokes acceptance of the goods, the seller has the risk of loss from the time when the rejection or revocation is effective.

(2) If the seller has tendered nonconforming goods, the risk of loss has passed to the buyer, and the goods are damaged or lost before the buyer effectively rejects or revokes acceptance, the seller has the risk of loss to the extent the nonconformity of the goods caused the damage or loss.

(3) If conforming goods are identified to the contract when the buyer repudiates or is otherwise in breach and the risk of loss has not otherwise passed to the buyer, the buyer has the risk of loss for those goods for a commercially reasonable time after the breach or repudiation.

SOURCE: Sales, Sections 2-509 and 2-510.

Notes

1. Section 2-612, which has been substantially rewritten, is derived from former sections 2-509 and 2-510 but makes several substantive changes.

First, the basic rule for passage of the risk of loss, subsection (b), does not depend upon the conformity of the goods. As part of this change, the relationship between the tender of delivery sections and the risk of loss provisions are clarified throughout the draft.

Second, the basic rule in a non-carrier, non-bailee situation is for the risk to pass to the buyer when the buyer receives possession or control of the goods. Subsection (b)(1). This change accords with the PEB recommendation. The passage of risk of loss upon tender of delivery for non-merchant seller situations is rejected. See former section 2-509(3).

Third, risk of loss in the case of breach is governed by subsection (c) and rejects the relevance of insurance coverage to the passage of the risk question. This reflects the PEB recommendation. While breach is not generally relevant to passage of the risk, subsection (c) recognizes three situations where there should be an exception to the general rule. Subsection (c) is thus new and replaces former section 2-510. Subsection (c)(1) is designed to bring the risk of loss rules into conformity with the buyer's obligation to care for the goods upon rightful rejection or revocation of acceptance which is one of reasonable care. Subsection (c)(2) is based upon the principle that when the nonconformity causes the loss or damage to the goods, the seller should have the risk of loss. This is consistent with the PEB study report recommendation. Subsection (c)(3) is based upon the idea that a repudiation or failure to take delivery could surprise the seller who is expecting the risk of loss to pass to the buyer at a particular point and gives the seller a reasonable opportunity to decide what to do with the goods.

Fourth, the phrase "with any required indorsement" has been added to subsection (b)(3)(A) to make clear that the risk passes when the negotiable paper is indorsed.

Fifth, the words "to the buyer" in subsection (b)(3)(B) clarify that the acknowledgment should be to the buyer and is in accord with the revision to section 2-602 on tender of delivery. See *Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.*, 774 F. 2d 214 (7th Cir. 1985). This change is consistent with the PEB study report recommendations.

Sixth, subsection (b)(3)(C) has been changed from "written direction" to "record directing" to accord with the medium neutral approach of the draft.

2. The following non-substantive changes from former sections 2-509 and 2-510 have been made to this section. Subsection (a) restates the rule from former section 2-509(4) by making the risk of loss rules in the section subject to the risk of loss rules for sales on approval located in section 2-506 and deletes the statement that the risk of loss rules may be varied by agreement as surplusage. Subsection (b) makes the general rules subject to subsection (c) just as the former section 2-509(4) made the section subject to section 2-510.

Subsection (b)(2) is the same as former section 2-509(1) and subsection (b)(3) is the same

as former section 2-509(2) with the following non-substantive changes in addition to the substantive change noted above to clarify the relationship between the risk of loss rules and the tender of delivery rules. First, “where” and “though” has been changed to “if.” Second, the indefinite reference “it” has been changed to a noun as the subject “the contract.” Third, the gender pronouns have been eliminated. Fourth, the cross references to other sections have been updated to reflect the reorganization of the draft.

3. Except as stated in subsection (c), risk of loss principles do not affect the parties’ obligations under the contract. The seller must tender and the buyer must pay as agreed. Thus, a buyer with the risk who fails to pay as agreed may be liable for the price or for damages for breach of contract. Similarly, a seller with the risk is still obligated to deliver the goods as agreed or answer in damages for breach of contract.

4. To illustrate the application of section 2-612, consider the following hypotheticals.

(a) S tenders nonconforming goods. Under subsection (b)(1), S has the risk of loss until B takes possession or control of the goods. If the goods are lost or damaged while in S’s possession or control, S has the risk of loss. [Same as current law].

(b) S tenders nonconforming goods. B takes possession of the goods. Under subsection (b)(1), B now has the risk of loss even though B has not accepted the goods under section 2-706. If the goods are destroyed or damaged before acceptance, B is not liable for the price under section 2-822 but would be liable for damages for breach of contract for failing to perform its obligation under the contract. B would have a cause of action for the seller’s failure to tender conforming goods. [Change from the current law, see section 2-510(1)]. However, if the nonconformity caused the loss, then, the risk of loss is on S to the extent the nonconformity caused the loss under subsection (c)(2).

(c) S tenders nonconforming goods. B takes possession of the goods. Under subsection (b)(1), B has the risk of loss. Assume B rejects the goods or accepts the goods and then revokes acceptance. The risk of loss then returns to S from the time the rejection or revocation is effective. Subsection (c)(1). This conforms the risk of loss rule to the buyer’s duty under section 2-704 as a bailee to take reasonable care of the goods. Thus, if the goods are lost or destroyed after the rejection or revocation becomes effective, S has the risk of loss for those goods. B is only liable for the goods if B fails to exercise ordinary care for the goods under section 2-704. Rights to insurance proceeds is governed by other law. [change from current law, section 2-510(2)]

(d) S tenders nonconforming goods. B takes possession of the goods. Under subsection (b)(1), B has the risk of loss. B accepts the goods and does not revoke acceptance. B has the risk of loss for those goods and under section 2-822 is liable for the price. [same as current law, section 2-510(1)].

(e) S tenders conforming goods. B takes possession of the goods. The risk of loss is on

B under subsection (b)(1). B wrongfully rejects the goods. The goods are destroyed after rejection. Under section 2-822(a)(2), S may recover the price or may sue for breach of contract for B's wrongful rejection. If S regains possession of the goods and then the goods are destroyed, S can recover the price only if the destruction was within a reasonable time after the risk of loss passed to B. Even if S cannot recover the price because the goods are destroyed beyond the reasonable time after the risk passed to the buyer, S has a remedy for breach of contract against B for wrongfully rejecting the goods. [Same as current law, section 2-709]

(f) S tenders conforming goods. B takes possession of the goods. The risk of loss is on B under subsection (b)(1). B accepts the goods but then attempts to wrongfully revoke acceptance. The goods are then destroyed. S may still recover the price under section 2-822 as the wrongful revocation does not undo the acceptance. [Same as current law, section 2-709]

(g) S identifies conforming goods to the contract. B repudiates. Risk of loss under subsection (b) would still be on seller. Subsection (c)(3) advances the principle that if the goods are destroyed within a reasonable time after B's breach, that S can treat the risk of loss as resting on B. The primary effect of that shifting of the risk of loss is to entitle S to the price under section 2-822(a)(2). If subsection (c)(3) did not exist, S would still have its remedy for breach due to B's repudiation, but would not have the action for the price under section 2-822. [Principle derived from section 2-510(3) but not dependant upon "deficiency in insurance coverage"].

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

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

Art. 68, dealing with goods sold in transit, has no exact counterpart in section 2-612, the closest provision being section 2-612(b)(2). Furthermore, there is no provision like section 2-612(b)(3), which treats goods in the possession of a bailee.

Cases not otherwise covered are picked up in Art. 69, which is CISG's equivalent to old section 2-509(3). Even between commercial parties, the buyer, in some cases, may have the risk of loss before taking possession of the goods. See Art. 69(2).

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

account of the breach" are not impaired. Art. 70.

6. Compare section 2B-623 (March 1998 draft).

PART 7

BREACH, REPUDIATION, AND EXCUSE

SECTION 2-701. BREACH OF CONTRACT GENERALLY; SUBSTANTIAL IMPAIRMENT.

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

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

(1) A seller is in breach if it fails to deliver, fails to perform an obligation, makes a nonconforming tender of performance, or repudiates the contract.

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

(c) To determine whether the value of an installment or the whole contract has been substantially impaired by a breach of contract under Sections 2-708, 2-710, or 2-712, the court may consider:

(1) the extent to which the aggrieved party has been deprived of the benefit that it reasonably expected under the contract;

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

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

(4) whether the party in breach acted in good faith.

(d) The cumulative effect of individual, insubstantial breaches of contract may

substantially impair the value of the whole contract to the other party .

SOURCE: Sales, Sections 2-703, 2-711; Licenses, Section 2B-109.

Notes

1. Section 2-701 is a new section that is derived, in part, from former Sections 2-703 and 2-711 which defined breach as part of the index to the remedies sections. The PEB study report identified some ambiguities in both former section 2-703 and section 2-711 which are solved by separating the types of breaches from the entitlement to remedies. Thus section 2-815 (seller's remedies) and section 2-823 (buyer's remedies) merely index the remedies that either the seller or buyer is entitled to exercise if there is a breach. Section 2-701(b) identifies those events that are usually breaches of contract and correspond to those breaches identified in former section 2-703 and 2-711. As recommended by the PEB study report, the buyer's breach includes failure to pay after delivery as well as "payment due on or before delivery" as provided in former section 2-703. If the failure after acceptance is a default under a security agreement, Article 9 would govern enforcement of the security interest. In addition, subsection (b) identifies that the failure to perform any obligation under the contract is a breach. Neither section 2-703 or section 2-711 contained that definition of breach. Given the movement of the definition of breach from the remedies' index sections and the identification of additional types of conduct as a breach, no attempt has been made to conform the definitions of breach in subsection (b) to the same style as former section 2-703 or section 2-711.

2. Subsection (a) is a statement of breach that corresponds to the statement of obligation found in section 2-601. Section 2-601 states that the parties are obligated to perform in accordance with the contract. Section 2-701(a) states that breach of contract is determined by the terms of the contract. Terms of the contract are determined from the total legal obligation of the parties, section 1-201(11), which includes the parties' agreement, section 1-201(3), and the provisions of applicable law including the types of breach identified in subsection (b).

3. Subsection (c) is a new section based upon Restatement (Second) of Contracts §241, which defines material breach. Instead of using the material breach terminology, subsection (c) uses the terminology already in use in Article 2, whether the value of the installment or the contract is substantially impaired by a breach. Given the reaffirmance of the perfect tender rule and the decision to not explicitly cover service contracts within the scope of Article 2, the substantial impairment concept is relevant only to installment contract situation (§2-712), the anticipatory repudiation situation (§2-710) and the revocation of acceptance situation (§2-708). Those three sections are identified in subsection (c). The four factors listed in subsection (c) are taken from the Restatement (Second) of Contracts §241. Two factors from the Restatement which are not reflected above are (i) the extent to which the injured party can be compensated for the deprived benefit and (ii) the extent that the party to perform will suffer a forfeiture. Should those factors be listed as well?

4. Whether the conduct of the seller or the buyer is a breach depends upon whether the seller's or buyer's failure to perform is excused (§2-714 through §2-717), whether the seller

cures the breach as provided in section 2-709, or whether the performance obligation is waived, section 2-702.

5. Compare section 2B-109 (March 1998 draft).

SECTION 2-702. WAIVER OF BREACH; PARTICULARIZATION OF NONCONFORMITY.

(a) Except as otherwise provided in subsection (c), a party that knows that the other party's performance constitutes a breach of contract but accepts that performance and fails within a reasonable time to object is precluded from relying on the breach to cancel the contract. Except as otherwise provided in subsection (c), acceptance of that performance and failure to object do not preclude a claim for damages unless the party in breach has changed its position reasonably and in good faith in reliance on the aggrieved party's inaction.

(b) Failure to object to a nonconforming performance under subsection (a) does not foreclose objection to the same or similar breach of contract in future performances of like kind unless the party foreclosed expressly so states. A statement waiving future performance may be retracted by seasonable notification received by the other party that strict performance will be required unless the waiver has induced the other party to change its position reasonably and in good faith.

(c) A party is precluded from relying on a nonconforming performance as follows :

(1) Payment upon tender of documents of title made without reservation of rights waives the right to recover the payment for defects apparent on the face of the document of title.

(2) The buyer's failure to state, in connection with a rejection under Section 2-703, a particular nonconformity that is ascertainable by reasonable inspection precludes reliance on the unstated nonconformity to justify rejection or to establish a breach of contract if:

(A) the seller, upon a seasonable particularization, had a right to cure under Section 2-709 and could have cured the non-conformity or breach; or

(B) between merchants, the seller after rejection has made a request in a record for a full and final statement in a record of all non-conformities on which the buyer proposes to rely.

(3) The buyer's failure to state, in connection with a revocation of acceptance under Section 2-708, the nonconformity that justifies the revocation precludes the buyer from relying on the nonconformity to justify the revocation or to establish breach of contract if the seller had a right to cure under Section 2-709 and could have cured the non-conformity or breach.

Source: Sales, Section 2-605, Licenses 2B-606.

Notes

1. This section, which is new, has not been reviewed by the Drafting Committee. It collects in one place the rules regarding waivers of breach. Former section 2-209 has been criticized as an unclear effort to both incorporate and control waiver in the context of Article 2. The PEB study report recommended that waiver be more explicitly defined and its application be clarified. This section and section 2-210(d) do so.

2. Both this section and section 2-210(d) do not operate on a clean slate in terms of determining when there is a waiver and what the effect of a waiver is on the parties' rights and obligations. Under section 1-103 principles of waiver as developed at common law operate to supplement Article 2 provisions. It is unrealistic to preclude completely common law principles of waiver by attempting a complete and full statement of waiver principles within Article 2. Rather the approach taken in this section and section 2-210(d) is to clarify particular effects of application of the waiver concept without defining what is a waiver for all cases.

3. Section 2-210(d) clarifies that a party may waive an express condition to its own performance obligation. The effect of that waiver of an express condition is that the performance obligation arises even if the condition does not come to pass. If that condition is not also a performance obligation of the party, the failure of the condition is not a breach of contract. Restatement (Second) Contracts §225. Often it is difficult to tell whether the contract term is merely a condition to performance of the other party or whether it is also a performance obligation of that first party.

For example, S agrees to sell goods to B for \$5,000 with delivery on May 1. Is delivery May 1 a condition to B's duty to pay or is delivery May 1 a promise that S will deliver on May 1? If, in the unlikely event the term is interpreted to be a condition, then if S does not deliver on May 1, B has no duty to perform its obligation to pay. S, however, has not breached the contract. B's conduct or words, however, may have indicated that B waived the condition of delivery May 1. In that case, because the condition is waived, B's obligation to pay arises, even if delivery is not by May 1. B has no cause of action for breach against S because the condition was not a performance obligation of S.

Assume, however, that the delivery term is a promise to perform by delivering on May 1. S's promise to perform is assumed to be dependent upon B's promise to perform and vis versa, Restatement (Second) Contracts §232. If S does not deliver on May 1, S has breached the contract. B would be able to pursue its remedies for breach against S, including canceling the contract and damages for breach. If B, by B's conduct or words, waives performance of the promise to deliver on May 1, at common law, the effect of the waiver is that B could not cancel the contract, but could recover damages for S's breach by failing to deliver on May 1. See Restatement (Second) Contracts §246.

Unless it is very clear that a term is only an express condition to performance and not a performance obligation, courts should employ the presumption that terms in a contract are performance obligations and not mere conditions. See Restatement (Second) Contracts §227.

4. With that background, this section operates as follows. Subsection (a) implements the common law rule that a party may waive a performance obligation and by doing so loses the right to cancel the contract but not the right to recover damages unless the other party detrimentally relies on the failure to object. Subsection (b) addresses the effect of a waiver under subsection (a) of a previous performance obligation on future performance obligations. The last sentence of subsection (b) and the last sentence of section 2-210(d) state the same rule. (Arguably, one of the sentences could be eliminated). Both subsections (a) and (b) have no counterpart in former Article 2.

Subsection (c) states three situations where failure to object does waive the right to establish breach based upon the particular nonconforming performance. Subsections (c)(1) and (c)(2) are from former section 2-605 with no change in substance. Subsection (c)(1) is the same as former section 2-605(2) with the following non-substantive changes. First, in accord with the deletion of shipping terms and the changes to section 2-609 to remedy the ambiguity of "payment against documents" phrase, the phrase "payment against documents" has been changed to "payment upon tender of documents." Second, the phrase "documents" has been changed to "documents of title" given the changes to Article 5. Third, the phrase "precludes recovery" has been changed to "waives the right to recover" to make the phrasing consistent with the phrasing of the rest of the section regarding waiver.

Subsection (c)(2) is the same as former section 2-605(1) one substantive change and with the following non-substantive changes. The substantive change is to require the seller to have

had a right to cure in subsection (c)(2)(A), a concept perhaps implicit in the former section 2-605(1)(a). The non-substantive changes are as follows. First, a cross reference is added to the rejection section. This is a non-substantive change unless this section in the former act was applicable to the installment contract situation. Second, the word “defect” has been changed to “nonconformity” to reflect that the issue is non-conformity to the contract requirements, not defect as defined in some other situation such as under tort law. Third, “which” has been changed to “that.” Fourth, the gender pronoun has been eliminated. Fifth, “where” and “when” have been changed to “if.” Sixth, the two clauses in subsections (A) and (B) have been written in parallel phrasing. Seventh, the indefinite “it” has been changed to “breach.” Eighth, the phrase “if stated seasonably” has been changed to “upon a seasonable particularization.” Ninth, the references to written requests and statements in former section 2-605(1)(b) have been changed to refer to “records” in line with the medium neutral approach of the draft.

Subsection (c)(3) is a new section included to dovetail with the expansion of the right to cure in the post revocation situation under section 2-709. The limitation to nonconformities ascertainable by reasonable inspection contained in subsection (c)(2) does not make sense in the revocation situation as the only situation where the seller has a right to cure after revocation is when the defect is not easily discoverable. Thus, subsection (c)(3) is narrowly drawn to require a particularization of the defects justifying revocation that the seller had a right to cure and could have been cured. Subsection (c)(3) thus parallels subsection (c)(2)(A). The drafting committee should consider whether a parallel to subsection (c)(2)(B) is necessary in the revocation context as well.

Not listed in subsection (c) is the effect of the failure to particularize in the notice of breach in the case of the accepted goods under section 2-707(c)(1). That omission is intentional. The policy question that needs to be answered in the accepted goods case is what is the purpose of any particularization requirement that would be imposed. A particularization requirement would not facilitate a statutory cure as the seller has no right to cure under section 2-709 when the goods are accepted and acceptance is not revoked. A deemed waiver by failure to particularize would be inconsistent with the prejudice standard in section 2-707 where notice itself is excused unless there is prejudice by failure to notify.

5. To illustrate the operation of this section, assume that S agrees to sell goods to B, with delivery on May 1. S communicates to B that S can deliver the goods on May 5, but cannot make the delivery on May 1. The contract does not include a no oral modification or an anti-waiver clause. B accepts delivery on May 5 and does not object. Delivery on May 1 should be presumed to be a promise, not a mere condition to B’s performance, unless the contract clearly provides otherwise. S’s failure to deliver on May 1 is a breach of S’s performance obligation. B’s acceptance of B’s performance and failure to object to S’s late delivery means that B cannot cancel the contract, but may pursue B’s claim for damages caused by S’s late delivery, unless S has detrimentally relied on B’s silence. Subsection (a).

Assume that in the contract above, S agreed to deliver goods the first of every month for 6 months. S’s first delivery is late and not delivered until May 5. B accepts the delivery and does

not object to its lateness. S's obligation to deliver the next month's installment on time on the first of June is intact. B's failure to object to the first late delivery is not a waiver of future timely deliveries. Subsection (b), first sentence. Assume, however, that B accepts the late delivery on May 5 and tells S that as long as the deliveries are made before the 5th of every month, B will take the deliveries. That may be a statement waiving future performance of timely deliveries. In order to retract that waiver of future performance, B would have to give seasonable notice to S before S relied on the waiver to S's detriment.

Assume that S agreed to deliver goods that conformed to an express warranty on May 1. S delivered the goods on May 1 but the goods did not conform to the warranty. B timely rejects the goods under section 2-703. Under subsection (a), B has objected by its rejection to the nonconforming performance. Under subsection (c)(2), if the nonconformity is ascertainable by reasonable inspection and the seller had the right to cure the breach under section 2-709 and could have cured, then B has to particularize the nonconformity or is barred from asserting the nonconformity to establish breach or justify the revocation. If the nonconformity is not ascertainable by reasonable inspection, B need not particularize the defect and will not suffer any adverse consequences from failing to particularize unless B knows of the defect when it accepts S's performance. In that case, subsection (a) will operate to preclude a cancellation and perhaps damages if the second sentence of subsection (a) applies.

Assume the same facts but that B did not reject, but accepted. B then timely and properly revoked acceptance under section 2-708(a)(2). B's timely and proper revocation should satisfy the objection required under subsection (a). If S has a right to cure under section 2-709 and could have cured, then B must particularize those defects justifying revocation or not be allowed to assert those defects to justify revocation or establish breach. As to non-conformities not sufficient to justify revocation that B knows about, subsection (a) would operate to determine B's rights.

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

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

7. Compare section section 2B-606 (March 1998 draft).

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

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

- (1) reject the whole;
- (2) accept the whole; or
- (3) accept any commercial units and reject the rest.

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

SOURCE: Sales, Section 2-601, 2-602(1)

Notes

1. Section 2-703 continues the perfect tender rule from former section 2-601. The only substantive change to subsection (a) is to add a cross reference to section 2-603(b) regarding the ability to reject if required to give notice in a shipment contract and material loss or delay results. This does not change the current law as it relates to the right to reject, it only makes the rejection rule from that section visible (former section 2-504). The PEB study report recommended that the limitations on the right to reject be collected in this section.

The non-substantive changes are as follows: First, the cross references to installment contracts, the limitations of remedies section and the liquidated damages sections are by number with no text. Second, the phrase “unit or units” was reduced to “units” to eliminate redundancy.

2. Subsection (b) follows section 2-602(1) with one substantive change flagged by the bracketed language for further discussion. The “delivery or tender” language is the same as current law. A concern with starting the reasonable time for rejection from the time the nonconformity should have been discovered is the uncertainty in each case of when that discovery should have been. If a discovery time is implemented, then some limits must be placed on the right to reject concerning the status of the goods similar to the limitation in section 2-708(b) that rejection must occur before any substantial change in the goods not caused by their own defects.

The non-substantive change is to redraft the two sentences into one sentence in order to eliminate the indefinite “it.” Current law requires the notice to be seasonable and the rejection to be within a reasonable time.

The Drafting Committee should determine whether both “seasonable” and “reasonable” is necessary.

3. The buyer’s right to reject is determined by whether the goods or delivery fail to conform to the contract, the parties’ total legal obligation, which includes the parties’ bargain in fact, applicable course of performance, course of dealing and usage of trade, as well as terms incorporated from the U.C.C. and other applicable law. Section 1-201(11). The right to reject is also subject to the obligation of good faith. Section 1-203. Even if the buyer rightfully rejects, the buyer’s ability to cancel the contract or pursue other remedies is tempered by the seller’s right to cure in section 2-709. If the seller has the right to cure under section 2-709, the buyer has an obligation to allow the seller to make the cure. If the seller properly cures, the buyer’s ability to force the goods back on the seller through rejection is defeated.

4. A rejection not permitted under subsection (a) is wrongful and a breach by the buyer even if the buyer gives prompt notice under subsection (b). The rejection maybe effective but wrongful. Section 2-701(b)(1). A rejection may be rightful under the standard of subsection (a) but ineffective under subsection (b). A rightful but ineffective rejection may be an acceptance under section 2-706(a)(3).

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

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

6. Compare section 2B-609 (March 1998 draft) (not adopting perfect tender rule except for mass-market licenses).

SECTION 2-704. EFFECT OF EFFECTIVE RIGHTFUL REJECTION AND JUSTIFIABLE REVOCATION OF ACCEPTANCE.

(a) Subject to Sections 2-705 and 2-829(b), after an effective rightful rejection or justifiable revocation of acceptance, a buyer in physical possession of the goods shall hold the

goods with reasonable care at the seller's disposition for a sufficient time to permit the seller to remove them. However, the buyer has no further obligation with regard to the goods.

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

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

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

(c) A buyer in possession that wrongfully but effectively rejects goods is subject to subsection (b)(1) and the duty of care in subsection (a).

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

Notes

1. Section 2-704 is derived from former sections 2-602 and 2-608(3). Subsection (a) is the same in substance as former section 2-602(2)(b) & (c) and continues the rule that the buyer has an obligation of reasonable care for goods rightfully rejected and for goods for which acceptance has been justifiably revoked. The cross reference to section 2-829(b) (former section 2-711(3)) continues the rule that the duty of reasonable care is subject to the buyer's security interest. This section also continues the rule that the general duty of reasonable care is subject to the more specific rules set forth in the next section, section 2-705, (combining former sections 2-603 and 2-604). As suggested in the PEB study report, subsection (c) is added to clarify the buyer's obligation in the following different situations: rightful and effective rejection, justified and effective revocation, and wrongful but effective rejections.

If the buyer has grounds for justifiable revocation but has not effectively revoked by

giving the appropriate notice as required under section 2-708, the buyer has still accepted the goods and can do whatever the buyer wants with the goods. If the buyer attempts to revoke acceptance wrongfully, the acceptance has not been undone and the buyer may do whatever the buyer wants with the goods. If the buyer has grounds for rejection but has not given notice as required, the buyer has not rejected the goods and may do whatever the buyer wants with the goods. Subsection (a) has also been redrafted to eliminate gender references.

2. Subsection (b) is derived from former section 2-602(b)(1) but has been revised to deal with the problem of post rejection or revocation use of the goods. The PEB study report recommended that this issue be addressed. The courts have developed several alternative approaches. Under current law, a buyer's post rejection or revocation use of the goods can either be treated as an acceptance thus undoing the rejection or revocation, can be a violation of the buyer's obligation of reasonable care, or can be neither an acceptance or a violation of the reasonable care obligation but rather a reasonable use that the court requires the buyer to compensate the seller for. The subsection adopts the third approach. The redraft also eliminates the concept of "wrongful as against the seller" which has created confusion about its meaning and effect in light of former section 2-606 which stated that actions wrongful against the seller are an acceptance only if ratified by the seller, but acts inconsistent with the seller's ownership interest were an acceptance. The PEB study report recommended that this confusion be dealt with. Section (b)(1) and the acceptance section, section 2-708, are now consistent with each other. Unreasonable acts inconsistent with the seller's ownership interest are an acceptance if the seller chooses to treat the act as an acceptance. If the seller does not treat the unreasonable act as an acceptance, the seller may have non-code remedies for conversion. Reasonable acts inconsistent with the seller's ownership interest are not an acceptance, but the buyer is liable for the reasonable value of the use.

3. **CISG.** Under Art. 86, if a buyer has received and intends to reject goods, he must take reasonable steps to preserve the goods. If the goods shipped to the buyer are at the buyer's disposal at the destination, unless a seller's agent is present at the destination, the buyer must take possession if that can be done without paying the price or incurring unreasonable inconvenience or expense.

4. Compare section 2B-612 (March 1998 draft).

SECTION 2-705. MERCHANT BUYER'S DUTIES; BUYER'S OPTIONS AS TO SALVAGE.

(a) Subject to a buyer's security interest under Section 2-829(b), if the seller does not have an agent or place of business at the market where the goods were rejected or acceptance was revoked, a merchant buyer, after an effective rejection or justifiable revocation of acceptance of

goods in the buyer's possession or control, shall follow any reasonable instructions received from the seller with respect to the goods. In the absence of such instructions, a merchant buyer shall make a reasonable effort to sell or otherwise dispose of the goods for the seller's account if they are perishable or threaten to decline speedily in value. Instructions are not reasonable if on-demand indemnity for expenses is not forthcoming.

(b) A merchant buyer that sells goods under subsection (a) is entitled to reimbursement from the seller or out of the proceeds for the reasonable expenses of caring for and selling them. If the expenses do not include a sales commission, the buyer is entitled to a commission usual in the trade or, if there is none, to a reasonable sum not exceeding 10 percent on the gross proceeds.

(c) Subject to subsection (a), unless a seller gives instructions to a merchant buyer within a reasonable time after notification of an effective rejection or justifiable revocation of acceptance, a buyer may store the rejected goods for the seller's account, reship them to the seller, or resell them for the seller's account, with reimbursement as provided in subsection (b).

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

SOURCE: Sales, Sections 2-603 & 2-604.

Notes

1. Section 2-705 is the same in substance as former sections 2-603 and 2-604. Subsection (a) continues the rules from former section 2-603(1) with one substantive change as recommended in the PEB study report that the merchant buyer's obligations also apply after a justified revocation of acceptance. The following non-substantive changes have been made. First, gender pronouns have been eliminated. Second, "when" has been changed to "if." Third, "has no" has been changed to "does not." Fourth, "under a duty . . . to follow" has been changed to "shall follow." Fifth, the long sentence has been broken into two sentences to improve readability.

2. Subsection (b) is the same as former section 2-603(2) with three non-substantive changes. First, the word “merchant” has been added in front of buyer. This is not a substantive change as the former section only applied to merchant buyers (see the caption and the reference to the buyer’s obligation under subsection (1)). Second, the gender pronoun has been eliminated. Third, the long sentence has been broken into two sentences to improve readability.

3. Subsection (c) is the same as former section 2-604 with the following substantive change. The section has been made to apply to justified revocations of acceptance as recommended by the PEB study report. The non-substantive changes are as follows. First, the negative phrasing of “if the seller gives no instructions” has been changed to the positive phrasing of “unless a seller gives instructions.” Second, the cross references to the preceding sections are substituted for the longer textual cross references. Fourth, the word “merchant buyer” is placed within the second clause. As under current law, the merchant buyer is the only one obligated to follow the seller’s instructions and if no instructions are given, has the rights of subsection (c). Non-merchant buyer’s also have the rights of subsection (c). Fifth, the last sentence of former section 2-604 is contained in the following subsection (d).

4. Subsection (d) is the same in substance as former section 2-603(3) except that the long sentence is split into two sentences.

5. **CISG.** Art. 87 allows a buyer who has taken possession of the goods under Art. 86 (see note under section 2-704) to store the goods at the expense of the other party as long as that expense is not unreasonable. Under Art. 88, the buyer may sell the goods if the seller unreasonably delays in regaining possession of the goods or providing for the expense of preserving the goods. If goods will decline speedily in value or will be unreasonably expensive to preserve, the buyer must sell the goods. A party selling the goods may deduct from the proceeds the expenses of preserving and selling the goods and account to the other party for the balance.

6. Compare section 2B-612 (March 1998 draft).

SECTION 2-706. WHAT CONSTITUTES ACCEPTANCE OF GOODS.

(a) Goods are accepted when the buyer:

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

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

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

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

(b) Acceptance of a part of any commercial unit is acceptance of that entire unit.

SOURCE: Sales, Section 2-606.

Notes

1. Section 2-706 is derived in large part from former section 2-606 with the following substantive changes. First, in subsection (a)(1) it allows an acceptance to take place without a reasonable opportunity to inspect if the buyer so states to the seller. Inspection is a right subject to waiver by the person benefited by the right. Second, subsection (a)(4) is redrafted to dovetail with the rights of a buyer who uses the goods post rejection or revocation. There are three non-substantive changes to this section. First, the gender references are eliminated. Second, “acceptance of goods occurs” has been shortened to “goods are accepted. Third, the subsections have been placed in parallel phrasing so that the opportunity to inspect phrase in subsection (a)(3) has been moved to the beginning of the subsection so it reads the same as subsection (a)(2).

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

3. Compare section 2B-613 (March 1998 draft).

SECTION 2-707. EFFECT OF ACCEPTANCE; NOTICE OF BREACH; BURDEN OF ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE OF CLAIM OR LITIGATION TO PERSON ANSWERABLE OVER.

(a) A buyer shall pay at the contract rate for any goods accepted.

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

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

(1) The buyer, within a reasonable time after the buyer discovers or should have

discovered a breach of contract, shall notify the party claimed against of the breach. However, a failure to give timely notice bars the buyer from a remedy only to the extent that the party entitled to notice establishes that it was prejudiced by the failure.

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

(d) A buyer has the burden of establishing a breach of contract with respect to goods accepted.

(e) In a claim for breach of a warranty, indemnity, or other obligation against the buyer for which another party is answerable over, the following rules apply:

(1) The buyer may give notice of the litigation to the other party in a record, and the person notified may then give similar notice to any other person that is answerable over. If the notice invites the person notified to intervene in the litigation and defend and states that failure to do so will bind the person notified in any action later brought by the buyer as to any determination of fact common to the two actions, the person notified is so bound unless, after seasonable receipt of the notice, the person notified intervenes in the litigation and defends.

(2) If the claim is one for infringement or the like, the original seller may demand in a record that its buyer turn over control of the litigation, including settlement, or otherwise be barred from any remedy over. If the seller also agrees to bear all expense and to satisfy any adverse judgment, the buyer is so barred unless, after seasonable receipt of the demand, control is turned over to the seller.

(f) Subsections (c), (d), and (e) apply to an obligation of a buyer to hold the seller harmless against infringement or the like.

SOURCE: Sales, Section 2-607.

Notes

1. Section 2-707 follows former section 2-607 except for the following substantive changes. First, the prejudice standard for the failure to give notice is stated in subsection (c)(1). The requirement that the party claimed against establish prejudice is a middle position between stating that the failure to give notice is an absolute bar to recovery and requiring proof of material prejudice. See Restatement (Second) of Contracts §229, excusing a condition where the failure is not material and implementation would result in disproportionate forfeiture. The PEB study report recommended that the text or the comments indicate that the content of the notice need only indicate that problems have arisen regarding accepted goods and should reject cases that provided too stringent a standard for the content of the notice. A notice sufficient under this section is also sufficient under section 2-702(a) to avoid waiving any remedies for breach. Second, the notice must be given to the “person claimed against” not “the seller” as under current law. This accommodates the notice requirement in the non-privity situations. Third, the vouching in procedure in subsection (e) has been expanded to include indemnity actions and persons other than the seller who are answerable over.

The non-substantive changes are as follows. All of the subsections are redrafted to eliminate the gender pronouns. The word “must” is changed to “shall.” Subsection (b) omits the language from former section 2-607(2) that duplicated the thrust of the revocation of acceptance section. In subsection (c), “where” is changed to “if.” Subsection (d) is redrafted in the active as opposed to passive voice. Subsection (e) changes “written” notices and demands to “record” notices and demands in accord with the medium neutral approach. Long sentences are also broken into two sentences to improve readability.

2. **CISG.** Although the buyer is obligated to take delivery and pay the price “as required by the contract and this Convention,” Art. 53, the concept of acceptance is irrelevant to the obligations of either party. Thus, there is no need to state the “effect” of acceptance.

3. Compare section 2B-613(d) (March 1998 draft).

SECTION 2-708. REVOCATION OF ACCEPTANCE.

(a) The buyer may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the buyer if the lot or unit was accepted:

(1) on the reasonable assumption that its nonconformity would be cured and it has

not been seasonably cured; or

(2) without discovery of its nonconformity if acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(b) A buyer's acceptance must be revoked within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. The revocation is not effective until the buyer notifies the seller of it.

(c) A buyer that justifiably and effectively revokes acceptance has the same rights and duties under Sections 2-704 and 2-705 with regard to the goods as if they had been rejected.

SOURCE: Sales, Section 2-608.

Notes

1. Section 2-708 follows former section 2-608. The following non-substantive changes have been made. First, the gender pronouns have been eliminated. Second, the use of the indefinite "it" has been reduced. Third, in subsection (b) the first sentence has been rephrased in the active voice. Pursuant to the PEB study report recommendation to clarify the relationship between the buyer's revocation and the buyer's duty as to care of the goods, subsection (c) has been drafted to provide that the buyer who has effectively and justifiably revoked acceptance has the duties as to the goods as stated in sections 2-704 and 2-705. A buyer who is not justified in its revocation or who does not act effectively to revoke acceptance has not undone the acceptance and thus may do what it wants with the goods and is not subject to the duties in sections 2-704 and 2-705.

2. **CISG.** The buyer may declare the contract avoided for a fundamental breach. Art. 49. The buyer cannot declare the contract avoided unless he can make restitution of the goods in substantially the same condition as he received them unless restitution is rendered impossible not due to an act or omission of the buyer, the goods have deteriorated due to the inspection allowed by Art. 38, or the goods are sold, consumed or transformed in the buyer's normal course before he discovered or should have discovered the nonconformity. Art. 82.

3. Compare section 2B-614 (March 1998 draft).

SECTION 2-709. CURE.

(a) If a buyer effectively and rightfully rejects goods or a tender of delivery under Section 2-703 or justifiably revokes an acceptance under Section 2-708(a)(2) and the agreed time for performance has not expired, the seller, upon seasonable notice to the buyer and at its own expense, may cure any breach of contract by making a conforming tender of delivery within the agreed time and by compensating the buyer for all of the buyer's reasonable and necessary expenses caused by the nonconforming tender and subsequent cure.

(b) If a buyer effectively and rightfully rejects goods or a tender of delivery under Section 2-703 or justifiably revokes acceptance under Section 2-708(a)(2) and the agreed time for performance has expired, the seller, upon seasonable notice to the buyer and at its own expense, may cure the breach of contract by making a tender of conforming goods and by compensating the buyer for all of the buyer's reasonable and necessary expenses caused by the nonconforming tender and subsequent cure, if the cure is [appropriate and] timely under the circumstances and the buyer has no reasonable grounds to refuse the cure.

SOURCE: Sales, Section 2-508; Unidroit Principles, Art. 7.1.4; CISG Art. 37, Art. 48.

Notes

1. Section 2-709 is derived from former section 2-508 and has been substantially influenced by the Unidroit Principles and CISG provisions.

The seller's right to cure has been expanded in two ways. First, if the buyer has revoked under section 2-708(a)(2) the seller may cure. This change accords with the PEB study report recommendation to allow cure after a revocation of acceptance. However, the revocation must be because of non-discovery of the non-conformity under section 2-708(a)(2) and not because of a failure to cure under section 2-708(a)(1). To allow a further cure after revocation of acceptance because of a failure to cure would give the seller two opportunities to cure. Second, if the time for contract performance has expired, the requirement that the seller have reasonable grounds to believe that the nonconforming tender would be acceptable has been deleted. Instead, the test is whether the cure is "[appropriate and] timely under the circumstances and the buyer has no reasonable grounds to refuse the cure. The PEB study report expressed concern about the imprecision of the "reasonable grounds to believe" test. Former section 2-508(2) was directed

toward preventing surprise rejections. The concept of “reasonable grounds to refuse the cure” is broad enough to deal with that situation as well as with the “shaken faith” cases. The words “appropriate and” are bracketed for further discussion of whether they are necessary.

The seller’s right to cure has been restricted in the following ways. The section makes explicit that the cure is at the seller’s expense, the seller must compensate the buyer for the buyer’s expenses caused by the nonconforming tender and cure, and the cure must either be a conforming tender (subs. a) or of conforming goods (sub. b). If the seller has a right to cure and has given timely notice of cure, the buyer may not cancel. See section 2-808. Seasonable notice to the buyer incorporates the idea that the notice would be untimely if the buyer has reasonably changed its position in good faith reliance on the non-conforming tender. See Hawkland §2:508:2.

2. Under this approach, the following questions remain:

(a) Does the concept of conforming goods in subsection (b) pick up a cure related to quantity or other non-quality aspects of the contract requirements?

(b) Under former section 2-508, there is some controversy about whether the goods may be made conforming by repair. The PEB study report recommended that the Drafting Committee decide in what circumstances the goods could be made conforming by repair.

3. **CISG.** Under CISG, the buyer has no remedy of rejection for a nonconforming tender and cannot “avoid” the contract unless the seller has committed a “fundamental breach,” see Art. 49(1)(a) and Art. 25.

Article 37 deals with Seller’s cure where nonconforming goods are delivered “before the date for delivery. Seller may cure “up to that date” if the “exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. Buyer retains any right to claim damages.

Article 48(1), which does not apply if the contract is avoided for fundamental breach under Art. 49, gives a right to cure “even after the date for delivery. Seller may “remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty or reimbursement by the seller of expenses advanced by the buyer. Again, Buyer retains any right to claim damages.

UNIDROIT PRINCIPLES. Article 7.1.4 provides:

(1) The non-performing party may, at its own expense, cure any non-performance, provided that

(a) without due delay, it gives notice indicating the proposed manner and timing

of the cure;

(b) cure is appropriate in the circumstances;

(c) the aggrieved party has no legitimate interest in refusing cure; and

(d) cure is effected promptly.

(2) The right to cure is not precluded by notice of termination.

(3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.

(4) The aggrieved party may withhold performance pending cure.

(5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

4. Compare section 2B-605 (March 1998 draft) (imposes affirmative duty to cure).

SECTION 2-710. INSTALLMENT CONTRACT: BREACH.

(a) An "installment contract" means a contract in which the terms require or [authorize] [the circumstances permit] the delivery of goods in separate lots to be separately accepted, even if the [agreement] [contract] requires payment other than in installments or contains a term stating "Each delivery is a separate contract" or words of similar import.

(b) In an installment contract, the buyer may reject any nonconforming installment of delivery of goods or documents if the nonconformity of the goods substantially impairs the value of that installment to the buyer and cannot be cured or if the nonconformity is a defect in the required documents of title. [However, if a nonconforming tender by the seller is not a breach of the whole contract under subsection (c) and the seller gives adequate assurance of its cure, the buyer shall accept that installment.]

(c) If a nonconformity or default with respect to one or more installments in an installment contract is a substantial impairment of the value of the whole contract, there is a breach of the whole contract and the aggrieved party may cancel the contract. However, the power to cancel the contract for breach is waived, or a canceled contract is reinstated, if the aggrieved party accepts a nonconforming installment without seasonably giving notice of cancellation, brings an action with respect to only past installments, or demands performance as to future installments.

SOURCE: Sales, Section 2-612.

Notes

1. Section 2-710 is derived from former section 2-612 with the following changes. Subsection (a) defines an installment contract and adds language that makes clear that how payment is to be made does not determine whether a contract is an installment contract. The first set of brackets highlights the issue whether the definition of installment contract should be broadened to allow “circumstances to determine that the contract should be treated as if it were an installment contract. See also section 2-302. The second set of brackets highlights for decision whether the proper word is agreement or contract. The word “clause” is changed to “term” in order to consistently use defined terms, section 1-201(42).

2. Subsection (b) is the same as former section 2-612(2) except that the sentence has been divided into two sentences to improve readability and the words “to the buyer” have been added to implement the rule that it is a subjective test of substantial impairment that controls. This subjective standard is also used in the revocation of acceptance situation and was recommended in the PEB study report as the better rule. The PEB study report suggested that the seller’s right to cure apply to deliveries of non-conforming installments. Section 2-709 does not apply to the pre-rejection cure contemplated by this subsection as section 2-709 depends first upon a rightful rejection or a justifiable revocation. The comments or the text should clarify what is required to effect a cure sufficient to preclude rejection under subsection (b). The second sentence is bracketed to raise for discussion whether that language is needed given the definition of substantial impairment now contained in section 2-701(c). Prior to substantial impairment being defined in the draft, the effect of the last sentence was to direct the court to two of the factors used to determine “material breach” under the common law. Given the definition of substantial impairment, the issue is whether that language is needed in this section.

3. Subsection (c) restates the rule of former section 2-612(3) with the following changes. The first sentence makes explicit what was implicit in the former section, that if there is a substantial impairment, the aggrieved party may cancel the contract. The second sentence then makes a conforming change to demonstrate that the right to cancel is lost or if already canceled the contract is reinstated if the aggrieved party takes one of three actions. These changes comply with the PEB study report to clarify the role of cancellation in an installment contract. See also section 2-808. Finally, the section is redrafted to eliminate the gender pronouns.

4. **CISG.** Article 73 governs a contract for “for delivery of goods by installments.” Either party may avoid either a particular installment or the entire contract in defined cases of fundamental breach. See Art. 25. The concept is consistent with section 2-710 but the terminology is somewhat different.

5. Compare section 2B-610 (March 1998 draft).

SECTION 2-711. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.

(a) A contract for sale imposes an obligation on each party not to impair the other's

expectation of receiving due performance. If reasonable grounds for insecurity arise with respect to the performance of either party, the other party may demand in a record adequate assurance of due performance and, until that assurance is received, if commercially reasonable, may suspend any performance for which the agreed return has not already been received.

(b) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered is determined according to commercial standards.

(c) Acceptance of any improper delivery or payment does not prejudice an aggrieved party's right to demand adequate assurance of future performance.

(d) After receipt of a justified demand under subsection (a), failure to provide within a reasonable time, not exceeding 30 days, assurance of due performance which is adequate under the circumstances of the particular case is a repudiation of the contract under Section 2-712(a).

SOURCE: Sales, Section 2-609.

Notes

1. Section 2-711 follows section 2-609 with only two substantive changes. First, written notices are satisfied by "records" in line with the medium neutral approach. Second, the failure to respond to a demand is a repudiation only if it is a justified demand pursuant to the test of subsection (a). Current law leaves unclear whether a demand that does not meet the test of subsection (a) could nonetheless be justified.

2. The non-substantive changes to this section are as follows. First, the first sentence has been redrafted to the active voice. Second, "when" has been changed to "if". Third, gender pronouns have been eliminated. Fourth, a cross reference to the repudiation section is included in subsection (d).

3. **CISG.** See Article 71(a), which recognizes a more limited principle of performance insecurity. A party suspending performance under Art. 71(a) must notify the other party "immediately" and must continue with performance "if the other party provides adequate assurance of his performance." Art. 71(3).

4. Compare section 2B-620 (March 1998 draft).

SECTION 2-712. ANTICIPATORY REPUDIATION.

(a) If either party to a contract repudiates a performance not yet due and the loss of performance will substantially impair the value of the contract to the other party, the aggrieved party may:

(1) await performance by the repudiating party for a commercially reasonable time or resort to any remedy for breach of contract, even if it has urged the repudiating party to retract the repudiation or has notified the repudiating party that it would await the agreed performance; and

(2) in either case, suspend its own performance or, if a seller, proceed in accordance with Section 2-817.

(b) Repudiation includes language that one party will not or cannot make a performance still due under the contract or voluntary affirmative conduct that reasonably appears to the other party to make a future performance impossible.

SOURCE: Sales, Section 2-610.

Notes

1. Section 2-712 continues the rules of former section 2-610 with the following two substantive changes. First, subsection (a) is revised so that a repudiation of performance, as opposed to “the contract,” is the triggering event. Thus this section will apply to repudiations of installments or part performance. A substantial impairment that constitutes a repudiation under this section would also be a breach of the whole contract under section 2-710(c). The second substantive change is to include a non-exclusive definition of repudiation in subsection (b) based upon the Restatement (Second) of Contracts §250. This change accords with the PEB study report recommendation.

2. The non-substantive changes to this section are (1) eliminating the gender pronouns, (2) changing “when” to “if,” and (3) reducing the cross reference in former subsection (c) to a reference to the section as opposed to the textual explanation of the reference.

3. **CISG.** Article 72(1) states that if “prior to the date for performance of the contract it

is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided." Unless that party has "declared that he will not perform his obligations," Art. 72(3), however, the other must give reasonable notice of an intention to avoid the contract in order to permit that party "to provide adequate assurance of his performance." Art. 72(3). Adequate assurance presumably requires more than just a simple retraction of the repudiation.

4. Compare section 2B-621 (March 1998 draft).

SECTION 2-713. RETRACTION OF ANTICIPATORY REPUDIATION.

(a) A repudiating party may retract a repudiation until its next performance is due unless the aggrieved party, after the repudiation, has canceled the contract, materially changed its position, or otherwise indicated that the repudiation is considered to be final.

(b) A retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform the contract. However, a retraction must contain any assurance justifiably demanded under Section 2-711.

(c) Retraction reinstates a repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay caused by the repudiation.

SOURCE: Sales, Section 2-611.

Notes

1. Section 2-713 follows former section 2-611. The non-substantive changes to this section are (1) elimination of gender pronouns, (2) in subsection (b), breaking the long sentence into two sentences and substitution "that" for "which," and (3) changing the word "occasioned" to "caused."

2. **CISG.** There is no comparable provision in CISG. Under Articles 71 and 72, however, a party suspending performance for an apparent inability of the other to perform a substantial part of the contract, Art. 71(3), or intending to declare the contract avoided for a repudiation, Art. 72(2), must give immediate notice to the other. At that point, the other has the chance to provide adequate assurance of performance. Presumably that adequate assurance will include a retraction.

3. Compare section 2B-622 (March 1998 draft).

SECTION 2-714. CASUALTY TO IDENTIFIED GOODS. If the parties to a contract assume the continued existence and eventual delivery to the buyer of goods identified when the contract is made and the goods suffer casualty without the fault of either party before the risk of loss passes to the buyer and no commercially reasonable substitute is available, the following rules apply:

- (1) The seller shall seasonably notify the buyer of the nature and extent of the loss.
- (2) If the loss is total, the contract is [avoided] [terminated].
- (3) If the loss is partial or the goods no longer conform to the contract, the buyer may nevertheless demand inspection and may treat the contract as [terminated] [avoided] or accept the goods with due allowance from the contract price for the partial loss or the nonconformity but without further right against the seller.

SOURCE: Sales, Section 2-613.

Notes

1. Section 2-714 continues the rules from former section 2-613 with three substantive changes. First, the standard of when the section applies has been changed from the contract “requires for its performance goods identified when the contract is made” to the parties “assume the continued existence and eventual delivery to the buyer of goods identified when the contract is made.” This test responds to the ambiguity about when does the “contract require” the identified goods and relaxes that test to focus on the parties’ assumptions about what goods will be used to fulfill the contract. To not expand the section beyond its reason, the following limitation is then placed on the ability to use this section, that “no commercially reasonable substitute is available.” This limitation means that a seller who is selling stock goods identified when the contract was made and who has a commercially reasonable substitute available could not use this section to avoid delivery and liability. The combination of these two changes keeps the section within its reason of providing an excuse when the parties contemplated that special goods would be used to fulfill the contract without the ambiguity of the phrase “contract requires.”

Second, the reference to “no arrival, no sale” terms has been deleted in accordance with the decision to not include shipping terms definitions within revised Article 2.

Third, the revision requires the seller to give notice to the buyer of the nature and extent of the loss in a seasonable manner. This change is designed to bring this section within the notice requirement of revision section 2-717 (current section 2-616). The seller should be obligated to notify the buyer seasonably in order to take advantage of the liberal excuse provided in this section.

2. The following three non-substantive changes have been made. First, “when” has been changed to “if.” Second, the phrasing of subsection (3) is made consistent with the article’s use of the concept of non-conformity as opposed to the old phrasing of deterioration. Third, the gender pronouns are eliminated. Another non-substantive change is flagged by the use of the brackets. Given the expanded treatment of the “termination” concept, that term should be used here instead of the old language of “avoided.”

3. **CISG.** Article 79(1) provides that a "party is not liable for a failure to perform any of his obligations if he proved that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." Article 79(2) also provides limited excuse where a party's failure is "due to the failure by a third person." Arguably, this provision provides as much excuse from performance as does section 2-714 (formerly section 2-613).

SECTION 2-715. SUBSTITUTED PERFORMANCE.

(a) If, without the fault of either party, agreed berthing, loading, or unloading facilities or an agreed type of carrier becomes unavailable, or an agreed manner of delivery otherwise becomes commercially impracticable, a party may claim excuse under Section 2-716 unless a commercially reasonable substitute is available. In that case, reasonable substitute performance must be tendered and accepted.

(b) If an agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery until the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been made, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive, or predatory.

SOURCE: Sales, Section 2-614.

Notes

1. Section 2-715 makes only one substantive change to former section 2-614. Subsection (a) provides that if a commercially reasonable substitute is not available, the performance may be excused under section 2-716. The non-substantive change is to change “where” to “if.”

2. Subsection (b) may have increased importance if the European Union adopts the EURO as the common currency for its members. Thus, a contract price to be paid in Deutsch marks or Swiss francs may, because of such action, be payable only in EUROS. Does subsection (b) provide an adequate solution to this problem?

SECTION 2-716. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.

(a) Subject to Section 2-715 and subsection (b), delay in performance or nonperformance by the seller is not a breach of contract if the seller’s performance as agreed has been made impracticable by:

(1) the occurrence of a contingency whose nonoccurrence was a basic assumption on which the contract was made; or

(2) compliance in good faith with any applicable foreign or domestic governmental regulation, statute, or order, whether or not it later proves to be invalid.

(b) A party claiming excuse under subsection (a) shall seasonably notify the other party that there will be delay or nonperformance. If the claimed excuse affects only a part of the seller’s capacity to perform, the seller shall also allocate production and deliveries among its customers in a manner that is fair and reasonable and notify the buyer of the estimated quota made available. In allocating production and deliveries, the seller may include regular customers not then under contract as well as its own requirements for further manufacture.

SOURCE: Sales, Section 2-615.

Notes

1. Section 2-716 continues the rules for excuse from performance from former section 2-

615 with two substantive changes. First, the concept of excuse from “delivery obligations has been broadened to excuse from “performance in recognition that the seller’s obligations may include more than delivery of the goods. Second, the phrase “except so far as the seller may have assumed a greater obligation has been eliminated. The parties should be able to agree to either a lesser or greater obligation than what is provided in this default rule.

2. The non-substantive changes are to break the long sentence in former subsection (a) into two subsections in order to improve readability and to eliminate the gender pronouns. Former subsections (b) and (c) have been integrated into one section to make the rules regarding allocations more readable and to eliminate the gender pronouns.

3. **CISG.** See Article 79(1), which grants excuse for an "impediment beyond his control and that he could not reasonably be expected to have taken...into account at the time of the conclusion of the contract or to have avoided or overcome..." This language is consistent with the law interpreting Force Majeure clauses. "Impediment" suggests external interference with the capacity to perform rather than changes affecting the incentive to perform. Thus, an unexpected labor dispute may impede the buyer's duty to take delivery of the goods but a severe drop in market prices would not impede the buyer's duty to pay for goods taken.

4. Compare section 2B-624 (March 1998 draft).

SECTION 2-717. PROCEDURE ON NOTIFICATION CLAIMING EXCUSE.

(a) A party that receives notification of a material or indefinite delay in performance or an allocation permitted under Section 2-714 or 2-716 as to any delivery concerned, or if there is a breach of the whole contract under Section 2-710(c), then as to the whole, by notification in a record, may:

(1) terminate and thereby discharge any unexecuted portion of the contract; or

(2) modify the contract by agreeing to take the available allocation in substitution under Section 2-716 or by accepting the goods with due allowance as provided in Section 2-714.

(b) If, after receipt of notification under Section 2-714 or 2-716, a party fails to terminate or modify the contract within a reasonable time not exceeding 30 days, the contract lapses [is terminated] with respect to any performance affected.

(c) This section may be varied by agreement only to the extent that the parties have

assumed an obligation different than that provided under Sections 2-714 and 2-716.

SOURCE: Sales, Section 2-616.

Notes

1. Section 2-717 makes the following changes to the rules provided in former section 2-616. First, the notification procedure is made applicable to the excuse provision of section 2-714. Second, the notification can be made in a “record” as opposed to a “written” notice in line with the medium neutral approach of the draft. Third, the phrasing “deliveries” is changed to “performance” in recognition that performance obligations include non-delivery obligations and in line with the idea that either party may use this section. Fourth, the bracketed language in subsection (b) is to raise the issue of whether the defined term “terminated” should substitute for “lapses.” Fifth, the redrafting of subsection (c) is based upon the change to section 2-716 that allows parties to assume other obligations. If the parties assume an obligation other than the obligation provided in the default rules of sections 2-714 and 2-716, the parties can vary the procedure on default. If the default rules govern excuse, the parties cannot modify the rules of this section. The non-substantive changes to this section are to redraft to eliminate gender pronouns and to reduce the textual references to other sections to section numbers.

2. **CISG.** There is no comparable provision in CISG. Article 79(4), however, requires that the party who fails to perform “must give notice to the other party of the impediment and its effect on his ability to perform.” The penalty for failure to notify is damages. Also, Article 79(3) provides that the excuse or exemption provided by Art. 79(1) “has effect for the period during which the impediment exists.” These requirements provide a framework within which the parties can negotiate over allocations and adjustments.

3. Compare section 2B-624 (March 1998 draft).

SECTION 2-718. PRESERVING EVIDENCE OF GOODS IN DISPUTE. To further the adjustment of a claim or dispute, the following rules apply:

(1) Either party to a [contract][sale], on reasonable notification to the other party, has a right to inspect, test, and sample the goods for the purpose of ascertaining the facts and preserving evidence. This right includes goods that are in the possession or control of the other party.

(2) Parties to a [contract][sale] may agree to an inspection or survey by a third party to determine the conformity or condition of the goods and may agree that the findings will be binding upon them in any later litigation or adjustment.

SOURCE: Sales, Section 2-515.

Notes

Section 2-718 follows former section 2-515 without substantive change. The non-substantive changes to this section are to move the “purpose” phrase in subsection (1) to the end of the sentence to improve readability and to break the long sentence in subsection (1) into two sentences to improve readability. The bracketed phrases of “contract” and “sale” raise for decision whether either is the proper term given the definitions of section 2-102. Former section 2-515 did not use either term, merely referring to “parties” without being clear about what they were “parties” to.

PART 8

REMEDIES

[A. IN GENERAL]

SECTION 2-801. SUBJECT TO GENERAL LIMITATIONS. The remedies of the seller, buyer, and other protected persons under this article are subject to the general limitations and principles stated in Sections 2-801 through 2-814.

SOURCE: New.

Notes

1. This section is new and sets out the remedial hierarchy of Part 8. Subpart A (Sections 2-801 through 2-814) contain sections that are applicable to both buyer and sellers and set forth remedial policies that control the application of the more specific remedial rules in Subpart B (seller's remedies are in sections 2-815 through 2-822) and Subpart C (buyer's remedies are in sections 2-823 through 2-829). Part 8 follows the organizational structure used in Article 2A, Part 5.

2. **CISG.** Revised Part 8 is consistent with the remedial structure in CISG. Chapter II states the obligations of the seller (Articles 30-44) and the remedies of the buyer upon breach of contract by the seller. Article 45. Buyer's remedies include the "rights" provided in Articles 46-52, which are unique to the buyer, and "damages" claimed under Articles 74-77, which are common to the buyer and the seller. Similarly, Chapter III states the obligations of the buyer (Articles 53-59) and the remedies of the seller upon breach by the buyer. Article 61. Seller's remedies include the "rights" provided in Articles 62-65, which are unique to the seller, and "damages" claimed under Articles 74-77, which are common to both parties. In general, the prefers specific performance over damages and states applicable damage principles in general terms.

3. Article 2B organizes the remedies sections into three subparts; "A. In General", "B. Damages" and "C. Performance Remedies". The draft does not detail the hierarchy among the principles in the subparts. See Part 7 of March 1998 Draft of Article 2B.

SECTION 2-802. BREACH OF CONTRACT; PROCEDURES. If a party is in breach of a contract, the party seeking enforcement:

(1) has the rights and remedies in this article and, except as limited by this part, in the agreement;

(2) may reduce its claim to judgment or otherwise enforce the contract by any available administrative or judicial procedure, or the like, including arbitration if agreed to by the parties; and

(3) may enforce the rights granted by and remedies available under other law.

SOURCE: Leases, Section 2A-501.

Notes

This section has no counterpart in current article 2 and is based on section 2A-501 which is based on section 9-501. See section 9-601 (March 1998 draft). Compare section 2B-701(c) (March 1998 draft). This section provides a summary of the aggrieved party's general remedial rights upon a breach of contract. Whether a party is in breach of contract depends upon the principles in Part 7.

SECTION 2-803. REMEDIES IN GENERAL.

(a) In accordance with Section 1-106, the remedies provided in this article must be liberally administered with the purpose of placing the aggrieved party in as good a position as if the other party had fully performed.

(b) Unless the contract provides for liquidated damages under Section 2-809 or a limited remedy enforceable under Section 2-810, an aggrieved party may not recover that part of a loss resulting from a breach of contract that could have been avoided by reasonable measures under the circumstances. The burden of establishing a failure to take reasonable measures under the circumstances is on the party in breach.

Alternative A

(c) The rights granted by and remedies available under this article are cumulative, but a party may not recover more than once for the same injury. An aggrieved seller who has resold goods under Section 2-819 may not recover damages under section 2-821(a). An aggrieved buyer who has covered under Section 2-825 may not recover damages under section 2-826.

Alternative B

(c) The rights granted by and remedies available under this article are cumulative, but a party may not recover more than once for the same injury.

Alternative C

(c) The rights granted by and remedies available under this article are cumulative, but a party may not recover more than once for the same injury. Unless the contract contains an enforceable liquidated damages provision or a limited remedy enforceable under Sections 2-809 or 2-810, a court may deny or limit a remedy if, under the circumstances, it would put the aggrieved party in a substantially better position than if the party in breach had fully performed.

End Alternatives

(d) This article does not impair a remedy for breach of any obligation or promise collateral or ancillary to a contract for sale.

SOURCE: Licenses, Section 2B-701, 2B-707(c); Sales, Section 2-701.

Notes

1. The bulk of this section has no counterpart in former Article 2. Subsection (d) is the same as former section 2-701 with redrafting to the active as opposed to passive voice. Subsection (a) is derived from the statement of remedial policy in section 1-106. Subsection (b) contains a statement of the mitigation principle. These three subsections have not generated any controversy and appear to be generally accepted as good statements of policy.

2. Subsection (c) has three alternative formulations for discussion. Each alternative contains the same first sentence which declares that the rights and remedies are cumulative. This statement accords with the former Article 2's rejection of a policy of an election of remedies. Thus comment 1 to former section 2-706 states: "This Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case. The first sentence does place one limitation on the aggrieved party's right to recover which is a preclusion of double recovery for the same injury.

The second sentence of Alternative C is the same as the July 1997 draft. This sentence has generated considerable debate and disagreement. In general, Part 8 provides two alternative measures of damages for an aggrieved buyer who has not accepted the goods, the cover price minus the contract price (section 2-825) or the market price minus the contract price (section 2-826). An aggrieved seller has three alternative damage measurements, the contract price minus the resale price (section 2-819), the contract price minus the market price (section 2-821(a)) or

lost profit and reliance expenditures (section 2-821(b)). The issue is the extent to which the draft should attempt to guide the courts and parties in controlling the aggrieved party's choice of remedial measure. Given the debate three alternatives are proposed. Alternative B is proposed to leave the matter to the courts to decide using the guiding light of the principle from subsection (a). Alternative A provides that if the aggrieved party has chosen to cover under section 2-825 or resell under section 2-819, then the market price measurement is not available as a possible measure of damages. Choices between other measurements are left to the courts to police using the principle of subsection (a).

The aggrieved buyer is not required to cover although the statement of the mitigation principle in subsection (b) may preclude the recover of loss that could have been prevented if the aggrieved buyer could have reasonably avoided that loss by making a cover transaction. See Restatement (2d) Contracts §350. If the buyer covers under section 2-825 by reasonably and in good faith making a purchase in substitution for the goods from the seller without undue delay, the buyer has appropriately mitigated. If the buyer does cover, Alternative A would preclude the buyer from using the market price formula. Comment 5 to former section 2-713 (market price measurement for an aggrieved buyer) provides "The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered. Courts have interpreted this comment to mean that if the buyer has covered by buying goods in substitution of the ones due the seller in good faith, reasonably and without unreasonable delay, the buyer must use section 2-712 to measure its damages and may not use section 2-713 as the measurement device. See *Commonwealth Edison C. v. Allied Chemical Nuclear Products Inc.*, 684 F. Supp. 1434, 1435 (N. D. Ill. 1984) ("Official comment 5 to §2-713 indicates that when a party covers, his damages are measured by §2-712, not §2-713. "); *Dickson v. Dehli Seed Co.*, 760 S.W. 2d 382, 389 (Ct. App. Ark. 1988) ("Because appellee chose to purchase substitute goods its remedy was limited to that of §2-712 unless the purchase did not constitute 'cover.' "); *Neibert v. Schwenn Agri-Production Corp.*, 579 N.E.2d 389, 393 (Ill. Ct. App. 1991) (Section 2-713 "only applies when and to the extent the buyer has not covered. "); James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE §6.4, subsection c (4th ed. 1995) (advocating that a cover that qualifies under §2-712 should preclude the buyer from recovering a greater amount by using the market price formula of §2-713). Alternative A implements the rule of those cases. Does the drafting committee agree?

The seller is not required to resell goods. Again, the mitigation principle of subsection (b) may prevent the seller from recovering the part of the loss that could have been prevented if the seller could have reasonably sold the goods. If the seller does resell and complies with the requirements of section 2-819, the seller has appropriately mitigated the loss. If the seller does resell and complies with the requirements of section 2-819 (former section 2-706), Alternative A precludes the seller from choosing the market price formula to measure the loss. See *Sharp Electronics Corp. v. Lodgistix, Inc.*, 802 F. Supp. 370, 380-81 (D. Kan. 1992) (In that case, seller could not use market price damages when it had resold the goods); White & Summers, UNIFORM COMMERCIAL CODE, §7-7 (4th ed. 1995) (advocating that a resale complying with the requirements of section 2-706 should preclude seller from recovering a larger amount by using the market price formula of section 2-708(1)).

Alternative A does not address the availability of a lost profit recovery under section 2-821(b) when the seller has resold the goods. Does the drafting committee agree?

3. Compare section 2B-701(a) and (b) (March 1998 draft) (same as alternative C); section 2B-707(c) (March 1998 draft) (statement of mitigation principle).

SECTION 2-804. MEASUREMENT OF DAMAGES IN GENERAL. If there is a breach of contract, the aggrieved party may recover compensation for the loss resulting in the ordinary course from the breach as determined under Sections 2-815 through 2-829 or as determined in any reasonable manner, together with incidental damages and consequential damages, less expenses and costs avoided as a result of the breach.

SOURCE: Sales, Section 2-714(a); Licenses, Section 2B-707(a).

Notes

1. Section 2-804 is new and provides a general statement of a measurement rule that can be used if the specific measurement rules are not sufficient to compensate the aggrieved party's expectancy interest. Although compensation of the expectancy interest of the aggrieved party is the general rule, a party may also use this measurement to compensate the aggrieved party's reliance or restitution interests. See Restatement (2d) Contracts §349. Even if an aggrieved party cannot establish any general or direct damages, an aggrieved party may recover incidental and consequential damages resulting from the breach.

2. An aggrieved party should not be able to use section 2-804 to recover damages based upon its reliance or restitutionary interests when those interests are greater than its expectancy interest. To illustrate, assume seller and buyer enter into an installment contract for 10 deliveries at \$20,000 per delivery. Seller's cost of performing is actually \$25,000 per delivery and the market price at time of delivery is \$20,000 and Seller could resell undelivered goods for at most \$20,000. Seller made a bad deal by underestimating the cost of Seller's performance. Thus on each delivery that Buyer accepts, Seller is losing \$5,000. Buyer breaches. Seller's general damage recovery under either market or resell formula is \$0. Under a restitution theory, Seller could argue that it should get the value of the benefit it conferred on Buyer by its part performance. If the value of the benefit conferred on Buyer is measured by the market value of the goods, the restitution recovery is identical to the expectancy recovery. If the value of the benefit conferred on Buyer is measured by the contract price Buyer agreed to pay, then as to any installments accepted, the Buyer is already liable for the price under section 2-822, and Seller gets no benefit from asserting restitution. If the value of the benefit conferred on Buyer is measured by the cost of performance, then Seller will get the \$25,000 per delivery as to the goods accepted by Buyer. See *Boomer v. Muir*, 24 P.2d 570 (Cal. App. 1933) (a construction contract

situation where the value of the benefit conferred on the buyer was measured by the cost of performance of the builder); U.S. v. Western States Mechanical Contractors, 834 F.2d, 1533 (10th Cir. 1987) (subcontractor's contract price was \$295,706, the reasonable value of work under the subcontract as determined at trial was \$475,000, subcontractor wrongly fired so general contractor in breach, 40% of the work was done by subcontractor prior to firing, subcontractor received 40% of \$475,000 as restitution for the value of the work performed). See also Restatement (Second) Contracts §371. Recovery based upon the reliance or restitution interest that exceeds the expectancy interest of the aggrieved party should not be allowed when the aggrieved party enters into a losing contract. See Restatement (2d) Contracts §349 comment a. If the party completely performs the contract and they are owed only money, the Restatement (Second) Contracts §373(2) provides that restitution is not allowed, thus the seller would be limited to the price. This result would have to be stated in the comments to this section. Does the Drafting Committee agree?

3. Compare section 2B-707(a) (March 1998 draft).

SECTION 2-805. INCIDENTAL DAMAGES. Incidental damages resulting from breach of contract include compensation for any commercially reasonable charges, expenses, or commissions incurred with respect to:

(1) inspection, receipt, transportation, care, and custody of identified goods which are the subject of the breached contract;

(2) stopping delivery or shipment;

(3) effecting cover, return, or resale of the goods;

(4) reasonable efforts otherwise to minimize or avoid the consequences of breach; and

(5) otherwise dealing with the goods or effectuating other remedies [after the breach].

SOURCE: Sales, Sections 2-715(1), 2-710.

Notes

1. Section 2-805 combines former section 2-710 and former section 2-715(1) into one section. Section 2-805 continues as incidental damages the types of damages found in those two sections with redrafting to accommodate the combination into one listing. Two substantive changes have been made. First, the recovery of incidental damages under subsection (1) for an aggrieved buyer is not limited to goods rightfully rejected. This limitation has been criticized as more restrictive than the common law rule and as encouraging rejection in the marginal case.

Hawkland §2-513:03. Second, the catchall phrases in subsection (4) and (5) are to give more content to the catchall phrases located at the end of both former sections. Section 2-710 (“or otherwise resulting from the breach ”); Section 2-715(1) (“any other reasonable expense incident to the delay or other breach ”). The bracketed language in subsection (5) is proposed to bring the catchall in subsection (5) closer to those statements.

2. Compare section 2B-102(a)(22) (March 1998 draft).

SECTION 2-806. CONSEQUENTIAL DAMAGES.

(a) Consequential damages resulting from a breach of contract include compensation for:

(1) any loss, including loss to property other than the goods sold, the party in breach at the time of contracting had reason to know would probably result from the aggrieved party's general or particular requirements and needs and which could not have been avoided by reasonable measures under the circumstances; and

(2) injury to person proximately resulting from any breach of warranty.

(b) The aggrieved party may not recover any consequential damages pursuant to subsection (a)(1) that result in unreasonably disproportionate compensation to the aggrieved party. Compensation may be unreasonably disproportionate if the circumstances indicate that the risk of the consequential loss was not allocated to the breaching party such as when the consequential loss is significantly greater than the benefit the party in breach has received or would have received from the contract or the parties were informal in their dealing. The breaching party has the burden of establishing that consequential damages under subsection (a)(1) result in unreasonably disproportionate compensation.

SOURCE: Sales, Sections 2-710(b), 2-715(b) (March, 1995), Licenses §2B-102(a)(7).

Notes

1. Section 2-806 is derived from the provision governing buyer’s consequential damages in former section 2-715(2) with the following changes. First, the section has been rephrased to

govern both the seller and buyer as the aggrieved party to implement the PEB study report recommendation that the seller also be allowed to recover consequential damages. Second, subsection (a)(2) is the same as former section 2-715(2)(b) except that it does not cover property damage as under the former law. Damage to property other than the goods sold is governed by the foreseeability test and mitigation principle in subsection (a)(1) and not the proximate cause test of subsection (a)(2). Third, the foreseeability test as stated in subsection (a)(1) requires the aggrieved party have reason to know of the losses that would probably result as opposed to reason to know of the general or particular requirements of the other party. Compare Restatement (2d) Contracts § 351(1). Fourth, subsection (b) allows the breaching party to demonstrate that the consequential damages under subsection (a)(1) are unreasonably disproportionate compensation. The second sentence of subsection (b) attempts to give definition to that phrase based upon comment f and the cases to have discussed Restatement (2d) Contracts §351(3) which provides: "A court may limit damages for foreseeable loss by excluding recover for loss of profits, by allowing recover only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation. See *Perini Corp. v. Great Bay Hotel & Casino, Inc.*, 610 A.2d 364, 381-83 (N. J. 1992) (disproportion between loss suffered by aggrieved party and price charged by breaching party); *International Ore & Fertilizer Corp. v. SGS Control Services, Inc.*, 743 F. Supp. 250 (S.D.N.Y. 1990) (same).

2. Assuming the contract does not contain an enforceable exclusion of consequential damages (section 2-810), the aggrieved party must satisfy four conditions to recover:

(a) The loss must result from (be caused by) the breach. This cause-in-fact requirement is common to all breach of contract claims, but may be more difficult to establish when the loss is remote from the breach.

(b) The loss must result from general or particular requirements of the aggrieved party of which the breaching party had notice (knowledge or reason to know) at the time of contracting. This is Article 2's version of the famous principle in Hadley v. Baxendale. In addition, 2-806 now requires the breaching party to have reason to know at the time of contracting that the loss "would probably result from the breach." See Restatement, Second, Contracts §351. This occupies the middle ground between losses that are "likely to result" and losses that are simply "in the cards," and is unlikely to change the operation of this section.

(c) An otherwise foreseeable loss is not recoverable if, after the breach, it could have been prevented by either the aggrieved or the breaching party through "reasonable measures under the circumstances." This limitation, which is a specific application of section 2-803(b), works best where the buyer can cover to minimize or avoid lost profits.

Normally, the breaching party must establish that the plaintiff failed to mitigate. See section 2-803(b). In cases where both parties could have avoided the loss by the same or similar acts and it is "equally reasonable" to expect the breaching party to minimize damages, the defendant is in no position to contend that the plaintiff failed to mitigate." See, e.g., *Nezperce*

Storage Co. v. Zenner, 670 P.2d 871 (Id. 1983). An unresolved issue is whether the plaintiff must bear the burden of proof that it mitigated its consequential damages as part of its case to recover consequential damages or whether mitigation is in the nature of an affirmative defense that the defendant must establish that the plaintiff failed to mitigate in order to reduce the amount of consequential damages. Section 2-803(b) places the burden of proving that mitigation did not occur on the breaching party. The PEB study report assumed that the breaching party would have the burden of demonstrating that the aggrieved party did not mitigate. The comments could make this clear.

(d) The plaintiff must prove the loss with reasonable certainty. This limitation controls loss in complex cases of remote or speculative damage, (e.g., loss of good will, new businesses) but is not an insuperable barrier in most cases.

3. **CISG.** Both buyer and seller can recover foreseeable consequential damages. Article 74.

4. Compare section 2B-102(a)(7) (March 1998 draft); section 2B-707(d) (March 1998 draft).

SECTION 2-807. SPECIFIC PERFORMANCE.

(a) A court may enter a decree for specific performance if the parties have expressly agreed to that remedy or the goods or the agreed performance of the party in breach of contract are unique or in other proper circumstances. Even if the parties expressly agree to specific performance, a court shall not enter a decree for specific performance where the breaching party's sole remaining contractual obligation is the payment of money.

(b) The decree for specific performance may include terms and conditions as to payment of the price, damages, or other relief the court considers just.

SOURCE: Section 2A-521; Sales, Section 2-716(1) & (2).

Notes

1. Section 2-807 is derived from former section 2-716(1) & (2) but has been rephrased in order to allow either party to request specific performance. Former section 2-716 in the caption referred to the buyer's right to get specific performance. Thus the words "or the agreed performance of the party in breach" are added. This change also recognizes that performance other than the goods may be unique. Second, the parties may agree to specific performance. This

change accords with the PEB study report recommendation. Third, the second sentence of subsection (a) prevents the breaching party from getting specific performance if the only obligation is to pay money. The last sentence of subsection (a) is designed to distinguish the “take and pay” contracts from contracts where the only obligation is to pay for goods already accepted. In take and pay contracts, the parties would be able to agree to specific performance and have that agreement enforced. Finally the first sentence is redrafted in the active voice as opposed to passive voice.

2. **CISG.** Specific performance is the preferred remedy for sellers and buyers under the Convention. See Articles 46 and 62. Article 28 provides, however, that if under CISG “one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.”

3. Compare section 2B-711 (March 1998 draft).

SECTION 2-808. CANCELLATION: EFFECT.

(a) An aggrieved party may cancel a contract if there is a breach under Section 2-701, or in the case of an installment contract, a breach of the whole contract under Section 2-710(c), unless there is a waiver of the breach under Section 2-702 or a right to cure the breach under Section 2-709.

(b) Cancellation is not effective until the canceling party notifies the party in breach of the cancellation.

(c) Except as otherwise provided in subsection (d), upon cancellation, all obligations that are still executory on both sides are discharged.

(d) The obligations surviving cancellation include:

- (1) a right based on a previous breach or performance of a contract;
- (2) any term limiting disclosure of information;
- (3) an obligation to return or dispose of goods;
- (4) a choice of law or forum;

(5) an obligation to arbitrate or otherwise resolve disputes through alternative dispute resolution procedures;

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

(7) a remedy for breach of the whole contract or any unperformed balance; and

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

(e) Unless a contrary intention clearly appears, language of cancellation, rescission, or avoidance of the contract or similar language shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach of contract.

SOURCE: Sales, Sections 2-106(3) & (4), 2-720; Licenses, Sections 2B-702 & 2B-627.

Notes

1. Section 2-808 is an articulation of the cancellation remedy and consequences of cancellation derived from former section 2-106(3) & (4). The PEB study report recommended that the availability and effect of cancellation be clarified. Cancellation is defined in section 2-102(a)(4) as a party ending a contract because of the other party's breach, the same as former section 2-106(4). Subsection (a) is derived from former sections 2-703(a)(f) and 2-711(1) but makes clear that if a party is precluded from canceling if there has been a waiver of the breach under section 2-702 and if the seller still has a right to cure under section 2-709. Subsection (b) is new. See the definition of notify in section 1-201(26). Subsection (c) states the effect of cancellation.

Former section 2-106(4) provided that upon cancellation, all obligations that are still executory on both sides are discharged, rights based upon prior breach or performance are retained, and remedies for breach of the whole contract and any unperformed balance are retained. These rules are retained in subsections (c) and (d)(1) & (7). The remaining subsections of subsection (d) have evolved through attempts to coordinate with Article 2B and the list of obligations that survive termination in section 2-310. Section 2-310 provides the following additional rights survive termination: "a term limiting the scope, manner, method, or location of the exercise of rights in the goods", "an obligation of confidentiality, non-disclosure, or non-competition", "an indemnity term", and "a limitation of remedy or modification or disclaimer of warranty". Should those obligations be listed in this section as well? By using the word "includes" subsection (d) provides a non-exclusive list of obligations that survive cancellation. Section 2-310(c) provides that the obligation of returning or disposing of the goods must be

promptly performed. Should that provision be in this section as well?

2. As with other default rules, the parties are able to alter the effect of this provision by agreement. Thus the parties could provide that the obligations in this section do not survive cancellation or that other obligations of the contract do survive cancellation. An obligation must be created by the parties' contract in order to have the possibility of surviving cancellation under this section. That is, this section does not create any of the obligations listed in the section but is merely stating the effect of cancellation on such an obligation if the contract has created that obligation. Cancellation generally affects only future performance and is not rescission of the contract so that the aggrieved party is not required to return the pre-cancellation performance. For example, if seller is the breaching party and has delivered a non-conforming installment of goods and the nonconforming installment results in a breach of the whole contract, the buyer may cancel the contract. When the buyer cancels, the buyer need not return the accepted non-conforming installments to the seller, but has the right to obtain damages due to the non-conformity of those past installments. The cancellation means that the seller need not deliver any of the remaining installments but the seller is liable for breach of the whole contract. If the parties have already rendered their performance so that obligations are not executory on both sides, then cancellation is a meaningless remedy. Assume in a one shot contract that the seller has delivered non-conforming goods and the buyer has accepted those goods. The buyer cancels due to the non-conformity. The buyer is still liable for the price and has a counterclaim for damages under section 2-827 unless buyer can revoke acceptance under section 2-707. The buyer's cancellation does not affect the buyer's obligation to pay for the goods nor give the buyer the ability to return the goods to the seller outside of the revocation right.

Subsection (e) is the same as former section 2-720.

3. **CISG.** CISG's equivalent to "cancellation" is "avoidance" for a fundamental breach of contract. See Art. 25, 49(1) and 64(1). The effects of a proper avoidance are stated in Art. 81-84. In general, it is more difficult to avoid the contract under CISG than it is to cancel under Article 2. Moreover, the seller's remedies of contract-market price damages or resale and the buyer's remedies of contract-market price damages and "cover" depend upon avoidance. Art. 75 and 76.

4. Compare section 2B-702 (March 1998 draft).

SECTION 2-809. LIQUIDATION OF DAMAGES; DEPOSITS.

(a) Damages for breach of contract by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the difficulties of proof of loss in the event of breach and either the actual loss or the then anticipated loss caused by the breach. If a term liquidating damages is unenforceable under this subsection, the aggrieved party may pursue the

remedies provided in this article.

(b) If a seller justifiably withholds delivery of goods or stops performance because of the buyer's breach of contract or insolvency, the buyer is entitled to restitution of any amount by which the sum of payments exceeds the amount to which the seller is entitled under a term liquidating damages in accordance with subsection (a).

(c) The buyer's right to restitution under subsection (b) is subject to offset to the extent that the seller establishes a right to recover damages under the provisions of this article other than subsection (a) and the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(d) If a seller has received payment in goods, their reasonable value or the proceeds of their resale are payments for the purposes of subsection (b). However, if the seller has notice of the buyer's breach before reselling goods in part performance, the resale is subject to the requirements of section 2-819.

SOURCE: Sales, Section 2-718. See Licenses, Section 2B-704.

Notes

1. Section 2-809 continues the rules from former section 2-718 with several substantive changes. First, in subsection (a) the tests of inconvenience or non-feasibility of obtaining an adequate remedy have been eliminated. Second, the last sentence from former subsection (1) has been eliminated. Third, the last sentence of subsection (a) is new and states what was implicit in the former rule, that if a liquidated damages clause is unenforceable, the remedies of the Article become available.

2. Subsection (b) continues the rules from former subsection (2) with the following changes. First, the occasions in which restitution might be available are expanded from "delivery of goods" to "stopping of performance on account of breach or insolvency." This change recognizes that there are other types of performance a seller may be entitled to stop and also creates a better mesh with the seller's rights in section 2-818. Second, the penalty offset provision of former subsection (2)(b) has been eliminated as recommended in the PEB study report. The non-substantive changes to the section are to change "where" to "if" and to rephrase

to eliminate the gender pronoun.

3. Subsection (c) continues the rule from former subsection (3) without change. Subsection (d) continues the rule from former subsection (4) with rephrasing to eliminate the gender pronoun and to update the reference to the resale section.

4. **CISG:** There is no provision dealing with liquidated damages. Restitution claims are permitted in certain cases of avoidance for fundamental breach. See Articles 81(2), 82 and 84.

5. Compare section 2B-704 (March 1998 draft).

SECTION 2-810. CONTRACTUAL MODIFICATION OF REMEDY.

(a) Subject to Section 2-809 and subsections (b) and (c), the following rules apply:

(1) An agreement may add to or substitute for the remedies available under this article and may limit or alter the measure of damages recoverable for breach of contract such as by limiting the buyer's remedies to return of the goods and repayment by the seller of the price or to repair and replacement of nonconforming goods or parts by the seller.

Alternative A

(2) An agreed remedy under paragraph (1) may not be applied to deprive the aggrieved party of a minimum adequate remedy under the circumstances.

Alternative B

(2) An exclusive agreed remedy must be a minimum adequate remedy for breach of the obligations in the contract.

Alternative C

(2) An exclusive agreed remedy that is not a minimum adequate remedy for breach of the obligations in the contract is unconscionable.

End of Alternatives

(3) Resort to an agreed remedy under paragraph (1) is optional. However, if the

parties expressly agree that the agreed remedy is exclusive, it is the sole remedy.

Alternative A

(b) [Subject to subsection (a)(2)], [if, because of a breach of contract or other circumstances, an exclusive, agreed remedy fails substantially to achieve the intended purpose of the parties] [if circumstances cause an exclusive or limited remedy to fail of its essential purpose], the following rules apply:

(1) In a contract other than a consumer contract, the aggrieved party may pursue all remedies available under this article. However, an agreement expressly providing that incidental or consequential damages, including those resulting from the failure to provide the limited remedy, are excluded is enforceable to the extent permitted under subsection (c).

(2) In a consumer contract, an aggrieved party may reject the goods or revoke acceptance and, to the extent of the failure, may pursue all remedies available under this article including the right to recover consequential or incidental damages, despite any term purporting to exclude or limit such remedies.

Alternative B

(b) If circumstances cause an exclusive or limited remedy to fail of its essential purpose, an aggrieved party may resort to all remedies for breach provided under this article. An exclusion of incidental and consequential damages that is otherwise enforceable under subsection (c) is not effective to preclude recovery of consequential and incidental damages that arise from the failure of the exclusive or limited remedy.

Alternative C

(b) If circumstances cause an exclusive or limited remedy to fail of its essential purpose,

an aggrieved party may resort to all remedies for breach provided under this article. An exclusion of consequential or incidental damages otherwise enforceable under subsection (c) is enforceable only if the breaching party establishes that the aggrieved party agreed to assume the risk of the consequential or incidental damages in the event the exclusive or limited remedy was not provided.

End of Alternatives

(c) [Subject to subsection (b)(1)], consequential damages and incidental damages may be limited or excluded by agreement unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of a consumer contract is presumed to be unconscionable but limitation of such damages if the loss is commercial is not.

SOURCE: Sales, Section 2-719; Licenses, Section 2B-703.

Notes

1. Section 2-810 continues the rules from former section 2-719. Subsection (a)(1) restates the rules of former subsection (1)(a). Subsection (a)(3) restates the rule of former subsection (1)(b) with rephrasing to active voice.

Subsection (a)(2) is given in three alternatives. There are two issues. First, should the principle of former comment 1 to section 2-719 be provided in the text or should it remain in the comments. The PEB study report recommended that the drafting committee consider placing in the text a statement about when an agreed remedy goes too far. Second, what is the appropriate statement of the principle? The comment provides:

“... it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy

provisions of this Article.

The various alternatives proposed in the text attempt to respond to the second question. Should the adequacy of the remedy be tested at the time of formation, see *CogniTTest Corp. v. Riverside Pub. Co.*, 107 F. 3d 493 (7th Cir. 1997), or should the adequacy of the remedy be tested depending upon the events post-formation, see *Champlain Enterprises, Inc. v. U.S.*, 957 F. Supp. 26 (N.D.N.Y. 1997)?

2. Subsection (b) addresses the troublesome issue of what to do with a consequential and incidental damage excluder in the event the exclusive agreed remedy fails. This issue is frequently litigated and the PEB study report recommended that the revision clarify how this concept should be applied. 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 when the buyer is a consumer? Subsection (b) provides three alternative approaches to these questions.

Alternative A is the same as provided in the July 1997 draft. The brackets provide a choice between the old language from former subsection (2) and an updated version of the same principle. Alternative B limits the recoverable consequential and incidental damages to those caused by the failure to provide the exclusive or limited remedy as agreed. Alternative C allows the breaching party to enforce the consequential and incidental damage excluder if it establishes that the aggrieved party agreed to assume the risk of that harm even if the limited or exclusive remedy was not provided. Compare section 2B-703(c) (March 1998 draft) which requires the excluder term to be made "expressly independent of the performance of the agreed remedy in order to be enforced.

3. Subsection (c) continues the rules from former section 2-719(3) with the addition of recognizing the commercial practice of exclusion of incidental damages by agreement as well. The words "by agreement" are added to make clear that the exclusion must be part of the parties' agreement as defined in section 1-201(3). The presumption of unconscionability in a "consumer contract" instead of "in the case of consumer goods" when personal injury results is a slightly narrower presumption of unconscionability because a consumer contract requires that the seller be in the business of selling consumer goods. Consumer goods as used in former Article 2 was not so limited. See former section 2-103(3) which stated the consumer goods definition in 9-109 controlled in Article 2.

4. Compare section 2B-703 (March 1998 draft).

SECTION 2-811. REMEDIES FOR MISREPRESENTATION OR FRAUD.

Remedies for material misrepresentation or fraud include all remedies available under this article for non-fraudulent breach of contract. Rescission or a claim for rescission of a contract for sale and rejection or return of the goods do not bar and are not inconsistent with a claim for damages or other remedy.

SOURCE: Sales, Section 2-721.

Notes

This section is the same as former section 2-721. The last sentence of the section has been rephrased to eliminate the “neither-nor” phrasing. Professor Gary Monsarud has suggested that the text or comments of section 2-811 be revised to make clear that if a contract induced by fraud is affirmed by the buyer keeping the goods followed by the aggrieved buyer suing for deceit in tort, the aggrieved buyer may recover damages based upon its expectation interest under section 2-827 as opposed to its reliance interest. See Monsarud, *Measuring Damages After Buyer’s Affirmation of an Article 2 Sales Contract Induced by Fraud: A Study of Code Jurisprudence in Light of Section 2-721 and Pre-Code Conflicts in Remedial Theory*, 1996 Col. Bus. L. Rev. 423.

Compare section 2B-706 (March 1998 draft).

SECTION 2-812. PROOF OF MARKET PRICE.

(a) If evidence of a price prevailing at a time or place described in this article is not readily available, the following rules apply:

(1) The price prevailing within any reasonable time before or after the time described may be used.

(2) The price prevailing at any other place that in commercial judgment or usage of trade is a reasonable substitute for the one described may be used, making proper allowance for any cost of transporting the goods to or from the other place.

(3) Evidence of a relevant price prevailing at another time or place offered by one party is not admissible unless the party has given the other party notice that the court finds

sufficient to prevent unfair surprise.

(b) If the prevailing price or value of any goods regularly bought and sold in any established commodity market is in dispute, reports in official publications or trade journals or in newspapers, periodicals, or other means of communication in general circulation and published as the reports of that market are admissible in evidence. The circumstances of the preparation of such a report may affect the weight of the evidence but not its admissibility.

SOURCE: Sales, Sections 2-723, 2-724.

Notes

1. Section 2-812 restates the rules from former section 2-721(2) & (3) and former section 2-724. Subsections (a)(1) and (2) restate the rules from former subsection (2) without substantive change and subsection (a)(3) restates the rule from former subsection (3) without substantive change. The non-substantive changes are to change “which” to “that,” to break up the long sentence into clauses to improve readability, and to eliminate the gender pronoun. Subsection (b) restates the rule from former section 2-724 with only one substantive change, adding the phrase “other means of communication” to provide for non-paper methods of publication. The non-substantive changes are to change “whenever” to “if,” to change “in issue” to “in dispute,” change “shall be” to “are” and to change “may be shown to affect” to “may affect” and to attempt to reduce the indefinite use of “it.”

2. Subsection (1) from former section 2-723 on measurement of market price in the anticipatory repudiation sections is eliminated and the issue is dealt with in the sections on market price measurement of damages, section 2-821 and section 2-826.

3. Article 2B does not have a comparable section.

SECTION 2-813. LIABILITY OF THIRD PERSONS FOR INJURY TO GOODS.

If a third person deals with goods identified to a contract for sale and causes actionable injury [to the goods] [to a party to that contract], the parties to the contract have the following rights and remedies:

(1) A party with title to, or a security interest, special property interest, or insurable interest in, the goods has a right of action against the third person.

(2) If the goods have been destroyed or converted, the party that had the risk of loss under the contract for sale, or since the injury has assumed that risk as against the other party, also has a right of action against the third person.

(3) If at the time of the injury the plaintiff does not have the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, the plaintiff's [recovery] [right of action] or settlement is, subject to the plaintiff's interest, as a fiduciary for the other party to the contract.

(4) Either party, with the consent of the other, may maintain an action for the benefit of a concerned party.

SOURCE: Sales, Section 2-722.

Notes

Section 2-813 continues the rules of former section 2-722 with no substantive change except to change "third party" to the "third person, who is not likely to be a party to the contract. The non-substantive changes are to change "where" to "if", to eliminate the gender pronouns, to break the long sentence in former subsection (a) into two separate subsections to improve readability, to rephrase the sentences to place "party" as the subject of the sentence instead of the "right of action" as the subject of the sentence, and to eliminate the indefinite use of "it". Article 2B does not have a comparable section.

This provision is a procedural rule that details who has standing to pursue an action for damages for harm to the goods. The injury to the goods is usually actionable under law other than Article 2.

SECTION 2-814. STATUTE OF LIMITATIONS.

(a) An action for breach of a contract under this article and an action for indemnity must be commenced within the later of four years after the right of action has accrued under subsection (b) or one year after the breach was or should have been discovered, but no longer than five years after the right of action accrued. Except in a consumer contract or an action for indemnity, the

original agreement may reduce the period of limitation to not less than one year.

(b) Except as otherwise provided in subsection (c) and (d) and Sections 2-402(e), 2-408(e) and (f)(4), and 2-409(d), a right of action for breach of contract accrues when the breach occurs, even if the aggrieved party did not have knowledge of the breach. For purposes of this section, a breach by repudiation occurs when the aggrieved party learns or should have learned of the repudiation.

(c) If a breach of warranty occurs, the following rules apply:

(1) Subject to paragraph (2), a right of action for breach of warranty accrues when the seller has completed tender of delivery of the nonconforming goods.

(2) If a warranty expressly extends to performance of the goods after delivery [and discovery of the breach must await the time of such performance], a right of action accrues when the buyer discovers or should have discovered the breach.

(d) A right of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party.

(e) If an action for breach of contract is commenced within the applicable time limitation is terminated but a remedy by another action for the same breach of contract is available, the other action may be commenced after the expiration of the time limitation and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure to prosecute.

(f) This section does not alter the law on tolling of a statute of limitations and does not apply to a right of action that accrued before the effective date of this article.

SOURCE: Sales, Section 2-725; Licenses Section 2B-705.

Notes

1. Section 2-814 continues the rules from former section 2-725 with the following changes. First, subsection (a) continues the 4 year limitation period but in the spirit of conformity with Article 2B has a possible one year extension. In addition, this is the limitation period for all breach of contract actions under this article, even those not arising out of a contract for sale such as the remote warranties. Thus the language from former section 2-725(1) of “breach of any contract for sale” has been changed to “breach of contract under this article. Second, the period of limitations can be reduced to one year except for indemnity actions and consumer contracts. Third, the limitation under the old law that the parties could not extend the limitations period has been eliminated as not effective.

2. Subsection (b) continues the accrual rule of former subsection (2) with exceptions for breach of warranty of quality as under current law and stated in subsection (c) and the following new exceptions, for indemnity actions following the provision in section 2A-506 located in subsection (d), for warranty of title under section 2-402(e), for breach of remote warranties under section 2-408(e), and for breach of extended warranties under section 2-409(d). The second sentence to subsection (b) is also new and provides a statement of when a breach by repudiation occurs for accrual purposes. Subsection (d) responds to a commercial need to have an accrual rule for indemnity actions.

3. Subsection (c) continues the accrual rules regarding breach of warranty found in former subsection (2) with a change to make clear that it is when the tender of delivery is completed that the cause of action accrues. This is consistent with the definition of tender of delivery in section 2-602(a) which provides that tender of delivery includes agreed installation or assembly. The future performance rule that triggers the discovery rule has proven troublesome in the cases. The rephrasing from “future performance” to “performance of the goods after delivery” is an attempt to make the intent more clear. The bracketed language is from the former subsection. Is it necessary language?

4. Subsection (e) continues the rule from former subsection (3) with the following non-substantive changes: “where” has been changed to “if”, “so . . . as to leave available” has been changed to “is available”, and “failure or neglect” has been shortened to “failure”.

5. Subsection (f) continues the rule from former subsection (4) without with the following non-substantive changes: “nor does it” has been changed to “does not”, “which have” has been changed to “that” and “before this Act becomes effective” has been changed to “before the effective date of this article”.

6. Compare section 2B-705 (March 1998 draft).

[B. SELLER'S REMEDIES]

SECTION 2-815. SELLER'S REMEDIES IN GENERAL. If a buyer breaches the contract under Sections 2-701 or 2-710(c) or becomes insolvent, the seller may:

- (1) withhold delivery of the goods under Sections 2-816(a) or 2-818(a);
- (2) stop delivery of the goods under Section 2-818(b);
- (3) proceed with respect to goods still unidentified to the contract or unfinished under Section 2-817;
- (4) reclaim the goods under Section 2-816(b);
- (5) obtain specific performance under Section 2-807 or recover the price under Section 2-822;
- (6) resell the goods and recover damages under Section 2-819;
- (7) recover damages for repudiation or nonacceptance under Section 2-821;
- (8) recover incidental and consequential damages under Sections 2-805 and 2-806;
- (9) cancel the contract under Section 2-808;
- (10) recover liquidated damages under Section 2-809;
- (11) enforce limited remedies under Section 2-810; or
- (12) recover damages under Section 2-804.

SOURCE: Sales, Section 2-703.

Notes

Section 2-815 is derived from former section 2-703. This section does not have any substantive limitations on the availability of any remedy and is purely an index section. Former section 2-703 was criticized as an incomplete list of the seller's available remedies. The types of breach referenced in the former section are not necessary here given the definitions of breach in sections 2-701 and 2-710. Whether an aggrieved seller can exercise any of the rights listed is determined by the particular requirements of each section and the general principles in Subpart A. Article 2B has no comparable provision.

**SECTION 2-816. SELLER'S RIGHT TO WITHHOLD DELIVERY OF GOODS
OR TO RECLAIM GOODS AFTER DELIVERY TO BUYER.**

(a) If a buyer is in breach of contract under Section 2-701, the seller may withhold delivery of the goods directly affected. If the breach is of the whole contract, Section 2-710(c), the seller may withhold delivery of any undelivered balance.

(b) Under this article, a seller may reclaim goods delivered to a buyer under a contract for sale only in the following circumstances:

(1) A seller that discovers that the buyer has received goods on credit while insolvent may reclaim the goods upon a demand made in a record within 10 days after receipt of the goods or, if a bankruptcy case in which the buyer is the debtor is commenced during the 10 day period, such demand must be made within 20 days after receipt of the goods. If the buyer made a material misrepresentation of a credit condition in a record to the reclaiming seller or to a credit reporting agency or the like less than 90 days before delivery, the demand is timely if made within a reasonable time after delivery.

(2) If payment is due and demanded on delivery to the buyer, the seller may reclaim the goods delivered upon a demand made within a reasonable time after the seller discovers or should have discovered that payment was not made.

(c) Reclamation under subsection (b) is subject to the rights under this article of a buyer in ordinary course of business or other good-faith purchaser for value that arise before the seller takes possession under a timely demand for reclamation. Successful reclamation of the goods under subsection (b)(1) precludes all other remedies with respect to them.

SOURCE: Sales, Sections 2-507(2), 2-702, 2-703(a).

Notes

1. Subsection (a) is a statement of the principle in former section 2-703(a). Subsection (b) is a revision in several respects to the seller's right to reclaim found in former section 2-702(2). First, subsection (b)(2) codifies the seller's right to reclaim in non-credit sales which has long been recognized in the cases. See PEB Commentary No. 1. Second, subsection (b)(1) continues the right to reclaim in the insolvency situation as under current law with several changes. The demand must be in a record. Current state law does not require a written demand, but 11 U.S.C. § 546(c) requires a "written demand if the case is in bankruptcy. The time limit of 10 days is extended in accordance with the extension in §546(c). The 10 day limit for making the demand does not apply if the buyer materially misrepresents "credit condition not "insolvency as under former law. The misrepresentation need not be made to the seller but can be made to third parties such as credit reporting agencies. The misrepresentation must be in a "record as opposed to a "writing. Query whether any of these changes should be included within subsection (b)(2)? The intent of the last sentence of former subsection (2) that makes the reclamation right in the section exclusive is continued in the language at the beginning of subsection (b) "a seller may reclaim . . . only in the following circumstances.

2. Subsection (c) is derived from former subsection (3) and makes the following changes to that rule. First, a timing rule is added so that the rights that trump the reclamation must arise prior to the seller taking possession following a timely demand. This follows the PEB study report recommendation to clarify the application of this priority rule. Second, this priority rule will apply to the cash seller reclamation situation, a situation not addressed under the former rule. The second sentence of subsection (c) is the same as the second sentence of former subsection (3). The preclusion of other remedies is limited to the insolvency based reclamation in subsection (b)(1) so that the preclusive effect of reclamation is not extended to the cash seller reclamation situation. The preclusive effect of the credit sale reclamation upon insolvency is based upon the concept that a buyer who receives goods on credit while insolvent has engaged in fraud. The seller who elects to reclaim is electing a rescission remedy for fraud which the older cases held was inconsistent with the right to get damages for breach of contract. Query whether this distinction should be maintained given the Code's general disdain for election of remedies doctrine and the fact that in many instances a buyer will both be insolvent (giving rise to the right to reclaim) and may have breached the contract as well. This election of remedies idea has not been applied in the cash seller reclamation situation, see *Burk v. Emmick*, 637 F.2d 1172 (8th Cir. 1980). If the buyer is insolvent and has otherwise breached the contract, should reclamation preclude other remedies for breach? If the fear is the reclamation creates a secret lien on behalf of the seller, it is unclear how precluding the seller from obtaining breach of contract damages if the seller reclaims makes the lien any less secret.

The Drafting Committee voted at its March 1997 meeting to not clarify in the text or comments whether the right of reclamation extended to the proceeds of the goods. Current case law is confused and conflicting on this point.

3. **CISG.** Under the Convention, a seller who avoids a contract for fundamental breach

can reclaim delivered goods from the buyer. Although goods delivered either for cash or on credit can be reclaimed, there are no express limitations on the time or method of reclamation. See Art. 64(1), 81(2), and 84(2).

4. Compare section 2B-714 (March 1998 draft) (right to discontinue access in an access contract) and section 2B-715 (March 1998 draft) (right to possession and discontinue use).

**SECTION 2-817. SELLER'S RIGHT TO IDENTIFY GOODS TO CONTRACT
DESPITE BREACH OR TO SALVAGE UNFINISHED GOODS.**

(a) An aggrieved seller may:

(1) identify to the contract conforming goods not already identified if they are in the seller's possession or control at the time the seller learned of the breach of contract; and

(2) resell goods that are shown to have been intended for the particular contract, even if those goods are unfinished.

(b) If goods are unfinished at the time of breach of contract, an aggrieved seller, in the exercise of reasonable commercial judgment for the purposes of minimizing loss and of effective realization, may complete the manufacture and wholly identify the goods to the contract, cease manufacture and resell for scrap or salvage value, or proceed in any other reasonable manner.

SOURCE: Sales, Section 2-704.

Notes

1. Section 2-817 follows former section 2-704 with the following non-substantive changes. First, gender pronouns have been eliminated. Second, the words “preceding section” are eliminated as not relevant given the revisions to former section 2-703. Third, the phrase “which have demonstrably been intended” has been changed to “that are shown to have been intended. Fourth, the phrase “at the time of the breach of contract” has been added to subsection (b). Fifth, the clauses at the end of subsection (b) have been placed in parallel structure.

2. Compare section 2B-712 (March 1998 draft).

**SECTION 2-818. SELLER'S REFUSAL TO DELIVER BECAUSE OF BUYER'S
INSOLVENCY; STOPPAGE IN TRANSIT OR OTHERWISE.**

(a) A seller that discovers that the buyer is insolvent may refuse to make delivery except for cash, including payment for all goods previously delivered under the contract.

(b) Subject to subsection (d), a seller may stop delivery of goods in the possession of a carrier or other bailee if the buyer is insolvent or repudiates or fails to make a payment due before delivery or if, for any other reason, the seller has a right to withhold or reclaim the goods.

(c) As against a buyer under subsection (b), the seller may stop delivery until:

(1) receipt of the goods by the buyer;

(2) acknowledgment to the buyer by any bailee of the goods, other than a carrier, or by a carrier by reshipment or as warehouseman, that the bailee holds the goods for the buyer;
or

(3) negotiation to the buyer of any negotiable document of title covering the goods.

(d) If notice to stop delivery has been given, the following rules apply:

(1) The notice must afford the carrier or bailee a reasonable opportunity to prevent delivery of the goods.

(2) After notification, the carrier or bailee shall hold and deliver the goods according to the directions of the seller. The seller is liable to the bailee or carrier for any resulting charges or damages. A carrier or bailee need not stop delivery if the seller does not provide indemnity for charges or damages upon the carrier's or bailee's demand.

(3) If a negotiable document of title has been issued for goods, the carrier or bailee

need not obey a notification to stop until surrender of the document.

(4) A carrier or bailee that has issued a nonnegotiable document of title need not obey a notification to stop received from a person other than the person named in the document as the person from which the goods have been received for shipment or storage.

SOURCE: Sales, Sections 2-702(1) & 2-705.

Notes

1. Section 2-818 is continues the rules from former sections 2-702(1) and 2-705. Subsection (a) restates the rule from former section 2-702(1) with rephrasing to eliminate the gender references. Subsection (b) continues the rule from former section 2-702(1) that a seller may stop delivery when the buyer is insolvent and the rule from former section 2-705(1) with only one change. The language of “carload, truckload, planeload or larger shipments of express or freight” has been eliminated. The Drafting Committee concluded that this language was out of date in light of changing shipping methods and practices which now allows individual tracking of goods in shipment. The carrier is protected from harm by the on demand indemnity provision added to subsection (d)(2).

2. Subsection (c) restates the rules from former subsection (2) with one non-substantive change of combining former subsections (2)(b) and (2)(c) to make clear what “such acknowledgment” meant in former subsection (2)(c). Subsection (d) restates the rules from former subsection (3) with the following substantive changes. First, each subsection has been rephrased to apply to both carriers and bailees. Former subsection (3) (a) through (c) applied to bailees and subsection (d) applied to carriers. Second, as previously mentioned, the on-demand indemnity for charges or damages protects the bailee or carrier from incurring liability to third parties that the seller may not later be able to pay although obligated to pay. Third, instead of the word consignor, the words defining a consignor from section 7-102(1)(c) are inserted in subsection (d)(4). The non-substantive changes to subsection (d) are to change “reasonable diligence” to “reasonable opportunity”, change “must” to “shall”, and change “is not obliged” to “need not.”

3. **CISG.** Article 71(1) states when a party may suspend performance of obligations and Article 71(2) carries that right over to cases where the goods have been “dispatched.” These provisions have little detail. Article 71(2) provides that delivery can be suspended even if the buyer has a document entitling the buyer to obtain the goods. The Article 2 rule in subsection (c)(3) is to the contrary. Article 71(3), however, requires the party suspending performance to give immediate notice of suspension to the other and to continue performance if the other provides adequate assurance of his performance. These latter requirements are not found in Article 2. Should seller be obligated to give notice of stoppage to the buyer?

4. Compare section 2B-715 (March 1998 draft).

SECTION 2-819. SELLER'S RESALE.

(a) If a buyer has breached a contract and the goods concerned are in the seller's possession or control, the seller may resell them or the undelivered balance. If the resale is made in good faith, within a commercially reasonable time, and in a commercially reasonable manner, the seller may recover the contract price less the resale price together with any consequential and incidental damages, less expenses avoided as a result of the breach.

(b) A resale:

(1) may be at a public auction or private sale including sale by one or more contracts to sell or by identification to an existing contract of the seller;

(2) may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the sale, including the method, manner, time, place, and terms, must be commercially reasonable; and

(3) must be reasonably identified as referring to the breached contract, but the goods need not be in existence or have been identified to the contract before the breach.

(c) If the resale is at a public auction, the following rules apply:

(1) Only identified goods may be sold unless there is a recognized market for the public sale of futures in goods of the kind.

(2) The resale must be made at a usual place or market for public sale if one is reasonably available. Except in the case of goods that are perishable or which threaten to decline in value speedily, the seller shall give the buyer reasonable notice of the time and place of the resale.

(3) If the goods are not to be within the view of persons attending the sale, the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders.

(4) The seller may buy the goods.

(d) A good-faith purchaser at a resale takes the goods free of any rights of the original buyer, even if the seller fails to comply with this section.

(e) The seller is not accountable to the buyer for any profit made on a resale. However, a person in the position of a seller or a buyer which has rightfully rejected or justifiably revoked acceptance shall account for any excess over the amount of the claim secured by the security interest as provided in Section 2-829(b).

SOURCE: Sales, Section 2-706.

Notes

1. Section 2-819 continues the rules from former section 2-706 with several changes. First, subsection (a) adds the words “in the seller’s possession or control” as a requirement for the seller’s resale. This makes explicit what is implicit in the seller’s ability to resell, that the seller have the goods. Second, “under the conditions stated in section 2-703” is replaced with “if a buyer has breached a contract” to reflect the decision to take the types of breach out of the remedies index section. Third, the phrase “within a commercially reasonable time” has been added as part of the implementation of the mitigation obligation and the idea that if the seller has properly resold, the seller has done what is required to mitigate loss. Fourth, the formula is stated as “contract price less the resale price” instead of the “difference between the two prices” to be a more accurate statement of the amount recoverable. It is only if the resale price is less than the contract price that the seller has suffered harm. Fifth, “consequential” has been added to reflect the decision to allow seller consequential damages. Sixth, “expenses avoided as a result” is substituted for “expenses saved in consequence”.

2. Subsection (b) is a restatement of the rules from former subsection (2) with the following changes. First, the notice on private resale has been eliminated so the exception for as provided in subsection (3) is not necessary. Second, “unless otherwise agreed” is eliminated as unnecessary. Third, the word “auction” is inserted after “public” to reflect the former comment 4: “By ‘public’ sale is meant a sale by auction.” Fourth, the three sentences have been broken into three separate subsections for clarity of reading. Fifth, the word “broken contract” has been

changed to “breached contract” and the last sentence has been redrafted to eliminate the indefinite “it.”

3. Subsection (c) restates the rules from former subsection (4) with the following changes: “can” is changed to “may”, “must” is changed to “shall”, and “those” is changed to “persons”. In addition, the phrase “the goods” is added to “the seller may buy”. The long sentence in former subsection (b) is changed to two sentences. Subsection (d) restates the rule from former subsection (5) with the following non-substantive changes: “purchaser who buys in good faith” is changed to “good faith purchaser”, “though” is changed to “if”, and “one or more requirements” is dropped as surplusage. Subsection (e) is the same in as former subsection (6) with the following non-substantive changes: “who” is changed to “which” and the gender reference is eliminated.

4. **CISG.** Article 75 permits the seller to resell the goods after the contract has been avoided for fundamental breach, but contains none of the detail in section 2-819. If the seller resells, damages are measured by the “difference between the contract price and the price in the substitute transaction.” Furthermore, if the seller resells, damages measured by the difference between the contract price and the market price are not available. Article 76.

5. Compare section 2B-708(b) (March 1998 draft).

SECTION 2-820. PERSON IN POSITION OF SELLER.

(a) In this section, a person in the position of a seller includes, as against a principal, an agent that has paid or become responsible for the price of goods on behalf of the principal or any person that otherwise holds a security interest or other right in goods similar to that of a seller.

(b) A person in the position of a seller has the same remedies as a seller under this article.

SOURCE: Sales, Section 2-707.

Notes

Section 2-820 restates the rules from former section 2-707 with the following substantive change. A person in the position of the seller gets all of the seller’s remedies. Former section 2-707 appeared to limit the remedies to withholding or stopping delivery, reselling and incidental damages for no apparent reason. Subsection (a) restates the same definition of “person in the position of the seller” with the following non-substantive changes: “who” is changed to “that”, “anyone” is changed to “person”, and the gender pronoun has been eliminated.

SECTION 2-821. SELLER'S DAMAGES FOR NONACCEPTANCE, FAILURE

TO PAY, OR REPUDIATION.

(a) If a buyer breaches a contract, the seller may recover damages based upon market price, together with any incidental and consequential damages, less expenses avoided as a result of the breach, as follows:

(1) Except as provided in subsection (2), the measure of damages is the contract price less the market price of comparable goods at the time and place for tender.

(2) In the case of a repudiation governed by Section 2-712, the measure of damages is the contract price less the market price of comparable goods at the place for tender and at the time when a commercially reasonable period after the seller learned of the repudiation has expired but no later than the time stated in subsection (a)(1). The commercially reasonable time includes the time for awaiting a retraction under Section 2-712 and the time that would have been needed to obtain substitute performance.

(b) A seller may recover damages measured by other than the market price, together with incidental and consequential damages, including:

(1) lost profits, including reasonable overhead, resulting from the breach of contract determined in any reasonable manner; and

(2) reasonable expenditures made in preparing for or performing the contract if, after the breach, the seller is unable to obtain reimbursement by salvage, resale, or other reasonable measures.

SOURCE: Sales, Section 2-708.

Notes

1. Section 2-821 is based upon former section 2-708 and former section 2-723(1) with several changes. First, because of the definition of breach and the fact that this provision is

subject to the provisions of subpart A, the lengthy introductory phrase from former subsection (1) is not necessary. Second, the seller's entitlement to consequential damages is reflected in the revised section. Third, the phrase of "difference between" is changed to "contract price less the market price." Fourth, the word "unpaid" is eliminated. The extent to which the buyer is entitled to restitution is determined by section 2-809. Fifth, "expenses saved in consequence of" is changed to "expenses avoided as a result of."

The sixth change, subsection (a)(2), deals explicitly with the issue of when to measure market price in the case of an anticipatory repudiation. See Hawkland §2-708:03 for a discussion of this issue. If the buyer repudiates the contract, the market price is measured at the end of a commercially reasonable time after the repudiation but no later than the tender date. Another way to deal with this issue is to not state a separate rule for time of measurement in the case of anticipatory repudiation and let the mitigation principle control the timing of the measurement. The market price would be measured at time of tender unless the mitigation principle would lead to a measurement of market price at an earlier time so that the seller could not recover for that part of the loss that could have been reasonably prevented through a mitigating resale. Thus, if the buyer repudiates, the mitigation principle would determine when the market price should be measured if the seller has not resold under section 2-819 or is not claiming damages under section 2-821(b). See Restatement (2d) Contracts §350.

2. Subsection (b) is a revision of the rule from former subsection (2) that has been interpreted by the courts to allow sellers to recover lost profits and reliance expenditures. The former subsection (2) was used in the cases of uncompleted goods, jobbers or middlemen, or lost volume sellers. This remedy is an alternative to the remedy under sections 2-819 or 2-821(a). No effort has been made to state who is entitled to use the section or how lost profits should be calculated given the variety of situations in which this measurement may be appropriate and the variety of ways in which courts have measured lost profits.

3. The seller's ability to choose among the three measurements of resale based damages, market price damages and lost profits is discussed in the notes following section 2-803.

4. **CISG.** If the contract is avoided and the aggrieved seller has not resold the goods under Art. 75, Art. 76 allows for contract damages to be measured by the difference between the contract price and the current price.

5. Compare section 2B-708 (March 1998 draft).

SECTION 2-822. ACTION FOR PRICE.

(a) If a buyer fails to pay the price as it becomes due, the seller may recover, together with any incidental and consequential damages, the price of:

(1) goods accepted;

(2) conforming goods lost or damaged after risk of their loss has passed to the buyer, but, if the seller has retained or regained control of the goods, the loss or damage must occur within a commercially reasonable time after the risk of loss has passed to the buyer; and

(3) goods identified to the contract, if the seller is unable after a reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that this effort would be unavailing.

(b) A seller that remains in control of the goods and sues for the price shall hold for the buyer any goods identified to the contract. If the seller is entitled to the price and resale becomes possible, the seller may resell the goods under Section 2-819 at any time before the collection of the judgment. The net proceeds of the resale must be credited to the buyer. Payment of the judgment entitles the buyer to any goods not resold.

(c) If a buyer has breached the contract, a seller that has sued for but is held not entitled to the price under this section may still be awarded damages for nonacceptance under Section 2-821.

SOURCE: Sales, Section 2-709.

Notes

1. Section 2-822 continues the rules from former section 2-709 with the following substantive changes. First, in subsection (a)(2) the rule is rewritten so that the limitation of loss or damage within a commercially reasonable time only applies if the seller has regained the goods. Second, a cross reference to section 2-819 is added in subsection (b) to subject the seller's resale to the commercial reasonableness and notice requirements. Third, the draft reflects that the seller is now entitled to consequential damages. The non-substantive changes are to eliminate the gender references, change "when" to "if", change "must" to "shall", break up the long sentence in former subsection (2), and to reduce the long introductory clause in former subsection (3) to "if the buyer has breached."

2. **CISG.** Under Article 62, the seller may "require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is

inconsistent with this requirement." There are no conditions, such as those found in section 2-822, and there is no specific provision permitting recovery of the price.

3. Compare section 2B-708 (March 1998 draft).

[C. BUYER'S REMEDIES]

SECTION 2-823. BUYER'S REMEDIES IN GENERAL; BUYER'S SECURITY INTEREST IN REJECTED GOODS. If a seller is in breach of the contract under section 2-701, or in breach of the whole contract under Section 2-710(c), the aggrieved buyer may:

(1) recover the price paid under Section 2-829(a) or deduct damages from price unpaid under Section 2-828;

(2) cancel the contract under Section 2-808;

(3) cover and obtain damages under Section 2-825;

(4) recover damages for non-delivery or repudiation under Section 2-826;

(5) recover damages for breach with regard to accepted goods under Section 2-827.

(6) recover identified goods under Section 2-824;

(7) obtain specific performance under Section 2-807;

(8) enforce a security interest under Section 2-829(b);

(9) recover incidental and consequential damages under Sections 2-805 and 2-806;

(10) recover liquidated damages under Section 2-809;

(11) enforce limited remedies under Section 2-810; or

(12) recover damages under Section 2-804.

SOURCE: Sales, Section 2-711.

Notes

Section 2-823 is based on former section 2-711. Consistent with the revisions to the

seller's index section, this section indexes the aggrieved buyer's remedies. Whether a buyer is in fact entitled to any particular remedy depends upon the requirements of the each particular section and the principles of subpart A. Article 2B has no comparable provision.

SECTION 2-824. PREPAYING BUYER'S RIGHT TO GOODS; REPLEVIN.

(a) A buyer that pays all or a part of the price of goods identified to the contract, whether or not they have been shipped, and makes and keeps good a tender of full performance, has a right to recover them from the seller if the seller repudiates or fails to deliver as required by the contract.

(b) A buyer may recover from the seller by replevin, detinue, sequestration, claim and delivery, or the like, goods identified to a contract if, after reasonable efforts, the buyer is unable to effect cover for the goods or the circumstances reasonably indicate that an effort to obtain cover would be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

(c) If the requirements of subsection (a) or (b) are satisfied, the buyer's right vests upon identification of the goods to the contract for sale even if the seller has not then repudiated the contract or failed to deliver as required by the contract.

SOURCE: Sales, Sections 2-502 & 2-716(3).

Notes

1. Section 2-824 is derived from former sections 2-502 and 2-716(3). Subsection (a) expands the ability of a prepaying buyer to recover the goods from the seller from the very limited grounds in former section 2-502. Thus the right is no longer limited to cases of seller's insolvency and the goods need only be identified and need not be conforming. Subsection (c) is a new section designed to bolster the priority rule in section 2-505(a) to allow the buyer who has the right to obtain the goods to also prevail against creditors of the seller in certain situations as defined in section 2-505.

Subsection (b), which states rights in addition to subsection (a), is a restatement of the rule of former section 2-716(3) with the additional language after "replevin" taken from section

2A-521 to reflect the variety of types of state law procedures of similar import. The section has been rephrased to eliminate the gender pronoun.

2. **CISG.** CISG has no provision dealing with a buyer's right to goods on the seller's insolvency and, in general, does not deal with the claims of the seller's creditors to those goods. But see Articles 41-43. Article 46(1), however, states that the "buyer may require performance by the seller of his obligations" without regard to whether the buyer has prepaid the price. Revised §2-824 is now closer to Article 46(1) in granting the buyer what amounts to specific performance. See CISG Art. 28, which states that a court is not "bound" to specifically enforce a contract under CISG "unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."

3. Compare section 2B-711 (March 1998 draft).

SECTION 2-825. COVER; BUYER'S PURCHASE OF SUBSTITUTE GOODS.

(a) If a seller breaches a contract, the buyer may cover by making in good faith and without unreasonable delay any reasonable purchase of, contract to purchase, or arrangement to procure comparable goods to substitute for those due from the seller.

(b) A buyer that covers in the manner required by subsection (a) may recover damages measured by the cost of covering less the contract price, together with any incidental or consequential damages, less expenses avoided as a result of the seller's breach.

(c) A buyer that fails to cover in a manner required under subsection (a) is not barred from any other available remedy.

SOURCE: Sales, Section 2-712.

Notes

1. Section 2-825 continues the rules from former section 2-712 with the following two changes. First, it adds "arrangement to procure" in recognition that a cover need not involve a purchase. Second, it adds "comparable" in front of goods to make clear that the buyer does not get to upgrade in quality at the expense of the seller but that the cover goods need not be exactly the same as the goods the seller did not provide. The non-substantive changes are to shorten the introductory phrase to reflect the relocation of the definition of breach, "in substitution" is changed to "to substitute", the gender pronouns are eliminated, and the phrase "saved in consequence" is changed to "avoided as a result of".

2. **CISG.** Under Article 75, if the contract is avoided and the buyer has "bought goods in replacement," damages are measured by the "difference between the contract price and the price in the substitute transaction" as well as any further damages under article 74. If the buyer has made a purchase under Article 75, damages under Article 76 are not available.

3. Compare section 2B-709 (March 1998 draft).

SECTION 2-826. BUYER'S DAMAGES FOR NONDELIVERY OR REPUDIATION.

(a) If a seller breaches a contract, the buyer may recover damages based on market price, together with any incidental and consequential damages, less expenses avoided as a result of the seller's breach, as follows:

(1) Except as provided in subsection (2), the measure of damages is the market price for comparable goods at the time of the breach or when the buyer learned of the breach, whichever is later, less the contract price.

(2) In the case of a repudiation governed by Section 2-712, the measure of damages is the market price of comparable goods at the time when a commercially reasonable period after the buyer learned of the breach has expired, but no later than the time stated in subsection (a)(1), less the contract price. The commercially reasonable time includes the time for awaiting a retraction under Section 2-712 and the time that would have been needed to obtain substitute performance.

(b) Market price is determined at the place for tender. However, in cases of rejection after arrival or revocation of acceptance, it is determined at the place of arrival.

SOURCE: Sales, Section 2-713.

Notes

1. Section 2-826 is based upon former sections 2-713 and 2-723(1) and is drafted in the

same style as section 2-821. This section makes the following changes to the rules from the former statute. First, subsection (a)(1) inserts “time of the breach” for the measurement of the market price unless the buyer “learned of the breach” later. The “learned of the breach” language is from former section 2-713. Second, the market price has to be of “comparable goods.” Third, subsection (a)(2) deals with measurement of market price in the case of an anticipatory repudiation. See *Hawkland* §2-713:03 for a discussion of this issue. See also *Royce Realty & Developing Inc. v. Arkla, Inc.* 863 P.2d 1150 (Okla. 1993); *Palmer v. Idaho Peterbilt, Inc.*, 641 P. 2d 346 (Idaho Ct. App. 1982). The market price in the anticipatory repudiation situation could also be governed by the general rule for measurement of market price subject to the mitigation principle in section 2-803. See Restatement (2d) Contracts §350. The following non-substantive changes are to change the long introductory phrase to “if a seller breaches”, change “saved in consequence of” to “avoided as a result of” and to break the two thoughts in former subsection (2) into two sentences.

2. **CISG.** Under Article 76, if the contract has been avoided and there has been no “purchase” under Article 75, the buyer may recover the difference between the contract price and “current price at the time of avoidance as well as any further damages recoverable under article 74.”

3. Compare section 2B-709 (March 1998 draft).

SECTION 2-827. BUYER'S DAMAGES FOR BREACH REGARDING ACCEPTED GOODS.

(a) A buyer that has accepted goods and not justifiably revoked acceptance and that has given notice pursuant to Section 2-707(c)(1) may recover as damages for any nonconforming tender the loss resulting in the ordinary course of events from the seller's breach as determined in any reasonable manner.

(b) A measure of damages for breach of a warranty of quality is the value of the goods as warranted less the value of the goods accepted at the time and place of acceptance [unless special circumstances show proximate damages of a different amount].

(c) A buyer may recover incidental and consequential damages.

SOURCE: Sales, Section 2-714.

Notes

1. Section 2-827 continues the rules from former section 2-714 with the following changes. First, the phrase “not justifiably revoked acceptance” makes clear that the buyer who revokes acceptance cannot use this section to measure damages. Second, bracketed words in subsection (b) were contained in former subsection (2). At issue is whether the word “the” from prior law stated an exclusive way to measure damages for breach of warranty or not. If the formula is not exclusive, then the meaning of the special circumstances language is difficult to comprehend. Third, the words “of quality” have been inserted in subsection (b) to reflect the cases which measured damages for breach of warranty of title under the formula in subsection (a). See *Hudson v. Gaines*, 403 S.E.2d 852 (Ga. App. 1991). The non-substantive changes are to eliminate the gender pronouns, change “where” to “that”, change “any manner which is reasonable” to “any reasonable manner” and to eliminate the phrase “in a proper case” from former subsection (3) as surplusage.

2. **CISG.** Under the Convention, a buyer has more power to “require” the seller to perform and the seller has more power to “cure” non-conformities than under Article 2. After delivery where the seller has failed to cure, however, Article 50 provides that if the goods “do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at that time.” Thus, Article 50 combines the measurement standard in 2-827(b) with the buyer's power to reduce the price granted in section 2-828.

3. Compare section 2B-709 (March 1998 draft).

SECTION 2-828. DEDUCTION OF DAMAGES FROM PRICE. A buyer, on so notifying a seller of an intent to do so, may deduct all or any part of the damages resulting from any breach of contract from any part of the contract price still due under the same contract.

Source: Sales, Section 2-717.

Notes

Section 2-828 makes no changes of substance to former section 2-717. The sentence is rephrased slightly to eliminate the gender pronoun. Compare CISG. Art. 50; section 2B-710 (March 1998 draft).

SECTION 2-829. RECOVERY OF PRICE; BUYER’S SECURITY INTEREST IN REJECTED GOODS.

(a) If the seller has breached the contract, the buyer may recover any payments made on

the price of goods that are not accepted.

(b) On rightful rejection or justifiable revocation of acceptance, a buyer has a security interest in goods in the buyer's possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care, and custody. The buyer may hold the goods and resell them in the manner provided for an aggrieved seller under Section 2-819, except that the buyer shall give the seller reasonable notice of the intended resale and must account to the seller for any excess of the proceeds of resale over the amount of the security interest created in this subsection.

Source: Sales, Section 2-711, section 2-706(6).

Notes

Section 2-829 is the derived from former section 2-711. Subsection (a) states the buyer's ability to get the price back if the buyer has not accepted the goods. Subsection (b) restates the rule from former sections 2-711(3) and 2-706(6) with non-substantive changes to eliminate gender pronouns and to continue to require the buyer to give notice of resale as under current law even though the revision does not require the seller in a private sale to give such notice. The buyer's obligation to care for the goods under sections 2-704 and 2-705 are subject to the buyer's right as the holder of a security interest under this section.