

DRAFT
FOR DISCUSSION ONLY

**PROPOSED AMENDMENTS TO
UNIFORM COMMERCIAL CODE
ARTICLE 2 - SALES**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

**AMERICAN LAW INSTITUTE TENTATIVE DRAFT
MAY 2001**

With Reporter's Notes and Prefatory Note

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Prefatory Note.

After approximately a decade of analysis and discussion, the decision was made to change Article 2 by adopting a series of amendments to the existing law. For the most part, these changes update the Article to accommodate electronic commerce and to reflect development of business practices, changes in other law, and interpretive difficulties of practical significance. The proposed amendments are substantive in nature, reflecting the Drafting Committee's decision to avoid amending provisions that have not been a source of problems. Some interpretive clarifications of importance are reflected in the Preliminary Comments rather than the text of the amendments.

These amendments reflect the fact that, overall, Article 2 continues to serve well. This is largely a result of the approach of the Article, which relies to a large extent on the ability of the parties to adapt its provisions by agreement, including course of performance, course of dealing and usage of trade, and on the courts to apply its provisions sensibly. No change in the law is cost free; even changes intended merely to clarify the law impose educational costs and costs associated with unintended consequences. These amendments also reflect an inability to reach reasonable consensus on some issues, such as how to handle standard form contracts, the efficacy of terms first delivered with the goods, and the proper scope of the Article. In these and other instances, the courts will continue to develop the law through cases that respond to the circumstances under which the issues are presented for resolution, and the fact that a particular issue is not addressed by these amendments does not necessarily reflect approval or disapproval of existing cases addressing that issue; rather it may reflect the perception that the law on the issue is still under development and that codification is premature. The Permanent Editorial Board for the Uniform Commercial Code will continue to monitor developments and may in the future, as advisable, issue Commentaries or recommend further statutory amendments to address issues that these amendments do not address.

A few words about the format in which the amendments are presented are in order. Sections in which no amendments are being proposed are not reproduced in the draft, but the full text of each section that contains any amendment has been provided. The extent to which the amendments are explained by Preliminary Comments varies from section to section. In a few sections, minor changes have been proposed because the wording in existing Article 2 has proven particularly confusing; other proposed amendments conform the draft to revised Article 5, revised Article 9, or the draft of revised Article 1. Amendments such as these are merely noted in the Preliminary Comments that follow the relevant sections. Throughout the draft, minor amendments are proposed that reformulate provisions in a gender-neutral fashion or that facilitate medium neutrality by substituting "record" for "writing" and "authenticate" for "sign. These amendments are not explained by a Preliminary Comment. With respect to sections that are amended in one of the ways described above, the existing Official Comments remain valid and will be amended only to the extent necessary to explain the changes. In other sections, the Preliminary Comments represent a proposal for a complete revision of the existing Official Comments.

Article 2A is also being presented as a package of amendments. The charge to the Drafting Committee with regard to Article 2A generally limited its authority to proposing changes where appropriate to incorporate changes also being proposed for Article 2 and to proposing changes necessitated by revised Article 9. The Preliminary Comments to the draft of Article 2A for the most part attribute the proposed amendments to either Article 2 or Article 9 without explaining the underlying rationales. That explanation may be found in the Preliminary Comments to the Article 2 draft and in the Official Comments to revised Article 9. In a few instances (e.g., the definition of “finance lease”), the Committee was authorized to make changes that go beyond Article 2 or Article 9, and in these instances the Preliminary Comments reflect the reason for the change. It is anticipated that the package of amendments to Articles 2 and 2A will be presented to the state legislatures as a single package, and consideration will be given to coordinating these enactment efforts with the enactment efforts for revised Article 1.

The following is a brief summary of the proposed amendments to Article 2:

Electronic Contracts. The federal Electronic Signatures in Global and National Commerce Act (“E-Sign”) has been enacted since the 2000 Annual Meeting of the ALI. E-Sign will be applicable to transactions governed by amended Article 2, and it preempts a number of inconsistent provisions in prior drafts. The current draft retains a few substantive contracting provisions that are beyond the scope of E-Sign and a few procedural provisions that are consistent with E-Sign. The latter provisions were retained in order to validate electronic contracts in the small class of transactions to which E-Sign does not apply.

The following definitions, many of which will be moved from Section 2-103 to revised Article 1, are relevant to issues involving electronic contracting: authenticate (this term may be changed in light of the recommendation of the UETA Standby Committee that the term “sign, defined to include electronic signatures, be used), conspicuous, electronic, electronic agent, electronic record, information processing system, receipt, and record. Throughout the draft, “writing” has been replaced by “record” and “sign” by “authenticate. Section 2-204 contains rules that govern formation of a contract by one or more electronic agents, and Sections 2-211 through 2-213 contain provisions of general applicability to electronic contracts. Finally, E-Sign permits states some latitude to modify its provisions, and Section 2-104(4) of the draft takes advantage of that opportunity except to the extent E-Sign provides protection to consumers.

New Protections for Buyers (Including Consumer Buyers). The draft contains a number of new protections for buyers. Some of those protections apply to all buyers; some apply only to buyers who qualify as consumers. Some of the consumer protections arise in the context of an expansion of sellers’ rights in non-consumer contracts.

Transactions subject to other law. In addition to Section 2-102, which provides that Article 2 does not impair or repeal any statute that provides for protection of consumers and which is not being amended, Section 2-108(1)(b) and (3) subordinate Article 2 to any applicable rule or court decision that provides a different result for consumers. Section 2-108(1)(c) and (3) subordinate Article 2 to inconsistent provisions in non-consumer state statutes that apply to

particular types of transactions.

Warranties and Related Obligations. With regard to warranties and warranty-like obligations, the draft amends Article 2 as follows:

- It creates new statutory obligations running from a seller of new goods to a remote purchaser in the normal chain of distribution predicated on representations in a record that the seller reasonably expects to be, and that is, furnished to the remote purchaser. Section 2-313A.
- It creates new statutory obligations running from a seller of new goods to a remote purchaser in the normal chain of distribution predicated on representations by the seller in advertising or in a similar communication to the public. Section 2-313B.
- It creates a new category of obligation, “remedial promise, and clarifies the relationship between a remedial promise and an express warranty created under Section 2-313 and one of the new statutory obligations created under Section 2-313A or 2-313B. Section 2-725(2)(c) gives an aggrieved buyer at least two years after breach of a remedial promise to commence an action even if the normal limitations period has expired.
- In a consumer contract that is evidenced by a record and that attempts to disclaim an implied warranty by using an expression like “as is” or “with all faults,” the disclaimer must be in the record and must be conspicuous. Section 2-316(2).
- In a consumer contract, it requires greater clarity in the statutorily prescribed language used to disclaim the implied warranty of merchantability (“[t]he seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract”) or fitness (“[t]he seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract”). Section 2-316(3)(a).

Remedies. With respect to buyers’ remedies, the draft amends Article 2 as follows:

- It creates a new right to recover goods identified to the contract if a consumer buyer has made a down payment and the seller thereafter repudiates the contract or fails to deliver the goods. 2-502(1)(a). That right, as well as the existing right of any buyer to recover goods if the seller becomes insolvent within ten days after receiving the first installment on the price, vests when the buyer acquires a special property in the goods under Section 2-501(1), even if the seller is not yet in breach. 2-502(2). A similar vesting rule applies to a buyer’s right of replevin or the like under Section 2-716(3). 2-716(4).
- It grants sellers a right to cure following revocation of acceptance under Section 2-608(1)(b) but insulates consumers by stating explicitly that there is no right to cure following revocation in a consumer contract. 2-508. Note that in non-consumer

contracts a revoking buyer that fails to state with particularity a defect that justifies revocation and that is ascertainable by reasonable inspection may be precluded from relying on the unstated defect. Section 2-605(1).

- It clarifies and improves the test for determining whether a seller has a right to cure. In cases of early delivery, it requires that the seller act in good faith (Section 2-508(1)); in other cases it requires not only good faith on the part of the seller but also that the cure be “appropriate and timely under the circumstances” (Section 2-508(2)). It also obligates the seller to compensate the buyer for reasonable expenses caused by the breach and its subsequent cure. Section 2-508(1), (2).
- It provides that use of goods by the buyer following rejection or revocation of acceptance is not wrongful if the use is reasonable in the circumstances (for example, a use that mitigates damages). Sections 2-608(4), 2-602(2).
- It provides that failure to give timely notice of breach bars a buyer from a remedy only if the seller is prejudiced by the failure (as opposed to the complete bar under existing Article 2). Section 2-607.
- It provides for consequential damages for a seller subject to a test that is similar to the test imposed on buyers under Section 2-715(2)(a). Section 2-710(2). However, a seller may not recover consequential damages from a consumer. 2-710(3).
- It encourages courts to enforce contract terms providing for the remedy of specific performance (unless the only remaining obligation is the payment of money), but the same provision excludes consumer contracts. Section 2-716(1).
- It retains the strict conditions of existing law on the enforcement of liquidated damages clauses in consumer contracts but relaxes them significantly for other contracts. Section 2-718.
- It grants a right of restitution for all payments made by a prepaying buyer when the seller justifiably withholds deliver or stops performance by eliminating the statutory liquidated damages provision in existing Article 2. Section 2-718(2). The same provision clarifies that the buyer has a right of restitution when the seller’s action is predicated on the buyer’s insolvency rather than breach by the buyer.
- It expands the general limitation period to the later of four years after accrual or one year after the breach should have been discovered, but no later than five years after accrual. Section 2-725(1). Consistent with existing law, the same provision permits reduction of the limitation period to one year; but it is amended to preclude reduction of the limitation period in consumer contracts.

Unconscionability Comment. At its final meeting, the Drafting Committee established a

process designed to produce a consensus among parties interested in the unconscionability comment and decided not to amend the original Official Comment if consensus could not be reached. The Preliminary Comment to Section 2-302 is the result of that process.

Battle of the Forms. The draft's approach to the battle of the forms has not changed since the 2000 Annual Meeting. Like the draft presented at that time, it disconnects issues of contract formation from issues regarding the terms of contracts. The formation rule – that a “definite and seasonable expression of acceptance operates as an acceptance even though it does not mirror the offer – is set forth as an amendment to the section dealing with offer and acceptance generally. Section 2-206(c).

Section 2-207 is amended to state the terms of contracts formed in any manner, not just those as to which there is a battle of the forms. Terms include, subject to the parol evidence rule: 1) terms that appear in the records of both parties (this assumes that both parties have set forth their terms in a record); 2) terms, whether in a record or not, to which both parties agree; and terms supplied or incorporated under the UCC. Preliminary Comment 2 to Section 2-207 explains that the courts will have to determine, based on context, whether the parties have “agreed to a particular term. The same analysis applies when a contract formed in any manner is later confirmed in a record that contains terms additional to or different from the terms of the contract being confirmed.

The draft does not attempt to solve the “rolling contract problem that arises when a seller delivers its standard terms with the goods. The courts will have to continue to develop this issue. *See* Section 2-207, Preliminary Comment 3.

Miscellaneous Changes. The draft proposes numerous amendments to existing sections. Among the more important are the following:

- With regard to the statute of frauds, the draft increases the threshold amount to \$5,000 (Section 2-201(1)); clarifies that to satisfy the statute a record must contain a quantity term (Section 2-201(1)); clarifies that any admission under oath, including one not made in court, satisfies the statute (Section 2-201(3)(b)); and provides that a contract for the sale of goods is not subject to the common-law's “one-year statute-of-frauds rule (Section 2-201(4)).
- With regard to the parol evidence rule, it uncouples issues of interpretation from issues of supplementation. When the issue is one of interpretation, it provides that terms may be explained by evidence of a course of performance, course of dealing, or usage of trade without a preliminary determination that there is an ambiguity. Section 2-202(2).
- It clarifies the rules governing assignment and delegation and conforms them to revised Article 9. Section 2-210.
- It imposes liability on a seller that unreasonably exposes a buyer to litigation over title

to goods. Section 2-312(1)(a).

- It eliminates Sections 2-319 through 2-324, which define shipping terms in a manner that is inconsistent with modern commercial practices.
- It amends Section 2-328 to use language that is common among modern auctioneers.
- It clarifies the rules governing rejection in a manner that distinguishes between rightful rejections and rejections that are wrongful but effective. Sections 2-602, 2-603, 2-604.
- With regard to installment contracts, it clarifies the role of cure (Sections 2-612(1), 2-508(1), (2)) and amends the standard for rejecting a single installment so that it conforms to the standard for revocation of acceptance (the defect must be substantial to the buyer). Section 2-612(1).
- It provides that a seller can protect its right of reclamation in a credit sale by giving notice within a reasonable time after buyer's receipt of the goods (amended from notice within 10 days under existing law). Section 2-702(2).
- It amends the provisions indexing sellers' and buyers' remedies so that they give a complete listing of available statutory remedies. Sections 2-703, 2-711.
- It provides that in cases of repudiation a seller's or buyer's market damages are to be measured by the market price in effect a commercially reasonable time after the aggrieved party learned of the repudiation. Sections 2-708, 2-713, 2-724.
- It simplifies and clarifies the provision on seller's lost-profit remedy. Section 2-708.
- It provides statute-of-limitation rules for cases where a person is answerable over to a buyer against whom a claim has been asserted (Section 2-725(2)(d)), for breaches of the warranty of title and the warranty against infringement (Section 2-725(3)(d)), and for the new statutory obligations arising under Sections 2-313A and 2-313B (Section 2-725(3)(b), (c)).

PART 1

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER

§ 2–103. Definitions and Index of Definitions.

(1) In this Article unless the context otherwise requires

(a) “Authenticate” means i) to sign a record; or (ii) to attach to or logically associate with a record an electronic sound, symbol, or process, with the intent to sign the record.

Preliminary Comment

The definition of “authenticate” may be moved to revised Article 1. The definition is broad enough to cover any record that is “signed” within the meaning of present Article 1 (Section 1-201(39)) or that contains an “electronic signature” within the meaning of the Uniform Electronic Transactions Act (Section 2(8)), and it is consistent with the federal Electronic Signatures in Global and National Commerce Act (U.S.C.).

~~(a)~~ (b) “Buyer” means a person who buys or contracts to buy goods.

(c) “Conspicuous”, with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.

A term in an electronic record intended to evoke a response by an electronic agent is conspicuous if it is presented in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the record by an individual. Whether a term is “conspicuous” or not is a decision for the court.

Conspicuous terms include the following:

(i) for a person:

(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same

1 or lesser size;

2 (B) language in the body of a record or display in larger type than
3 the surrounding text, or in contrasting type, font, or color to the surrounding text of the
4 same size, or set off from surrounding text of the same size by symbols or other marks
5 that call attention to the language; and

6 (ii) for a person or an electronic agent, a term that is so placed in a record
7 or display that the person or electronic agent cannot proceed without taking action with
8 respect to the particular term.

9 **Preliminary Comment**

10
11 The definition of “conspicuous” may be moved to revised Article 1. The first sentence is
12 based on Section 1-201(10) but the concept is expanded to include terms in electronic records.
13 The general standard is, that to be conspicuous, a term ought to be noticed by a reasonable
14 person. The second sentence states a special rule for situations where the sender of an electronic
15 record intends to evoke a response from an electronic agent; the presentation of the term must be
16 capable of evoking a response from a reasonably configured electronic agent. Whether a term is
17 conspicuous is an issue for the court.

18
19 Paragraphs i and ii set out several methods for making a term conspicuous. Requiring
20 that a term be conspicuous blends a notice function (the term ought to be noticed) and a planning
21 function (giving guidance to the party relying on the term about how that result can be achieved).

22
23 Paragraph (i), which relates to the general standard for conspicuousness, is based on
24 Section 1-201(10) but this subsection is intended to give more guidance. Paragraph (ii) is new
25 and relates to the special standard for electronic records intended to evoke a response from an
26 electronic agent. Although these paragraphs indicate some of the methods for making a term
27 attention-calling, the test is whether attention can reasonably be expected to be called to it. The
28 statutory language should not be construed to permit a result that is inconsistent with that test.

29
30 (d) “Consumer” means an individual who buys or contracts to buy goods that, at
31 the time of contracting, are intended by the individual to be used primarily for personal,
32 family, or household purposes.

33 **Preliminary Comment**

The definition of “consumer” may be moved to revised Article 1. The definition is significant in determining whether a contract qualifies as a consumer contract. A consumer is a natural person (cf. Section 1-201(30)) who buys or contracts to buy the goods for a purpose typically associated with consumers – i.e., a personal, family or household purpose. The requirement that the buyer intend that the goods be used “primarily for personal, family or household purposes is consistent with the definition of consumer goods in revised Article 9. See Section 9-102(a)(23).

(e) “Consumer contract” means a contract between a merchant seller and a consumer.

Preliminary Comment

This term is limited to a contract for sale between a seller that is a “merchant” and a buyer that is a “consumer”. Thus, neither a sale by a consumer to a consumer nor a sale by a merchant to an individual who intends that the goods be used primarily in a home business qualify as a consumer contract.

(f) “Delivery means the voluntary transfer of physical possession or control of
goods.

Preliminary Comment

The definition of “delivery” as it applies to goods may be moved to revised Article 1, which already contains a definition of the term as it applies to an instrument, document of title or chattel paper.

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

Preliminary Comment

The definition of “electronic” may be moved to revised Article 1. The electronic contracting provisions, including the definitions of “electronic,” “electronic agent,” “record,” “electronic record,” “information processing system,” and certain the electronic aspects of “receive” are based on the provisions of the Uniform Electronic Transactions Act and are consistent with the federal Electronic Signatures in Global and National Commerce Act (U.S.C.).

(h) “Electronic agent” means a computer program or an electronic or other

1 automated means used independently to initiate an action or respond to electronic records
2 or performances in whole or in part, without review or action by an individual.

3 **Preliminary Comment**
4

5 The definition of “electronic agent” may be moved to revised Article 1.
6

7 (i) “Electronic record” means a record created, generated, sent, communicated,
8 received, or stored by electronic means.

9 **Preliminary Comment**
10

11 The definition of “electronic record” may be moved to revised Article 1.
12

13 (j) “Foreign exchange transaction” means a transaction in which one party agrees
14 to deliver a quantity of a specified money or unit of account in consideration of the other
15 party’s agreement to deliver another quantity of different money or unit of account either
16 currently or at a future date, and in which delivery is to be through funds transfer, book
17 entry accounting, or other form of payment order, or other agreed means to transfer a
18 credit balance. The term includes a transaction of this type involving multiple moneys
19 and spot, forward, option, or other products derived from underlying moneys and any
20 combination of these transactions. The term does not include a transaction involving
21 multiple moneys in which one or both of the parties is obligated to make physical
22 delivery, at the time of contracting or in the future, of banknotes, coins, or other form of
23 legal tender or specie.

24 **Preliminary Comment**
25

26 This definition, which is new, is used in the definition of goods in Section 2-105(1),
27 which now excludes “the subject matter of foreign exchange transactions. See Preliminary
28 Comment to Section 2-105.
29

(b) (k) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

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

Preliminary Comment

The definition of “information processing system” may be moved to revised Article 1. The term is used in the definition of “receipt”.

~~(c) "Receipt of goods means taking physical possession of them.~~

(m) “Receipt means:

(i) with respect to goods, taking delivery; or

(ii) with respect to a notice:

(A) coming to a person's attention; or

(B) being delivered to and available at an agreed location, or at an

information processing system designated by agreement for that purpose in a form capable of being processed by and, if the recipient does not utilize an electronic agent, perceived from a system of that type by the recipient, but a notice that is an electronic record is not received if the sender or its information processing system inhibits the ability of the recipient to print or store the record; or, in the absence of an agreed location or system:

(I) in the case of a notice that is not an electronic record,
being delivered at the person's residence, or the person's place of business through which
the contract was made, or at any other place held out by the person as a place for receipt
of notices of the kind; or

1 (II) in the case of a notice that is an electronic record, being
2 delivered to and available at a system or at an address in that system in a form capable of
3 being processed by and, if the recipient does not utilize an electronic agent, perceived
4 from a system of that type by a recipient, if the recipient uses, or otherwise holds out, that
5 system or address for receipt of notices of the kind and the sender does not know that the
6 notice cannot be accessed from that place, but a notice that is an electronic record is not
7 received if the sender or its information processing system inhibits the ability of the
8 recipient to print or store the record.

9 **Preliminary Comment**

10
11 This definition may, to the extent it deals with receipt of notices, be moved to revised
12 Article 1. The definition deals with receipt of goods and notices. It does not apply to a
13 communication that is not a notice but that might be required by a contract. For example,
14 nothing in this definition precludes a party that is contractually obligated to provide information
15 regarding a trade secret from sending it in an electronic communication that cannot be printed or
16 stored. To the extent that the definition deals with nonelectronic notices, this definition is based
17 on existing Section 1-201(26). To the extent that it deals with electronic notices, it is based on
18 Section 15 of the Uniform Electronic Transactions Act.

19
20 The definition must be read in a manner that is consistent with existing Section 1-201(27)
21 dealing with receipt by an organization.

22
23 (n) "Receive means to take receipt.

24
25 (o) "Record means information that is inscribed on a tangible medium or that is
26 stored in an electronic or other medium and is retrievable in perceivable form.

27 **Preliminary Comment**

28
29 The definition of "record conforms to revised Article 9. It may be moved to revised
30 Article 1.

31
32 (p) "Remedial promise means a promise by the seller to repair or replace the
33 goods or to refund all or part of the price upon the happening of a specified event.

Preliminary Comment

A “remedial promise” is a promise by the seller to take remedial action upon the happening of a specified event. The types of remediation contemplated are specified in the definition – repair or replacement of the goods, or refund of all or part of the price. No other promise by a seller qualifies as a remedial promise. Further, the seller is entitled to specify precisely the event that will trigger its obligation. Typical examples include a commitment to repair any parts that prove to be defective, or a commitment to refund the purchase price if the goods fail to perform in a certain manner. A post-sale promise to fix a problem that the seller is not obligated to fix in order to placate a dissatisfied customer is not within the definition of remedial promise.

It is irrelevant whether the promised remedy is exclusive under Section 2-719(1) or merely additional to the buyer’s normal Code remedies. Whether the promised remedy is exclusive, and if so whether it has failed its essential purpose, is determined under Section 2-719.

Use of the term resolves a statute-of-limitations problem. Under original Section 2-725, a right of action for breach of an express warranty accrued at the time of tender unless the warranty explicitly extended to the future performance of the goods, in which case a discovery rule applied. By contrast, a right of action for breach of an ordinary (non-warranty) promise accrued when the promise was breached. A number of courts held that commitments by sellers to take remedial action in the event the goods proved to be defective during a specified period of time constituted warranties and applied the time-of-tender rule; other courts used strained reasoning that allowed them to apply the discovery rule even though the promise at issue referred to the future performance of the seller, not the goods.

This Act takes the position that a promise by the seller to take remedial action is not a warranty at all and therefore is not subject to either the time-of-tender or discovery rule. Section 2-725(2)(c) separately addresses the accrual of a right of action for a remedial promise. For further explanation, see Preliminary Comment 2 to Section 2-725.

~~(d)~~ (q) "Seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this Article or to specified Parts thereof, and the sections in which they appear are:

"Acceptance". Section 2–606.

~~"Banker's credit". Section 2–325.~~

"Between merchants". Section 2–104.

1 "Cancellation". Section 2–106(4).
2
3 "Commercial unit". Section 2–105.
4
5 ~~"Confirmed credit". Section 2–325.~~
6
7 "Conforming to contract". Section 2–106.
8
9 "Contract for sale". Section 2–106.
10
11 "Cover". Section 2–712.
12
13 "Entrusting". Section 2–403.
14
15 "Financing agency". Section 2–104.
16
17 "Future goods". Section 2–105.
18
19 "Goods". Section 2–105.
20
21 "Identification". Section 2–501.
22
23 "Installment contract". Section 2–612.
24
25 ~~"Letter of Credit". Section 2–325.~~
26
27 "Lot". Section 2–105.
28
29 "Merchant". Section 2–104.
30
31 ~~"Overseas". Section 2–323.~~
32
33 "Person in position of seller". Section 2–707.
34
35 "Present sale". Section 2–106.
36
37 "Sale". Section 2–106.
38
39 "Sale on approval". Section 2–326.
40
41 "Sale or return". Section 2–326.
42
43 "Termination". Section 2–106.
44

(3) The following definitions in other Articles apply to this Article:

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

~~"Consignee". Section 7-102.~~

~~"Consignor". Section 7-102.~~

~~"Consumer goods". Section 9-109.~~

"Dishonor". Section 3-502.

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

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

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

(4) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

§ 2-104. Definitions: "Merchant"; "Between Merchants"; "Financing Agency".

(1) "Merchant" means a person who deals in goods of the kind or otherwise by ~~his~~ the person's occupation holds ~~himself~~ out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom ~~such~~ the knowledge or skill may be attributed by ~~his~~ the person's employment of an agent or broker or other intermediary who by ~~his~~ the person's occupation holds ~~himself~~ out as having ~~such~~ the knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of

1 title accompany the draft. "Financing agency" includes also a bank or other person who similarly
2 intervenes between persons who are in the position of seller and buyer in respect to the goods
3 (Section 2–707).

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

6
7 **§ 2–105. Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial**
8 **Unit".**
9

10 (1) "Goods" means all things (including specially manufactured goods) which are
11 movable at the time of identification to the contract for sale other than the money in which the
12 price is to be paid, the subject matter of foreign exchange transactions, investment securities
13 (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing
14 crops and other identified things attached to realty as described in the section on goods to be
15 severed from realty (Section 2–107).

16 (2) Goods must be both existing and identified before any interest in them can pass.
17 Goods which are not both existing and identified are "future" goods. A purported present sale of
18 future goods or of any interest therein operates as a contract to sell.

19 (3) There may be a sale of a part interest in existing identified goods.

20 (4) An undivided share in an identified bulk of fungible goods is sufficiently identified to
21 be sold although the quantity of the bulk is not determined. Any agreed proportion of such a
22 bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent
23 of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

24 (5) "Lot" means a parcel or a single article which is the subject matter of a separate sale

or delivery, whether or not it is sufficient to perform the contract.

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

Preliminary Comment

The definition of "goods" in subsection (1) has been amended to exclude the subject matter of "foreign exchange transactions. See Section 2-103(1)(j). Although a contract in which currency is the commodity exchanged is a sale of goods, an exchange in which delivery is "through funds transfer, book entry accounting, or other form of payment order, or other agreed means to transfer a credit balance" is not a sale of goods and is not governed by Article 2. In the latter case, Article 4A or other law applies. On the other hand, if the parties agree to a forward transaction where, after January 1, 2002, dollars are to be physically delivered in exchange for the delivery of Euros, the transaction is not within the "foreign exchange" exclusion and Article 2 applies.

§ 2-108. Transactions Subject to Other Law.

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

(a) [list any certificate of title statutes of this State covering automobiles, trailers, mobile homes, boats, farm tractors, or the like], except with respect to the rights of a buyer in ordinary course of business under Section 2-403(b) which arise before a certificate of title covering the goods is effective in the name of any other buyer;

(b) rule of this State or final decision of a court of this State that establishes a different rule for consumers; or

(c) statute of this State to which the transaction is subject, such as statutes dealing with:

1 (i) the sale or lease of agricultural products;
2 (ii) the transfer of blood, blood products, human tissues, or parts;
3 (iii) the consignment or transfer by artists of works of art or fine prints;
4 (iv) distribution agreements, franchises, and other relationships through
5 which goods are sold;
6 (v) the misbranding or adulteration of food products or drugs; and
7 (vi) dealers in particular products, such as automobiles, motorized
8 wheelchairs, agricultural equipment, and hearing aids.

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

12 (3) For purposes of this article, failure to comply with a law referred to in subsection (1)
13 has only the effect specified in that law.

14 (4) This article modifies, limits, and supersedes the application of the Electronic
15 Signatures in Global and National Commerce Act (U.S.C.) except to the extent that act
16 provides protection for consumers.

17 **Preliminary Comment**

18
19 1. Section 2-108, which is new, follows the form of Section 2A-104(1).

20
21 2. In subsection (1), it is assumed that Article 2 is subject to any applicable federal law,
22 such as the United Nations Convention on Contracts for the International Sale of Goods (CISG)
23 or the Magnuson-Moss Warranty Act.

24
25 3. Subsection (1)(a) permits the states to list any applicable certificate-of-title statutes
26 and provides that Article 2 is subject to their provisions on the transfer and effect of title except
27 for the rights of a buyer in ordinary course of business in certain limited situations. In
28 entrustment situations, subsection (1)(a) overrides those certificate-of-title statutes that provide

1 that a person cannot qualify as an owner unless a certificate has been issued in the person's name.
2 By contrast, in those cases where an owner in whose name a certificate has been issued entrusts a
3 titled asset to a dealer that then sells it to a buyer in ordinary course of business, this section
4 provides that the priority issue between the owner and the buyer is to be resolved in the first
5 instance by reference to the certificate-of-title statute.
6

7 Illustration #1. Suppose that a used car is stolen from Owner by Thief and Thief, by
8 fraud, is able to obtain a clean certificate of title from State X. Thief sells the car to
9 Buyer, a good faith purchaser for value but not a buyer in ordinary course of business, and
10 transfers the certificate of title to Buyer. The exception in subsection (1)(a) does not
11 apply to protect Buyer. Further, under Section 2-403(1) Buyer does not get good title
12 from Thief, regardless of the certificate. The same result follows if the applicable state
13 certificate of title law makes the certificate prima facie evidence of ownership. Buyer
14 will prevail, however, if the applicable law conflicts with the result obtained under this
15 Article by making issuance of the certificate conclusive on title.
16

17 Illustration #2. Dealer sells a new car to Buyer #1 and signs a form permitting Buyer #1
18 to apply for a certificate of title. Buyer #1 leaves the car with Dealer so that Dealer can
19 finish its preparation work on the car. While the car remains in Dealer's possession and
20 before the state issues a certificate of title in Buyer #1's name, Buyer #2 makes Dealer a
21 better offer on the car, which Dealer accepts. Buyer #1 entrusted the car to Dealer, and if
22 Buyer #2 qualifies as a buyer in ordinary course of business its title to the car will be
23 superior to that of Buyer #1.
24

25 Illustration #3. Owner in whose name a certificate of title has been issued leaves a car
26 with Dealer for repair. Dealer sells the car to Buyer, who qualifies as a buyer in ordinary
27 course of business. If the certificate-of-title law in the state resolves the priority contest
28 between Owner and Buyer, that solution should be implemented. Otherwise, Buyer
29 prevails under Section 2-403(2).
30

31 4. This section also deals with the effect of a conflict or failure to comply with any other
32 state law that might apply to a transaction governed by this Article. Subsection (1) provides that
33 the adoption of this Article should not be construed to impair or repeal such a law, and
34 subsection (2) provides that in the event of a conflict the other law governs (except for the rights
35 of a buyer in ordinary course of business under subsection (1)(a)).
36

37 Section 2-102 provides that this Article does not impair or repeal any statute regulating
38 *inter alia* sales to consumers. Subsection (1)(b) supplements that section and provides that this
39 Article is also subject to "any applicable rule or decision that establishes a different rule for
40 consumers [emphasis supplied].
41

42 The relationship between Article 2 and federal and state consumer laws will vary from
43 transaction to transaction and from State to State. For example, the Magnuson-Moss Warranty
44 Act, 15 U.S.C.A. §§ 2301 *et. seq.*, may or may not apply to the consumer dispute in question and

1 the applicable state “lemon law” may provide more or less protection than Magnuson-Moss. To
2 the extent of application, the other laws control. Otherwise, Article 2 applies.

3
4 Subsection (1)(c) provides an illustrative but not exhaustive list of other applicable state
5 statutes that may preempt all or part of Article 2. For example, franchise contracts may be
6 regulated by state franchise acts, the seller of unmerchantable blood or human tissue may be
7 insulated from warranty liability and disclaimers of the implied warranty of merchantability may
8 be invalidated by non-uniform amendments to Article 2. The existence, scope, and effect of
9 these statutes must be assessed from State to State.

10
11 Assuming that there is a conflict, subsection (3) deals with the failure of parties to the
12 contract to comply with the applicable law. The failure has the “effect specified” in the law.
13 Thus, the failure to obtain a required license may make the contract illegal, and thus therefore
14 unenforceable, while the nonnegligent supply of unmerchantable blood under a “blood shield
15 statute may mean only that the supplier is insulated from liability for injury to person or property.

16
17 5. Subsection (4) takes advantage of a provision of the federal Electronic Signatures in
18 Global and National Commerce Act (E-Sign). E-Sign permits state law to modify, limit or
19 supersede its provisions if the state law is consistent with Titles I and II of E-Sign, gives no
20 special legal effect or validity to and does not require the implementation or application of
21 specific technologies or technical specifications, and if enacted subsequent to E-Sign makes
22 specific reference to E-Sign. Subsection (4) does not apply to the consumer-protection
23 provisions of E-Sign.

24 25 PART 2

26 27 **FORM, FORMATION, TERMS AND READJUSTMENT OF CONTRACT;** 28 **ELECTRONIC CONTRACTING**

29 30 **§ 2–201. Formal Requirements; Statute of Frauds.**

31
32 (1) ~~Except as otherwise provided in this section a~~ A contract for the sale of goods for the
33 price of ~~\$500~~ \$5,000 or more is not enforceable by way of action or defense unless there is some
34 ~~writing~~ record sufficient to indicate that a contract for sale has been made between the parties and
35 ~~signed~~ authenticated by the party against whom enforcement is sought or by ~~his~~ the party’s
36 authorized agent or broker. A ~~writing~~ record is not insufficient because it omits or incorrectly
37 states a term agreed upon other than a quantity term, but ~~and~~ the contract is not enforceable under
38 this ~~paragraph~~ subsection beyond the quantity of goods shown in ~~such~~ the ~~writing~~ record.

1 (2) Between merchants if within a reasonable time a ~~writing~~ record in confirmation of the
2 contract and sufficient against the sender is received and the party receiving it has reason to know
3 its contents, it satisfies the requirements of subsection (1) against such party unless ~~written~~
4 of objection to its contents is given in a record within 10 days after it is received.

5 (3) A contract which does not satisfy the requirements of subsection (1) but which is valid
6 in other respects is enforceable

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

12 (b) if the party against whom enforcement is sought admits in ~~his~~ the party's
13 pleading, or in the party's testimony or otherwise ~~in court~~ under oath that a contract for
14 sale was made, but the contract is not enforceable under this ~~provision~~ paragraph beyond
15 the quantity of goods admitted; or

16 (c) with respect to goods for which payment has been made and accepted or which
17 have been received and accepted (Sec. 2-606).

18 (4) A contract that is enforceable under this section is not rendered unenforceable merely
19 because it is not capable of being performed within one year or any other applicable period after
20 its making.

21 Preliminary Comment

22
23 1. The record required by subsection (1) need not contain all the material terms of the
24 contract and the material terms that are stated need not be precise or accurate. All that is required

1 is that the record afford a basis for believing that the offered oral evidence rests on a real
2 transaction. The record may be written in lead pencil on a scratch pad or entered into a laptop
3 computer. It need not indicate which party is the buyer and which party is the seller. The only
4 term which must appear is the quantity term, which need not be accurately stated but recovery is
5 limited to the amount stated. A term indicating that the quantity is based on the output of the
6 seller or the requirements of the buyer is a quantity term for purposes of this section. The price,
7 time and place of payment or delivery, the general quality of the goods, or any particular
8 warranties may all be omitted.
9

10 Special emphasis must be placed on the permissibility of omitting the price term. In
11 many valid contracts for sale the parties do not mention the price in express terms. The buyer is
12 bound to pay and the seller to accept a reasonable price, which the trier of the fact will determine.
13 Frequently the price is not mentioned since the parties have based their agreement on a price list
14 or catalogue known to both of them, and the list or catalogue serves as an efficient safeguard
15 against perjury. Finally, “market prices and valuations that are current in the vicinity constitute
16 a similar check. Of course, if the “price consists of goods rather than money, the quantity of
17 goods must be stated.
18

19 There are only three definite and invariable requirements as to the memorandum made by
20 subsection (1). First, the memorandum must evidence a contract for the sale of goods; second,
21 the memorandum must be “authenticated ; and third, the memorandum must have a quantity
22 term.
23

24 2. The phrase “Except as otherwise provided in this section has been deleted from
25 subsection (1). This means that the statement in subsection (3) of three statutory exceptions to
26 subsection (1) does not preclude the possibility that a promisor will be estopped to raise the
27 statute-of-frauds defense in appropriate cases.
28

29 3. “Partial performance as a substitute for the required record can validate the contract
30 only for the goods which have been accepted or for which payment has been made and accepted.
31

32 Receipt and acceptance either of goods or of the price constitutes an unambiguous overt
33 admission by both parties that a contract actually exists. If the court can make a just
34 apportionment, therefore, the agreed price of any goods actually delivered can be recovered
35 without a writing or, if the price has been paid, the seller can be forced to deliver an
36 apportionable part of the goods. The overt actions of the parties make admissible evidence of the
37 other terms of the contract necessary to a just apportionment. This is true even though the
38 actions of the parties are not in themselves inconsistent with a different transaction such as a
39 consignment for resale or a mere loan of money.
40

41 Part performance by the buyer requires that the buyer deliver something that is accepted
42 by the seller as the performance. Thus, part payment may be made by money or check, accepted
43 by the seller. If the agreed price consists of goods or services, then they must also have been
44 delivered and accepted. When the seller accepts partial payment for a single item the statute is

1 satisfied entirely.

2
3 4. Between merchants, failure to answer a confirmation of a contract in a record that
4 satisfies the requirements of subsection (1) against the sender within ten days of receipt renders
5 the record sufficient against the recipient. The only effect, however, is to take away from the
6 party that fails to answer the defense of the Statute of Frauds; the burden of persuading the trier
7 of fact that a contract was in fact made orally prior to the record confirmation is unaffected.

8
9 A merchant includes a person “that by occupation purports to have knowledge or skill
10 peculiar to the *practices* or goods involved in the transaction. Section 2-104(1)(emphasis
11 supplied). Thus, a professional or a farmer should be considered a merchant because the practice
12 of objecting to an improper confirmation ought to be familiar to any person in business.

13
14 5. Failure to satisfy the requirements of this section does not render the contract void for
15 all purposes, but merely prevents it from being judicially enforced in favor of a party to the
16 contract. For example, a buyer that takes possession of goods as provided in an oral contract
17 which the seller has not meanwhile repudiated is not a trespasser. Nor would the statute-of-
18 frauds provisions of this section be a defense to a third person that wrongfully induces a party to
19 refuse to perform an oral contract, even though the injured party cannot maintain an action for
20 damages against the party so refusing to perform.

21
22 6. It is not necessary that the record be delivered to anybody, nor is this section intended
23 to displace decisions that have given effect to lost records. It need not be authenticated by both
24 parties, but except as stated in subsection (2) it is not sufficient against a party that has not
25 authenticated it. Prior to a dispute, no one can determine which party's authentication of the
26 record may be necessary, but from the time of contracting each party should be aware that it is
27 the authentication by the other which is important.

28
29 7. If the making of a contract is admitted in court, either in a written pleading, by
30 stipulation or by oral statement before the court, or is admitted under oath but not in court, as by
31 testimony in a deposition or an affidavit filed with a motion, no additional record is necessary.
32 Subsection (3)(b) makes it impossible to admit the contract in these contexts and still use the
33 Statute of Frauds as a defense. However, the contract is not thus conclusively established. The
34 admission is evidential against the maker of the truth of the facts admitted and of nothing more;
35 as against the other party, it is not evidential at all.

36
37 8. Subsection (4), which is new, repeals the “one year provision of the Statute of Frauds
38 for contracts for the sale of goods. The phrase “any other applicable period recognizes that
39 some state statutes apply to periods longer than one year. The confused and contradictory
40 interpretations under the so-called “one year clause are illustrated in *C.R. Klewin, Inc. v.*
41 *Flagship Properties, Inc.*, 600 A.2d 772 (Conn. 1991) (Peters, J.).

42
43 **§ 2–202. Final ~~Written~~ Expression in a Record: Parol or Extrinsic Evidence.**

(1) Terms with respect to which the confirmatory ~~memoranda~~ records of the parties agree or which are otherwise set forth in a ~~writing~~ record intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be ~~explained~~ or supplemented by evidence of:

(a) ~~by course of dealing or usage of trade (Section 1-205) or by course of~~
~~performance (Section 2-208)~~ course of performance, course of dealing or usage of trade
(Section 1-303); and

(b) by evidence of consistent additional terms unless the court finds the writing record to have been intended also as a complete and exclusive statement of the terms of the agreement.

(2) Terms in a record may be explained by evidence of course of performance, course of dealing, or usage of trade without a preliminary determination by the court that the language used is ambiguous.

Preliminary Comment

1. Subsection (1) codifies the parol evidence rule, the operation of which depends upon the intention of both parties that terms in a record are the “final expression of their agreement with respect to the included terms. Without this mutual intention to integrate the record, the parol evidence rule does not apply to exclude other terms allegedly agreed to prior to or contemporaneously with the writing. Unless there is a final record, these alleged terms are provable as part of the agreement by relevant evidence from any credible source. When each party sends a confirmatory record, mutual intention to integrate is presumed with regard to terms “with respect to which the confirmatory records of the parties agree.

2. Because a record is final for the included terms (an integration) does not mean that the parties intended that the record contain all the terms of their agreement (a total integration). If a record is final but not complete and exclusive it cannot be contradicted by evidence of prior agreements reflected in a record or prior or contemporaneous oral agreements, but it can be supplemented by evidence, drawn from any source, of consistent additional terms. Even if the

1 record is final, complete and exclusive it can be supplemented by evidence of noncontradictory
2 terms drawn from an applicable course of performance, course of dealing, or usage of trade
3 unless those sources are carefully negated by a term in the record. If the record is final, complete
4 and exclusive it cannot be supplemented by evidence of terms drawn from other sources, even
5 terms that are consistent with the record.

6
7 3. The cross-references in subsection (1)(a) have been changed to correspond with
8 revised Article 1.
9

10 4. Whether a writing is final, and whether a final writing is also complete, are issues for
11 the court. This section rejects any assumption that because a record has been worked out which
12 is final on some matters, it is to be taken as including all the matters agreed upon. If the
13 additional terms are those that, if agreed upon, they would certainly have been included in the
14 document in the view of the court, then evidence of their alleged making must be kept from the
15 trier of fact. This article takes no position on the evidentiary strength of a merger clause as
16 evidence of a mutual intent that the record be final and complete since that depends upon the
17 particular circumstances involved.
18

19 5. This section does not exclude evidence introduced to show that the contract is
20 avoidable for misrepresentation, mistake, or duress, or that the contract or a term is
21 unenforceable because of unconscionability. Similarly, this section does not operate to exclude
22 evidence of a subsequent modification or evidence that, for the purpose of claiming excuse, both
23 parties assumed that a certain event would not occur.
24

25 6. Issues of interpretation are generally left to the courts. In interpreting terms in a
26 record, subsection (2) permits either party to introduce evidence drawn from an appropriate
27 objective source without any preliminary determination by the court that the term at issue is
28 ambiguous. The subsection deals with that circumstance and no other. It takes no position on
29 whether a preliminary determination of ambiguity is a condition to the admissibility of evidence
30 drawn from any other source or on whether a contract clause can exclude an otherwise applicable
31 implied-in-fact source.
32

33 *Legislative Note: The cross-references in subsection (1)(a) should not be changed if the*
34 *jurisdiction has not adopted revised Article 1.*
35

36 **§ 2–203. Seals Inoperative.**

37
38 The affixing of a seal to a writing record evidencing a contract for sale or an offer to buy or sell
39 goods does not constitute the writing record a sealed instrument and the law with respect to
40 sealed instruments does not apply to such a contract or offer.

41 **§ 2–204. Formation in General.**

1 (1) A contract for sale of goods may be made in any manner sufficient to show
2 agreement, including offer and acceptance, conduct by both parties which recognizes the
3 existence of such a contract, or the interaction of electronic agents.

4 (2) An agreement sufficient to constitute a contract for sale may be found even though the
5 moment of its making is undetermined.

6 (3) Even though one or more terms are left open a contract for sale does not fail for
7 indefiniteness if the parties have intended to make a contract and there is a reasonably certain
8 basis for giving an appropriate remedy.

9 (4) Except as otherwise provided in Sections 2-211 through 2-213, the following rules
10 apply:

11 (a) A contract may be formed by the interaction of electronic agents of the
12 parties, even if no individual was aware of or reviewed the electronic agents' actions or
13 the resulting terms and agreements.

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

18 (i) cause the electronic agent to complete the transaction or performance;

19 or

20 (ii) indicate acceptance of an offer, regardless of other expressions or
21 actions by the individual to which the electronic agent cannot react.

22 **Preliminary Comment**
23

1 1. Subsection (1) sets forth the basic policy of recognizing any manner of expression of
2 agreement. In addition to traditional contract formation by oral or written agreement, or by
3 performance, subsection (1) provides that an agreement may be made by electronic means.
4 Regardless of how the agreement is formed under this section, the legal effect of the agreement is
5 subject to the other provisions of this Article.
6

7 2. Under subsection (1), appropriate conduct by the parties may be sufficient to establish
8 an agreement. Subsection (2) is directed primarily to the situation when the interchanged
9 correspondence does not disclose the exact point at which the deal was closed, but the actions of
10 the parties indicate that a binding obligation has been undertaken.
11

12 3. Subsection (3) states the principle as to “open terms” underlying later sections of the
13 Article. If the parties intend to enter into a binding agreement, this subsection recognizes that
14 agreement as valid in law, despite missing terms, if there is any reasonably certain basis for
15 granting a remedy. The test is not certainty as to what the parties were to do nor as to the exact
16 amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed
17 upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards
18 on the point of “indefiniteness” are intended to be applied, this Act making provision elsewhere
19 for missing terms needed for performance, open price, remedies and the like.
20

21 The more terms the parties leave open, the less likely it is that they have intended to
22 conclude a binding agreement, but their actions frequently may be conclusive on the matter
23 despite the omissions.
24

25 4. Subsections (4)(a) and (b) are derived from Sections 14(a) and (b) of the Uniform
26 Electronic Transactions Act (UETA). Subsection (4)(a) confirms that contracts may be formed
27 by machines functioning as electronic agents for parties to a transaction. This subsection is
28 intended to negate any claim that lack of human intent, at the time of contract formation,
29 prevents contract formation. When machines are involved, the requisite intention to contract
30 flows from the programming and use of the machine. This provision, along with sections 2-211, 2-
31 212, and 2-213, is intended to remove barriers to electronic contract formation.
32

33 5. Subsection (4)(b) validates contracts formed by an individual and an electronic agent.
34 This subsection substantiates an anonymous click-through transaction. As with subsection (4)(a),
35 the intent to contract by the electronic agent flows from the programming and use of the machine.
36 The requisite intent to contract by the individual is found by the acts of the individual that the
37 individual has reason to know will be interpreted by the machine as allowing the machine to
38 complete the transaction or performance, or that will be interpreted by the machine as signifying
39 acceptance on the part of the individual. This intent is only found, though, when the individual is
40 free to refuse to take the actions that the machine will interpret as acceptance or allowance to
41 complete the transaction. For example, if A goes to a website that provides for purchasing goods
42 over the Internet, and after choosing items to be purchased is confronted by a screen which
43 advises her that the transaction will be completed if A clicks “I agree” then A will be bound by
44 the click as long as A was free to refuse the click.

1 6. Nothing in this section is intended to restrict equitable defenses, such as fraud or
2 mistake, in electronic contract formation. However, because the law of electronic mistake is not
3 well developed, and because factual issues may arise that are not easily resolved by legal
4 standards developed for nonelectronic transactions, courts should not automatically apply
5 standards developed in other contexts. Courts should also factor in the specific differences
6 between electronic and nonelectronic transactions in resolving equitable claims in electronic
7 contracts.

8
9 **§ 2–205. Firm Offers.**

10
11 An offer by a merchant to buy or sell goods in ~~a signed writing~~ an authenticated record
12 which by its terms gives assurance that it will be held open is not revocable, for lack of
13 consideration, during the time stated or if no time is stated for a reasonable time, but in no event
14 may such period of irrevocability exceed three months; but any such term of assurance ~~on a form~~
15 in a form record supplied by the offeree must be separately ~~signed~~ authenticated by the offeror.

16
17 **§ 2–206. Offer and Acceptance in Formation of Contract.**

18
19 (1) Unless otherwise unambiguously indicated by the language or circumstances

20 (a) an offer to make a contract shall be construed as inviting acceptance in any
21 manner and by any medium reasonable in the circumstances;

22 (b) an order or other offer to buy goods for prompt or current shipment shall be
23 construed as inviting acceptance either by a prompt promise to ship or by the prompt or
24 current shipment of conforming or non-conforming goods, but such a shipment of
25 non-conforming goods does not constitute an acceptance if the seller seasonably notifies
26 the buyer that the shipment is offered only as an accommodation to the buyer.

27 (2) Where the beginning of a requested performance is a reasonable mode of acceptance
28 an offeror who is not notified of acceptance within a reasonable time may treat the offer as
29 having lapsed before acceptance.

(3) A definite and seasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer.

Preliminary Comment

1. Subsection (1)(b) deals with the situation where a shipment made following an order is shown by a notification of shipment to be referable to that order but has a defect. Such a nonconforming 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. However, the seller by stating that the shipment is nonconforming and is offered only as an accommodation to the buyer keeps the shipment of notification from operating as an acceptance.

2. The “unless” clause that appeared at the end of the sentence that is now subsection (3) when that sentence was a part of original Section 2-207(1) has been omitted as unnecessary. Subsection (3) rejects the mirror image rule, but any responsive record must still be fairly regarded as an “acceptance” and not as a proposal for such a different transaction that it should be construed to be a rejection of the offer.

§ 2-207. Additional Terms in Acceptance or Terms of Contract; Effect of Confirmation.

~~(1) A definite and seasonable expression of acceptance or 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 offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.~~

~~(2) The additional terms are to be construed as proposals for addition to the contract.~~

~~Between merchants such terms become part of the contract unless:~~

~~(a) the offer expressly limits acceptance to the terms of the offer;~~

~~(b) they materially alter it; or~~

~~(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.~~

~~(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a~~

1 ~~contract. In such case the terms of the particular contract consist of those terms on which the~~
2 ~~writings of the parties agree, together with any supplementary terms incorporated under any other~~
3 ~~provisions of this Act.~~

4 If (i) conduct by both parties recognizes the existence of a contract although their records
5 do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii)
6 a contract formed in any manner is confirmed by a record that contains terms additional to or
7 different from those in the contract being confirmed, the terms of the contract, subject to Section
8 2-202, are:

9 (a) terms that appear in the records of both parties;

10 (b) terms, whether in a record or not, to which both parties agree; and

11 (c) terms supplied or incorporated under any provision of this Act.

12 **Preliminary Comment**

13
14 1. This section has been thoroughly revised. It states the terms of all contracts for sale,
15 not just those as to which there has been a “battle of the forms.”

16
17 2. This section applies only when a contract has been formed under other provisions of
18 Article 2. Its function is to define the terms of that contract. Where forms are exchanged before
19 or during performance, the subsection differs from original Section 2-207 and the common law in
20 that it gives no preference to the first or the last form; it applies the same test to the terms in each.
21 Terms in a record that insist on all of that record’s terms and no others as a condition of contract
22 formation have no effect on the operation of this section. (Of course where one party’s record
23 insists on its own terms as a condition to contract formation, where that party does not thereafter
24 perform or otherwise acknowledge the existence of a contract, and where the other party does not
25 agree to those terms, the record’s insistence on its own terms will keep a contract from being
26 formed under Sections 2-204 or 2-206, and Section 2-207 will not be applicable.) As with
27 original Section 2-207, courts will have to distinguish between “confirmations that are
28 addressed in Section 2-207 and “modifications that are addressed in Section 2-209.

29
30 3. By inviting a court to determine whether a party “agrees to the other party’s terms,
31 the text recognizes the enormous variety of circumstances that may be presented to a court under
32 this section, and the section gives the court greater discretion to include or exclude certain terms
33 than original Section 2-207 did. In many cases mere performance should not be construed to be

1 agreement to terms in another's record by one that has sent or will send its own record with
2 additional or different terms. Thus a party that sends a record (however labeled or characterized,
3 including an offer, counteroffer, acceptance, acknowledgment, purchase order, confirmation or
4 invoice) with additional or different terms should not be regarded as having agreed to any of the
5 other's additional or different terms by performance; in that case the terms are found under
6 paragraph (a) (terms in both records) and paragraph (c) (supplied or incorporated by this Act).
7 By the same reasoning performance after an original agreement between the parties (orally,
8 electronically or otherwise) should not normally be construed to be agreement to terms in the
9 other's record unless that record is part of the original agreement.

10
11 The rule would be different where no agreement precedes the performance and only one
12 party sends a record. If, for example, a buyer sends a purchase order, there is no oral or other
13 agreement and the seller delivers in response to the purchase order but does not send its own
14 acknowledgment or acceptance, the seller should normally be treated as having agreed to the
15 terms of the purchase order.

16
17 Of course, an offeree's unqualified response, such as "I accept, to an offer that contained
18 many terms would show agreement to all of the offer's terms. In some cases an expression of
19 acceptance accompanied by one or more additional terms also might demonstrate the offeree's
20 agreement to the terms of the offer. For example, consider a buyer that sends a purchase order
21 with technical specifications and a seller that responds with a record stating "Thank you for your
22 order. We will fill it promptly. Note that we do not make deliveries after 3:00 p.m. on Fridays.
23 Here a court could find that both parties agreed to the technical specifications.

24
25 In some cases a court might find nonverbal agreement to additional or different terms that
26 appear in only one record. If, for example, both parties' forms called for the sale of 700,000 nuts
27 and bolts but the purchase order or another record of the buyer conditioned the sale on a test of a
28 sample to see if the nuts and bolts would perform properly, the seller's sending a small sample to
29 the buyer might be construed to be an agreement to buyer's condition. A court could find that the
30 contract called for arbitration where both forms provided for arbitration but each contained
31 immaterially different arbitration provisions. It is possible that trade practice in a particular trade
32 or course of dealing between contracting parties might treat the offeree's performance as
33 acceptance of the offeror's terms even when the offeree sent its own record; conversely trade
34 practice or course of dealing might bind the offeror to terms in the offeree's form when the
35 expectation in the trade or in the course of dealing so directs.

36
37 In a rare case terms in the records of both parties might not become part of the contract;
38 that might happen where the parties contemplated agreement to a single negotiated record, each
39 exchanged similar proposals and commenced interim performance but never reached a negotiated
40 agreement because of differences over crucial terms. There is a limitless variety of verbal and
41 nonverbal behavior that may be claimed to be an agreement to another's record. The section
42 leaves the interpretation of that behavior to the wise discretion of the courts.

43
44 4. An "agreement" may include terms derived from a course of performance, a course of

1 dealing, and usage of trade. See Section 1-201. If the members of a trade or if the contracting
2 parties expect to be bound by a term that appears in the record of only one contracting party, that
3 term is part of the agreement. However, repeated use of a particular term or repeated failure to
4 object to a term on another's record is not normally sufficient in itself to establish a course of
5 performance, a course of dealing or a trade usage.

6
7 5. The section omits any specific treatment of terms on or in the container in which the
8 goods are delivered. Amended Article 2 takes no position on the question whether a court should
9 follow the reasoning in Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997) (Section 2-207 does
10 not apply to these cases; the “rolling contract is not made until acceptance of the seller’s terms
11 after the goods and terms are delivered) or the contrary reasoning in Step-Saver Data Systems,
12 Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir.1991) (contract is made at time of oral or other
13 bargain and “shrink wrap terms or those in the container become part of the contract only if they
14 comply with provisions like Section 2-207).

15
16 **§ 2-208. Course of Performance or Practical Construction Reserved.**

17
18 ~~(1) Where the contract for sale involves repeated occasions for performance by either~~
19 ~~party with knowledge of the nature of the performance and opportunity for objection to it by the~~
20 ~~other, any course of performance accepted or acquiesced in without objection shall be relevant to~~
21 ~~determine the meaning of the agreement.~~

22 ~~(2) The express terms of the agreement and any such course of performance, as well as~~
23 ~~any course of dealing and usage of trade, shall be construed whenever reasonable as consistent~~
24 ~~with each other; but when such construction is unreasonable, express terms shall control course~~
25 ~~of performance and course of performance shall control both course of dealing and usage of trade~~
26 ~~(Section 1-205).~~

27 ~~(3) Subject to the provisions of the next section on modification and waiver, such course~~
28 ~~of performance shall be relevant to show a waiver or modification of any term inconsistent with~~
29 ~~such course of performance.~~

1 **Preliminary Comment**

2
3 This section has been moved to revised Article 1 (Section 1-303).

4
5 **§ 2–209. Modification, Rescission and Waiver.**

6
7 (1) An agreement modifying a contract within this Article needs no consideration to be
8 binding.

9 (2) ~~A signed agreement~~ An agreement in an authenticated record which excludes
10 modification or rescission except by ~~a signed writing~~ an authenticated record cannot be otherwise
11 modified or rescinded, but except as between merchants such a requirement ~~on a form~~ in a form
12 record supplied by the merchant must be separately ~~signed~~ authenticated by the other party.

13 (3) The requirements of the statute of frauds section of this Article (Section 2–201) must
14 be satisfied if the contract as modified is within its provisions.

15 (4) Although an attempt at modification or rescission does not satisfy the requirements of
16 subsection (2) or (3) it can operate as a waiver.

17 (5) A party who has made a waiver affecting an executory portion of the contract may
18 retract the waiver by reasonable notification received by the other party that strict performance
19 will be required of any term waived, unless the retraction would be unjust in view of a material
20 change of position in reliance on the waiver.

21 **§ 2–210. Delegation of Performance; Assignment of Rights.**

22
23 (1) ~~A party may perform his duty through a delegate unless otherwise agreed or unless the~~
24 ~~other party has a substantial interest in having his original promisor perform or control the acts~~

1 required by the contract. No delegation of performance relieves the party delegating of any duty
2 to perform or any liability for breach.

3 (2) Unless otherwise agreed all rights of either seller or buyer can be assigned except
4 where the assignment would materially change the duty of the other party, or increase materially
5 the burden or risk imposed on him by his contract, or impair materially his chance of obtaining
6 return performance. A right to damages for breach of the whole contract or a right arising out of
7 the assignor's due performance of his entire obligation can be assigned despite agreement
8 otherwise.

9 (3) Unless the circumstances indicate the contrary a prohibition of assignment of "the
10 contract" is to be construed as barring only the delegation to the assignee of the assignor's
11 performance.

12 (4) An assignment of "the contract" or of "all my rights under the contract" or an
13 assignment in similar general terms is an assignment of rights and unless the language or the
14 circumstances (as in an assignment for security) indicate the contrary, it is a delegation of
15 performance of the duties of the assignor and its acceptance by the assignee constitutes a promise
16 by him to perform those duties. This promise is enforceable by either the assignor or the other
17 party to the original contract.

18 (5) The other party may treat any assignment which delegates performance as creating
19 reasonable grounds for insecurity and may without prejudice to his rights against the assignor
20 demand assurances from the assignee (Section 2-609).

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

1 (a) Subject to paragraph (b) and except as otherwise provided in Section 9-406 or
2 as otherwise agreed, all rights of either seller or buyer may be assigned unless the
3 assignment would materially change the duty of the other party, increase materially the
4 burden or risk imposed on that party by the contract, or impair materially that party's
5 chance of obtaining return performance. A right to damages for breach of the whole
6 contract or a right arising out of the assignor's due performance of its entire obligation
7 can be assigned despite an agreement otherwise.

8 (b) The creation, attachment, perfection, or enforcement of a security interest in
9 the seller's interest under a contract is not an assignment that materially changes the duty
10 of or materially increases the burden or risk imposed on the buyer or materially impairs
11 the buyer's chance of obtaining return performance within paragraph (a) unless, and then
12 only to the extent that, enforcement of the security interest results in a delegation of a
13 material performance of the seller. Even in that event, the creation, attachment,
14 perfection, and enforcement of the security interest remain effective. However, the seller
15 is liable to the buyer for damages caused by the delegation to the extent that the damages
16 could not reasonably be prevented by the buyer, and a court having jurisdiction may grant
17 other appropriate relief, including cancellation of the contract or an injunction against
18 enforcement of the security interest or consummation of the enforcement.

19 (2) If the seller or buyer delegates performance of its duties under a contract, the
20 following rules apply:

21 (a) A party may perform its duties through a delegate unless otherwise agreed or
22 unless the other party has a substantial interest in having the original promisor perform or

1 control the acts required by the contract. No delegation of performance relieves the party
2 delegating of any duty to perform or any liability for breach.

3 (b) Acceptance of a delegation of duties by the assignee constitutes a promise to
4 perform those duties. This promise is enforceable by either the assignor or the other party
5 to the original contract.

6 (c) The other party may treat any delegation of duties as creating reasonable
7 grounds for insecurity and may without prejudice to its rights against the assignor demand
8 assurances from the assignee under Section 2-609.

9 (d) A contractual term prohibiting the delegation of duties otherwise delegable
10 under paragraph (a) is enforceable, and an attempted delegation is not effective.

11 (3) An assignment of “the contract” or of “all my rights under the contract” or an
12 assignment in similar general terms is an assignment of rights and unless the language or the
13 circumstances, as in an assignment for security, indicate the contrary, it is also a delegation of
14 performance of the duties of the assignor.

15 (4) Unless the circumstances indicate the contrary a prohibition of assignment of “the
16 contract” is to be construed as barring only the delegation to the assignee of the assignor’s
17 performance.

18 **Preliminary Comment**

19
20 1. This section is consistent with original Section 2-210 but follows a different
21 organizational approach. Subsection (1) deals with the assignment of rights, subsection (2) deals
22 with the delegation of duties, and subsections (3) and (4) are interpretive rules of general
23 applicability. The section has also been changed to conform with revised Article 9.

1 2. Generally, this section recognizes both the assignment of rights and the delegation of
2 duties as normal and permissible incidents of a contract for the sale of goods.

3
4 3. Subsection (1)(a) treats the effect of an assignment by either the seller or the buyer of
5 the rights but not the duties arising under the contract for sale. These rights may be effectively
6 assigned to a third person unless the assignment materially increases the duty, burden or risk, or
7 materially impairs expected performance to the other party, or, subject to subsection (1)(b) and
8 Section 9-406 (discussed below), otherwise agreed. Even then a right to damages for breach of
9 the whole contract or a right arising out of the assignor's due performance of its entire obligation
10 can be assigned despite contrary agreement.

11
12 An assignment, however, is not effective if it would “materially change the duty of the
13 other party, increase materially the burden or risk imposed on that party by the contract, or
14 increase materially that party’s likelihood of obtaining return performance. Subsection (1)(a).
15 The cases where these limitations apply are rare. For example, a seller that has fully performed
16 the contract should always be able to assign the right to payment. This is the basis for most
17 accounts receivable financing. If, however, the contract is still executory, the assignment of the
18 right to payment to a third person might decrease the seller’s incentive to perform and, thus,
19 increase the buyer’s risk. Similarly, the buyer’s assignment of the right to receive a fixed
20 quantity of goods should not usually be objectionable but if the parties have a “requirements
21 contract, the assignment could increase materially the seller’s risk.

22
23 Subsection (1)(a) is subject to Section 9-406 of revised Article 9. That provision makes
24 rights to payment for goods sold (“accounts”), whether or not earned, freely alienable by
25 invalidating anti-assignment terms in agreements between account debtors and seller-assignors,
26 and also by invalidating terms that render these assignments a breach.

27
28 4. Subsection (1)(a) is subject to subsection (1)(b), which conforms with revised Article
29 9. If an assignment of rights creates a security interest in the seller’s interest under the contract,
30 including a right to future payments, subsection (1)(b) states that there is no material impairment
31 under subsection (1)(a) unless the creation, attachment, perfection and enforcement “results in a
32 delegation of material performance of the seller. This is not likely in most assignments, and the
33 buyer’s basic protection is to demand adequate assurance of due performance from the seller if
34 the assignment creates reasonable grounds for insecurity.

35
36 5. Occasionally a seller or buyer will delegate duties under the contract without also
37 assigning rights. For example, a dealer might delegate its duty to procure and deliver a fixed
38 quantity of goods to the buyer to a third party. In these cases, subsection (2) states the limitations
39 on that power. A contract term prohibiting the delegation of duties renders an attempted
40 delegation ineffective. Subsection (2)(d).

1 Second, if the third person accepts the delegation, an enforceable promise is made to both
2 the delegator and the person entitled under the contract to perform those duties. Subsection
3 (2)(b). In short, as to the person entitled under the contract a third party beneficiary contract is
4 created. However, the delegator's duty to perform under the contract is not discharged unless the
5 person entitled to performance agrees to substitute the delegatee for the delegator (a novation).
6 See subsection (2)(a), last sentence.

7
8 Third, the person entitled under the contract may treat any delegation of duties as
9 reasonable grounds for insecurity and may demand adequate assurance of due performance for
10 the assignee-delegatee. Subsection (2)(c).

11
12 Finally, in any event, a delegation of duties is not effective if the person entitled under the
13 contract has a "substantial interest in having the original promisor perform or control the
14 performance required by the contract. Subsection (2)(a).

15
16 6. In the case of ambiguity, subsection (3) provides a rule of interpretation to determine
17 when an assignment of rights should also be considered a delegation of duties. When there is
18 ambiguity, the preference is to construe the language as both a delegation of duties as well as an
19 assignment of rights.

20
21 7. This section is not intended as a complete statement of the law of delegation and
22 assignment but is limited to clarifying a few points doubtful under the case law. Particularly,
23 neither this section nor this Article touches directly on such questions as the need or effect of
24 notice of the assignment, the rights of successive assignees, or any question of the form of an
25 assignment, either as between the parties or as against any third parties. Some of these questions
26 are dealt with in Article 9.

27 28 **§ 2-211. Legal Recognition of Electronic Contracts, Records and Authentications.**

29
30 (1) A record or authentication may not be denied legal effect or enforceability solely
31 because it is in electronic form.

32 (2) A contract may not be denied legal effect or enforceability solely because an
33 electronic record was used in its formation.

34 (3) This article does not require a record or authentication to be created, generated, sent,

1 communicated, received, stored, or otherwise processed by electronic means or in electronic
2 form.

3 (4) A contract formed by the interaction of an individual and an electronic agent under
4 Section 2-204(4)(b) does not include terms provided by the individual if the individual had
5 reason to know that the agent could not react to the terms as provided.

6 **Preliminary Comment**

7
8 1. This section is new. Subsections (1) and (2) are derived from Section 7(a) and (b) of
9 the Uniform Electronic Transactions Act (UETA), and subsection (3) is derived from Section
10 5(b) of UETA. Subsection (4) is based on Section 206(c) of the Uniform Computer Information
11 Transactions Act (UCITA). Each subsection conforms to the federal Electronic Signatures in
12 Global and National Commerce Act.

13
14 2. This section sets forth the premise that the medium in which a record, authentication,
15 or contract is created, presented or retained does not affect its legal significance. Subsections (1)
16 and (2) are designed to eliminate the single element of medium as a reason to deny effect or
17 enforceability to a record, authentication, or contract. The fact that the information is set forth in
18 an electronic, as opposed to paper, medium is irrelevant.

19
20 3. A contract may have legal effect and yet be unenforceable. See Restatement 2d
21 Contracts Section 8. To the extent that a contract in electronic form may have legal effect but be
22 unenforceable, subsection (2) validates its legality. Likewise, to the extent that a record or
23 authentication in electronic form may have legal effect but be unenforceable, subsection (1)
24 validates the legality of the record or authentication.

25
26 For example, though a contract may be unenforceable, the parties' electronic records may
27 have collateral effects, as in the case of a buyer that insures goods purchased under a contract that
28 is unenforceable under Section 2-201. The insurance company may not deny a claim on the
29 ground that the buyer is not the owner, though the buyer may have no direct remedy against the
30 seller for failure to deliver. See Restatement 2d Contracts, Section 8, Illustration 4. Whether an
31 electronic record or authentication is valid under other law is not addressed by this Act.

32
33 4. While subsection (2) validates the legality of an electronic contract, it does not in any
34 way diminish the requirements of Sections 2-204 and 2-206 regarding the formation of contracts,

1 and the requirements of those sections, where applicable, must be met for contract formation.

2
3 **§ 2-212. Attribution.** An electronic record or electronic authentication is attributed to a person
4 if the record was created by or the authentication was the act of the person or the person's
5 electronic agent or the person is otherwise bound by the act under the law.

6 **Preliminary Comment**

7
8 1. This section is new. It is based on Section 9 of the Uniform Electronic Transactions
9 Act (UETA).

10
11 2. As long as the electronic record was created by a person or the electronic
12 authentication resulted from a person's action it will be attributed to that person. The legal effect
13 of the attribution is to be derived from other provisions of this Act or from other law. This
14 section simply assures that these rules will be applied in the electronic environment. A person's
15 actions include actions taken by a human agent of the person as well as actions taken by an
16 electronic agent, i.e., the tool, of the person. Although this section may appear to state the
17 obvious, it assures that the record or authentication is not ascribed to a machine, as opposed to
18 the person operating or programming the machine.

19
20 3. In each of the following cases, both the electronic record and electronic authentication
21 would be attributable to a person under this section:

22
23 A. The person types his/her name as part of an e-mail purchase order;

24
25 B. The person's employee, pursuant to authority, types the person's name as part of an e-
26 mail purchase order;

27
28 C. The person's computer, programmed to order goods upon receipt of inventory
29 information within particular parameters, issues a purchase order which includes the
30 person's name, or other identifying information, as part of the order.

31
32 In each of these cases, other law would ascribe both the authentication and the action to the
33 person if done in a paper medium. This section expressly provides that the same result will occur
34 when an electronic medium is used.

1 4. Nothing in this section affects the use of an electronic authentication as a means of
2 attributing a record to a person. See Section 2-102(a)(1). Once an electronic authentication is
3 attributed to the person, the electronic record with which it is associated would also be attributed
4 to the person unless the person established fraud, forgery, or other invalidating cause. However,
5 an electronic authentication is not the only method for attribution of a record.

6
7 5. In the context of attribution of records, normally the content of the record will provide
8 the necessary information for a finding of attribution. It is also possible that an established
9 course of dealing between parties may result in a finding of attribution. Just as with a paper
10 record, evidence of forgery or counterfeiting may be introduced to rebut the evidence of
11 attribution. The use of facsimile transmissions provides a number of examples of attribution
12 using information other than a signature. A facsimile may be attributed to a person because of the
13 information printed across the top of the page that indicates the machine from which it was sent.
14 Similarly, the transmission may contain a letterhead which identifies the sender. Some cases
15 have held that the letterhead actually constituted a signature because it was a symbol adopted by
16 the sender with intent to authenticate the facsimile. However, the signature determination
17 resulted from the necessary finding of intention in that case. Other cases have found facsimile
18 letterheads NOT to be signatures because the requisite intention was not present. The critical
19 point is that with or without a signature, information within the electronic record may well
20 suffice to provide the facts resulting in attribution of an electronic record to a particular party.

21
22 6. Certain information may be present in an electronic environment that does not appear
23 to attribute but which clearly links a person to a particular record. Numerical codes, personal
24 identification numbers, public and private key combinations, all serve to establish the party to
25 which an electronic record should be attributed. Security procedures will be another piece of
26 evidence available to establish attribution.

27
28 7. Once it is established that a record or authentication is attributable to a particular
29 person, the effect of the record or authentication must be determined in light of the context and
30 surrounding circumstances, including the parties' agreement, if any. This will primarily be
31 governed by other sections of this article. See, e.g., sections 2-201, 2-202, 2-204, 2-206, 2-207,
32 and 2-209.

33 34 **§ 2-213 . Electronic Communication.**

35
36 (1) If the receipt of an electronic communication has a legal effect, it has that effect even
37 though no individual is aware of its receipt.

38 (2) Receipt of an electronic acknowledgment of an electronic communication establishes

1 that the communication was received but, in itself, does not establish that the content sent
2 corresponds to the content received.

3 **Preliminary Comment**

4
5 1. This section is new. Its provisions are adapted from Sections 15(e) and (f) of the
6 Uniform Electronic Transactions Act (UETA).

7
8 2. This section deals with electronic communications generally and is not limited to
9 electronic records, which must be retrievable in perceivable form. The section does not resolve
10 the questions of when or where electronic communications are determined to be sent or received;
11 nor does it indicate that a communication has any particular substantive legal effect. This Article
12 determines the time of receipt of a notice that is an electronic record.

13
14 3. Subsection (1) makes clear that receipt is not dependent on a person having notice that
15 the communication is in the person's electronic system. The paper analog is the recipient who
16 never reads a mail notice.

17
18 4. Subsection (2) provides legal certainty regarding the effect of an electronic
19 acknowledgment. It only addresses the fact of receipt, not the quality of the content, nor whether
20 the electronic communication was read or "opened."

21
22 5. This section does not address the question of whether the exchange of electronic
23 communications constitutes the formation of a contract. Questions of formation are addressed by
24 Sections 2-204 and 2-206.

25 26 **PART 3**

27 28 **GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT**

29 30 **§ 2-302. Unconscionable Contract or Clause Term.**

31
32 (1) If the court as a matter of law finds the contract or any ~~clause~~ term of the contract to
33 have been unconscionable at the time it was made the court may refuse to enforce the contract, or

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

3 (2) When it is claimed or appears to the court that the contract or any clause thereof may
4 be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to
5 its commercial setting, purpose and effect to aid the court in making the determination.

6 **Preliminary Comment**

7
8 1. This section is intended to make it possible for the courts to police explicitly against
9 the contracts or terms which they find to be unconscionable instead of by adverse construction of
10 language, by manipulation of the rules of offer and acceptance or by determinations that the term
11 is contrary to public policy or to the dominant purpose of the contract. The section is intended to
12 allow a court to pass directly on the unconscionability of the contract or a particular term of the
13 contract and to make a conclusion of law as to its unconscionability. Courts have been
14 particularly vigilant when the contract at issue is set forth in a standard form. The principle is
15 one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks
16 because of superior bargaining power. The basic test is whether, in the light of the general
17 commercial background and the commercial needs of the particular trade or case, the term or
18 contract involved is so one-sided as to be unconscionable under the circumstances existing at the
19 time of the making of the contract.

20
21 2. Under this section the court, in its discretion, may refuse to enforce the contract as a
22 whole if it is permeated by the unconscionability, or it may strike any single term or group of
23 terms which are so tainted or which are contrary to the essential purpose of the agreement or to
24 material terms to which the parties have expressly agreed, or it may simply limit unconscionable
25 results.

26
27 3. The present section is addressed to the court, and the decision is to be made by it. The
28 evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the
29 agreement which results from the court's action on these matters is to be submitted to the general
30 trier of the facts.

31 **§ 2-304. Price Payable in Money, Goods, Realty, or Otherwise.**

32
33
34 (1) The price can be made payable in money or otherwise. If it is payable in whole or in

1 part in goods each party is a seller of the goods which ~~he~~ that party is to transfer.

2 (2) Even though all or part of the price is payable in an interest in realty the transfer of the
3 goods and the seller's obligations with reference to them are subject to this Article, but not the
4 transfer of the interest in realty or the transferor's obligations in connection therewith.

5 **§ 2-305. Open Price Term.**
6

7 (1) The parties if they so intend can conclude a contract for sale even though the price is
8 not settled. In such a case the price is a reasonable price at the time for delivery if

9 (a) nothing is said as to price; or

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

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

13 (2) A price to be fixed by the seller or by the buyer means a price ~~for him to fix~~ to be
14 fixed in good faith.

15 (3) When a price left to be fixed otherwise than by agreement of the parties fails to be
16 fixed through fault of one party the other may at ~~his~~ its option treat the contract as canceled or
17 ~~himself~~ itself fix a reasonable price.

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

1 **§ 2–308. Absence of Specified Place for Delivery.**

2
3 Unless otherwise agreed

4 (a) the place for delivery of goods is the seller's place of business or if ~~he~~ it has
5 none ~~his~~ the seller's residence; but

6 (b) in a contract for sale of identified goods which to the knowledge of the parties
7 at the time of contracting are in some other place, that place is the place for their delivery;
8 and

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

10 **§ 2–309. Absence of Specific Time Provisions; Notice of Termination.**

11
12 (1) The time for shipment or delivery or any other action under a contract if not provided
13 in this Article or agreed upon shall be a reasonable time.

14 (2) Where the contract provides for successive performances but is indefinite in duration
15 it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by
16 either party.

17 (3) Termination of a contract by one party except on the happening of an agreed event
18 requires that reasonable notification be received by the other party and an agreement dispensing
19 with notification is invalid if its operation would be unconscionable. However, a term specifying
20 standards for the nature and timing of notice is enforceable if the standards are not manifestly
21 unreasonable.

22 **Preliminary Comment**

1 The last sentence of subsection (3) is new and is based on Section 1-102(3). It provides
2 for greater party autonomy. In appropriate circumstances, the parties might even agree that the
3 standard for notice is no notice at all.

4
5 **§ 2–310. Open Time for Payment or Running of Credit; Authority to Ship Under**
6 **Reservation.**

7
8 Unless otherwise agreed

9 (a) payment is due at the time and place at which the buyer is to receive the goods
10 even though the place of shipment is the place of delivery; and

11 (b) if the seller is required or authorized to send the goods ~~he~~ the seller may ship
12 them under reservation, and may tender the documents of title, but the buyer may inspect
13 the goods after their arrival before payment is due unless such inspection is inconsistent
14 with the terms of the contract (Section 2–513); and

15 (c) if tender of delivery is ~~authorized and agreed to be~~ made by way of documents
16 of title otherwise than by subsection (b) then payment is due at the time and place at
17 which the buyer is to receive the documents regardless of where the goods are to be
18 received; and

19 (d) where the seller is required or authorized to ship the goods on credit the credit
20 period runs from the time of shipment but post-dating the invoice or delaying its dispatch
21 will correspondingly delay the starting of the credit period.

22 **Preliminary Comment**
23

24 The word “required” has been added to paragraph (b) to make that provision consistent
25 with other usages throughout Article 2 and with the common understanding of business practices.
26 See, e.g., Sections 2-504 and 2-509(1). Paragraph (c) has been amended for clarity.

1 **§ 2–311. Options and Cooperation Respecting Performance.**
2

3 (1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of
4 Section 2–204) to be a contract is not made invalid by the fact that it leaves particulars of
5 performance to be specified by one of the parties. Any such specification must be made in good
6 faith and within limits set by commercial reasonableness.

7 (2) Unless otherwise agreed specifications relating to assortment of the goods are at the
8 buyer's option and ~~except as otherwise provided in subsections (1)(c) and (3) of Section 2–319~~
9 specifications or arrangements relating to shipment are at the seller's option.

10 (3) Where such specification would materially affect the other party's performance but is
11 not seasonably made or where one party's cooperation is necessary to the agreed performance of
12 the other but is not seasonably forthcoming, the other party in addition to all other remedies

13 (a) is excused for any resulting delay in ~~his own~~ that party's performance; and

14 (b) may also either proceed to perform in any reasonable manner or after the time
15 for a material part of ~~his~~ that party's own performance treat the failure to specify or to
16 cooperate as a breach by failure to deliver or accept the goods.

17 **Preliminary Comment**
18

19 The cross-references in subsection (2) has been deleted because the referenced provisions
20 no longer exist. The introductory phrase (“[u]nless otherwise agreed) is sufficient to make the
21 point.
22

23 **§ 2–312. Warranty of Title and Against Infringement; Buyer's Obligation Against**
24 **Infringement.**
25

1 (1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

2 (a) the title conveyed shall be ~~good~~, good and its transfer rightful and shall not,
3 because of any colorable claim to or interest in the goods, unreasonably expose the buyer
4 to litigation; and

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

7 ~~(2) A warranty under subsection (1) will be excluded or modified only by specific~~
8 ~~language or by circumstances which give the buyer reason to know that the person selling does~~
9 ~~not claim title in himself or that it is purporting to sell only such right or title as it or a third~~
10 ~~person may have.~~

11 ~~(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the~~
12 ~~kind warrants that the goods shall be delivered free of the rightful claim of any third person by~~
13 ~~way of infringement or the like but a buyer who furnishes specifications to the seller must hold~~
14 ~~the seller harmless against any such claim which arises out of compliance with the specifications.~~

15 (2) Unless otherwise agreed a seller that is a merchant regularly dealing in goods of the
16 kind warrants that the goods shall be delivered free of the rightful claim of any third person by
17 way of infringement or the like but a buyer that furnishes specifications to the seller must hold
18 the seller harmless against any such claim that arises out of compliance with the specifications.

19 (3) A warranty under this section may be disclaimed or modified only by specific
20 language or by circumstances that give the buyer reason to know that the seller does not claim
21 title, that the seller is purporting to sell only the right or title as the seller or a third person may

1 have, or that the seller is selling subject to any claims of infringement or the like.

2 **Preliminary Comment**

3
4 1. Subsection (1) makes provision for a buyer's basic needs for a title which the buyer in
5 good faith expects to acquire by the purchase, namely, that the buyer receive a good, clean title
6 transferred also in a rightful manner so that the buyer will not be exposed to a lawsuit in order to
7 protect it. Under subsection (1), the seller warrants that (1) the title conveyed is good, (2) the
8 transfer is rightful, and (3) the transfer does not unreasonably expose the buyer to litigation
9 because a third person has or asserts a “colorable claim to or interest in the goods.

10
11 In addition to sales in which there is an actual cloud on the title, a warranty that the “title
12 conveyed is good and its transfer rightful also covers cases where the title is good but the
13 transfer is not rightful. For example, a wrongful transfer with good title occurs where a merchant
14 bailee to which goods are entrusted for repair sells them without authority to a buyer in the
15 ordinary course of business. See Section 2-403(2); Sumner v. Fel-Air, Inc., 680 P.2d 1109
16 (Alaska 1984).

17
18 The subsection now expressly states what the courts have long recognized; further
19 protection for the buyer is needed when the title is burdened by colorable claims that affect the
20 value of the goods. See Frank Arnold KRS, Inc. v. L.S. Meier Auction Co., Inc., 806 F.2d 462
21 (3d Cir. 1986) (two lawsuits contest title); Jeanneret v. Vichey, 693 F.2d 259 (2d Cir. 1982)
22 (export restrictions in country from which painting was taken affect value); Colton v. Decker,
23 540 N.W.2d 172 (S.D. 1995) (conflicting vehicle identification numbers). Therefore, not only is
24 the buyer entitled to a good title, but the buyer is also entitled to a marketable title, and until the
25 colorable claim is resolved the market for the goods is impaired. See Wright v. Vickaryous, 611
26 P.2d 20 (Alaska 1980).

27
28 The justification for this rule is that the buyer of goods that are warranted as to title has a
29 right to rely on the fact that there will be no need later to have to contest ownership. The mere
30 casting of a substantial shadow over the buyer’s title, regardless of the ultimate outcome, violates
31 the warranty of good title. See American Container Corp. v. Hanley Trucking Corp., 111 N.J.
32 Super. 322, 268 A.2d 313,318 (1970). It should be noted that not any assertion of a claim by a
33 third party will constitute a breach of the warranty of title. The claim must be reasonable and
34 colorable. See C.F. Sales, Inc. v. Amfert, 344 N.W.2d 543 (Iowa 1983).

35
36 The warranty of title extends to a buyer whether or not the seller was in possession of the
37 goods at the time the sale or contract to sell was made.

1 Consistent with original Article 2, this section does not provide for a separate warranty of
2 quiet possession in addition to the warranty of title. Disturbance of quiet possession, although
3 not mentioned specifically, is one way, among many, in which the breach of the warranty of title
4 might be established.

5
6 The “knowledge referred to in subsection (1)(b) is actual knowledge as distinct from
7 notice.

8
9 2. The provisions of this Article requiring notification to the seller within a reasonable
10 time after the buyer's discovery of a breach (Section 2-607(3)(a)) apply to notice of a breach of
11 the warranty of title when the seller's breach was innocent. However, if the seller's breach was in
12 bad faith, the seller cannot claim prejudice by the delay in giving notice.

13
14 3. Subsection (2) provides the warranty against infringement. Unlike the warranty of
15 title, for this warranty the seller must be a merchant that is “regularly dealing in goods of the
16 kind sold.

17
18 When the goods are part of the seller’s normal stock and are sold in the normal course of
19 business, it is the seller’s duty to see that no claim of infringement of a patent or trademark by a
20 third party will mar the buyer’s title. A sale by a person other than a dealer, however, raises no
21 implication in its circumstances of such a warranty. Nor is there such an implication when the
22 buyer orders goods to be assembled, prepared or manufactured on the buyer’s own specifications.
23 If, in such a case, the resulting product infringes a patent or trademark, the liability will run from
24 buyer to seller. There is, under these circumstances, a tacit representation on the part of the
25 buyer that the seller will be safe in manufacturing according to the specifications, and the buyer
26 is under an obligation in good faith to indemnify the seller for any loss suffered.

27
28 4. Subsection (3) deals with the disclaimer or modification of the warranties of title or
29 against infringement. This is a self-contained provision governing the modification or
30 disclaimer of warranties under this section; the warranties in this section are not designated as
31 “implied warranties, and hence are not subject to the modification and disclaimer provisions of
32 Section 2-316(2) and (3). Unlike Section 2-316, subsection (3) of this section does not have any
33 specific requirements that the disclaimer or modification be contained in a record or be
34 conspicuous.

35
36 Subsection (3) recognizes that sales by sheriffs, executors, certain foreclosing lienors and
37 persons similarly situated may be so out of the ordinary commercial course that their peculiar
38 character is immediately apparent to the buyer and therefore no personal obligation is imposed
39 upon the seller that is purporting to sell only an unknown or limited right. This subsection does

1 not touch upon and leaves open all questions of restitution arising in these cases, when a unique
2 article so sold is reclaimed by a third party as the rightful owner.

3
4 Foreclosure sales under Article 9 are another matter. Section 9-610 of revised Article 9
5 provides that a disposition of collateral under that section includes warranties such as those
6 imposed by this section on a voluntary disposition of property of the kind involved.
7 Consequently, unless properly excluded under subsection (3) or under the special provisions for
8 exclusion in Section 9-610, a disposition under that section of collateral consisting of goods
9 includes the warranties imposed by subsection (1) and, if applicable, subsection (2).

10
11 6. The statute of limitations for a breach of warranty under this section is determined
12 under the provisions set out in Section 2-725(1) and (3)(c).

13
14 **§ 2-313. Express Warranties by Affirmation, Promise, Description, Sample; Remedial**
15 **Promise.**

16
17 (1) In this section, "immediate buyer" means a buyer that enters into a contract with the
18 seller.

19 ~~(1)~~ (2) Express warranties by the seller to the immediate buyer are created as follows:

20 (a) Any affirmation of fact or promise made by the seller ~~to the buyer~~ which
21 relates to the goods and becomes part of the basis of the bargain creates an express
22 warranty that the goods shall conform to the affirmation or promise.

23 (b) Any description of the goods which is made part of the basis of the bargain
24 creates an express warranty that the goods shall conform to the description.

25 (c) Any sample or model which is made part of the basis of the bargain creates an
26 express warranty that the whole of the goods shall conform to the sample or model.

27 ~~(2)~~ (3) It is not necessary to the creation of an express warranty that the seller use formal
28 words such as "warrant" or "guarantee" or that ~~he~~ the seller have a specific intention to make a

warranty, but 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 a warranty.

(4) Any remedial promise made by the seller to the immediate buyer creates an obligation that the promise will be performed upon the happening of the specified event.

Preliminary Comment

1. Subsections (2) and (3) are identical to original Article 2 except that the term “immediate buyer” is used to make clear that the section is limited to express warranties and remedial promises made by a seller to a buyer with which the seller has a contractual relationship. Sections 2-313A and 2-313B address obligations that run directly from a seller to a remote purchaser.

2. Subsection (4) introduces the term “remedial promise,” which was not used in original Article 2. This section deals with remedial promises to immediate buyers; sections 2-313A and 2-313B deal with remedial promises running directly from a seller to a remote purchaser. Remedial promise is defined in Section 2-103(1)(p).

3. “Express warranties rest on “dickered aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. “Implied warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated. As with original Article 2, warranties of description and sample are designated “express rather than “implied.

4. This section is limited in its scope and direct purpose to express warranties and remedial promises made by the seller to the immediate buyer as part of a contract for sale. It is not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined to contracts within the scope of this Article.

Section 2-313B recognizes that a seller may incur an obligation to a remote purchaser through a medium for communication to the public, such as advertising. An express warranty to an immediate buyer may also arise through a medium for communication to the public if the elements of this section are satisfied.

The fact that a buyer has rights against an immediate seller under this section does not

1 preclude the buyer from also asserting rights against a remote seller under Section 2-313A or 2-
2 313B.

3
4 5. The present section deals with affirmations of fact or promises made by the seller,
5 descriptions of the goods, or exhibitions of samples or models, exactly as any other part of a
6 negotiation which ends in a contract is dealt with. No specific intention to make a warranty is
7 necessary if any of these factors is made part of the basis of the bargain. In actual practice
8 affirmations of fact and promises made by the seller about the goods during a bargain are
9 regarded as part of the description of those goods; hence no particular reliance on these
10 statements need be shown in order to weave them into the fabric of the agreement. Rather, any
11 fact which is to take these affirmations or promises, once made, out of the agreement requires
12 clear affirmative proof. The issue normally is one of fact.

13
14 6. In view of the principle that the whole purpose of the law of warranty is to determine
15 what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which
16 refuse except in unusual circumstances to recognize a material deletion of the seller's obligation.
17 Thus, a contract is normally a contract for a sale of something describable and described. A
18 clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's
19 obligation for the description and therefore cannot be given literal effect under Section 2-316(1).

20
21 This is not intended to mean that the parties, if they consciously desire, cannot make their
22 own bargain as they wish. But in determining what they have agreed upon good faith is a factor
23 and consideration should be given to the fact that the probability is small that a real price is
24 intended to be exchanged for a pseudo-obligation.

25
26 7. Subsection (2)(b) makes specific some of the principles set forth above when a
27 description of the goods is given by the seller.

28
29 A description need not be by words. Technical specifications, blueprints and the like can
30 afford more exact description than mere language and if made part of the basis of the bargain
31 goods must conform with them. Past deliveries may set the description of quality, either
32 expressly or impliedly by course of dealing. Of course, all descriptions by merchants must be
33 read against the applicable trade usages with the general rules as to merchantability resolving any
34 doubts.

35
36 8. The basic situation as to statements affecting the true essence of the bargain is no
37 different when a sample or model is involved in the transaction. This section includes both a
38 "sample" actually drawn from the bulk of goods which is the subject matter of the sale, and a
39 "model" which is offered for inspection when the subject matter is not at hand and which has not

1 been drawn from the bulk of the goods.

2
3 Although the underlying principles are unchanged, the facts are often ambiguous when
4 something is shown as illustrative, rather than as a straight sample. In general, the presumption
5 is that any sample or model, just as any affirmation of fact, is intended to become a basis of the
6 bargain. But there is no escape from the question of fact. When the seller exhibits a sample
7 purporting to be drawn from an existing bulk, good faith of course requires that the sample be
8 fairly drawn. But in mercantile experience the mere exhibition of a “sample” does not of itself
9 show whether it is merely intended to “suggest” or to “be” the character of the subject-matter of
10 the contract. The question is whether the seller has so acted with reference to the sample as to
11 become responsible that the whole shall have at least the values shown by it. The circumstances
12 aid in answering this question. If the sample has been drawn from an existing bulk, it must be
13 regarded as describing values of the goods contracted for unless it is accompanied by an
14 unmistakable denial of responsibility. If, on the other hand, a model of merchandise not on hand
15 is offered, the mercantile presumption that it has become a literal description of the subject
16 matter is not so strong, and particularly so if modification on the buyer's initiative impairs any
17 feature of the model.

18
19 9. The precise time when words of description or affirmation are made or samples are
20 shown is not material. The sole question is whether the language or samples or models are fairly
21 to be regarded as part of the contract. If language that would otherwise create an obligation
22 under this section is used after the closing of the deal (as when the buyer when taking delivery
23 asks and receives an additional assurance), an obligation will arise if the requirements for a
24 modification are satisfied. See Downie v. Abex Corp., 741 F.2d 1235 (10th Cir. 1984).

25
26 10. Concerning affirmations of value or a seller's opinion or commendation under
27 subsection (3), the basic question remains the same: What statements of the seller have in the
28 circumstances and in objective judgment become part of the basis of the bargain? As indicated
29 above, all of the statements of the seller do so unless good reason is shown to the contrary. The
30 provisions of subsection (3) are included, however, since common experience discloses that
31 some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to
32 false statements of value, however, the possibility is left open that a remedy may be provided by
33 the law relating to fraud or misrepresentation.

34
35 There are a number of factors relevant to determining whether an expression creates a
36 warranty under this section or is merely puffing. For example, the relevant factors may include
37 whether the seller's representations taken in context, (1) were general rather than specific, (2)
38 related to the consequences of buying rather than the goods themselves, (3) were “hedged” in
39 some way, (4) were related to experimental rather than standard goods, (5) were concerned some
40 aspects of the goods but not a hidden or unexpected non-conformity, (6) were informal
41 statements made in a formal contracting process, (7) were phrased in terms of opinion rather than

1 fact, or (8) were not capable of objective measurement.

2
3 11. The use of the word “promise” in subsection (2)(a) is unusual in that it refers to
4 statements about the quality or performance characteristics of the goods. For example, a seller
5 might make an affirmation of fact to the buyer that the goods are of a certain quality, or may
6 promise that the goods when delivered will be of a certain quality, or may promise that the goods
7 will perform in a certain manner after delivery. In normal usage, “promise” refers to a what a
8 person, not goods, will do; that is, a promise is a commitment to act, or refrain from acting, in a
9 certain manner in the future. A promise about the quality or performance characteristics of the
10 goods creates an express warranty if the other elements of a warranty are present whereas a
11 promise by which the seller commits itself to take remedial action upon the happening of a
12 specified event is a remedial promise. The distinction has meaning in the context of the statute
13 of limitations. A right of action for breach of an express warranty accrues when the goods are
14 tendered to the immediate buyer (Section 2-725(3)(a)) unless the warranty consists of a promise
15 that explicitly extends to the future performance of the goods and discovery must await the time
16 for performance, in which case accrual occurs when the immediate buyer discovers or should
17 have discovered the breach (Section 2-725(3)(d)). Section 2-725(2)(c) separately addresses the
18 accrual of a right of action for breach of a remedial promise.

19
20 Remedial promise is dealt with in a separate subsection to make clear that it is a concept
21 separate and apart from express warranty and that the elements of an express warranty, such as
22 basis of the bargain, are not applicable.

23
24 **§ 2-313A. Obligation to Remote Purchaser Created by Record Packaged with or**
25 **Accompanying Goods.**

26
27 (1) This section applies only to new goods and goods sold or leased as new goods in a
28 transaction of purchase in the normal chain of distribution. In this section:

29 (a) “Immediate buyer” means a buyer that enters into a contract with the seller.

30 (b) “Remote purchaser” means a person that buys or leases goods from an
31 immediate buyer or other person in the normal chain of distribution.

32 (2) If a seller in a record packaged with or accompanying the goods makes an affirmation
33 of fact or promise that relates to the goods, provides a description that relates to the goods, or

1 makes a remedial promise, and the seller reasonably expects the record to be, and the record is,
2 furnished to the remote purchaser, the seller has an obligation to the remote purchaser that:

3 (a) the goods will conform to the affirmation of fact, promise or description
4 unless a reasonable person in the position of the remote purchaser would not believe that
5 the affirmation of fact, promise or description created an obligation; and

6 (b) the seller will perform the remedial promise.

7 (3) It is not necessary to the creation of an obligation under this section that the seller use
8 formal words such as “warrant” or “guarantee” or that the seller have a specific intention to
9 undertake an obligation, but an affirmation merely of the value of the goods or a statement
10 purporting to be merely the seller's opinion or commendation of the goods does not create an
11 obligation.

12 (4) The following rules apply to the remedies for breach of an obligation created under
13 this section:

14 (a) The seller may modify or limit the remedies available to the remote purchaser
15 if the modification or limitation is furnished to the remote purchaser no later than the time
16 of purchase or if the modification or limitation is contained in the record that contains the
17 affirmation of fact, promise or description.

18 (b) Subject to a modification or limitation of remedy, a seller in breach is liable
19 for incidental or consequential damages under Section 2-715, but the seller is not liable
20 for lost profits.

21 (c) The remote purchaser may recover as damages for breach of a seller’s

1 obligation arising under subsection (2) the loss resulting in the ordinary course of
2 events as determined in any manner that is reasonable.

3 (5) An obligation that is not a remedial promise is breached if the goods did not conform
4 to the affirmation of fact, promise or description creating the obligation when the goods left the
5 seller's control.

6 **Preliminary Comment**

7
8 1. Sections 2-313A and 2-313B are new, and they follow case law and practice in
9 extending a seller's obligations regarding new goods to remote purchasers. This section deals
10 with what are commonly called "pass-through warranties". In the paradigm situation, a
11 manufacturer will sell goods in a package to a retailer and include in the package a record that
12 sets forth the obligations that the manufacturer is willing to undertake in favor of the ultimate
13 party in the distributive chain, the person that buys or leases the goods from the retailer. If the
14 manufacturer had sold the goods directly to the ultimate party the statements in the record might
15 amount to an express warranty or remedial promise under Section 2-313.

16
17 No direct contract exists between the seller and the remote purchaser, and thus the seller's
18 obligation under this section is not referred to as an "express warranty. Use of "obligation
19 rather than "express warranty avoids any inference that the basis of the bargain test is applicable
20 here. The test for whether an obligation other than a remedial promise arises is similar in some
21 respects to the basis of the bargain test, but the test set forth in this section is exclusive. Because
22 "remedial promise" in Section 2-313 is not subject to the basis of the bargain test, that term is
23 used in this section.

24
25 2. The party to which an obligation runs under this section may either buy or lease the
26 goods, and thus the term "remote purchaser" is used. The term is more limited than "purchaser
27 in Article 1, however, and does not include a donee or any voluntary transferee who is not a
28 buyer or lessee. Moreover, the remote purchaser must be part of the normal chain of distribution
29 for the particular product. That chain will by definition include at least three parties and may
30 well include more – for example, the manufacturer might sell first to a wholesaler, that would
31 then resell the goods to a retailer for sale or lease to the public. A buyer or lessee from the
32 retailer would qualify as a remote purchaser and could invoke this section against either the
33 manufacturer or the wholesaler (if the wholesaler provided a record to the retailer to be furnished
34 to the ultimate party), but no subsequent transferee, such as a used-goods buyer or sublessee,
35 could qualify. The law governing assignment and third-party beneficiary, including Section 2-
36 318, must be consulted to determine whether a party other than the remote purchaser can enforce

1 an obligation created under this section.

2
3 3. The application of this section is limited to new goods and goods sold or leased as new
4 goods within the normal chain of distribution. It does not apply to goods that are sold outside the
5 normal chain, such as “gray goods or salvaged goods, nor does it apply if the goods are unused
6 but sold as seconds. The concept is flexible, and determining whether goods have been sold or
7 leased in the normal chain of distribution requires consideration of the seller’s expectations with
8 regard to the manner in which its goods will reach the remote purchaser. For example, a car
9 manufacturer may be aware that certain of its dealers transfer cars among themselves, and under
10 the particular circumstances of the case a court might find that a new car sold initially to one
11 dealer but leased to the remote purchaser by another dealer was leased in the normal chain of
12 distribution. The concept may also include practices as door-to-door sales and distribution
13 through a nonprofit organization (e.g., Girl Scout cookies).

14
15 The phrase “goods sold or leased as new goods” refers to goods that in the normal course
16 of business would be considered new. There are many instances in which goods might be used
17 for a limited purpose yet be sold or leased in the normal chain of distribution as new goods. For
18 example, goods that have been returned to a dealer by a purchaser and placed back into the
19 dealer’s inventory might be sold or leased as new goods in the normal chain of distribution.
20 Other examples might include goods that have been used for the purpose of inspection (e.g., a car
21 that has been test-driven) and goods that have been returned by a sale-or-return buyer (Section 2-
22 326).

23
24 4. This section applies only to obligations set forth in a record that is packaged with the
25 goods or otherwise accompanies them (subsection (2)). Examples include a label affixed to the
26 outside of a container, a card inside a container, or a booklet handed to the remote purchaser at
27 the time of purchase. Moreover, the seller must be able to anticipate that the remote purchaser
28 will acquire the record, and thus the section is limited to records that the seller reasonably
29 expects to be furnished, and that are in fact furnished, to the remote purchaser.

30
31 Neither this section nor Section 2-313B are intended to overrule cases that impose
32 liability on facts that are similar to those within the direct scope of one of the sections. For
33 example, the sections are not intended to overrule a decision imposing liability on a seller that
34 distributes a sample to a remote purchaser.

35
36 5. Obligations other than remedial promises created under this section are analogous to
37 express warranties and are subject to a test that is akin to the basis of the bargain test of Section
38 2-313(2). The seller is entitled to shape the scope of the obligation, and the seller’s language
39 tending to create an obligation must be considered in context. If a reasonable person in the
40 position of the remote purchaser, reading the seller’s language in its entirety, would not believe

1 that an affirmation of fact, promise or description created an obligation, there is no liability under
2 this section.

3
4 6. There is no difference between remedial promise as used in this section (and Section
5 2-313B) and the same term as used in Section 2-313.

6
7 7. Subsection (4)(a) makes clear that the seller may employ the provisions of Section 2-
8 719 to modify or limit the remedies available to the remote purchaser for breach of the seller's
9 obligation hereunder. The modification or limitation may appear on the same record as the one
10 which creates the obligation, or it may be provided to the remote purchaser separately, but in no
11 event may it be furnished to the remote purchaser any later than the time of purchase.

12
13 The requirements and limitations set forth in Section 2-719, such as the requirement of an
14 express statement of exclusivity and the tests for failure of essential purpose (Section 2-719(2))
15 and unconscionability (Section 2-719(3)) are applicable to a modification or limitation of remedy
16 under this section.

17
18 8. As with express warranties, no specific language or intention is necessary to create an
19 obligation, and whether an obligation exists is normally an issue of fact. Subsection (3) is
20 virtually identical to Section 2-313(3), and the tests developed under the common law and under
21 that section to determine whether a statement creates an obligation or is mere puffing are directly
22 applicable to this section.

23
24 Just as a seller can limit the extent to which its language creates an express warranty
25 under Section 2-313 by placing that language in a broader context, so too can a seller under this
26 section or Section 2-313B limit the extent of its liability to a remote purchaser (subsection(4)(a)).
27 In other words, the seller, in undertaking an obligation under these sections, can spell out the
28 scope and limits of that obligation.

29
30 9. As a rule, a remote purchaser may recover monetary damages measured in the same
31 manner as in the case of an aggrieved buyer under Section 2-714, including incidental and
32 consequential damages to the extent they would be available to an aggrieved buyer. Subsection
33 (4)(c) parallels Section 2-714(1) in allowing the buyer to recover for loss resulting in the ordinary
34 course of events as determined in any manner which is reasonable. In the case of an obligation
35 that is not a remedial promise, the normal measure of damages would be the difference between
36 the value of the goods if they had conformed to the seller's statements and their actual value, and
37 the normal measure of damages for breach of a remedial promise would be the difference
38 between the value of the promised remedial performance and the value of the actual performance
39 received.

1 Subsection (4)(b) precludes a remote purchaser from recovering consequential damages
2 that take the form of lost profits.

3
4 *Legislative Note: To maintain their relative positions in this Act, Sections 2-313A and 2-*
5 *313B may have to be renumbered according to the convention used by a particular state.*
6 *For example, in some states they may be designated as 2-313.1 and 2-313.2.*

7
8 **§ 2-313B. Obligation to Remote Purchaser Created by Communication to Public.**

9
10 (1) This section applies only to new goods and goods sold or leased as new goods in a
11 transaction of purchase in the normal chain of distribution. In this section:

12 (a) “Immediate buyer” means a buyer that enters into a contract with the seller.

13 (b) “Remote purchaser” means a person that buys or leases goods from an
14 immediate buyer or other person in the normal chain of distribution.

15 (2) If a seller in advertising or a similar communication to the public makes an
16 affirmation of fact or promise that relates to the goods, provides a description that relates to the
17 goods, or makes a remedial promise and the remote purchaser enters into a transaction of
18 purchase with knowledge of and with the expectation that the goods will conform to the
19 affirmation of fact, promise, or description, or that the seller will perform the remedial promise,
20 the seller has an obligation to the remote purchaser that:

21 (a) the goods will conform to the affirmation of fact, promise or description unless
22 a reasonable person in the position of the remote purchaser would not believe that the
23 affirmation of fact, promise or description created an obligation; and

24 (b) the seller will perform the remedial promise.

1 (3) It is not necessary to the creation of an obligation under this section that the seller use
2 formal words such as “warrant” or “guarantee” or that the seller have a specific intention to
3 undertake an obligation, but an affirmation merely of the value of the goods or a statement
4 purporting to be merely the seller's opinion or commendation of the goods does not create an
5 obligation.

6 (4) The following rules apply to the remedies for breach of an obligation created under
7 this section:

8 (a) The seller may modify or limit the remedies available to the remote purchaser
9 if the modification or limitation is furnished to the remote purchaser no later than the time
10 of purchase. The modification or limitation may be furnished as part of the
11 communication that contains the affirmation of fact, promise or description.

12 (b) Subject to a modification or limitation of remedy, a seller in breach is liable
13 for incidental or consequential damages under Section 2-715, but the seller is not liable
14 for lost profits.

15 (c) The remote purchaser may recover as damages for breach of a seller's
16 obligation arising under subsection (2) the loss resulting in the ordinary course of events
17 as determined in any manner that is reasonable.

18 (5) An obligation that is not a remedial promise is breached if the goods did not conform
19 to the affirmation of fact, promise or description creating the obligation when the goods left the
20 seller's control.

21 **Preliminary Comment**

1 1. Sections 2-313B and 2-313A are new, and they follow case law and practice in
2 extending a seller's obligations regarding new goods to remote purchasers. This section deals
3 with obligations to a remote purchaser created by advertising or a similar communication to the
4 public. In the paradigm situation, a manufacturer will engage in an advertising campaign
5 directed towards all or part of the market for its product and will make statements that if made to
6 an immediate buyer would amount to an express warranty or remedial promise under Section 2-
7 313. The goods, however, are sold to someone other than the recipient of the advertising and are
8 then resold or leased to the recipient. By imposing liability on the seller, this section adopts the
9 approach of cases such as *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 226
10 N.Y.S.2d 363, 181 N.E.2d 399 (Ct. App. 1962).

11
12 If the seller's advertisement is made to an immediate buyer, whether the seller incurs
13 liability is determined by Section 2-313 and this section is inapplicable.

14
15 2. This section parallels Section 2-313A in most respects, and the Preliminary Comments
16 to that section should be consulted. In particular, the reasoning of Comment 1 (scope and
17 terminology), Comment 2 (definition of remote purchaser), Comment 3 (new goods and goods
18 sold as new goods in the normal chain of distribution), Comment 4 (reasonable person in the
19 position of the remote purchaser), Comment 6 (modification or limitation of remedy), Comment
20 7 (puffing and limitations on extent of obligation) and Comment 8 (damages) is adopted here.

21
22 3. This section provides an additional test for enforceability not found in Section 2-313A.
23 In order to be held liable, the remote purchaser must, at the time of purchase, have knowledge of
24 the affirmation of fact, promise, description or remedial promise and must also have an
25 expectation that the goods will conform or that the seller will comply. This test is entirely
26 subjective, while the reasonable person test in subsection (2)(a) is objective in nature.

27
28 Put another way, the seller will incur no liability to the remote purchaser if: i) the
29 purchaser did not have knowledge of the seller's statement at the time of purchase; ii) the remote
30 purchaser knew of the seller's statement at the time of purchase but did not expect the goods to
31 conform or the seller to comply; iii) a reasonable person in the position of the remote purchaser
32 would not believe that the seller's statement created an obligation (this test does not apply to
33 remedial promises), or iv) the seller's statement is puffing.

34
35 In determining whether the tests set forth in this section are satisfied, a court should
36 consider the temporal relationship between the communication and the purchase. For example,
37 the remote purchaser may acquire the goods years after the seller's advertising campaign. In this
38 circumstance, it would be highly unusual for the advertisement to have created the level of
39 expectation in the remote purchaser or belief in the reasonable person in the position of the
40 remote person necessary for the creation of an obligation under this section.

1 5. In determining whether an obligation arises under this Section, all information known
2 to the remote purchaser at the time of contracting must be considered. For example, a news
3 release by a manufacturer limiting the statements made in its advertising and known by the
4 remote purchaser, or a communication to the remote purchaser by the immediate seller limiting
5 the statements made in the manufacturer's advertising must be considered in determining
6 whether the expectation test applicable to the remote purchaser and the belief test applicable to
7 the reasonable person in the position of the remote purchaser are satisfied.

8
9 6. The remedies for breach of an obligation arising under this section may be modified or
10 limited as set forth in Section 2-719. The modification or limitation may be contained in the
11 advertisement that creates the obligation, or it may be separately furnished to the remote
12 purchaser no later than the time of purchase.

13
14 7. Section 2-318 deals with the extension of obligations to certain third-party
15 beneficiaries. Of course, no extension is necessary if the goods are purchased by an agent. In
16 this case, the knowledge and expectation of the principal, not the agent, are relevant in
17 determining whether an obligation arises under this section. Nothing in this Act precludes a
18 court from determining that a household operates as a buying unit under the law of agency.

19
20 *Legislative Note: In order to maintain their relative positions in this Act, Sections 2-*
21 *313A and 2-313B may have to be renumbered according to the convention used by a*
22 *particular state. For example, in some states they may be designated as 2-313.1 and 2-*
23 *313.2.*

24
25 **§ 2–314. Implied Warranty: Merchantability; Usage of Trade.**

26
27 (1) Unless excluded or modified (Section 2–316), a warranty that the goods shall be
28 merchantable is implied in a contract for their sale if the seller is a merchant with respect to
29 goods of that kind. Under this section the serving for value of food or drink to be consumed
30 either on the premises or elsewhere is a sale.

31 (2) Goods to be merchantable must be at least such as

32 (a) pass without objection in the trade under the contract description; and

33 (b) in the case of fungible goods, are of fair average quality within the description;

1 and

2 (c) are fit for the ordinary purposes for which such goods of that description are
3 used; and

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

6 (e) are adequately contained, packaged, and labeled as the agreement may require;
7 and

8 (f) conform to the promise or affirmations of fact made on the container or label if
9 any.

10 (3) Unless excluded or modified (Section 2–316) other implied warranties may arise from
11 course of dealing or usage of trade.

12 **Preliminary Comment**

13
14 1. The phrase “goods of that description” rather than “for which such goods are used” is
15 used in subsection (2)(c). This emphasizes the importance of the agreed description in
16 determining fitness for ordinary purposes.

17
18 2. The seller's obligation applies to present sales as well as to contracts to sell subject to
19 the effects of any examination of specific goods. See Section 2–316(5). Also, the warranty of
20 merchantability applies to sales for use as well as to sales for resale.

21
22 3. The question when the warranty is imposed turns basically on the meaning of the
23 terms of the agreement as recognized in the trade. Goods delivered under an agreement made by
24 a merchant in a given line of trade must be of a quality comparable to that generally acceptable in
25 that line of trade under the description or other designation of the goods used in the agreement.
26 The responsibility imposed rests on any merchant-seller.

27
28 4. A specific designation of goods by the buyer does not exclude the seller's obligation

1 that they be fit for the general purposes appropriate to the goods. A contract for the sale of
2 second-hand goods, however, involves only an obligation as is appropriate to the goods for that is
3 their contract description. A person making an isolated sale of goods is not a “merchant within
4 the meaning of the full scope of this section and, thus, no warranty of merchantability would
5 apply. The seller’s knowledge of any defects not apparent on inspection would, however,
6 without need for express agreement and in keeping with the underlying reason of the present
7 section and the provisions on good faith, impose an obligation that known material but hidden
8 defects be fully disclosed.

9
10 5. Although a seller may not be a “merchant as to the goods in question, if the seller
11 states generally that the goods are “guaranteed the provisions of this section may furnish a guide
12 to the content of the resulting express warranty. This has particular significance in the case of
13 second-hand sales, and has further significance in limiting the effect of fine-print disclaimer
14 clauses where their effect would be inconsistent with large-print assertions of “guarantee.

15
16 6. The second sentence of subsection (1) covers the warranty with respect to food and
17 drink. The serving for value of food or drink for consumption on the premises or elsewhere is
18 treated as a sale. Thus, both the patron in a restaurant and a buyer of “take out food are
19 protected by the implied warranty of merchantability.

20
21 7. Suppose that an unmerchantable lawn mower causes personal injury to the buyer, who
22 is operating the mower. Without more, the buyer can sue the seller for breach of the implied
23 warranty of merchantability and recover for injury to person “proximately resulting from the
24 breach. Section 2-715(2)(b).

25
26 This opportunity does not resolve the tension between warranty law and tort law where
27 goods cause personal injury or property damage. The primary source of that tension arises from
28 disagreement over whether the concept of defect in tort and the concept of merchantability in
29 Article 2 are coextensive where personal injuries are involved, i.e., if goods are merchantable
30 under warranty law can they still be defective under tort law, and if goods are not defective under
31 tort law can they be unmerchantable under warranty law? The answer to both questions should
32 be no, and the tension between merchantability in warranty and defect in tort where personal
33 injury or property damage is involved should be resolved as follows:

34
35 When recovery is sought for injury to person or property, whether goods are merchantable
36 is to be determined by applicable state products liability law. When, however, a claim for
37 injury to person or property is based on an implied warranty of fitness under Section
38 2-315 or an express warranty under Section 2-313 or an obligation arising under Section
39 2-313A or 2-313B, this Article determines whether an implied warranty of fitness or an
40 express warranty was made and breached, as well as what damages are recoverable under

1 Section 2-715.

2
3 To illustrate, suppose that the seller makes a representation about the safety of a lawn
4 mower that becomes part of the basis of the buyer's bargain. The buyer is injured when the gas
5 tank cracks and a fire breaks out. If the lawnmower without the representation is not defective
6 under applicable tort law, it is not unmerchantable under this section. On the other hand, if the
7 lawnmower did not conform to the representation about safety, the seller made and breached an
8 express warranty and the buyer may sue under Article 2.

9
10 8. Subsection (2) does not purport to exhaust the meaning of "merchantable" nor to
11 negate any of its attributes not specifically mentioned in the text of the statute, but arising by
12 usage of trade or through case law. The language used is "must be at least such as ..., and the
13 intention is to leave open other possible attributes of merchantability.

14
15 9. Paragraphs (a) and (b) of subsection (2) are to be read together. Both refer, as
16 indicated above, to the standards of that line of the trade which fits the transaction and the seller's
17 business. "Fair average" is a term directly appropriate to agricultural bulk products and means
18 goods centering around the middle belt of quality, not the least or the worst that can be
19 understood in the particular trade by the designation, but such as can pass "without objection.
20 Of course a fair percentage of the least is permissible but the goods are not "fair average" if they
21 are all of the least or worst quality possible under the description. In cases of doubt as to what
22 quality is intended, the price at which a merchant closes a contract is an excellent indication of
23 the nature and scope of the merchant's obligation under the present section.

24
25 10. Fitness for the ordinary purposes for which goods of the type are used is a
26 fundamental concept of the present section and is covered in paragraph (2)(c). As stated above,
27 merchantability is also a part of the obligation owing to the buyer for use. Correspondingly,
28 protection, under this aspect of the warranty, of the person buying for resale to the ultimate
29 consumer is equally necessary, and merchantable goods must therefore be "honestly resalable in
30 the normal course of business because they are what they purport to be.

31
32 11. Paragraph (2)(d) on evenness of kind, quality and quantity follows case law. But
33 precautionary language has been added as a remainder of the frequent usages of trade which
34 permit substantial variations both with and without an allowance or an obligation to replace the
35 varying units.

36
37 12. Paragraph (2)(e) applies only where the nature of the goods and of the transaction
38 require a certain type of container, package or label. Paragraph (2)(f) applies, on the other hand,
39 wherever there is a label or container on which representations are made, even though the

1 original contract, either by express terms or usage of trade, may not have required either the
2 labeling or the representation. This follows from the general obligation of good faith which
3 requires that a buyer should not be placed in the position of reselling or using goods delivered
4 under false representations appearing on the package or container. No problem of extra
5 consideration arises in this connection since, under this Article, an obligation is imposed by the
6 original contract not to deliver mislabeled articles, and the obligation is imposed where
7 mercantile good faith so requires and without reference to the doctrine of consideration.

8
9 13. Exclusion or modification of the warranty of merchantability, or of any part of it, is
10 dealt with in Section 2-316. That section must be read with particular reference to its subsection
11 (6) on limitation of remedies. The warranty of merchantability, wherever it is normal, is so
12 commonly taken for granted that its exclusion from the contract is a matter threatening surprise
13 and therefore requiring special precaution.

14
15 14. Subsection (3) is to make explicit that usage of trade and course of dealing can create
16 warranties and that they are implied rather than express warranties and thus subject to exclusion
17 or modification under Section 2-316. A typical instance would be the obligation to provide
18 pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed
19 dog or blooded bull.

20
21 15. In an action based on breach of warranty, it is of course necessary to show not only
22 the existence of the warranty but the fact that the warranty was broken and that the breach of the
23 warranty was the proximate cause of the loss sustained. In such an action an affirmative showing
24 by the seller that the loss resulted from some action or event following the seller's delivery of the
25 goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the
26 manufacture, processing or selection of the goods is relevant to the issue of whether the warranty
27 was in fact broken. Action by the buyer following an examination of the goods which ought to
28 have indicated the defect complained of can be shown as matter bearing on whether the breach
29 itself was the cause of the injury.

30
31
32 **§ 2-316. Exclusion or Modification of Warranties.**

33
34 (1) Words or conduct relevant to the creation of an express warranty and words or
35 conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent
36 with each other; but subject to the provisions of this Article on parol or extrinsic evidence
37 (Section 2-202) negation or limitation is inoperative to the extent that such construction is

1 unreasonable.

2 ~~(2) Subject to subsection (3), to exclude or modify the implied warranty of~~
3 ~~merchantability or any part of it the language must mention merchantability and in case of a~~
4 ~~writing must be conspicuous, and to exclude or modify any implied warranty of fitness the~~
5 ~~exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of~~
6 ~~fitness is sufficient if it states, for example, that "There are no warranties which extend beyond~~
7 ~~the description on the face hereof."~~

8 ~~(3) Notwithstanding subsection (2)~~

9 ~~(a) unless the circumstances indicate otherwise, all implied warranties are~~
10 ~~excluded by expressions like "as is", "with all faults" or other language which in common~~
11 ~~understanding calls the buyer's attention to the exclusion of warranties and makes plain~~
12 ~~that there is no implied warranty; and~~

13 ~~(b) when the buyer before entering into the contract has examined the goods or the~~
14 ~~sample or model as fully as he desired or has refused to examine the goods there is no~~
15 ~~implied warranty with regard to defects which an examination ought in the circumstances~~
16 ~~to have revealed to him; and~~

17 ~~(c) an implied warranty can also be excluded or modified by course of dealing or~~
18 ~~course of performance or usage of trade.~~

19 (2) Notwithstanding subsection (3), unless the circumstances indicate otherwise, all
20 implied warranties are excluded by expressions such as "as is" or "with all faults" or similar
21 language or conduct that in common understanding make it clear to the buyer that the seller

1 assumes no responsibility for the quality or fitness of the goods. In a consumer contract
2 evidenced by a record, the requirements of this subsection must be satisfied by conspicuous
3 language in the record.

4 (3) Subject to subsection (2), to exclude or modify an implied warranty of merchantability
5 or fitness, or any part of either implied warranty, the following rules apply:

6 (a) In a consumer contract, the language must be in a record and be conspicuous
7 and must:

8 (i) in the case of an implied warranty of merchantability, state “The seller
9 undertakes no responsibility for the quality of the goods except as otherwise provided in
10 this contract ; and

11 (ii) in the case of an implied warranty of fitness, state “The seller assumes
12 no responsibility that the goods will be fit for any particular purpose for which you may
13 be buying these goods, except as otherwise provided in the contract.

14 (b) In a contract other than a consumer contract, the language must:

15 (i) in the case of an implied warranty of merchantability, mention
16 merchantability; and

17 (ii) in the case of an implied warranty of fitness, state, for example, “There
18 are no warranties that extend beyond the description on the face hereof.

19 (c) Language that satisfies paragraph (a) also satisfies paragraph (b).

20 (4) An implied warranty may also be excluded or modified by course of performance,

1 course of dealing, or usage of trade.

2 (5) If before entering into the contract the buyer has examined the goods or the sample or
3 model as fully as desired or has refused to examine the goods after a demand by the seller, there
4 is no implied warranty with regard to defects that an examination ought in the circumstances to
5 have revealed to the buyer.

6 ~~(4)~~ (6) Remedies for breach of warranty can be limited in accordance with the provisions
7 of this Article on liquidation or limitation of damages and on contractual modification of remedy
8 (Sections 2–718 and 2–719).

9 **Preliminary Comment**

10
11 1. The subsections have been rearranged so that the general test for disclaimers of
12 implied warranties, found in original subsection (3)(a) and subsection (2) of this revision,
13 precedes the more specific tests of original subsection (2). Subsection (2) adds a requirement not
14 found in original subsection (3)(a), that in a consumer contract which is evidenced by a record, a
15 disclaimer that would otherwise be effective under the subsection must be conspicuous. This, of
16 course, eliminates the possibility of a disclaimer made orally or by conduct.

17
18 Subsection (3), which corresponds with original subsection (2), distinguishes between
19 commercial and consumer contracts. In a commercial contract, language that is within the
20 contemplation of the subsection need not be in a record, but if it is in a record it must be
21 conspicuous. Both record and conspicuousness are required for consumer contracts. In addition,
22 in consumer contracts the language necessary to comply with the subsection differs from that
23 required in original subsection (2).

24
25 2. This section is designed principally to deal with those frequent clauses in sales
26 contracts which seek to exclude “all warranties, express or implied. It seeks to protect a buyer
27 from unexpected and unbargained language of disclaimer by denying effect to this language
28 when inconsistent with language of express warranty and permitting the exclusion of implied
29 warranties only by language or other circumstances which protect the buyer from surprise.

30
31 3. The seller is protected under this Article against false allegations of oral warranties by
32 its provisions on parol and extrinsic evidence and against unauthorized representations by the

1 customary “lack of authority” clauses. This Article treats the limitation or avoidance of
2 consequential damages as a matter of limiting remedies for breach, separate from the matter of
3 creation of liability under a warranty. If no warranty exists, there is of course no problem of
4 limiting remedies for breach of warranty. Under subsection (6) the question of limitation of
5 remedy is governed by the sections referred to rather than by this section.

6
7 4. Subsection (2) deals with general terms such as “as is, “as they stand, “with all
8 faults, and the like. These terms in ordinary commercial usage are understood to mean that the
9 buyer takes the entire risk as to the quality of the goods involved. The terms covered by the
10 subsection are in fact merely a particularization of subsection (4) which provides for exclusion or
11 modification of implied warranties by usage of trade.

12
13 Subsection (2) clarifies that a disclaimer that otherwise satisfies its requirements need not
14 be in a record. This is true in both commercial and consumer contracts. Further, in a commercial
15 contract these disclaimers need not be conspicuous even if it is contained in a record; however, a
16 disclaimer in a consumer contract evidenced by a record must be conspicuous to be effective.

17
18 5. Subsection (3) is a particularized application of the general rule of subsection (2). To
19 be within the subsection in a consumer contract, the disclaimer must be set forth in a record and
20 must be conspicuous. Moreover, the language required of a seller in a consumer contract
21 communicates more information than the language required of a seller under original subsection
22 (2). Use of the word “must” does not indicate that implied warranties cannot be disclaimed in
23 another manner, such as under subsection (2). In a commercial contract, there is no requirement
24 that the appropriate language be in a record or be conspicuous. Of course, evidence of an oral
25 disclaimer might be inadmissible under Section 2-202.

26
27 6. Whether or not oral language of disclaimer satisfies the requirements of subsection (2)
28 or, in a commercial contract, subsection (3), the language may be relevant under other sections to
29 the question whether the warranty was ever in fact created. Thus, unless the provisions of this
30 Article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of
31 fact as to whether reliance by the buyer occurred and whether the seller had “reason to know
32 under the section on implied warranty of fitness for a particular purpose.

33
34 7. The exceptions to the general rule set forth in subsections (4) and (5) are common
35 factual situations in which the circumstances surrounding the transaction are in themselves
36 sufficient to call the buyer's attention to the fact that no implied warranties are made or that a
37 certain implied warranty is being excluded.

38
39 Under subsection (4) warranties may be excluded or modified by the circumstances where

1 the buyer examines the goods or a sample or model of them before entering into the contract.
2 “Examination” as used in this paragraph is not synonymous with inspection before acceptance or
3 at any other time after the contract has been made. It goes rather to the nature of the
4 responsibility assumed by the seller at the time of the making of the contract. Of course if the
5 buyer discovers the defect and uses the goods anyway, or if the buyer unreasonably fails to
6 examine the goods before using them, resulting injuries may be found to result from the buyer’s
7 own action rather than proximately from a breach of warranty. See Sections 2–314 and 2–715.

8
9 In order to bring the transaction within the scope of “refused to examine” in subsection
10 (4), it is not sufficient that the goods are available for inspection. There must in addition be a
11 demand by the seller that the buyer examine the goods fully. The seller by the demand puts the
12 buyer on notice that the buyer is assuming the risk of defects which the examination ought to
13 reveal. The language “refused to examine” in this paragraph is intended to make clear the
14 necessity for the demand.

15
16 Application of the doctrine of “caveat emptor” in all cases where the buyer examines the
17 goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if
18 the offer of examination is accompanied by words as to their merchantability or specific
19 attributes and the buyer indicates clearly a reliance on those words rather than on the buyer’s
20 examination, they give rise to an “express” warranty. In these cases the question is one of fact as
21 to whether a warranty of merchantability has been expressly incorporated in the agreement.

22
23 The particular buyer's skill and the normal method of examining goods in the
24 circumstances determine what defects are excluded by the examination. A failure to notice
25 defects which are obvious cannot excuse the buyer. However, an examination under
26 circumstances which do not permit chemical or other testing of the goods would not exclude
27 defects which could be ascertained only by testing. Nor can latent defects be excluded by a
28 simple examination. A professional buyer examining a product in the buyer’s field will be held
29 to have assumed the risk as to all defects which a professional in the field ought to observe, while
30 a nonprofessional buyer will be held to have assumed the risk only for the defects as a layperson
31 might be expected to observe.

32
33 8. The situation in which the buyer gives precise and complete specifications to the seller
34 is not explicitly covered in this section, but this is a frequent circumstance by which the implied
35 warranties may be excluded. The warranty of fitness for a particular purpose would not normally
36 arise since in this situation there is usually no reliance on the seller by the buyer. The warranty of
37 merchantability in a transaction of this type, however, must be considered in connection with the
38 next section on the cumulation and conflict of warranties. Under paragraph (c) of that section in
39 case of an inconsistency the implied warranty of merchantability is displaced by the express
40 warranty that the goods will comply with the specifications. Thus, where the buyer gives
41 detailed specifications as to the goods, neither of the implied warranties as to quality will

1 normally apply to the transaction unless consistent with the specifications.

2
3 **§ 2–318. Third Party Beneficiaries of Warranties Express or Implied.**

4
5 (1) In this section:

6 (a) “Immediate buyer means a buyer that enters into a contract with the seller.

7 (b) “Remote purchaser means a person that buys or leases goods from an
8 immediate buyer or other person in the normal chain of distribution.

9 **Alternative A to subsection (2)**

10 ~~(2) A seller's warranty whether express or implied extends to any natural person who is in~~
11 ~~the family or household of his buyer or who is a guest in his home if it is reasonable to expect~~
12 ~~that such person may use, consume or be affected by the goods and who is injured in person by~~
13 ~~breach of the warranty.~~ A seller's warranty whether express or implied to an immediate buyer, a
14 seller's remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser
15 under Section 2-313A or 2-313B extends to any natural person who is in the family or household
16 of the immediate buyer or the remote purchaser or who is a guest in the home of either if it is
17 reasonable to expect that the person may use, consume or be affected by the goods and who is
18 injured in person by breach of the warranty, remedial promise or obligation. A seller may not
19 exclude or limit the operation of this section.

20 **Alternative B to subsection (2)**

21 ~~(2) A seller's warranty whether express or implied extends to any natural person who may~~
22 ~~reasonably be expected to use, consume or be affected by the goods and who is injured in person~~

1 ~~by breach of the warranty.~~ A seller's warranty whether express or implied to an immediate buyer,
2 a seller's remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser
3 under Section 2-313A or 2-313B extends to any natural person who may reasonably be expected
4 to use, consume or be affected by the goods and who is injured in person by breach of the
5 warranty, remedial promise or obligation. A seller may not exclude or limit the operation of this
6 section.

7 **Alternative C to subsection (2)**

8 ~~(2) A seller's warranty whether express or implied extends to any person who may~~
9 ~~reasonably be expected to use, consume or be affected by the goods and who is injured by breach~~
10 ~~of the warranty.~~ A seller's warranty whether express or implied to an immediate buyer, a seller's
11 remedial promise to an immediate buyer, or a seller's obligation to a remote purchaser under
12 Section 2-313A or 2-313B extends to any person that may reasonably be expected to use,
13 consume or be affected by the goods and that is injured by breach of the warranty, remedial
14 promise or obligation. A seller may not exclude or limit the operation of this section with respect
15 to injury to the person of an individual to whom the warranty, remedial promise or obligation
16 extends.

17 **Preliminary Comment**

18
19 1. This section retains original Article 2's alternative approaches but expands each
20 alternative to cover obligations arising under Sections 2-313A and 2-313B and remedial
21 promises.

22
23 2. The last sentence of each alternative to subsection (2) is not meant to suggest that a
24 seller is precluded from excluding or disclaiming a warranty which might otherwise arise in
25 connection with the sale provided the exclusion or modification is permitted by Section 2-316.

Nor is it intended to suggest that the seller is precluded from limiting the remedies of the immediate buyer or remote purchaser in any manner provided in Sections 2-718 or 2-719. See also Section 2-313A(4) and Section 2-313B(4). To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, the provisions are equally operative against beneficiaries of warranties under this section. What this last sentence forbids is exclusion of liability by the seller to the persons to whom the warranties, obligations and remedial promises accruing to the immediate buyer or remote purchaser would extend under this section.

The last sentence of Alternative C permits a seller to reduce its obligations to third-party beneficiaries to a level commensurate with that imposed on the seller under Alternative B – that is, to eliminate liability to persons that are not individuals and to eliminate liability for damages other than personal injury.

3. As used in this section, the term “remote purchaser” refers to the party to whom an obligation initially runs under Section 2-313A or 2-313B. It does not refer to any subsequent purchaser of the goods.

4. As applied to warranties and remedial promises arising under Sections 2-313, 2-314 and 2-315, the purpose of this section is to give certain beneficiaries the benefit of the warranties and remedial promises which the immediate buyer received in the contract of sale, thereby freeing any beneficiaries from any technical rules as to “privity. It seeks to accomplish this purpose without any derogation of any right or remedy arising under the law of torts. Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.

Obligations and remedial promises under Sections 2-313A and 2-313B arise initially in a non-privity context but are extended under this section to the same extent as warranties and remedial promises running to a buyer in privity.

§ 2-319. ~~F.O.B. and F.A.S. Terms~~ Reserved.

~~(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which~~

~~(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the~~

1 ~~expense and risk of putting them into the possession of the carrier; or~~

2 ~~(b) when the term is F.O.B. the place of destination, the seller must at his own~~
3 ~~expense and risk transport the goods to that place and there tender delivery of them in the~~
4 ~~manner provided in this Article (Section 2-503);~~

5 ~~(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle,~~
6 ~~the seller must in addition at his own expense and risk load the goods on board. If the~~
7 ~~term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller~~
8 ~~must comply with the provisions of this Article on the form of bill of lading (Section~~
9 ~~2-323).~~

10 ~~(2) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a~~
11 ~~named port, even though used only in connection with the stated price, is a delivery term under~~
12 ~~which the seller must~~

13 ~~(a) at his own expense and risk deliver the goods alongside the vessel in the~~
14 ~~manner usual in that port or on a dock designated and provided by the buyer; and~~

15 ~~(b) obtain and tender a receipt for the goods in exchange for which the carrier is~~
16 ~~under a duty to issue a bill of lading.~~

17 ~~(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or~~
18 ~~subsection (2) the buyer must seasonably give any needed instructions for making delivery,~~
19 ~~including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate~~
20 ~~case its name and sailing date. The seller may treat the failure of needed instructions as a failure~~
21 ~~of cooperation under this Article (Section 2-311). He may also at his option move the goods in~~

1 ~~any reasonable manner preparatory to delivery or shipment.~~

2 ~~(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make~~
3 ~~payment against tender of the required documents and the seller may not tender nor the buyer~~
4 ~~demand delivery of the goods in substitution for the documents.~~

5 **Preliminary Comment**

6
7 Sections 2-319 through 2-324 have been eliminated because they are inconsistent with
8 modern commercial practices.

9
10 **§ 2-320. C.I.F. and C. & F. Terms Reserved.**

11
12 ~~(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and~~
13 ~~the insurance and freight to the named destination. The term C. & F. or C.F. means that the price~~
14 ~~so includes cost and freight to the named destination.~~

15 ~~(2) Unless otherwise agreed and even though used only in connection with the stated~~
16 ~~price and destination, the term C.I.F. destination or its equivalent requires the seller at his own~~
17 ~~expense and risk to~~

18 ~~(a) put the goods into the possession of a carrier at the port for shipment and~~
19 ~~obtain a negotiable bill or bills of lading covering the entire transportation to the named~~
20 ~~destination; and~~

21 ~~(b) load the goods and obtain a receipt from the carrier (which may be contained~~
22 ~~in the bill of lading) showing that the freight has been paid or provided for; and~~

23 ~~(c) obtain a policy or certificate of insurance, including any war risk insurance, of~~

1 a kind and on terms then current at the port of shipment in the usual amount, in the
2 currency of the contract, shown to cover the same goods covered by the bill of lading and
3 providing for payment of loss to the order of the buyer or for the account of whom it may
4 concern; but the seller may add to the price the amount of the premium for any such war
5 risk insurance; and

6 (d) prepare an invoice of the goods and procure any other documents required to
7 effect shipment or to comply with the contract; and

8 (e) forward and tender with commercial promptness all the documents in due form
9 and with any indorsement necessary to perfect the buyer's rights.

10 (3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and
11 imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to
12 insurance.

13 (4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make
14 payment against tender of the required documents and the seller may not tender nor the buyer
15 demand delivery of the goods in substitution for the documents.

16 Preliminary Comment

17
18 Sections 2-319 through 2-324 have been eliminated because they are inconsistent with
19 modern commercial practices.

20
21 **§ 2-321. C.I.F. or C. & F.: "Net Landed Weights"; "Payment on Arrival"; Warranty of**
22 **Condition on Arrival Reserved.**

23
24 Under a contract containing a term C.I.F. or C. & F.

1 ~~(1) Where the price is based on or is to be adjusted according to "net landed~~
2 ~~weights", "delivered weights", "out turn" quantity or quality or the like, unless otherwise agreed~~
3 ~~the seller must reasonably estimate the price. The payment due on tender of the documents~~
4 ~~called for by the contract is the amount so estimated, but after final adjustment of the price a~~
5 ~~settlement must be made with commercial promptness.~~

6 ~~(2) An agreement described in subsection (1) or any warranty of quality or~~
7 ~~condition of the goods on arrival places upon the seller the risk of ordinary deterioration,~~
8 ~~shrinkage and the like in transportation but has no effect on the place or time of identification to~~
9 ~~the contract for sale or delivery or on the passing of the risk of loss.~~

10 ~~(3) Unless otherwise agreed where the contract provides for payment on or after~~
11 ~~arrival of the goods the seller must before payment allow such preliminary inspection as is~~
12 ~~feasible; but if the goods are lost delivery of the documents and payment are due when the goods~~
13 ~~should have arrived.~~

14 **Preliminary Comment**

15
16 Sections 2-319 through 2-324 have been eliminated because they are inconsistent with
17 modern commercial practices.

18 19 **§ 2-322. Delivery "Ex-Ship" Reserved.**

20
21 ~~(1) Unless otherwise agreed a term for delivery of goods "ex-ship" (which means from~~
22 ~~the carrying vessel) or in equivalent language is not restricted to a particular ship and requires~~
23 ~~delivery from a ship which has reached a place at the named port of destination where goods of~~
24 ~~the kind are usually discharged.~~

1 ~~(2) Under such a term unless otherwise agreed~~

2 ~~(a) the seller must discharge all liens arising out of the carriage and furnish the~~
3 ~~buyer with a direction which puts the carrier under a duty to deliver the goods; and~~

4 ~~(b) the risk of loss does not pass to the buyer until the goods leave the ship's tackle~~
5 ~~or are otherwise properly unloaded.~~

6 **Preliminary Comment**

7
8 Sections 2-319 through 2-324 have been eliminated because they are inconsistent with
9 modern commercial practices.

10
11 **§ 2-323. Form of Bill of Lading Required in Overseas Shipment; "Overseas" Reserved.**

12
13 ~~(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. &~~
14 ~~F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading~~
15 ~~stating that the goods have been loaded in board or, in the case of a term C.I.F. or C. & F.,~~
16 ~~received for shipment.~~

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

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

23 ~~(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.~~

Preliminary Comment

Sections 2-319 through 2-324 have been eliminated because they are inconsistent with modern commercial practices.

§ 2-324. "No Arrival, No Sale" Term Reserved.

~~Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed,~~

~~(a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the non-arrival; and~~

~~(b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (Section 2=613).~~

Preliminary Comment

Sections 2-319 through 2-324 have been eliminated because they are inconsistent with modern commercial practices.

§ 2-325. "~~Letter of Credit~~" Term; "~~Confirmed Credit~~" Failure to Pay by Agreed Letter of Credit.

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

~~(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.~~

(3) ~~Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.~~

If the parties agree that the primary method of payment will be by letter of credit, the
following rules apply:

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

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

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

Preliminary Comment

1 This section has been amended to conform to revised Article 5.

2
3 **§ 2–326. Sale on Approval and Sale or Return; ~~Consignment Sales and Rights of~~**
4 **~~Creditors.~~**

5
6 (1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though
7 they conform to the contract, the transaction is

8 (a) a "sale on approval" if the goods are delivered primarily for use, and

9 (b) a "sale or return" if the goods are delivered primarily for resale.

10 (2) ~~Except as provided in subsection (3), goods~~ Goods held on approval are not subject to
11 the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to
12 such claims while in the buyer's possession.

13 ~~(3) Where goods are delivered to a person for sale and such person maintains a place of~~
14 ~~business at which he deals in goods of the kind involved, under a name other than the name of~~
15 ~~the person making delivery, then with respect to claims of creditors of the person conducting the~~
16 ~~business the goods are deemed to be on sale or return. The provisions of this subsection are~~
17 ~~applicable even though an agreement purports to reserve title to the person making delivery until~~
18 ~~payment or resale or uses such words as "on consignment" or "on memorandum". However, this~~
19 ~~subsection is not applicable if the person making delivery~~

20 ~~(a) complies with an applicable law providing for a consignor's interest or the like~~
21 ~~to be evidenced by a sign, or~~

22 ~~(b) establishes that the person conducting the business is generally known by his~~
23 ~~creditors to be substantially engaged in selling the goods of others, or~~

~~(c) complies with the filing provisions of the Article on Secured Transactions~~
~~(Article 9).~~

~~(4)~~ (3) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this Article (Section 2-201) and as contradicting the sale aspect of the contract within the provisions of this Article on parol or extrinsic evidence (Section 2-202).

Preliminary Comment

This section has been amended to conform to revised Article 9.

§ 2-328. Sale by Auction.

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

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made ~~while the hammer is falling in acceptance of~~ during the process of completing the sale but before a prior bid is accepted the auctioneer ~~may in his~~ has discretion to reopen the bidding or to declare the goods sold under the prior bid ~~on which the hammer was falling.~~

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement

1 ~~of completion of the sale, but a bidder's retraction does not revive any previous bid.~~ A sale by
2 auction is subject to the seller's right to withdraw the goods unless at the time the goods are put
3 up or during the course of the auction it is announced in express terms that the right to withdraw
4 the goods is not reserved. In an auction in which the right to withdraw the goods is reserved, the
5 auctioneer may withdraw the goods at any time until completion of the sale is announced by the
6 auctioneer. In an auction in which the right to withdraw the goods is not reserved, after the
7 auctioneer calls for bids on an article or lot, the article or lot cannot be withdrawn unless no bid
8 is made within a reasonable time. In either case a bidder may retract a bid until the auctioneer's
9 announcement of completion of the sale, but a bidder's retraction does not revive any previous
10 bid.

11 (4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or
12 procures such a bid, and notice has not been given that liberty for such bidding is reserved, the
13 buyer may at ~~his~~ the buyer's option avoid the sale or take the goods at the price of the last good
14 faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a ~~forced~~
15 ~~sale~~ an auction required by law.

16 **Preliminary Comment**

17
18 This section has been amended to use language that is common among auctioneers.
19 Specifically, "process of completing the sale" is used rather than "hammer falling" (subsection
20 (2)); "right to withdraw the goods" is used rather than "with reserve" (subsection (3)).

21 22 **PART 4**

23 24 **TITLE, CREDITORS AND GOOD FAITH PURCHASERS**

1 **§ 2–401. Passing of Title; Reservation for Security; Limited Application of This Section.**
2

3 Each provision of this Article with regard to the rights, obligations and remedies of the
4 seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except
5 where the provision refers to such title. Insofar as situations are not covered by the other
6 provisions of this Article and matters concerning title become material the following rules apply:

7 (1) Title to goods cannot pass under a contract for sale prior to their identification to the
8 contract (Section 2–501), and unless otherwise explicitly agreed the buyer acquires by their
9 identification a special property as limited by this Act. Any retention or reservation by the seller
10 of the title (property) in goods shipped or delivered to the buyer is limited in effect to a
11 reservation of a security interest. Subject to these provisions and to the provisions of the Article
12 on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any
13 manner and on any conditions explicitly agreed on by the parties.

14 (2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at
15 which the seller completes his performance with reference to the physical delivery of the goods,
16 despite any reservation of a security interest and even though a document of title is to be
17 delivered at a different time or place; and in particular and despite any reservation of a security
18 interest by the bill of lading

19 (a) if the contract requires or authorizes the seller to send the goods to the buyer
20 but does not require ~~him~~ the seller to deliver them at destination, title passes to the buyer
21 at the time and place of shipment; but

22 (b) if the contract requires delivery at destination, title passes on tender there.

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

(a) if the seller is to deliver a document of title, title passes at the time when and the place where ~~he~~ the seller delivers such documents; or

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

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such reversion occurs by operation of law and is not a "sale".

Preliminary Comment

The word "physical" been deleted in subsection (2) because the term "delivery" is now defined in section 2-103(1)(f) as "the voluntary transfer of physical possession or control of goods."

§ 2-402. Rights of Seller's Creditors Against Sold Goods.

(1) Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this Article (Sections 2-502 and 2-716).

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against ~~him~~ the creditor a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time

1 after a sale or identification is not fraudulent.

2 (3) ~~Nothing~~ Except as provided in Section 2-403(2), nothing in this Article shall be
3 deemed to impair the rights of creditors of the seller

4 (a) under the provisions of the Article on Secured Transactions (Article 9); or

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

10 Preliminary Comment

11
12 The introductory phrase in subsection (3) has been added because a change in Section 2-
13 403(2) (required for conformity with revised Article 9) can cause impairment of the rights of a
14 secured party.

15 16 **§ 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting".**

17
18 (1) A purchaser of goods acquires all title which ~~his~~ the purchaser's transferor had or had
19 power to transfer except that a purchaser of a limited interest acquires rights only to the extent of
20 the interest purchased. A person with voidable title has power to transfer a good title to a good
21 faith purchaser for value. When goods have been delivered under a transaction of purchase the
22 purchaser has such power even though

23 (a) the transferor was deceived as to the identity of the purchaser, or

24 (b) the delivery was in exchange for a check which is later dishonored, or

1 (c) it was agreed that the transaction was to be a "cash sale", or

2 (d) the delivery was procured through criminal fraud ~~punishable as larcenous~~
3 ~~under the criminal law.~~

4 (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind
5 gives ~~him~~ the merchant power to transfer ~~all rights of the entruster~~ all of the entruster's rights to
6 the goods and to transfer the goods free of any interest of the entruster to a buyer in ordinary
7 course of business.

8 (3) "Entrusting" includes any delivery and any acquiescence in retention of possession
9 regardless of any condition expressed between the parties to the delivery or acquiescence and
10 regardless of whether the procurement of the entrusting or the possessor's disposition of the
11 goods have been such as to be ~~larcenous~~ punishable under the criminal law.

12 [Legislative Note: If a state adopts the repealer of Article 6—Bulk
13 Transfers (Alternative A), subsection (4) should read as follows:]
14

15 (4) The rights of other purchasers of goods and of lien creditors are governed by the
16 Articles on Secured Transactions (Article 9) and Documents of Title (Article 7).

17 [Legislative Note: If a state adopts revised Article 6—Bulk Sales
18 (Alternative B), subsection (4) should read as follows:]
19

20 (4) The rights of other purchasers of goods and of lien creditors are governed by the
21 Articles on Secured Transactions (Article 9), Bulk Sales (Article 6) and Documents of Title
22 (Article 7).

23 **Preliminary Comment**
24

1. References to “larceny” have been replaced in subsections (1) and (3) by more general language referring to “criminal fraud” (subsection (1)) and conduct “punishable under the criminal law” (subsection (3)).

2. Subsection (2) has been amended to conform with revised Article 9. See Section 9-315(a).

PART 5

PERFORMANCE

§ 2-501. Insurable Interest in Goods; Manner of Identification of Goods.

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and ~~he~~ the buyer has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

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

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or

1 the next normal harvest season after contracting whichever is longer.

2 (2) The seller retains an insurable interest in goods so long as title to or any security
3 interest in the goods remains in ~~him~~ the seller and where the identification is by the seller alone
4 ~~he the seller~~ may until default or insolvency or notification to the buyer that the identification is
5 final substitute other goods for those identified.

6 (3) Nothing in this section impairs any insurable interest recognized under any other
7 statute or rule of law.

8
9 **§ 2-502. Buyer's Right to Goods on Seller's Insolvency.**

10
11 (1) Subject to ~~subsection (2)~~ subsections (2) and (3) and even though the goods have not
12 been shipped a buyer who has paid a part or all of the price of goods in which ~~he~~ the buyer has a
13 special property under the provisions of the immediately preceding section may on making and
14 keeping good a tender of any unpaid portion of their price recover them from the seller ~~if the~~
15 ~~seller becomes insolvent within ten days after receipt of the first installment on their price. if:~~

16 (a) in the case of goods bought by a consumer, the seller repudiates or fails to
17 deliver as required by the contract; or

18 (b) in all cases, the seller becomes insolvent within ten days after receipt of the
19 first installment on their price.

20 (2) The buyer's right to recover the goods under subsection (1) vests upon acquisition of a
21 special property, even if the seller had not then repudiated or failed to deliver.

22 ~~(2)~~ (3) If the identification creating ~~his~~ the special property has been made by the buyer

1 ~~he~~, the buyer acquires the right to recover the goods only if they conform to the contract for sale.

2 **Preliminary Comment**

3
4 Subsection (1)(a) and subsection (2) are new. With one exception, the amendments are
5 consistent with a conforming amendment approved as part of the revision of Article 9. The
6 exception is that the conforming amendment limits the vesting rule in subsection (2) to cases
7 governed by subsection (1)(a), whereas the vesting rule in this draft applies to all cases within
8 subsection (1).

9
10 **§ 2–503. Manner of Seller's Tender of Delivery.**

11
12 (1) Tender of delivery requires that the seller put and hold conforming goods at the
13 buyer's disposition and give the buyer any notification reasonably necessary to enable ~~him~~ the
14 buyer to take delivery. The manner, time and place for tender are determined by the agreement
15 and this Article, and in particular

16 (a) tender must be at a reasonable hour, and if it is of goods they must be kept
17 available for the period reasonably necessary to enable the buyer to take possession; but

18 (b) unless otherwise agreed the buyer must furnish facilities reasonably suited to
19 the receipt of the goods.

20 (2) Where the case is within the next section respecting shipment tender requires that the
21 seller comply with its provisions.

22 (3) Where the seller is required to deliver at a particular destination tender requires that ~~he~~
23 the seller comply with subsection (1) and also in any appropriate case tender documents as
24 described in subsections (4) and (5) of this section.

25 (4) Where goods are in the possession of a bailee and are to be delivered without being

1 moved

2 (a) tender requires that the seller either tender a negotiable document of title
3 covering such goods or procure acknowledgment by the bailee to the buyer of the buyer's
4 right to possession of the goods; but

5 (b) tender to the buyer of a non-negotiable document of title or of a ~~written~~
6 ~~direction to~~ a record directing the bailee to deliver is sufficient tender unless the buyer
7 seasonably objects, and except as otherwise provided in Article 9 receipt by the bailee of
8 notification of the buyer's rights fixes those rights as against the bailee and all third
9 persons; but risk of loss of the goods and of any failure by the bailee to honor the
10 non-negotiable document of title or to obey the direction remains on the seller until the
11 buyer has had a reasonable time to present the document or direction, and a refusal by the
12 bailee to honor the document or to obey the direction defeats the tender.

13 (5) Where the contract requires the seller to deliver documents

14 (a) ~~he~~ the seller must tender all such documents in correct form, ~~except as~~
15 ~~provided in this Article with respect to bills of lading in a set (subsection (2) of Section~~
16 ~~2-323)~~; and

17 (b) tender through customary banking channels is sufficient and dishonor of a
18 draft accompanying the documents constitutes non-acceptance or rejection.

19 Preliminary Comment

20
21 1. Subsection (4)(a) clarifies that the bailee's acknowledgment must be made to the
22 buyer. See Jason's Foods, Inc. v. Peter Eckrick & Sons, Inc., 774 F.2d 214 (7th Cir. 1985).
23 There is a similar amendment to Section 2-509(2)(b).

1
2 2. Under subsection (4)(b), receipt by the bailee of notification of a buyer's rights fixes
3 those rights as against the bailee and third parties except as otherwise provided in Article 9. The
4 exception for Article 9 conforms with revised Article 9.

5
6 3. The cross-reference in subsection (5)(a) has been deleted because Section 2-323 no
7 longer exists. All documents, including bills in a set, must be in "correct form, meaning the
8 form required by the contract.

9
10 **§ 2-504. Shipment by Seller.**

11
12 Where the seller is required or authorized to send the goods to the buyer and the contract
13 does not require ~~him~~ the seller to deliver them at a particular destination, then unless otherwise
14 agreed ~~he~~ the seller must

15 (a) put ~~the~~ conforming goods in the possession of such a carrier and make such a
16 contract for their transportation as may be reasonable having regard to the nature of the
17 goods and other circumstances of the case; and

18 (b) obtain and promptly deliver or tender in due form any document necessary to
19 enable the buyer to obtain possession of the goods or otherwise required by the agreement
20 or by usage of trade; and

21 (c) promptly notify the buyer of the shipment.

22 Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a)
23 is a ground for rejection only if material delay or loss ensues.

24 **Preliminary Comment**

25
26 The addition of "conforming" in paragraph (a) clarifies the relationship between this
27 section and Section 2-601.

1 **§ 2–505. Seller's Shipment Under Reservation.**
2

3 (1) Where the seller has identified goods to the contract by or before shipment:

4 (a) ~~his~~ the seller's procurement of a negotiable bill of lading to ~~his~~ the seller's
5 own order or otherwise reserves in ~~him~~ the seller a security interest in the goods. ~~His~~ the
6 seller's procurement of the bill to the order of a financing agency or of the buyer indicates
7 in addition only the seller's expectation of transferring that interest to the person named.

8 (b) a non-negotiable bill of lading to ~~himself~~ the seller or ~~his~~ the seller's nominee
9 reserves possession of the goods as security but except in a case ~~of conditional delivery~~
10 where a seller has a right to reclaim the goods under (subsection (2) of Section 2–507) a
11 non-negotiable bill of lading naming the buyer as consignee reserves no security interest
12 even though the seller retains possession of the bill of lading.

13 (2) When shipment by the seller with reservation of a security interest is in violation of
14 the contract for sale it constitutes an improper contract for transportation within the preceding
15 section but impairs neither the rights given to the buyer by shipment and identification of the
16 goods to the contract nor the seller's powers as a holder of a negotiable document.

17 **Preliminary Comment**
18

19 The change from “conditional delivery” to “right to reclaim the goods” in subsection
20 (1)(b) conforms to amended Section 2-507, where the seller's right to recover the goods
21 following dishonor of a check in a cash-sale transaction is now stated in terms of a right of
22 reclamation.

23
24 **§ 2–506. Rights of Financing Agency.**
25

1 (1) ~~A~~ Except as otherwise provided in Article 5, a financing agency by paying or
2 purchasing for value a draft which relates to a shipment of goods acquires to the extent of the
3 payment or purchase and in addition to its own rights under the draft and any document of title
4 securing it any rights of the shipper in the goods including the right to stop delivery and the
5 shipper's right to have the draft honored by the buyer.

6 (2) The right to reimbursement of a financing agency which has in good faith honored or
7 purchased the draft under commitment to or authority from the buyer is not impaired by
8 subsequent discovery of defects with reference to any relevant document which was apparently
9 regular on its face.

10 Preliminary Comment

11
12 Subsection (1) has been amended to provide that Article 5 governs in the event of a
13 conflict.

14 15 **§ 2-507. Effect of Seller's Tender; Delivery on Condition.**

16
17 (1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless
18 otherwise agreed, to ~~his~~ the buyer's duty to pay for them. Tender entitles the seller to acceptance
19 of the goods and to payment according to the contract.

20 (2) Where payment is due and demanded on the delivery to the buyer of goods or
21 documents of title, ~~his right as against the seller to retain or dispose of them is conditional upon~~
22 ~~his making the payment due~~ the seller may reclaim the goods delivered upon a demand made
23 within a reasonable time after the seller discovers or should have discovered that payment was
24 not made.

1 (3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in
2 ordinary course or other good-faith purchaser for value under this Article (Section 2-403).

3 **Preliminary Comment**
4

5 Subsection (2) has been amended to state directly that the seller's right to recover the
6 goods from the buyer in a cash-sale transaction is a right of reclamation. The phrase "due and
7 demande" refers to the situation where the seller takes a check that is later dishonored. See
8 Section 2-511. This change, and the addition of subsection (3), make the seller's rights parallel
9 in credit-sale and cash-sale transactions. See Section 2-702.

10
11 **§ 2-508. Cure by Seller of Improper Tender or Delivery; Replacement.**
12

13 ~~(1) Where any tender or delivery by the seller is rejected because non-conforming and the~~
14 ~~time for performance has not yet expired, the seller may seasonably notify the buyer of his~~
15 ~~intention to cure and may then within the contract time make a conforming delivery.~~

16 ~~(2) Where the buyer rejects a non-conforming tender which the seller had reasonable~~
17 ~~grounds to believe would be acceptable with or without money allowance the seller may if he~~
18 ~~seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.~~

19 (1) Where the buyer rejects goods or a tender of delivery under Section 2-601 or 2-612 or
20 except in a consumer contract justifiably revokes acceptance under Section 2-608(1)(b) and the
21 agreed time for performance has not expired, a seller that has performed in good faith, upon
22 seasonable notice to the buyer and at the seller's own expense, may cure the breach of contract by
23 making a conforming tender of delivery within the agreed time. The seller shall compensate the
24 buyer for all of the buyer's reasonable expenses caused by the seller's breach of contract and
25 subsequent cure.

(2) Where the buyer rejects goods or a tender of delivery under Section 2-601 or 2-612 or except in a consumer contract justifiably revokes acceptance under Section 2-608(1)(b) and the agreed time for performance has expired, a seller that has performed in good faith, upon reasonable notice to the buyer and at the seller's own expense, may cure the breach of contract, if the cure is appropriate and timely under the circumstances, by making a tender of conforming goods. The seller shall compensate the buyer for all of the buyer's reasonable expenses caused by the seller's breach of contract and subsequent cure.

Preliminary Comment

1. Subsection (1) permits a seller that has made a nonconforming tender in any case to make a conforming tender within the contract time upon seasonable notification to the buyer. It presumes that the buyer has rightfully rejected or justifiably revoked acceptance under Section 2-608(1)(b) through timely notification to the seller and has complied with any particularization requirements imposed by Section 2-605(1). The subsection applies even where the seller has taken back the nonconforming goods and refunded the purchase price. The seller may still make a good tender within the contract period. The closer, however, it is to the contract date, the greater is the necessity for extreme promptness on the seller's part in notifying of the intention to cure, if the notification is to be “seasonable” under this subsection.

The rule of this subsection, moreover, is qualified by its underlying reasons. Thus if, after contracting for June delivery, a buyer later makes known to the seller a need for shipment early in the month and the seller ships accordingly, the “contract time” has been cut down by the supervening modification and the time for cure of tender must be referred to this modified time term.

2. Cure after a justifiable revocation of acceptance is not available as a matter of right in a consumer contract. Further, even in a non-consumer contract no cure is available if the revocation is predicated on Section 2-608(1)(a). If the buyer is revoking because of a known defect that the seller has not been willing or able to cure, there is no justification for giving the seller a second chance to cure.

3. Subsection (2) expands the seller's right to cure after the time for performance has expired. As under subsection (1), the buyer's rightful rejection or in a non-consumer contract

justifiable revocation of acceptance under Section 2-608(1)(b) trigger the seller's right to cure. Original Section 2-508(2) was directed toward preventing surprise rejections by requiring the seller to have "reasonable grounds to believe the nonconforming tender was acceptable. Although this test has been abandoned, the requirement that the initial tender be made in good faith prevents a seller from deliberately tendering goods that it knows the buyer cannot use in order to save its contract and then, upon rejection, insisting on a second bite at the apple. The good faith standard applies under both subsection (1) and subsection (2).

4. The seller's cure under both subsection (1) and subsection (2) must be of conforming goods. Conforming goods includes not only conformity to the contracted-for quality but also as to quantity or assortment or other similar obligations under the contract. Since the time for performance has expired in a case governed by subsection (2), however, the seller's tender of conforming goods required to effect a cure under this section could not conform to the contracted time for performance. Thus, subsection (1) requires that cure be tendered "within the agreed time while subsection (2) requires that the tender be "appropriate and timely under the circumstances.

The requirement that the cure be "appropriate and timely under the circumstances provides important protection for the buyer. If the buyer is acquiring inventory on a just-in-time basis and needs to procure substitute goods from another supplier in order to keep the buyer's process moving, the cure would not be timely. If the seller knows from the circumstances that strict compliance with the contract obligations is expected, the seller's cure would not be appropriate. If the seller attempts to cure by repair, the cure would not be appropriate if it resulted in goods that did not conform in every respect to the requirements of the contract. The standard for quality on the second tender is still governed by Section 2-601. Whether a cure is appropriate and timely should be tested based upon the circumstances and needs of the buyer. Seasonable notice to the buyer and timely cure incorporate the idea that the notice and offered cure would be untimely if the buyer has reasonably changed its position in good faith reliance on the nonconforming tender.

5. Cure is at the seller's expense, and the seller is obligated to compensate the buyer for all the buyer's reasonable expenses caused by the breach and the cure. The term "reasonable expenses is not limited to expenses that would qualify as incidental damages.

§ 2-509. Risk of Loss in the Absence of Breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require ~~him~~ the seller to deliver them at a particular destination,

1 the risk of loss passes to the buyer when the goods are ~~duly~~ delivered to the carrier even
2 though the shipment is under reservation (Section 2–505); but

3 (b) if it does require ~~him~~ the seller to deliver them at a particular destination and
4 the goods are there ~~duly~~ tendered while in the possession of the carrier, the risk of loss
5 passes to the buyer when the goods are there ~~duly~~ so tendered as to enable the buyer to
6 take delivery.

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

9 (a) on ~~his~~ the buyer's receipt of a negotiable document of title covering the goods;
10 or

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

13 (c) after ~~his~~ the buyer's receipt of a non-negotiable document of title or other
14 ~~written~~ direction to deliver in a record, as provided in subsection (4)(b) of Section 2–503.

15 (3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on ~~his~~
16 the buyer's receipt of the goods ~~if the seller is a merchant, otherwise the risk passes to the buyer~~
17 ~~on tender of delivery.~~

18 (4) The provisions of this section are subject to contrary agreement of the parties and to
19 the provisions of this Article on sale on approval (Section 2–327) and on effect of breach on risk
20 of loss (Section 2–510).

21 **Preliminary Comment**

1 1. The word “duly” has been deleted in subsections (1)(a) and (1)(b) because it has
2 caused confusion. In a shipment contract, the risk of loss shifts to the buyer when the goods are
3 delivered to the carrier as required by Section 2-504; in a destination contract, the risk of loss
4 shifts when the goods are tendered to the buyer as required by Section 2-503(3).

5
6 2. Subsection (3) has been simplified by eliminating the distinction between merchant
7 and non-merchant sellers. In a case not governed by subsection (1) or subsection (2) and not
8 subject to a contrary result under subsection (4), the risk of loss passes to the buyer upon the
9 buyer’s receipt of the goods.

10
11 **§ 2–510. Effect of Breach on Risk of Loss.**

12
13 (1) Where a tender or delivery of goods so fails to conform to the contract as to give a
14 right of rejection the risk of their loss remains on the seller until cure or acceptance.

15 (2) Where the buyer rightfully revokes acceptance ~~he~~ the buyer may to the extent of any
16 deficiency in ~~his~~ the buyer’s effective insurance coverage treat the risk of loss as having rested on
17 the seller from the beginning.

18 (3) Where the buyer as to conforming goods already identified to the contract for sale
19 repudiates or is otherwise in breach before risk of their loss has passed to ~~him~~ the buyer, the
20 seller may to the extent of any deficiency in ~~his~~ the seller’s effective insurance coverage treat the
21 risk of loss as resting on the buyer for a commercially reasonable time.

22 **§ 2–512. Payment by Buyer Before Inspection.**

23
24 (1) Where the contract requires payment before inspection non-conformity of the goods
25 does not excuse the buyer from so making payment unless

26 (a) the non-conformity appears without inspection; or

27 (b) despite tender of the required documents the circumstances would justify

1 injunction against honor under this Act (Section 5–109(b)).

2 (2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or
3 impair the buyer's right to inspect or any of ~~his~~ the buyer's remedies.

4 **§ 2–513. Buyer's Right to Inspection of Goods.**

5
6 (1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or
7 delivered or identified to the contract for sale, the buyer has a right before payment or acceptance
8 to inspect them at any reasonable place and time and in any reasonable manner. When the seller
9 is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

10 (2) Expenses of inspection must be borne by the buyer but may be recovered from the
11 seller if the goods do not conform and are rejected.

12 (3) Unless otherwise agreed ~~and subject to the provisions of this Article on C.I.F.~~
13 ~~contracts (subsection (3) of Section 2–321)~~, the buyer is not entitled to inspect the goods before
14 payment of the price when the contract provides

15 (a) for delivery ~~"C.O.D." or on other like terms~~ on terms that under applicable
16 course of performance, course of dealing, or usage of trade are interpreted to preclude
17 inspection before payment; or

18 (b) for payment against documents of title, except where such payment is due only
19 after the goods are to become available for inspection.

20 (4) A place ~~or method~~ , method or standard of inspection fixed by the parties is presumed
21 to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift

1 the place for delivery or for passing the risk of loss. If compliance becomes impossible,
2 inspection shall be as provided in this section unless the place ~~or method~~ , method or standard
3 fixed was clearly intended as an indispensable condition failure of which avoids the contract.

4 Preliminary Comment

5
6 1. The cross-reference in subsection (3) has been deleted because Section 2-321 no
7 longer exists. The reference to “C.O.D. in subsection (3)(a) has been deleted for the same
8 reason that Sections 2-319 through 2-324 have been deleted – terms that amount to commercial
9 shorthand will no longer be included in the text of Article 2.

10
11 2. Subsection (4) has been amended to provide that, in addition to the place and method
12 of inspection, the parties may agree on the standard of inspection. The change responds to the
13 large number of cases where there is a dispute about the appropriate standard of inspection. The
14 word “compliance in the second sentence of subsection (4) includes compliance with an agreed
15 standard of inspection.

16 17 **§ 2–514. When Documents Deliverable on Acceptance; When on Payment.**

18
19 Unless otherwise agreed and except as otherwise provided in Article 5, documents against
20 which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable
21 more than three days after presentment; otherwise, only on payment.

22 Preliminary Comment

23
24 The exception for contrary provisions in Article 5 is new and makes this section
25 consistent with Section 4-503, which also states that it is subject to Article 5. The specific
26 question is what constitutes a time draft as opposed to a sight draft. Under Article 5, because an
27 issuer may have up to seven days to determine compliance of documents (Section 5-108), the
28 delay beyond three days does not necessarily indicate that the draft should be treated as a time
29 draft.

30 31 PART 6

1 **BREACH, REPUDIATION AND EXCUSE**

2

3 **§ 2–601. Buyer's Rights on Improper Delivery.**

4

5 Subject to the provisions of this Article on breach in installment contracts (Section

6 2–612) and on shipment by seller (Section 2-504), and unless otherwise agreed under the sections

7 on contractual limitations of remedy (Sections 2–718 and 2–719), if the goods or the tender of

8 delivery fail in any respect to conform to the contract, the buyer may

9 (a) reject the whole; or

10 (b) accept the whole; or

11 (c) accept any commercial unit or units and reject the rest.

12 **Preliminary Comment**

13

14 The cross-reference to Section 2-504, pursuant to which a seller's failure properly to

15 notify a buyer or to make a proper contract of carriage is a ground for rejection only if material

16 delay or loss ensues, has been included for accuracy.

17

18 **§ 2–602. Manner and Effect of ~~Rightful~~ Rejection.**

19

20 (1) Rejection of goods must be within a reasonable time after their delivery or tender. It

21 is ineffective unless the buyer seasonably notifies the seller.

22 (2) Subject to the provisions of the two following sections on rejected goods (Sections

23 2–603 and 2–604) and to Section 2-608(4),

24 (a) after rejection any exercise of ownership by the buyer with respect to any

25 commercial unit is wrongful as against the seller; and

1 (b) if the buyer has before rejection taken physical possession of goods in which
2 ~~he~~ the buyer does not have a security interest under the provisions of this Article
3 (subsection (3) of Section 2-711), ~~he~~ the buyer is under a duty after rejection to hold
4 them with reasonable care at the seller's disposition for a time sufficient to permit the
5 seller to remove them; but

6 (c) the buyer has no further obligations with regard to goods rightfully rejected.

7 (3) The seller's rights with respect to goods wrongfully rejected are governed by the
8 provisions of this Article on Seller's remedies in general (Section 2-703).

9 **Preliminary Comment**

10
11 1. Elimination of the word "rightful" in the title makes it clear that a buyer can
12 effectively reject goods even though the rejection is wrongful and constitutes a breach. See
13 Section 2-703(1). The word "rightful" has also been deleted from the titles to Section 2-603 and
14 2-604. See Preliminary Comments to those sections.

15
16 2. Subsection (2) has been amended to make it subject to Section 2-608(4), which deals
17 with the problem of post-rejection or post-revocation use of the goods. See Preliminary
18 Comment to Section 2-608.

19 20 **§ 2-603. Merchant Buyer's Duties as to Rightfully Rejected Goods.**

21
22 (1) Subject to any security interest in the buyer (subsection (3) of Section 2-711), when
23 the seller has no agent or place of business at the market of rejection a merchant buyer is under a
24 duty after rejection of goods in ~~his~~ the buyer's possession or control to follow any reasonable
25 instructions received from the seller with respect to the goods and in the absence of such
26 instructions to make reasonable efforts to sell them for the seller's account if they are perishable
27 or threaten to decline in value speedily. ~~Instructions~~ In the case of a rightful rejection

1 instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

2 (2) When the buyer sells goods under subsection (1) following a rightful rejection, ~~he~~ the
3 buyer is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses
4 of caring for and selling them, and if the expenses include no selling commission then to such
5 commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per
6 cent on the gross proceeds.

7 (3) In complying with this section the buyer is held only to good faith and good faith
8 conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

9 **Preliminary Comment**

10
11 Consistent with the approach taken in Section 2-602, the title to this section has been
12 amended to delete the word "rightful. Accordingly, except as otherwise stated in this section its
13 provisions apply to all effective rejections, including rejections that are wrongful. Thus, any
14 merchant buyer whose rejection is effective is subject to the duties set forth in the first sentence
15 of subsection (1), and a merchant buyer that complies with those duties is entitled to the
16 protection provided by subsection (3). However, the right to indemnity for expenses on demand
17 under the second sentence of subsection (1) and the right to reimbursement for expenses and a
18 commission under subsection (2) are limited to buyers whose rejections are rightful.

19 20 **§ 2-604. Buyer's Options as to Salvage of Rightfully Rejected Goods.**

21
22 Subject to the provisions of the immediately preceding ~~section on perishables if the seller~~
23 ~~gives no instructions within a reasonable time after notification of rejection~~ section, the buyer
24 may store the rejected goods for the seller's account or reship them to ~~him~~ the seller or resell
25 them for the seller's account with reimbursement as provided in the preceding section. Such
26 action is not acceptance or conversion.

27 **Preliminary Comment**

1 Consistent with the approach taken in Section 2-602, the title to this section has been
2 amended to delete the word “rightful. Accordingly, its provisions apply to any buyer whose
3 rejection is effective. Note, however, that this section is subject to Section 2-603, and the
4 provisions of that section differentiate between rightful and wrongful rejections.

5
6 The reference to “perishables has been deleted as misleading – Section 2-603 applies to
7 more than just goods that are perishable. The phrase “if the seller gives no instructions within a
8 reasonable time after notification of rejection has been deleted as superfluous.

9
10 **§ 2–605. Waiver of Buyer’s Objections by Failure to Particularize.**

11
12 (1) The buyer's failure to state in connection with rejection a particular defect or in
13 connection with revocation of acceptance a defect that justifies revocation ~~which is ascertainable~~
14 ~~by reasonable inspection~~ precludes ~~him~~ the buyer from relying on the unstated defect to justify
15 rejection or ~~to establish breach~~ revocation of acceptance if the defect is ascertainable by
16 reasonable inspection

17 (a) where the seller had a right to cure the defect and could have cured it if stated
18 seasonably; or

19 (b) between merchants when the seller has after rejection made a request in
20 ~~writing a record and for a full and final written~~ statement in record form of all defects on
21 which the buyer proposes to rely.

22 (2) ~~Payment~~ A buyer’s against documents tendered to the buyer made without
23 reservation of rights precludes recovery of the payment for defects apparent on the face of the
24 documents.

25 **Preliminary Comment**
26

1 1. This section rests upon a policy of permitting the buyer to give a quick and informal
2 notice of defects in a tender without penalizing the buyer for omissions, while at the same time
3 protecting a seller that is reasonably misled by the buyer's failure to state curable defects. Where
4 the defect in a tender is one which could have been cured by the seller, a buyer that merely rejects
5 the delivery without stating any objections to the tender is probably acting in commercial bad
6 faith and seeking to get out of a deal which has become unprofitable. Following the general
7 policy of this Article to preserve the deal wherever possible, subsection (1)(a) requires that the
8 seller's right to correct the tender in the circumstances be protected.

9
10 Subsection (1) as revised makes three substantive changes. First, failure to particularize
11 affects only the buyer's right to reject or revoke acceptance, not the buyer's right to establish
12 breach. Waiver of a right to damages for breach because of a failure properly to notify the seller
13 is governed by Section 2-607(3).

14
15 Second, subsection (1) now requires the seller to have had a right to cure under Section
16 2-508 in addition to having the ability to cure. This point was perhaps implicit in the prior
17 provision, but it is now expressly stated to avoid any question of whether this section creates a
18 seller's right to cure independent of the right enumerated in section 2-508. Thus if the defect is
19 one that could be cured under Section 2-508, the buyer will have waived that defect as a basis for
20 rejecting the goods, or possibly revoking acceptance, if the buyer fails to state the defect with
21 sufficient particularity to facilitate the seller's exercise of its right to cure as provided in Section
22 2-508.

23
24 Subsection (1) as revised has been extended to include not only rejection but also
25 revocation of acceptance. This is necessitated by the expansion of the right to cure (Section 2-
26 508) to cover revocation of acceptance in non-consumer contracts. The application of the
27 subsection to revocation cases is limited in the following ways: 1) because a revocation under
28 Section 2-608(1)(a) does not trigger a right to cure under Section 2-508, the revocation does not
29 trigger subsection (1); 2) because Section 2-608(1)(b) involves defects that are by definition
30 difficult to discover, there is no waiver under subsection (1) unless the defect at issue justifies the
31 revocation and the buyer has notice of it; and 3) because the right to cure following revocation of
32 acceptance is restricted under Section 2-508 to non-consumer contracts, this section cannot be
33 asserted against a consumer who is seeking to revoke acceptance. The consequences of a
34 consumer's failure to give proper notice are governed by Section 2-607(3).

35
36 2. When the time for cure is past, subsection (1)(b) makes plain that a merchant seller is
37 entitled upon request to a final statement of objections by a merchant buyer upon which the seller
38 can rely. What is needed is a clear statement to the buyer of exactly what is being sought. A
39 formal demand will be sufficient in the case of a merchant-buyer.

1 3. Subsection (2) has been revised to make clear that the buyer that makes payment upon
2 presentation of the documents to the buyer may waive defects, but that a person that is not the
3 buyer, such as the issuer of a letter of credit, that pays as against documents is not waiving the
4 buyer's right to assert defects in the documents as against the seller.

5
6 Subsection (2) applies to documents the same principle contained in section 2-606(1)(a)
7 for the acceptance of goods; that is, if the buyer accepts documents that have apparent defects,
8 the buyer is presumed to have waived the defects as a basis for rejecting the documents.
9 Subsection (2) is limited to defects which are apparent on the face of the documents. When
10 payment is required against documents, the documents must be inspected before the payment,
11 and the payment constitutes acceptance of the documents. When the documents are delivered
12 without requiring a contemporary payment by the buyer, the acceptance of the documents by
13 non-objection is postponed until after a reasonable time for the buyer to inspect the documents.
14 In either situation, however, the buyer "waives only what is apparent on the face of the
15 documents. Moreover, in either case, the acceptance of the documents does not constitute an
16 acceptance of the goods and does not impair any options or remedies of the buyer for improper
17 delivery of the goods. See Section 2-512(2).

18 19 **§ 2-606. What Constitutes Acceptance of Goods.**

20
21 (1) Acceptance of goods occurs when the buyer

22 (a) after a reasonable opportunity to inspect the goods signifies to the seller that
23 the goods are conforming or that ~~he~~ the buyer will take or retain them in spite of their
24 non-conformity; or

25 (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such
26 acceptance does not occur until the buyer has had a reasonable opportunity to inspect
27 them; or

28 (c) except as otherwise provided in Section 2-608(4), does any act inconsistent
29 with the seller's ownership; but if ~~such the~~ act is wrongful as against the seller it is an
30 acceptance only if ratified by him ratified by the seller it is an acceptance.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

Preliminary Comment

The only substantive change is the cross-reference in subsection (1)(c) to Section 2-608(4), which deals with the problem of post-rejection or post-revocation use of the goods. See Preliminary Comment to Section 2-608.

§ 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after ~~he~~ the buyer discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; however, failure to give timely notice bars the buyer from a remedy only to the extent that the seller is prejudiced by the failure and

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) and the buyer is sued as a result of such a breach ~~he~~ the buyer must so notify the seller within a reasonable time after ~~he~~ the buyer receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

1 (4) The burden is on the buyer to establish any breach with respect to the goods accepted.

2 (5) Where the buyer is sued for indemnity, breach of a warranty or other obligation for
3 which ~~his seller~~ another party is answerable over

4 (a) ~~he~~ the buyer may give ~~his seller~~ the other party ~~written~~ notice of the litigation
5 in a record. If the notice states that the ~~seller~~ other party may come in and defend and that
6 if the ~~seller~~ other party does not do so ~~he~~ the other party will be bound in any action
7 against ~~him~~ the other party by ~~his~~ the buyer by any determination of fact common to the
8 two litigations, then unless the ~~seller~~ other party after seasonable receipt of the notice
9 does come in and defend ~~he~~ the other party is so bound.

10 (b) if the claim is one for infringement or the like (subsection (3) of Section
11 2–312) the original seller may demand in ~~writing~~ a record that ~~his~~ its buyer turn over to
12 ~~him~~ it control of the litigation including settlement or else be barred from any remedy
13 over and if ~~he~~ it also agrees to bear all expense and to satisfy any adverse judgment, then
14 unless the buyer after seasonable receipt of the demand does turn over control the buyer is
15 so barred.

16 (6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to
17 hold the seller harmless against infringement or the like (subsection (3) of Section 2–312).

18 **Preliminary Comment**

19
20 1. Subsection (3)(a) provides that a failure to give notice to the seller bars the buyer from
21 a remedy for breach of contract only if the seller suffers prejudice due to the failure to notify. See
22 Restatement (Second) of Contracts § 229, excusing a condition where the failure is not material
23 and implementation would result in disproportionate forfeiture.
24

1 2. The vouching-in procedure in subsection (5) has been expanded to include indemnity
2 actions, and it has been broadened to include any other party that is answerable over, not just the
3 immediate seller. As under former Article 2, all the provisions of this section are subject to any
4 explicit reservation of rights. Section 1-207.

5
6 Vouching in does not confer on the notified seller a right to intervene, does not confer
7 jurisdiction of any kind on the court over the seller, and does not create a duty to defend on the
8 part of the seller. Those matters continue to be governed by the applicable rules of civil
9 procedure and substantive law outside this section. Vouching in is based upon the principle that
10 the seller is liable for its contractual obligations regarding the quality or title to the goods which
11 the buyer is being forced to defend.

12
13 **§ 2-608. Revocation of Acceptance in Whole or in Part.**

14
15 (1) The buyer may revoke ~~his~~ acceptance of a lot or commercial unit whose
16 non-conformity substantially impairs its value to ~~him~~ the buyer if ~~he~~ the buyer has accepted it

17 (a) on the reasonable assumption that its non-conformity would be cured and it
18 has not been seasonably cured; or

19 (b) without discovery of such non-conformity if ~~his~~ the buyer's acceptance was
20 reasonably induced either by the difficulty of discovery before acceptance or by the
21 seller's assurances.

22 (2) Revocation of acceptance must occur within a reasonable time after the buyer
23 discovers or should have discovered the ground for it and before any substantial change in
24 condition of the goods which is not caused by their own defects. It is not effective until the buyer
25 notifies the seller of it.

26 (3) A buyer who so revokes has the same rights and duties with regard to the goods
27 involved as if ~~he~~ the buyer had rejected them.

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

3 (a) Any use by the buyer that is unreasonable under the circumstances is wrongful
4 as against the seller and is an acceptance only if ratified by the seller.

5 (b) Any use of the goods that is reasonable under the circumstances is not
6 wrongful as against the seller and is not an acceptance, but in an appropriate case the
7 buyer shall be obligated to the seller for the value of the use to the buyer.

8 **Preliminary Comment**

9
10 Subsection (4), which is new, deals with the problem of post-rejection or revocation use
11 of the goods. The courts have developed several alternative approaches. Under original Article
12 2, a buyer's post-rejection or revocation use of the goods could be treated as an acceptance, thus
13 undoing the rejection or revocation, could be a violation of the buyer's obligation of reasonable
14 care, or could be a reasonable use for which the buyer must compensate the seller. Subsection
15 (4) adopts the third approach. If the buyer's use after an effective rejection or a justified
16 revocation of acceptance is unreasonable under the circumstances, it is inconsistent with the
17 rejection or revocation of acceptance and is wrongful as against the seller. This gives the seller
18 the option of ratifying the use, thereby treating it as an acceptance, or pursuing a non-Code
19 remedy for conversion.

20
21 If the buyer's use is reasonable under the circumstances, the buyer's actions cannot be
22 treated as an acceptance. The buyer must compensate the seller for the value of the use of the
23 goods to the buyer. Determining the appropriate level of compensation requires a consideration
24 of the buyer's particular circumstances and should take into account the defective condition of
25 the goods. There may be circumstances, such as where the use is solely for the purpose of
26 protecting the buyer's security interest in the goods, where no compensation is due the seller. In
27 other circumstances, the seller's right to compensation must be netted out against any right of the
28 buyer to damages.

29 30 **§ 2–609. Right to Adequate Assurance of Performance.**

31
32 (1) A contract for sale imposes an obligation on each party that the other's expectation of

1 receiving due performance will not be impaired. When reasonable grounds for insecurity arise
2 with respect to the performance of either party the other may ~~in writing~~ demand in a record
3 adequate assurance of due performance and until ~~he~~ the party receives the assurance may if
4 commercially reasonable suspend any performance for which ~~he~~ it has not already received the
5 agreed return.

6 (2) Between merchants the reasonableness of grounds for insecurity and the adequacy of
7 any assurance offered shall be determined according to commercial standards.

8 (3) Acceptance of any improper delivery or payment does not prejudice the aggrieved
9 party's right to demand adequate assurance of future performance.

10 (4) After receipt of a justified demand failure to provide within a reasonable time not
11 exceeding thirty days such assurance of due performance as is adequate under the circumstances
12 of the particular case is a repudiation of the contract.

13 **§ 2-610. Anticipatory Repudiation.**
14

15 (1) When either party repudiates the contract with respect to a performance not yet due
16 the loss of which will substantially impair the value of the contract to the other, the aggrieved
17 party may

18 (a) for a commercially reasonable time await performance by the repudiating
19 party; or

20 (b) resort to any remedy for breach (Section 2-703 or Section 2-711), even
21 though ~~he~~ the aggrieved party has notified the repudiating party that ~~he~~ it would await the
22 latter's performance and has urged retraction; and

1 (c) in either case suspend ~~his own~~ performance or proceed in accordance with the
2 provisions of this Article on the seller's right to identify goods to the contract
3 notwithstanding breach or to salvage unfinished goods (Section 2-704).

4 (2) Repudiation includes language that a reasonable party would interpret to mean that
5 the other party will not or cannot make a performance still due under the contract or voluntary,
6 affirmative conduct that would appear to a reasonable party to make a future performance by the
7 other party impossible.

8 **Preliminary Comment**

9
10 Subsection (2), which is new, provides guidance on when a party can be considered to
11 have repudiated a performance obligation based upon the Restatement (Second) of Contracts
12 § 250 and does not purport to be an exclusive statement of when a repudiation has occurred. As
13 under prior law, repudiation centers upon an overt communication of intention, actions which
14 render performance impossible, or a demonstration of a clear determination not to perform.
15 Repudiation does not require that performance be made utterly impossible, rather, actions which
16 reasonably indicate rejection of the performance obligation suffice. Failure to provide adequate
17 assurance of due performance under Section 2-609 also operates as a repudiation.

18 19 **§ 2-611. Retraction of Anticipatory Repudiation.**

20
21 (1) Until the repudiating party's next performance is due ~~he~~ that party can retract ~~his~~ the
22 repudiation unless the aggrieved party has since the repudiation canceled or materially changed
23 ~~his~~ position or otherwise indicated that ~~he considers~~ the repudiation is final.

24 (2) Retraction may be by any method which clearly indicates to the aggrieved party that
25 the repudiating party intends to perform, but must include any assurance justifiably demanded
26 under the provisions of this Article (Section 2-609).

27 (3) Retraction reinstates the repudiating party's rights under the contract with due excuse

1 and allowance to the aggrieved party for any delay occasioned by the repudiation.

2 **§ 2-612. "Installment Contract"; Breach.**

3
4 (1) An "installment contract" is one which requires or authorizes the delivery of goods in
5 separate lots to be separately accepted, even though the contract contains a clause "each delivery
6 is a separate contract" or its equivalent.

7 (2) The buyer may reject any installment which is non-conforming if the non-conformity
8 substantially impairs the value of that installment ~~and cannot be cured to the buyer~~ or if the
9 non-conformity is a defect in the required documents; but if the non-conformity does not fall
10 within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept
11 that installment.

12 (3) Whenever non-conformity or default with respect to one or more installments
13 substantially impairs the value of the whole contract there is a breach of the whole. But the
14 aggrieved party reinstates the contract if ~~he~~ the party accepts a non-conforming installment
15 without seasonably notifying of cancellation or if ~~he~~ the party brings an action with respect only
16 to past installments or demands performance as to future installments.

17 **Preliminary Comment**

18
19 Subsection (2) has been amended to make it clear that the buyer's right in the first
20 instance to reject an installment depends upon whether there has been a substantial impairment of
21 the value of the installment to the buyer and not on the seller's ability to cure the nonconformity.
22 The seller can prevent a rightful rejection by giving adequate assurances of cure. Amending
23 subsection (2) by adding the words "to the buyer makes the standard for rejecting an installment
24 consistent with the standard for revoking acceptance under Section 2-608.

25
26 **§ 2-613. Casualty to Identified Goods.**

1 Where the contract requires for its performance goods identified when the contract is
2 made, and the goods suffer casualty without fault of either party before the risk of loss passes to
3 the buyer, ~~or in a proper case under a "no arrival, no sale" term (Section 2-324)~~ then

4 (a) if the loss is total the contract is ~~avoided~~ terminated; and

5 (b) if the loss is partial or the goods have so deteriorated as no longer to conform
6 to the contract the buyer may nevertheless demand inspection and at ~~his~~ its option either
7 treat the contract as avoided or accept the goods with due allowance from the contract
8 price for the deterioration or the deficiency in quantity but without further right against
9 the seller.

10 Preliminary Comment

11
12 1. The cross-reference to Section 2-324 has been deleted because the referenced section
13 no longer exists.

14
15 2. The change in paragraph (a) from "avoided" to "terminated" preserves pre-termination
16 breaches. See Section 2-106(3).

17 18 **§ 2-615. Excuse by Failure of Presupposed Conditions.**

19
20 Except so far as a seller may have assumed a greater obligation and subject to the
21 preceding section on substituted performance:

22 (a) Delay in ~~delivery or non-delivery~~ performance or non-performance in whole or
23 in part by a seller who complies with paragraphs (b) and (c) is not a breach of ~~his~~ the
24 seller's duty under a contract for sale if performance as agreed has been made
25 impracticable by the occurrence of a contingency the non-occurrence of which was a

1 basic assumption on which the contract was made or by compliance in good faith with
2 any applicable foreign or domestic governmental regulation or order whether or not it
3 later proves to be invalid.

4 (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's
5 capacity to perform, ~~he~~ the seller must allocate production and deliveries among ~~his~~ its
6 customers but may at ~~his~~ its option include regular customers not then under contract as
7 well as ~~his~~ its own requirements for further manufacture. ~~He~~ The seller may so allocate
8 in any manner which is fair and reasonable.

9 (c) The seller must notify the buyer seasonably that there will be delay or
10 non-delivery and, when allocation is required under paragraph (b), of the estimated quota
11 thus made available for the buyer.

12 Preliminary Comment

13
14 “[D]elivery or non-delivery in Paragraph (a) has been changed to “performance or non-
15 performance to take into consideration the broad range of obligations that a seller may have in
16 addition to the obligation to deliver the goods.

17 18 **§ 2–616. Procedure on Notice Claiming Excuse.**

19
20 (1) Where the buyer receives notification of a material or indefinite delay or an allocation
21 justified under the preceding section ~~he~~ it may by ~~written~~ notification in a record to the seller as
22 to any delivery concerned, and where the prospective deficiency substantially impairs the value
23 of the whole contract under the provisions of this Article relating to breach of installment
24 contracts (Section 2–612), then also as to the whole,

1 (a) terminate and thereby discharge any unexecuted portion of the contract; or

2 (b) modify the contract by agreeing to take ~~his~~ its available quota in substitution.

3 (2) If after receipt of such notification from the seller the buyer fails so to modify the
4 contract within a reasonable time not exceeding thirty days the contract ~~lapses~~ is terminated with
5 respect to any ~~deliveries~~ performance affected.

6 (3) The provisions of this section may not be negated by agreement except in so far as the
7 seller has assumed a greater obligation under the preceding section.

8 **Preliminary Comment**

9
10 In subsection (2), the change from “lapses” to “is terminated” conforms with the
11 amendment of Section 2-613(a) and the change from “deliveries” to “performance” conforms
12 with the amendment to Section 2-615(a).

13
14 **PART 7**

15
16 **REMEDIES**

17
18 **§ 2-702. Seller's Remedies on Discovery of Buyer's Insolvency.**

19
20 (1) Where the seller discovers the buyer to be insolvent ~~he~~ the seller may refuse delivery
21 except for cash including payment for all goods theretofore delivered under the contract, and stop
22 delivery under this Article (Section 2-705).

23 (2) Where the seller discovers that the buyer has received goods on credit while insolvent
24 ~~he~~ the seller may reclaim the goods upon demand made within ~~ten days~~ a reasonable time after
25 the buyer's receipt of the goods, ~~but if misrepresentation of solvency has been made to the~~

1 ~~particular seller in writing within three months before delivery the ten-day limitation does not~~
2 ~~apply.~~ Except as provided in this subsection the seller may not base a right to reclaim goods on
3 the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

4 (3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in
5 ordinary course or other good-faith purchaser for value under this Article (Section 2-403).
6 Successful reclamation of goods excludes all other remedies with respect to them.

7 Preliminary Comment

8
9 1. The seller's right to withhold the goods or to stop delivery except for cash when the
10 seller discovers the buyer's insolvency is made explicit in subsection (1) regardless of the
11 passage of title, and the concept of stoppage has been extended to include goods in the
12 possession of any bailee who has not yet attorned to the buyer.
13

14 2. Subsection (2) takes as its base line the proposition that any receipt of goods on credit
15 by an insolvent buyer amounts to a tacit business misrepresentation of solvency and therefore is
16 fraudulent as against the particular seller. The amendments omit the 10-day limitation and the 3-
17 month exception to the 10-day limitation. If the buyer is in bankruptcy at the time of
18 reclamation, the seller will have to comply with Section 546(c) of the Bankruptcy Code of 1978,
19 which includes a 10-day limitation.
20

21 3. Because the right of the seller to reclaim goods under this section constitutes
22 preferential treatment as against the buyer's other creditors, subsection (3) provides that such
23 reclamation bars all of the seller's other remedies as to the goods involved.
24

25 4. The rights of a seller to reclamation under section 2-702 from its buyer are subordinate
26 to the rights of good faith purchasers from that buyer under Section 2-403. The amendments
27 take no position on the seller's claims to proceeds of the goods. Courts have disagreed on the
28 seller's rights to proceeds of goods that would have been subject to reclamation had they not
29 been resold.
30

31 **§ 2-703. Seller's Remedies in General.**

32
33 ~~Where the buyer wrongfully rejects or revokes acceptance of goods or fails to~~

1 ~~make a payment due on or before delivery or repudiates with respect to a part or the whole, then~~
2 ~~with respect to any goods directly affected and, if the breach is of the whole contract (Section~~
3 ~~2-612), then also with respect to the whole undelivered balance, the aggrieved seller may~~

4 ~~(a) withhold delivery of such goods;~~

5 ~~(b) stop delivery by any bailee as hereafter provided (Section 2-705);~~

6 ~~(c) proceed under the next section respecting goods still unidentified to the~~
7 ~~contract;~~

8 ~~(d) resell and recover damages as hereafter provided (Section 2-706);~~

9 ~~(e) recover damages for non-acceptance (Section 2-708) or in a proper~~
10 ~~case the price (Section 2-709);~~

11 ~~(f) cancel.~~

12 (1) A breach of contract by the buyer includes the buyer's wrongful rejection or
13 wrongful attempt to revoke acceptance of goods, wrongful failure to perform a contractual
14 obligation, failure to make a payment when due, or repudiation.

15 (2) If the buyer is in breach of contract the seller may to the extent provided for by
16 this Act or other law:

17 (a) withhold delivery of the goods;

18 (b) stop delivery of the goods under Section 2-705;

19 (c) proceed under Section 2-704 with respect to goods unidentified to the
20 contract or unfinished;

1 (d) reclaim the goods under Section 2-507(2) or 2-702(2);

2 (e) cancel;

3 (f) resell and recover damages under Section 2-706;

4 (g) recover damages for nonacceptance or repudiation under Section 2-
5 708(1);

6 (h) recover lost profits under Section 2-708(2);

7 (i) recover the price under Section 2-709;

8 (j) obtain specific performance under Section 2-716;

9 (k) recover liquidated damages under Section 2-718;

10 (l) in other cases, recover damages in any manner that is reasonable under
11 the circumstances.

12 (3) If a buyer becomes insolvent, the seller may:

13 (a) withhold delivery under Section 2-702(1);

14 (b) stop delivery of the goods under Section 2-705;

15 (c) reclaim the goods under Section 2-702(2).

16 **Preliminary Comment**

17
18 1. This section is a list of the remedies of the seller available under this Article to remedy
19 any breach by the buyer. It also lists the seller's statutory remedies in the event of buyer
20 insolvency. The subsection does not address the extent to which other law provides additional
21 remedies or supplements the statutory remedies in Article 2 (see Section 1-103).

22
23 In addition to the statutory remedies, it contemplates agreed upon remedies, see

1 subsection (2)(l). It does not address remedies that become available upon demand for adequate
2 assurance under Section 2-609.

3
4 This Article rejects any doctrine of election of remedy as a fundamental policy and thus
5 the remedies are essentially cumulative in nature and include all of the available remedies for
6 breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the
7 individual case.

8
9 2. The buyer's breach which occasions the use of the remedies under this section may
10 involve only one lot or delivery of goods, or may involve all of the goods which are the subject
11 matter of the particular contract. The right of the seller to pursue a remedy as to all the goods
12 when the breach is as to only one or more lots is covered by the section on breach in installment
13 contracts. The present section deals only with remedies available after the goods involved in the
14 breach have been determined by that section.

15
16 3. In addition to the typical case of refusal to pay or default in payment, the language in
17 subsection (1), "fails to make a payment due, is intended to cover the dishonor of a check on
18 due presentment, or the non-acceptance of a draft, and the failure to furnish an agreed letter of
19 credit.

20
21 4. It should also be noted that this Act requires its remedies to be liberally administered
22 and provides that any right or obligation which it declares is enforceable by action unless a
23 different effect is specifically prescribed (Section 1-106).

24
25 **§ 2-704. Seller's Right to Identify Goods to the Contract Notwithstanding Breach or**
26 **to Salvage Unfinished Goods.**

27
28 (1) An aggrieved seller under the preceding section may

29 (a) identify to the contract conforming goods not already identified if at the
30 time ~~he~~ the seller learned of the breach they are in ~~his~~ the seller's possession or
31 control;

32 (b) treat as the subject of resale goods which have demonstrably been
33 intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

§ 2-705. Seller's Stoppage of Delivery in Transit or Otherwise.

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when ~~he~~ the seller discovers the buyer to be insolvent (Section 2-702) ~~and may stop delivery of carload, truckload, planeload or larger shipments of express or freight or~~ when the buyer 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.

(2) As against such buyer the seller may stop delivery until

(a) receipt of the goods by the buyer; or

(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

1 (b) After such notification the bailee must hold and deliver the goods
2 according to the directions of the seller but the seller is liable to the bailee for any
3 ensuing charges or damages.

4 (c) If a negotiable document of title has been issued for goods the bailee is
5 not obliged to obey a notification to stop until surrender of the document.

6 (d) A carrier who has issued a non-negotiable bill of lading is not obliged
7 to obey a notification to stop received from a person other than the consignor.

8 **Preliminary Comment**

9
10 Subsection (1) has been amended to omit the restriction that prohibited stoppage of less
11 than “carload, truckload, planeload or larger shipments in certain circumstances. The capacity
12 of carriers to identify shipments as small as a single package makes it feasible to stop small
13 shipments.”

14 15 **§ 2–706. Seller's Resale Including Contract for Resale.**

16
17 (1) ~~Under the conditions stated in Section 2–703 on seller's remedies~~ In an
18 appropriate case involving breach by the buyer, the seller may resell the goods concerned or the
19 undelivered balance thereof. Where the resale is made in good faith and in a commercially
20 reasonable manner the seller may recover the difference between the contract price and the resale
21 price and the contract price together with any incidental or consequential damages allowed under
22 the provisions of this Article (Section 2–710), but less expenses saved in consequence of the
23 buyer's breach.

24 (2) Except as otherwise provided in subsection (3) or unless otherwise agreed
25 resale may be at public or private sale including sale by way of one or more contracts to sell or of

1 identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any
2 time and place and on any terms but every aspect of the sale including the method, manner, time,
3 place and terms must be commercially reasonable. The resale must be reasonably identified as
4 referring to the broken contract, but it is not necessary that the goods be in existence or that any
5 or all of them have been identified to the contract before the breach.

6 (3) Where the resale is at private sale the seller must give the buyer reasonable
7 notification of ~~his~~ an intention to resell.

8 (4) Where the resale is at public sale

9 (a) only identified goods can be sold except where there is a recognized
10 market for a public sale of futures in goods of the kind; and

11 (b) it must be made at a usual place or market for public sale if one is
12 reasonably available and except in the case of goods which are perishable or
13 threaten to decline in value speedily the seller must give the buyer reasonable
14 notice of the time and place of the resale; and

15 (c) if the goods are not to be within the view of those attending the sale the
16 notification of sale must state the place where the goods are located and provide
17 for their reasonable inspection by prospective bidders; and

18 (d) the seller may buy.

19 (5) A purchaser who buys in good faith at a resale takes the goods free of any
20 rights of the original buyer even though the seller fails to comply with one or more of the
21 requirements of this section.

1 (6) The seller is not accountable to the buyer for any profit made on any resale. A
2 person in the position of a seller (Section 2-707) or a buyer who has rightfully rejected or
3 justifiably revoked acceptance must account for any excess over the amount of ~~his~~ the buyer's
4 security interest, as hereinafter defined (subsection (3) of Section 2-711).

5 (7) Failure of a seller to resell within this section does not bar the seller from any
6 other remedy.

7 Preliminary Comment

8
9 1. **Changes.** Consistent with the revision of Section 2-710, this section now provides for
10 consequential as well as incidental damages. Subsection (7) is new, and parallels the provision
11 for buyer cover in 2-713. Original Section 2-706(1) measures damages by the difference between
12 the resale price and the contract price; amended subsection (1) reverses these terms ("difference
13 between the contract price and the resale price") because the contract price must be the larger
14 number for there to be direct damages.

15
16 2. The right of resale under this section arises when a seller reclaims goods under Section
17 2-507 or a buyer repudiates or makes a wrongful but effective rejection. In addition, there is a
18 right of resale if the buyer unjustifiably attempts to revoke acceptance and the seller takes back
19 the goods. However, the seller may choose to ignore the buyer's unjustifiable attempt to revoke
20 acceptance, in which case the appropriate remedy is an action for the price under Section 2-709.
21 Application of the right of resale to cases of buyer repudiation is supplemented by subsection (2),
22 which authorizes a resale of goods which are not in existence or were not identified to the
23 contract before the breach.

24
25 Subsection (1) allows the seller to resell the goods after a buyer's breach of contract if the
26 seller has possession or control of the goods. The seller may have possession or control of the
27 goods at the time of the breach or may have regained possession of the goods upon the buyer's
28 wrongful rejection. If the seller has regained possession of the goods from the buyer pursuant to
29 Article 9, that Article controls the seller's rights of resale.

30
31 3. Under this Article the seller resells by authority of law, on the seller's own behalf, for
32 the seller's own benefit and for the purpose of setting the seller's damages. The theory of a seller's
33 agency is thus rejected. The question of whether the title to the goods has or has not passed to the
34 buyer is not relevant for the operation of this section.

1
2 4. To recover the damages prescribed in subsection (1) the seller must act "in good faith
3 and in a commercially reasonable manner" in making the resale. If the seller complies with the
4 prescribed standards in making the resale, the seller may recover from the buyer the damages
5 provided for in subsection (1). Evidence of market or current prices at any particular time or
6 place is relevant only for the question of whether the seller acted in a commercially reasonable
7 manner in making the resale.
8

9 5. Subsection (2) enables the seller to resell in accordance with reasonable commercial
10 practices so as to realize as high a price as possible in the circumstances. A seller may sell at a
11 public sale or a private sale as long as the choice is commercially reasonable. A "public" sale is
12 one to which members of the public are admitted. A public sale is usually a sale by auction, but
13 all auctions are not public auctions. A private sale may be effected by an auction or by
14 solicitation and negotiation conducted either directly or through a broker. In choosing between a
15 public and private sale, the character of the goods must be considered and relevant trade practices
16 and usages must be observed. A public sale has further requirements stated in subsection (4).
17

18 The purpose of subsection (2) is to enable the seller to dispose of the goods to the best
19 advantage, and therefore the seller is permitted in making the resale to depart from the terms and
20 conditions of the original contract for sale to any extent "commercially reasonable" in the
21 circumstances.
22

23 As for the place for resale, the focus is on the commercial reasonableness of the seller's
24 choice as to the place for an advantageous resale. This section rejects the theory that the seller
25 should normally resell at the agreed place for delivery and that a resale elsewhere can be
26 permitted only in exceptional cases.
27

28 The time for resale is a reasonable time after the buyer's breach. What is a reasonable
29 time depends on the nature of the goods, the condition of the market and the other circumstances
30 of the case; its length cannot be measured by any legal yardstick or divided into degrees. When a
31 seller contemplating resale receives a demand from the buyer for inspection under Section 2-515,
32 the time for resale may be appropriately lengthened.
33

34 6. The provision of subsection (2) that the goods need not be in existence to be resold
35 applies when the buyer is guilty of anticipatory repudiation of a contract for future goods before
36 the goods or some of the goods have come into existence. In this case, the seller may exercise the
37 right of resale and fix the damages by "one or more contracts to sell" the quantity of conforming
38 future goods affected by the repudiation.
39

1 The companion provision of subsection (2), that resale may be made although the goods
2 were not identified to the contract prior to the buyer's breach, likewise contemplates an
3 anticipatory repudiation by the buyer, but one occurring after the goods are in existence. The
4 seller may identify goods to the contract after the breach, but must identify the goods being sold
5 as pertaining to the breached contract. If the identified goods conform to the contract, their resale
6 will fix the seller's damages as satisfactorily as if the goods had been identified before the breach.

7
8 7. If the resale is to be by private sale, subsection (3) requires that reasonable notification
9 of the seller's intention to resell must be given to the buyer. Notification of the time and place of
10 a private resale is not required.

11
12 8. Subsection (4) states requirements for a public resale. The requirements of this
13 subsection are in addition to the requirements of subsection (2), which pertain to all resales under
14 this section.

15
16 Paragraph (a) of subsection (4) qualifies the last sentence of subsection (2) with respect to
17 resales of unidentified and future goods at public sale. If conforming goods are in existence the
18 seller may identify them to the contract after the buyer's breach and then resell them at public
19 sale. If the goods have not been identified, however, the seller may resell them at public sale only
20 as "future" goods and only if there is a recognized market for public sale of futures in goods of
21 the kind.

22
23 Subsection (4)(b) requires that the seller give the buyer reasonable notice of the time and
24 place of a public resale so that the buyer may have an opportunity to bid or to secure the
25 attendance of other bidders. An exception is made in the case of goods "which are perishable or
26 threaten to decline speedily in value."

27
28 Since there would be no reasonable prospect of competitive bidding elsewhere,
29 subsection (4)(b) requires that a public resale "must be made at a usual place or market for public
30 sale if one is reasonably available"; i.e., a place or market which prospective bidders may
31 reasonably be expected to attend. The market may still be "reasonably available" under this
32 subsection, although at a considerable distance from the place where the goods are located. In
33 this case, the expense of transporting the goods for resale is recoverable from the buyer as part of
34 the seller's incidental damages under subsection (1). However, the question of availability is one
35 of commercial reasonableness in the circumstances and if such "usual" place or market is not
36 reasonably available, a duly advertised public resale may be held at another place if it is one
37 which prospective bidders may reasonably be expected to attend, as distinguished from a place
38 where there is no demand whatsoever for goods of the kind.

1 Subsection (4)(c) is designed to permit intelligent bidding. Subsection (4)(d), which
2 permits the seller to bid and, of course, to become the purchaser, benefits the original buyer by
3 tending to increase the resale price and thus decreasing the damages the buyer will have to pay.

4
5 9. Subsection (5) allows a purchaser to take the goods free of the rights of the buyer even
6 if the seller has not complied with this section. The policy of resolving any doubts in favor of the
7 resale purchaser operates to the benefit of the buyer by increasing the price the purchaser should
8 be willing to pay.

9
10 10. Subsection (6) recognizes that when the seller is entitled to resell under this Article,
11 the goods are the seller's goods and the purpose of resale under this section is to set the seller's
12 damages as against the buyer. However, a person in the position of the seller under Section 2-707
13 or a buyer asserting a security interest in the goods under Section 2-711(3) has only a limited
14 right in the goods and so must account to the seller for any excess over the limited amount
15 necessary to satisfy that right.

16
17 11. Subsection (7) expresses the policy that resale is not a mandatory remedy for the
18 seller. Except as otherwise provided in Section 2-710, the seller is always free to choose between
19 resale and damages for repudiation or nonacceptance under Section 2-708.

20
21 Subsection (7) parallels the provision in the cover section, Section 2-712. A seller that
22 fails to comply with the requirements of this section may recover damages under Section 2-
23 708(1). In addition, a seller may recover both incidental and consequential damages under
24 Section 2-710 assuming the seller's damages have not been liquidated under Section 2-718 or
25 limited under Section 2-719.

26
27 **§ 2-707. "Person in the Position of a Seller".**

28
29 (1) A "person in the position of a seller" includes as against a principal an agent
30 who has paid or become responsible for the price of goods on behalf of ~~his~~ the principal or
31 anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

32 (2) A person in the position of a seller ~~may as provided in this Article withhold or~~
33 ~~stop delivery (Section 2-705) and resell (Section 2-706) and recover incidental damages (Section~~
34 ~~2-710)~~ has the same remedies as a seller under this Article.

1 **Preliminary Comment**

2
3 Subsection (2) has been amended to permit a “person in the position of a seller to have
4 the full range of remedies available to a seller.

5
6 **§ 2–708. Seller's Damages for Non-acceptance or Repudiation.**

7
8 (1) Subject to subsection (2) and to the provisions of this Article with respect to
9 proof of market price (Section 2–723)

10 _____ (a) the measure of damages for non-acceptance or repudiation by the buyer
11 is the difference between the contract price and the market price at the time and
12 place for tender and the unpaid contract price together with any incidental or
13 consequential damages provided in this Article (Section 2–710), but less expenses
14 saved in consequence of the buyer's ~~breach~~ breach; and

15 (b) the measure of damages for repudiation by the buyer is the difference
16 between the contract price and the market price at the place for tender at the
17 expiration of a commercially reasonable time after the seller learned of the
18 repudiation, but no later than the time stated in paragraph (a), together with any
19 incidental or consequential damages provided in this Article (Section 2–710), but
20 less expenses saved in consequence of the buyer's breach.

21 (2) If the measure of damages provided in subsection (1) or in Section 2-706 is
22 inadequate to put the seller in as good a position as performance would have done then the
23 measure of damages is the profit (including reasonable overhead) which the seller would have
24 made from full performance by the buyer, together with any incidental or consequential damages

provided in this Article (Section 2-710), ~~due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.~~

Preliminary Comment

1. Changes. This section contains the following changes from original Section 2-708:

a) Consistent with the revision of Section 2-710, this section now provides for consequential as well as incidental damages. Subsection (1) has been divided into two paragraphs. The new paragraph, clarifies the measure of damages in anticipatory repudiation. The same approach has been taken in Section 2-713 on buyer's market-based damage claims.

b) Original Section 2-708(1) sets the measure of damages as the difference between the market price and the unpaid contract price. The word "unpaid" has been deleted as superfluous and misleading. An aggrieved buyer that has already paid a portion of the price is entitled to recover it in restitution under Section 2-718.

c) Original Section 2-708(1) measures damages by the difference between the resale price and the contract price. Subsection (1) of this draft reverses the terms ("difference between the contract price and the resale price") because the contract price must be the larger number in order for there to be direct damages. Compare Sections 2-712 and 2-713 on buyer's remedies, where the contract price is listed after the cover or market price.

d) Subsection (2) now has the following emphasized language added: "provided in subsection (1) or Section 2-706 is inadequate Most courts have correctly assumed that original Section 2-708(2) was an alternative to Section 2-706 as well as Section 2-708(1) but still have had to ask the question. See, e.g., R.E. Davis Chemical Corp. v. Diasonics, Inc., 826 F.2d 678 (7th Cir. 1987). The change makes this result explicit.

e) In subsection (2), the phrases that appeared in original 2-708(2), "due allowance for costs reasonably incurred" and "due credit for payments or proceeds of resale" have been deleted. As has been noted repeatedly (see, e.g., Harris, A General Theory for Measuring Seller's Damages for Total Breach of Contract, 60 Mich. L. Rev. 577 (1962)); the "due credit" language makes no sense for a seller who has lost a sale not because it ceased manufacture on a buyer's breach but because it has resold a finished product (that was made for its breaching buyer) to one its existing buyers. When a seller ceases manufacture and resells component parts for scrap or salvage value under Section 2-704(2), a credit for the proceeds is due the buyer to offset the damages under this section. And when a seller incurs costs that are not

1 recovered by scrap or salvage, it must be given an “allowance for those costs to measure its loss
2 accurately. See E. Farnsworth Contracts Section 12.9 (3rd ed. 1999)(general measure of damages
3 = loss in value + other loss – cost avoided – loss avoided).

4
5 2. The right to damages under this section arises when a seller reclaims goods under
6 Section 2-507 or a buyer repudiates or makes a wrongful but effective rejection. In addition,
7 there is a right to damages under this Section if the buyer unjustifiably attempts to revoke
8 acceptance and the seller takes back the goods. However, if the seller refuses to take the goods
9 back in the face of the buyer’s unjustifiable attempt to revoke acceptance, the appropriate remedy
10 is an action for the price under Section 2-709.

11
12 3. The current market price at the time and place for tender is the standard by which
13 damages for nonacceptance are to be determined. The time and place of tender is determined by
14 Section 2-503 on tender of delivery and by the use of common shipping terms. The provisions of
15 Section 2-723 are relevant in determining the market price.

16
17 In the event that there is no evidence available of the current market price at the time and
18 place of tender, proof of a substitute market may be made as provided in Section 2-723.
19 Furthermore, the section on the admissibility of market quotations is intended to ease materially
20 the problem of providing competent evidence.

21
22 4. Subsection (1)(b) addresses the question of when the market price should be measured
23 in the case of an anticipatory repudiation by the buyer. This section provides that the market
24 price should be measured in a repudiation case at the place of tender under the agreement at a
25 commercially reasonable time after the seller learned of the repudiation, but no later than the time
26 of tender under the agreement. This time approximates the market price at the time the seller
27 would have resold the goods, even though the seller has not done so under Section 2-706. In
28 determining whether the seller has learned of the repudiation, the court should be sensitive to the
29 rights of the aggrieved party when tactical behavior by the buyer has made the determination
30 difficult. See Louisiana Power and Light v. Allegheny Ludlow, 517 F. Supp. 1319 (D.C.La.
31 1981).

32
33 In a long term contract the calculation of damages for repudiation will be complex. The
34 court must first determine not only the market but also the contract price at the time of breach.
35 Since contract prices in long term contracts are commonly escalated, the court will have to
36 determine the escalated price at the time the aggrieved party learned of the repudiation. Next the
37 court must determine the quantities contracted for in each of the succeeding years of the
38 contract, apply the single difference between the market price and the escalated contract price
39 (determined at the time the aggrieved party learned of the repudiation) to the contracted quantity
40 for each of those years, and discount those damages for each of the future years to a present

1 value. See generally 1 J. White & R. Summers, Uniform Commercial Code, Practitioner Ed. 4th
2 347 (1995).

3
4 5. Subsection (2) is used in the cases of uncompleted goods, jobbers or middlemen, and
5 other lost-volume sellers. This remedy is an alternative to the remedy under subsection (1) or
6 Section 2-706 and is available when the damages based upon resale of the goods or market price
7 of the goods does not achieve the goal of full compensation for harm caused by the buyer's
8 breach. No effort has been made to state how lost profits should be calculated because of the
9 variety of situations in which this measurement may be appropriate and the variety of ways in
10 which courts have measured lost profits. This subsection permits the recovery of lost profits in
11 all appropriate cases. Since this section deals with the plaintiff's lost profit on a particular sale,
12 and not with cases where a plaintiff is suing for the "lost profits" from an enterprise as
13 consequential damages, it is not necessary to show a history of earnings; all that is necessary is
14 that the plaintiff shows a loss of the marginal benefit to be gained from performance of the
15 broken contract.

16
17 To qualify as a "lost volume" seller, the seller needs to show only that it could have
18 supplied both the breaching purchaser and the resale purchaser with the goods. Islamic Republic
19 of Iran v. Boeing Co., 771 F.2d 1279 (9th Cir. 1985). Where an aggrieved seller has sold goods
20 made for the breaching party to another, courts should consider whether the seller could and
21 would have made a profit on an additional sale in addition to the breached sale. If the Seller
22 could not or would not have profitably made another sale in the absence of breach, there is no
23 lost volume and the buyer would normally be made whole by a recovery of the incidental costs
24 associated with the substitute transaction.

25
26 6. Consequential damages are not recoverable under this section unless seller has made
27 reasonable attempts to minimize its damages in good faith, either by resale under Section 2-706
28 or by other reasonable means.

29
30 7. Where an agreement contains provisions for payment of a liquidated sum of money as
31 an alternative to performance, (such take-or-pay contracts), a court must determine whether the
32 agreement is truly for alternative performances or whether the alternatives are performance or
33 liquidated damages. Recovery under this section is available when a buyer breaches an
34 alternative performance contract. When the "alternative" is truly liquidated damages and when
35 that damage provision complies with Section 2-718 recovery, is under the liquidated damage
36 clause. See Royce Realty & Developing, Inc. v. Arkla, Inc., 863 P.2d 1150, 1154, 22 UCC2d 183
37 (Okla. 1993); 5A Corbin, Corbin on Contracts § 1082, at 463-64 (1964).

38
39 8. In some cases an aggrieved party's resale should prevent that party from recovering the
40 contract market difference under this section. If for example a seller does not lose a sale because

1 of the buyer's breach and resells at a price equal to or in excess of the contract price, the seller
2 should recover no more than incidental and consequential damages. To award an additional
3 amount because the seller could show the market price was higher than the contract price would
4 overcompensate the seller. Of course, a defendant, who wished so to limit a plaintiff seller,
5 would have to prove the resale and show that it had the economic effect of limiting the aggrieved
6 party's actual loss to an amount less than the contract market difference.

7
8 Whether a breaching party should be able to deprive an aggrieved party from the use of
9 the contract market formulas on a showing that the aggrieved party's actual damages were less
10 than the difference between the contract and the market prices has been much disputed in the
11 academic literature and has not received a consistent answer from the courts. Compare Nobs
12 Chemical USA Inc., v. Koppers Co. Inc., 616 F.2d 212 (5th. Cir. 1980), reh'g denied 618 F.2d
13 1389 (5th Cir. 1980)(yes) and Allied Cannery & Packers, Inc. v. Victor Packing Co., 162 Cal.
14 App.3d 905, 209 Cal. Rptr. 60 (1984)(yes) with Tongish v. Thomas, 840 P.2d 471 (Kan.
15 1992)(no). Even under the rule of Nobs Chemical, an aggrieved party should not be foreclosed
16 from recovery of the contract market difference simply because that party chooses not to proceed
17 with its transaction after the other party breaches. Trans World Metals, Inc. v. Southwire Co.,
18 769 F.2d 902 (2d Cir. 1985). In most cases it will be difficult for a defendant buyer to show that
19 an aggrieved seller's resale should foreclose recovery of the contract market difference under 2-
20 708(a) or lost profit under 2-708(b). Since most commercial sellers would have made at least one
21 additional sale had there had been no breach (the sale to the breaching buyer and the sale to the
22 third party), the resale does not make the seller whole. Sometimes it may even be appropriate for
23 a court to allow an aggrieved party to use a contract market formula in lieu of proof of its actual
24 loss to preserve its business secrets. See Ben-Shahar and Bernstein, The Secrecy Interest in
25 Contract Law, 109 Yale L. J. 1885 (2000).

26 27 **§ 2-709. Action for the Price.**

28
29 (1) When the buyer fails to pay the price as it becomes due the seller may recover,
30 together with any incidental or consequential damages under the next section, the price

31 (a) of goods accepted or of conforming goods lost or damaged within a
32 commercially reasonable time after risk of their loss has passed to the buyer; and

33 (b) of goods identified to the contract if the seller is unable after
34 reasonable effort to resell them at a reasonable price or the circumstances
35 reasonably indicate that such effort will be unavailing.

1 (2) Where the seller sues for the price ~~he~~ the seller must hold for the buyer any
2 goods which have been identified to the contract and are still in ~~his~~ the seller's control except
3 that if resale becomes possible ~~he~~ the seller may resell them at any time prior to the collection of
4 the judgment. The net proceeds of any such resale must be credited to the buyer and payment of
5 the judgment entitles ~~him~~ the buyer to any goods not resold.

6 (3) After the buyer has wrongfully rejected or revoked acceptance of the goods or
7 has failed to make a payment due or has repudiated (Section 2-610), a seller who is held not
8 entitled to the price under this section shall nevertheless be awarded damages for non-acceptance
9 under the preceding section.

10 **Preliminary Comment**

11
12 Subsection (1) has been amended to permit recovery of consequential damages as
13 provided in amended Section 2-710.

14 15 **§ 2-710. Seller's Incidental and Consequential Damages.**

16
17 (1) Incidental damages to an aggrieved seller include any commercially reasonable
18 charges, expenses or commissions incurred in stopping delivery, in the transportation, care and
19 custody of goods after the buyer's breach, in connection with return or resale of the goods or
20 otherwise resulting from the breach.

21 (2) Consequential damages resulting from the buyer's breach include any loss
22 resulting from general or particular requirements and needs of which the buyer at the time of
23 contracting had reason to know and which could not reasonably be prevented by resale or
24 otherwise.

(3) In a consumer contract, a seller may not recover consequential damages from a
consumer.

Preliminary Comment

1. Subsection (2), which permits an aggrieved seller to recover consequential damages, is based on Section 2-715(2)(a); that is, the loss must result from general or particular requirements of the seller of which the buyer had reason to know at the time of contracting. As with Section 2-715, the “tacit agreement test is rejected and the buyer is not liable for losses that could have been mitigated.

Sellers rarely suffer compensable consequential damages. A buyer's usual default is failure to pay. In normal circumstances the disappointed seller will be able to sell to another, borrow to replace the breaching buyer's promised payment, or otherwise adjust its affairs to avoid consequential loss. cf. Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1368 (7th Cir. 1985).

2. Subsection (3) precludes seller's from recovering consequential damages from consumers.

§ 2-711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

~~(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or~~

~~(b) recover damages for non-delivery as provided in this Article (Section~~

1 ~~2-713).~~

2 ~~(2) Where the seller fails to deliver or repudiates the buyer may also~~

3 ~~(a) if the goods have been identified recover them as provided in this~~
4 ~~Article (Section 2-502); or~~

5 ~~(b) in a proper case obtain specific performance or replevy the goods as~~
6 ~~provided in this Article (Section 2-716).~~

7 (1) A breach of contract by the seller includes the seller's wrongful failure to
8 deliver or to perform a contractual obligation, making of a nonconforming tender of delivery or
9 performance, or repudiation.

10 (2) If the seller is in breach of contract under subsection (1) the buyer may to the
11 extent provided for by [the Uniform Commercial Code] or other law:

12 (a) in the case of rightful cancellation, rightful rejection or justifiable
13 revocation of acceptance recover so much of the price as has been paid;

14 (b) deduct damages from any part of the price still due under Section 2-
15 717;

16 (c) cancel;

17 (d) cover and have damages under Section 2-712 as to all goods affected
18 whether or not they have been identified to the contract;

19 (e) recover damages for non-delivery or repudiation under Section 2-713;

20 (f) recover damages for breach with regard to accepted goods or breach

1 with regard to a remedial promise under Section 2-714;

2 (g) recover identified goods under Section 2-502;

3 (h) obtain specific performance or obtain the goods by Replevin or the like
4 under Section 2-716;

5 (i) recover liquidated damages under Section 2-718;

6 (j) in other cases, recover damages in any manner that is reasonable under
7 the circumstances.

8 (3) On rightful rejection or justifiable revocation of acceptance a buyer has a
9 security interest in goods in ~~his~~ the buyer's possession or control for any payments made on their
10 price and any expenses reasonably incurred in their inspection, receipt, transportation, care and
11 custody and may hold such goods and resell them in like manner as an aggrieved seller (Section
12 2-706).

13 **Preliminary Comment**

14
15 1. Despite the seller's breach, proper tender of delivery under the section on cure of
16 improper tender or replacement can effectively preclude the buyer's remedies under this section,
17 except for any delay involved.

18
19 2. To make it clear in subsection (3) that the buyer may hold and resell rejected goods if
20 the buyer has paid a part of the price or incurred expenses of the type specified. "Paid" as used
21 here includes acceptance of a draft or other time negotiable instrument or the signing of a
22 negotiable note. The buyer's freedom of resale is coextensive with that of a seller under this
23 Article except that the buyer may not keep any profit resulting from the resale and is limited to
24 retaining only the amount of the price paid and the costs involved in the inspection and handing
25 of the goods. The buyer's security interest in the goods is intended to be limited to the items
26 listed in subsection (c), and the buyer is not permitted to retain such funds as the buyer might
27 believe adequate for his damages. The buyer's right to cover, or to have damages for non-
28 delivery, is not impaired by the buyer's exercise of the right of resale.

1 3. It should also be noted that this Act requires its remedies to be liberally
2 administered and provides that any right or obligation which it declares is enforceable by action
3 unless a different effect is specifically prescribed (Section 1-106).

4
5 **§ 2-712. "Cover"; Buyer's Procurement of Substitute Goods.**

6
7 (1) ~~After a breach within the preceding section~~ If the seller wrongfully fails to
8 deliver or repudiates or the buyer rightfully rejects or justifiably revokes acceptance, the buyer
9 may "cover" by making in good faith and without unreasonable delay any reasonable purchase of
10 or contract to purchase goods in substitution for those due from the seller.

11 (2) The buyer may recover from the seller as damages the difference between the
12 cost of cover and the contract price together with any incidental or consequential damages as
13 hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's
14 breach.

15 (3) Failure of the buyer to effect cover within this section does not bar ~~him~~ the
16 buyer from any other remedy.

17 **Preliminary Comment**

18
19 1. **Changes.** Original Section 2-712(1) refers to a seller's "breach" as the basis for the
20 remedy in this section. The language has been changed to make it clear that there is a right to
21 cover "[i]f the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects or
22 justifiably revokes acceptance."

23
24 2. The purpose of this section is to provide the buyer with a remedy to enable the buyer to
25 obtain the goods the buyer is entitled to under the contract with the seller. This remedy is the
26 buyer's equivalent of the seller's right to resell.

27
28 The buyer is entitled to this remedy if the seller wrongfully fails to deliver the goods or
29 repudiates the contract or if the buyer rightfully rejects or justifiably revokes acceptance. Cover

1 is not available under this section if the buyer accepts the goods and does not rightfully revoke
2 the acceptance.

3
4 3. Subsection (2) allows a buyer that has appropriately covered to measure damages by
5 the difference between the cover price and the contract price. In addition, the buyer is entitled to
6 incidental damages, and when appropriate, consequential damages under Section 2-715.

7
8 4. The definition of "cover" is necessarily flexible, and therefore cover includes a series
9 of contracts or sales as well as a single contract or sale, goods not identical with those involved
10 but commercially usable as reasonable substitutes under the circumstances, and contracts on
11 credit or delivery terms differing from the contract in breach but reasonable under the
12 circumstances. The test of proper cover is whether at the time and place of cover the buyer acted
13 in good faith and in a reasonable manner. It is immaterial that hindsight may later prove that the
14 method of cover used was not the cheapest or most effective.

15
16 5. The requirement in subsection (1) that the buyer must cover "without unreasonable
17 delay" is not intended to limit the time necessary for the buyer to examine reasonable options and
18 decide how best to effect cover.

19
20 6. Subsection (3) expresses the policy that cover is not a mandatory remedy for the buyer.
21 The buyer is always free to choose between cover and damages for nondelivery under Section 2-
22 713. However, this subsection must be read in conjunction with the section 2-715(2)(a), which
23 limits the recovery of consequential damages to those damages that could not reasonably be
24 prevented by cover. Moreover, the operation of Section 2-716(3) on replevin and the like must be
25 considered because the inability to cover is made an express condition to the right of the buyer to
26 replevy the goods.

27
28 **§ 2-713. Buyer's Damages for Non-delivery or Repudiation.**

29
30 (1) Subject to the provisions of this Article with respect to proof of market price
31 (Section 2-723), if the seller wrongfully fails to deliver or repudiates or the buyer rightfully
32 rejects or justifiably revokes acceptance

33 _____ (a) the measure of damages for non-delivery or repudiation in the case of
34 wrongful failure to deliver by the seller or rightful rejection or justifiable

revocation of acceptance by the buyer is the difference between the market price at the time ~~when the buyer learned of the breach~~ for tender under the contract and the contract price together with any incidental ~~and~~ or consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's ~~breach~~. breach; and

(b) the measure of damages for repudiation by the seller is the difference between the market price at the expiration of a commercially reasonable time after the buyer learned of the repudiation, but no later than the time stated in paragraph (a), and the contract price together with any incidental or consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

Preliminary Comment

1. **Changes.** This section now provides a rule for anticipatory repudiation cases. This is consistent with the new rule for sellers in Section 2-708(1)(b). In a case not involving repudiation, the buyer's damages will be based on the market price at the time for tender under the agreement. This changes the former rule where the time for measuring damages was at the time the buyer learned of the breach.

2. This section provides for a buyer's expectancy damages when the seller wrongfully fails to deliver the goods or repudiates the contract or the buyer rightfully rejects or justifiably revokes acceptance. This section provides an alternative measure of damages to the cover remedy provided for in Section 2-712.

3. Under subsection (1)(a), the measure of damages for a wrongful failure to deliver the

1 goods by the seller or a rightful rejection or justifiable revocation of acceptance by the buyer is
2 the difference between the market price at the time for tender under the agreement and the
3 contract price.

4
5 4. Subsection (2)(b) addresses the question when the market price should be measured in
6 the case of an anticipatory repudiation by the seller. The market price should be measured in a
7 repudiation case at the place where the buyer would have covered at a commercially reasonable
8 time after the buyer learned of the repudiation, but no later than the time of tender under the
9 agreement. This time approximates the market price at the time the buyer would have covered
10 even though the buyer has not done so under Section 2-712. This subsection is designed to put
11 the buyer in the position the buyer would have been in if the seller had performed by
12 approximating the harm the buyer has suffered without allowing the buyer an unreasonable time
13 to speculate on the market at the seller's expense.

14
15 5. The market or current price to be used in comparison with the contract price under this
16 section is the price for goods of the same kind and in the same branch of trade.

17
18 When the current market price under this section is difficult to prove, Section 2-723 on
19 determination and proof of market price is available to permit a showing of a comparable market
20 price. When no market price is available, evidence of spot sale prices may be used to determine
21 damages under this section. When the unavailability of a market price is caused by a scarcity of
22 goods of the type involved, a good case may be made for specific performance under Section 2-
23 716. See the Preliminary Comment to that Section. For a discussion of the issues associated with
24 long term contracts see the comments to 2-708.

25
26 6. In addition to the damages provides in this section, the buyer is entitled to incidental
27 and consequential damages under Section 2-715.

28
29 7. In some cases obtaining cover should prevent the buyer from recovering the contract
30 market difference under this section. If for example a construction company that intended to buy
31 only one bulldozer covered by buying a bulldozer from a third party at or below the contract price
32 after a seller's breach, the buyer should recover no more than incidental and consequential
33 damages. To award an additional amount because the buyer could show the market price was
34 higher than the contract price would put the buyer in a better position than performance would
35 have. Of course, the seller would bear the burden of proving that cover had the economic effect
36 of limiting the buyer's actual loss to an amount less than the contract market difference.

37
38 In many cases an apparent cover should not foreclose the use of the contract market
39 measure of damages. If, for example, the buyer intended to buy an undetermined number of

1 bulldozers, the purchase of a bulldozer from a third party after breach would not necessarily
2 reduce the buyer's damages. If the breaching seller cannot prove that the new purchase is in fact a
3 replacement for the one not delivered under the contract, the "cover purchase should not
4 foreclose the buyer's recovery under 2-713 of the market contract difference.

5
6 For a discussion of the question when an aggrieved party should be foreclosed from a
7 contract market recover because of its cover or resale, see the Preliminary Comments to 2-708.

8 9 **§ 2-714. Buyer's Damages for Breach in Regard to Accepted Goods.**

10
11 (1) Where the buyer has accepted goods and given notification (subsection (3) of
12 Section 2-607) ~~he~~ the buyer may recover as damages for any non-conformity of tender the loss
13 resulting in the ordinary course of events from the seller's breach as determined in any manner
14 which is reasonable.

15 (2) The measure of damages for breach of warranty is the difference at the time
16 and place of acceptance between the value of the goods accepted and the value they would have
17 had if they had been as warranted, unless special circumstances show proximate damages of a
18 different amount.

19 (3) In a proper case any incidental and consequential damages under the next
20 section may also be recovered.

21 **§ 2-716. Buyer's Right to Specific Performance or Replevin.**

22
23 (1) Specific performance may be decreed where the goods are unique or in other
24 proper circumstances. In a contract other than a consumer contract, specific performance may
25 be decreed if the parties have agreed to that remedy. However, even if the parties agree to
26 specific performance, specific performance may not be decreed if the breaching party's sole

1 remaining contractual obligation is the payment of money.

2 (2) The decree for specific performance may include such terms and conditions as
3 to payment of the price, damages, or other relief as the court may deem just.

4 (3) The buyer has a right of replevin or the like for goods identified to the contract
5 if after reasonable effort ~~he~~ the buyer is unable to effect cover for such goods or the
6 circumstances reasonably indicate that such effort will be unavailing or if the goods have been
7 shipped under reservation and satisfaction of the security interest in them has been made or
8 tendered.

9 (4) The buyer's right under subsection (3) vests upon acquisition of a special
10 property, even if the seller had not then repudiated or failed to deliver.

11 **Preliminary Comment**

12
13 1. Changes: This section contains the following changes from original Section 2-716:

14
15 a) The second sentence of subsection (1) explicitly permits parties to bind
16 themselves to specific performance even where it would not otherwise be available.

17
18 b) In subsection (3), the phrase "or the like" has been added after "replevin" to
19 reflect the fact that under the governing state law the right may be called "detinue,
20 "sequestration, "claim and delivery, or something else.

21
22 c) Subsection (4) is new and corresponds with Section 2-502(b), which in turn is
23 derived from (but broader than) the conforming amendments to Article 9. It provides a vesting
24 rule for cases in which there is a right of replevin.

25
26 2. Uniqueness should be determined in light of the total circumstances surrounding the
27 contract and is not limited to goods identified when the contract is formed. The typical specific
28 performance situation today involves an output or requirements contract rather than a contract for
29 the sale of an heirloom or priceless work of art. A buyer's inability to cover is evidence of "other

proper circumstances.

3. Subsection (1) provides that a court may decree specific performance if the parties have agreed to that remedy; the parties' agreement to specific performance can be enforced even if legal remedies are entirely adequate. Even in a commercial contract, the third sentence of subsection (1) prevents the aggrieved party from obtaining specific performance if the only obligation of the party in breach is the payment of money. Whether a buyer is obligated to pay the price is determined by Section 2-709, not by this section.

Nothing in this section constrains the court's exercise of its equitable discretion in deciding whether to enter a decree for specific performance or in determining the conditions or terms of such a decree. This section assumes that the decree for specific performance will be conditioned on a tender of full performance by the party that is seeking the remedy.

4. The legal remedy of replevin or the like is also available for cases in which cover is unavailable and the goods have been identified to the contract. This is in addition to the prepaying buyer's right to recover identified goods upon the seller's insolvency or, when the goods have been bought for a personal, family, or household purpose, upon the seller's repudiation or failure to deliver (Section 2-502). If a negotiable document of title is outstanding, the buyer's right of replevin relates to the document and does not directly relate to the goods. See Article 7, especially Section 7-602.

5. Subsection (4) provides that a buyer's right to replevin or the like vests upon the buyer's acquisition of a special property in the goods (Section 2-501) even if the seller has not at that time repudiated or failed to make a required delivery. This vesting rule assumes application of a "first in time" priority rule. In other words, if the buyer's rights vest under this rule before a creditor acquires an *in rem* right to the goods, including an Article 9 security interest and a lien created by levy, the buyer should prevail.

§ 2-717. Deduction of Damages From the Price.

The buyer on notifying the seller of his an intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

§ 2-718. Liquidation or Limitation of Damages; Deposits.

1 (1) Damages for breach by either party may be liquidated in the agreement but
2 only at an amount which is reasonable in the light of the anticipated or actual harm caused by the
3 breach, ~~the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise~~
4 ~~obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a~~
5 ~~penalty.~~ and, in a consumer contract, in addition the difficulties of proof of loss and the
6 inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. Section 2-719
7 determines the enforceability of a term that limits but does not liquidate damages.

8 (2) Where the seller justifiably withholds delivery of goods or stops performance
9 because of the buyer's breach or insolvency, the buyer is entitled to restitution of any amount by
10 which the sum of ~~his~~ the buyer's payments exceeds ~~(a)~~ the amount to which the seller is entitled
11 by virtue of terms liquidating the seller's damages in accordance with subsection (1), ~~or (b) in the~~
12 ~~absence of such terms, twenty per cent of the value of the total performance for which the buyer~~
13 ~~is obligated under the contract or \$500, whichever is smaller.~~

14 (3) The buyer's right to restitution under subsection (2) is subject to offset to the
15 extent that the seller establishes

16 (a) a right to recover damages under the provisions of this Article other
17 than subsection (1), and

18 (b) the amount or value of any benefits received by the buyer directly or
19 indirectly by reason of the contract.

20 (4) Where a seller has received payment in goods their reasonable value or the
21 proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the

1 seller has notice of the buyer's breach before reselling goods received in part performance, ~~his~~ the
2 resale is subject to the conditions laid down in this Article on resale by an aggrieved seller
3 (Section 2-706).

4 Preliminary Comment

5
6 1. Changes. This section contains the following changes from original Section 2-718:

7
8 a) In subsection (1), the requirements that the party seeking to enforce a term
9 liquidating damages demonstrate “difficulties of proof of loss and “inconvenience or
10 nonfeasibility of otherwise obtaining an adequate remedy have been eliminated in commercial
11 contracts.

12
13 b) In subsection (1), the sentence “[a] term fixing unreasonably large liquidated
14 damages is void as a penalty has been eliminated as unnecessary and capable of causing
15 confusion.

16
17 c) The last sentence of subsection (1) has been added to clarify the relationship
18 between this section and Section 2-719.

19
20 d) In subsection (2), the circumstances in which restitution is available have been
21 expanded to cover any situation where the seller stops performance on account of the buyer’s
22 breach or insolvency.

23
24 e) In subsection (2), the buyer’s right to restitution is not limited by a statutory
25 liquidated damages provision.

26
27 2. A valid liquidated damages term may set the amount of all damages, including
28 consequential and incidental damages. As under former law, liquidated damages clauses should
29 be enforced if the amount is reasonable in light of the factors provided in subsection (1). This
30 section respects the parties’ ability to contract for damages while providing some control by
31 requiring reasonableness based upon the circumstances of the particular case.

32
33 Under original Section 2-718, a party seeking to enforce a liquidated damages term had to
34 demonstrate the difficulty of proving the loss and the inconvenience or nonfeasibility of
35 obtaining an adequate remedy. These tests have been eliminated in commercial contracts but

1 retained in consumer contracts.

2
3 3. The sentence from original Section 2-718(1) stating that an unreasonably large
4 liquidated damages term is void as a penalty has been eliminated as unnecessary and misleading.
5 If the liquidated damages are reasonable in light of the anticipated harm the term should be
6 enforced even if the actual harm is small; the penalty language of the former law could have been
7 construed to contradict that outcome. Cases to the contrary are rejected.

8
9 4. If a liquidated damages term is unenforceable, the remedies of this Article become
10 available to the aggrieved party.

11
12 5. Under subsection (2), only the buyer's payments that are more than the amount of an
13 enforceable liquidated damages term need be returned to the buyer. If the buyer has made
14 payment by virtue of a trade-in or other goods deposited with the seller, subsection (4) provides
15 that the reasonable value of such goods or their resale price should be used to determine what the
16 buyer has paid, not the value the seller allowed the buyer in the trade-in. To assure that the seller
17 obtains a reasonable price for such goods, the seller must comply with the resale provisions of
18 Section 2-706 if the seller knows of the buyer's breach before it has otherwise resold them.

19
20 Subsection (2) expands the situations in which restitution is available. Original Section
21 2-718(2) was limited to circumstances in which the seller justifiably withheld delivery because of
22 the buyer's breach. Subsection (2) extends the right to situations where the seller stops
23 performance because of the buyer's breach or insolvency.

24
25 6. Subsection (3) continues the rule from former law without change. If there is no
26 enforceable liquidated damages term, the buyer is entitled to restitution under subsection (2)
27 subject to a set off of the seller for any damages to which it is otherwise entitled to under this
28 Article.

29
30 **§ 2-722. Who Can Sue Third Parties for Injury to Goods.**

31
32 Where a third party so deals with goods which have been identified to a contract
33 for sale as to cause actionable injury to a party to that contract

34 (a) a right of action against the third party is in either party to the contract

35 for sale who has title to or a security interest or a special property or an insurable

1 interest in the goods; and if the goods have been destroyed or converted a right of
2 action is also in the party who either bore the risk of loss under the contract for
3 sale or has since the injury assumed that risk as against the other;

4 (b) if at the time of the injury the party plaintiff did not bear the risk of loss
5 as against the other party to the contract for sale and there is no arrangement
6 between them for disposition of the recovery, ~~his~~ the party plaintiff's suit or
7 settlement is, subject to ~~his~~ its own interest, as a fiduciary for the other party to the
8 contract;

9 (c) either party may with the consent of the other sue for the benefit of
10 whom it may concern.

11 **§ 2-723. Proof of Market Price: Time and Place.**

12 ~~(1) If an action based on anticipatory repudiation comes to trial before the time for~~
13 ~~performance with respect to some or all of the goods, any damages based on market price~~
14 ~~(Section 2-708 or Section 2-713) shall be determined according to the price of such goods~~
15 ~~prevailing at the time when the aggrieved party learned of the repudiation.~~

16 ~~(2)~~ (1) If evidence of a price prevailing at the times or places described in this
17 Article is not readily available the price prevailing within any reasonable time before or after the
18 time described or at any other place which in commercial judgment or under usage of trade
19 would serve as a reasonable substitute for the one described may be used, making any proper
20 allowance for the cost of transporting the goods to or from such other place.

21 ~~(3)~~ (2) Evidence of a relevant price prevailing at a time or place other than the one

1 described in this Article offered by one party is not admissible unless and until he has given the
2 other party such notice as the court finds sufficient to prevent unfair surprise.

3 Preliminary Comment

4
5 Subsection (1) has been deleted because Sections 2-708(1)(b) and 2-713(1)(b) now
6 provide the rule for the proper measure of damages in cases of repudiation.

7 8 **§ 2-724. Admissibility of Market Quotations.**

9
10 Whenever the prevailing price or value of any goods regularly bought and sold in
11 any established commodity market is in issue, reports in official publications or trade journals or
12 in newspapers ~~or periodicals~~ , periodicals or other means of communication in of general
13 circulation published as the reports of such market shall be admissible in evidence. The
14 circumstances of the preparation of such a report may be shown to affect its weight but not its
15 admissibility.

16 Preliminary Comment

17
18 The addition of “other means of communication” reflects the common use of non-paper
19 media.

20 21 **§ 2-725. Statute of Limitations in Contracts for Sale.**

22
23 ~~(1) An action for breach of any contract for sale must be commenced within four~~
24 ~~years after the cause of action has accrued. By the original agreement the parties may reduce the~~
25 ~~period of limitation to not less than one year but may not extend it.~~

26 ~~(2) A cause of action accrues when the breach occurs, regardless of the aggrieved~~

1 ~~party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is~~
2 ~~made, except that where a warranty explicitly extends to future performance of the goods and~~
3 ~~discovery of the breach must await the time of such performance the cause of action accrues~~
4 ~~when the breach is or should have been discovered.~~

5 (1) Except as otherwise provided in this section, an action for breach of any
6 contract for sale must be commenced within the later of four years after the right of action has
7 accrued under subsection (2) or (3) or one year after the breach was or should have been
8 discovered, but no longer than five years after the right of action accrued. By the original
9 agreement the parties may reduce the period of limitation to not less than one year but may not
10 extend it; however, in a consumer contract, the period of limitation may not be reduced.

11 (2) Except as otherwise provided in subsection (3), the following rules apply:

12 (a) Except as otherwise provided in this subsection, a right of action for
13 breach of a contract accrues when the breach occurs, even if the aggrieved party
14 did not have knowledge of the breach.

15 (b) For breach of a contract by repudiation, a right of action accrues at the
16 earlier of when the aggrieved party elects to treat the repudiation as a breach or
17 when a commercially reasonable time for awaiting performance has expired.

18 (c) For breach of a remedial promise, a right of action accrues when the
19 remedial promise is not performed when due. However

20 (i) if the remedial promise is not made in connection with a
21 warranty arising under Section 2-313, 2-314 or 2-315 or an obligation other than

1 the remedial promise arising under Section 2-313A or 2-313B, an action may not
2 be commenced after the later of i) two years after the right of action accrues, or ii)
3 four years after tender of delivery to the immediate buyer, defined in Section 2-
4 313, or receipt of the goods by the remote purchaser, defined in Sections 2-313A
5 and 2-313B; and

6 (ii) if the remedial promise is made in connection with a warranty
7 arising under Section 2-313, 2-314 or 2-315 or an obligation other than the
8 remedial promise arising under Section 2-313A or 2-313B, an action may not be
9 commenced after the later of i) two years after the right of action accrues, or ii) the
10 period of limitations for the warranty or the other obligation expires.

11 (d) In an action by a buyer against a person that is answerable over to the
12 buyer for a claim asserted against the buyer, the buyer's right of action against the
13 person answerable over accrues at the time the claim was originally asserted
14 against the buyer.

15 (3) If a breach of a warranty arising under Section 2-312, 2-313, 2-314, or 2-315,
16 or a breach of an obligation other than a remedial promise arising under Section 2-313A or 2-
17 313B, is claimed the following rules apply:

18 (a) Except as otherwise provided in paragraph (c), a right of action for
19 breach of a warranty arising under Section 2-313, 2-314 or 2-315 accrues when
20 the seller has tendered delivery to the immediate buyer, as defined in Section 2-
21 313, and has completed performance of any agreed installation or assembly of the
22 goods.

1 **(b) Except as otherwise provided in paragraph (c), a right of action for**
2 **breach of an obligation other than a remedial promise arising under Section**
3 **2-313A or 2-313B accrues when the remote purchaser, as defined in sections 2-**
4 **313A and 2-313B, receives the goods.**

5 **(c) Where a warranty arising under Section 2-313 or an obligation other**
6 **than a remedial promise arising under 2-313A or 2-313B explicitly extends to**
7 **future performance of the goods and discovery of the breach must await the time**
8 **for performance the right of action accrues when the immediate buyer as defined**
9 **in Section 2-313 or the remote purchaser as defined in Sections 2-313A and 2-**
10 **313B discovers or should have discovered the breach.**

11 **(d) A right of action for breach of warranty arising under Section 2-312**
12 **accrues when the aggrieved party discovers or should have discovered the breach.**
13 **However, an action for breach of the warranty of non-infringement may not be**
14 **commenced more than six years after tender of delivery of the goods to the**
15 **aggrieved party.**

16 ~~(3)~~ **(4)** Where an action commenced within the time limited by subsection (1) is so
17 terminated as to leave available a remedy by another action for the same breach such other action
18 may be commenced after the expiration of the time limited and within six months after the
19 termination of the first action unless the termination resulted from voluntary discontinuance or
20 from dismissal for failure or neglect to prosecute.

21 ~~(4)~~ **(5)** This section does not alter the law on tolling of the statute of limitations
22 nor does it apply to causes of action which have accrued before this Act becomes effective.

Preliminary Comment

1. Original Section 2-725 has been changed as follows: 1) The basic four-year limitation period in subsection (1) has been supplemented by a discovery rule that permits a cause of action to be brought within one year after the breach was or should have been discovered, although no later than five years after the time the cause would otherwise have accrued; 2) The applicable limitation period cannot be reduced in a consumer contract (subsection (1)); 3) Subsection (2) contains specific rules for cases of repudiation, breach of a remedial promise, and actions where another person is answerable over; 4) Subsection (3)(a) provides that the limitation period for breach of warranty accrues when tender of delivery has occurred and the seller has completed any agreed installation or assembly of the goods; 5) Subsection (3) contains specific rules for breach of an obligation arising under Section 2-313A or 2-313B, for breach of a warranty arising under Section 2-312, and for breach of a warranty against infringement.

2. Subsection (1) continues the four-year limitation period of original Article 2 but provides for a possible one-year extension to accommodate a discovery of the breach late in the four year period after accrual. The four year period under this Article is shorter than many other statutes of limitation for breach of contract and provides a period which is appropriate given the nature of the contracts under this Article and modern business practices. As under original Article 2, the period of limitation can be reduced to one year by an agreement in a commercial contract, but no reduction is permitted in consumer contracts.

3. Subsections (2) and (3) provide rules for accrual of the various types of action that this Article allows. Certainty of commercial relationships is advanced when the rules are clearly set forth. Subsection (2) deals with accrual rules for actions other than for breach of a warranty, including actions based on repudiation or breach of a remedial promise and actions where another person is answerable over. Subsection (3) deals with the accrual rules for the various claims based on a warranty, including a warranty of title and a warranty against infringement, or on an obligation other than a remedial promise arising under Section 2-313A or 2-313B.

Subsection (2)(a) states the general rule from prior law that a right of action for breach of contract accrues when the breach occurs without regard to the aggrieved party's knowledge of the breach. This general rule is then subject to the three more explicit rules in subsection (2) and to the rules for breach of warranty stated in subsection (3).

Subsection (2)(b) provides an explicit rule about repudiation cases. In a repudiation, the aggrieved party may await performance for a commercially reasonable time or resort to any remedy for breach. Section 2-610. The accrual rule for breach of contract in a repudiation case is keyed to the earlier of those two time periods.

Subsection (2)(c) addresses the accrual of a cause of action for breach of a remedial promise. A remedial promise may be made in the absence of a warranty running to an immediate buyer arising under Section 2-313, 2-314 or 2-315 or an obligation (other than the remedial promise itself) arising under Section 2-313A or 2-313B, as where a seller promises that it will

1 repair or replace any part that proves to be defective but does not warrant that the parts will not
2 fail. Conversely, a remedial promise may be made in conjunction with this warranty or other
3 obligation.

4
5 When there is no warranty or other obligation, a cause of action for breach of a remedial
6 promise accrues when the promise is not performed when due, and an action may not be brought
7 after the later of two years after the accrual date for the promise or four years after tender of
8 delivery. Thus, if the seller breaches the remedial promise in the first year after tender of
9 delivery the buyer has until the end of the fourth year after tender to commence an action;
10 however, if the breach occurs during the fourth year after tender the buyer may commence an
11 action for two years after the breach. Likewise, if the seller's remedial promise expressly extends
12 for five years and is breached during the fifth year, the buyer has until two years after the breach
13 to commence an action.

14
15 When the remedial promise is made in connection with a warranty or other obligation, the
16 limitation period is the later of two years after the accrual date for breach of the promise or the
17 time when a cause of action for breach of the warranty or other obligation would otherwise
18 expire. Thus, if the seller undertakes an obligation to a remote purchaser under Section 2-313A
19 that no parts will be defective at the time the goods leave the seller's control and in connection
20 with that obligation promises to repair or replace any part that fails during a three-year period
21 commencing with the remote purchaser's receipt of the goods, the remote purchaser's cause of
22 action for breach of the remedial promise expires at the later of two years after the promise is not
23 performed when due or four years after the remote purchaser receives the goods (subsection
24 (3)(b)).

25
26 Subsection (2)(d) addresses the problem that has arisen in the cases when an intermediary
27 party is sued for a breach of obligation for which its seller or another person is answerable over,
28 but the limitations period in the upstream lawsuit has already expired. This subsection allows a
29 party four years, or if reduced in the agreement, not less than one year, from when the claim is
30 originally asserted against the buyer for the buyer to sue the person that is answerable over.
31 Whether a party is in fact answerable over to the buyer is not addressed in this section.

32
33 4. Subsection (3) addresses the accrual rules for breach of a warranty arising under
34 Section 2-312, 2-313, 2-314 or 2-315, or of an obligation relating to the goods arising under
35 Section 2-313A or 2-313B. The accrual rules explicitly incorporate the definitions of
36 "immediate buyer" and "remote purchaser" in Sections 2-313, 2-313A and 2-313B. Any cause
37 of action brought by another person to which the warranty or obligation extends is derivative in
38 nature. Thus, the time period applicable to the immediate buyer or remote purchaser governs
39 even if the action is brought by a person to which the warranty or obligation extends under
40 Section 2-318.

41
42 Subsection (3)(a) continues the general rule that an action for breach of warranty accrues
43 in the case of an express or implied warranty to an immediate buyer upon completion of tender of
44 delivery of nonconforming goods to the immediate buyer but makes explicit that accrual is

1 deferred until the completion of any installation or assembly that the seller has agreed to
2 undertake. This extension of the time of accrual in the case of installation or assembly applies
3 only in the case of the seller promising to install or assemble and not in the case of a third party,
4 independent of the seller, undertaking that action.

5
6 Subsection (3)(b) addresses the accrual of a cause of action for breach of an obligation
7 other than a remedial promise arising under Section 2-313A or 2-313B. In these cases, the cause
8 of action accrues when the remote purchaser (as defined in those sections) receives the goods.
9 This accrual rule balances the rights of the remote buyer or remote lessee to be able to have a
10 cause of action based upon the warranty obligation the seller has created against the rights of the
11 seller to have some limit on the length of time the seller is liable.

12
13 Both of these accrual rules are subject to the exception in subsection (3)(c) for a warranty
14 or obligation that explicitly extends to the future performance of the goods and discovery of the
15 breach must await the time for performance. In this case, the cause of action does not accrue
16 until the buyer or remote purchaser discovers or should have discovered the breach.

17
18 With regard to a warranty of title or a warranty of non-infringement under Section 2-312,
19 subsection (3)(d) provides that a cause of action accrues when the aggrieved party discovers or
20 should have discovered the breach. In a typical case, the aggrieved party will not discover the
21 breach until it is sued by a party asserting title to the goods or an infringement, an event which
22 could be many years after the buyer acquired the goods. The accrual rule allows the aggrieved
23 party appropriate leeway to then bring a claim against the person that made the warranty. In
24 recognition of a need to have a time of repose in an infringement case, a party may not bring an
25 action based upon a warranty of non-infringement more than six years after tender of delivery.

26
27 5. Subsection (4) states the saving provision included in many state statutes and permits
28 an additional short period for bringing new actions where suits begun within the four year period
29 have been terminated so as to leave a remedy still available for the same breach.

30
31 6. Subsection (5) makes it clear that this Article does not purport to alter or modify in
32 any respect the law on tolling of the Statute of Limitations as it now prevails in the various
33 jurisdictions.

34 PART 8

35 TRANSITION PROVISIONS

36 § 2-801. Effective Date.

37
38
39
40 This [Act] shall become effective on _____, 20__.

41 § 2-802. Amendment of Existing Article 2.

1 This [Act] amends [insert citation to existing Article 2].

2 **§ 2-803. Applicability.**

3 This [Act] applies to a transaction within its scope that is entered into on or after
4 the effective date of this [Act]. This [Act] does not apply to a transaction that is entered into
5 before the effective date of this [Act] even if the transaction would be subject to this [Act] if it
6 had been entered into after the effective date of this [Act]. This [Act] does not apply to a cause
7 of action that has accrued before the effective date of this [Act].

8 **§ 2-804. Savings Clause.**

9 A transaction entered into before the effective date of this [Act] and the rights,
10 obligations, and interests flowing from that transaction are governed by any statute or other law
11 amended or repealed by this [Act] as if amendment or repeal had not occurred and may be
12 terminated, completed, consummated, or enforced under that statute or other law.