

REPORTER'S INTERIM DRAFT

FOR COMMENT

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

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

NOVEMBER, 1999

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

With Reporter's Notes

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ON UNIFORM STATE LAWS

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NOVEMBER 1999 INTERIM DRAFT

[Preliminary Note. This draft has not been considered by the Drafting Committee. It is the Reporter's Interim Draft, circulated for comment prior to the consideration of the Drafting Committee. The Reporter's Notes appended to the various sections are just that – notes. They are not official comments but merely describe the rationale for many of the decisions that have been made during the production of this draft.]

PART 1

GENERAL PROVISIONS

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

Code – Sales.

[Reporter's Note – This section retains language from the July draft of 2-101 to conform to the style of Article 3, Article 4, Article 4A, Article 5, and Article 8.]

SECTION 2-102. SCOPE.

(a) This Article applies to transactions in goods.

(b) If a transaction includes computer information and goods, this Article applies to the goods, but if a copy of a computer program is contained in and sold as part of other goods, this Article applies to the copy and the computer program unless:

(1) the other goods are a computer or computer peripheral; or

(2) giving the buyer access to or use of the program is ordinarily a material purpose of transactions in goods of the type sold.

(c) If there is a conflict between this Article and another Article of the [Uniform Commercial Code] that Article governs.

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

1 *[Reporter's Note - Subsection (b) will need to be fleshed out with a comment along the following*
2 *lines:*

3 *"This revision does not govern computer information transactions. Judicial*
4 *decisions that have applied existing Article 2 directly or by analogy to resolve an issue*
5 *in such a transaction are not necessarily retroactively disapproved. If a state has*
6 *enacted UCITA, it will govern such transactions after its effective date. If a state has not*
7 *enacted UCITA, a court could apply a provision of the revision by analogy if that*
8 *represents a sound policy choice, taking into account the expressed intentions of the*
9 *parties to the transaction, the differences between a sale of goods and a license of*
10 *computer information, and the policies reflected in UCITA.]*

11 *[Reporter's Note – Subsection (c) is based on a provision in the July draft. It is a helpful*
12 *clarification but should be accompanied by a comment making clear that it is a “one-way*
13 *street” – that is, it does not permit a provision from Article 2 to be injected into another Article.]*

14 **SECTION 2-103. DEFINITIONS.**

15 (a) In this Article:

16 (1) “Authenticate” means:

17 (A) to sign; or

18 (B) execute or adopt a symbol, or encrypt a record in whole or in

19 par, with present intent:

20 (i) identify the authenticating party; and

21 (ii) either:

22 (I) adopt or accept a record or term; or

23 (II) establish the authenticity of a record or term that

24 contains the authentication or to which a record containing the authentication refers.

25 *[Reporter's Note – This definition comes from Revised Article 9.]*

26 (2) “Between merchants” means in any transaction with respect to which

27 both parties are chargeable with the knowledge or skill of merchants.

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

2 (4) “Cancellation” means an act by either party which puts an end to the
3 contract for breach by the other.

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

9 **Alternative A to subsection (a)(6)**

10 (6) “Computer” means an electronic device that accepts information in
11 digital or similar form and manipulates it for a certain result based on a sequence of instructions.

12 *[Reporter’s Note – This definition comes from UCITA. There is some concern that it may be too*
13 *broad.]*

14 **Alternative B to subsection (a)(6)**

15 (6) “Computer” means an electronic device that can perform substantial
16 computations, including numerous arithmetic operations or logic operations, without human
17 intervention during the computation or operation.

18 *[Reporter’s Note – This definition comes from the July draft of Revised Article 2 and the July*
19 *draft of UCITA.]*

20 (7) “Computer information” means information in electronic form which is
21 obtained from or through the use of a computer, or which is in a form capable of being processed
22 by a computer. The term includes a copy of the information and any documentation or packaging
23 associated with the copy.

1 *[Reporter’s Note – This definition comes from UCITA.]*

2 (8) “Computer program” means computer information consisting of a set
3 of statements or instructions to be used directly or indirectly in a computer to bring about a
4 certain result.

5 *[Reporter’s Note – This term comes from UCITA but has been modified to make it clear that a*
6 *computer program is a subset of computer information. In addition, the definition deletes*
7 *UCITA’s reference to separately identifiable informational content.]*

8 (9) “Conforming” goods or conduct means goods or conduct that are in
9 accordance with the obligations under the contract.

10 (10) “Conspicuous”, with reference to a term, means so written, displayed,
11 or presented that a reasonable person against which it is to operate ought to have noticed it. A
12 term in an electronic record intended to evoke a response by an electronic agent is conspicuous if
13 it is presented in a form that would enable a reasonably configured electronic agent to take it into
14 account or react without review of the record by an individual. Whether a term is “conspicuous”
15 or not is a decision for the court. Conspicuous terms include the following:

16 (A) with respect to a person:

17 (i) a heading in capitals equal to or greater in size than the
18 surrounding lower case text, or in contrasting type, font, or color to the surrounding text of the
19 same or lesser size;

20 (ii) language in the body of a record or display in larger type
21 than the surrounding text, or in contrasting type, font, or color to the surrounding text of the
22 same size, or set off from surrounding text of the same size by symbols or other marks that call
23 attention to the language; and

1 [(iii) a term prominently referenced in an electronic record
2 or display which is readily accessible and reviewable from the record or display; and]

3 (B) with respect to a person or an electronic agent, a term [or
4 reference to a term] that is so placed in a record or display that the person or electronic agent can
5 not proceed without taking action with respect to the particular term [or reference].

6 *[Reporter's Note – This definition is adapted from current 1-201 and from UCITA. Paragraph*
7 *(A)(3) is bracketed for discussion. It does not create a safe-harbor since a court must still*
8 *determine whether a reference is “prominently” displayed, and thus it may do no more than*
9 *reiterate the basic test for conspicuousness (“whether a reasonable person against which it is to*
10 *operate ought to have noticed it”). For consistency, brackets are placed around related*
11 *provisions in paragraph (B).]*

12 *[Reporter's Note – There should be a comment that makes plain that the subsections cannot be*
13 *manipulated by unscrupulous sellers. For example, a contrasting color must create a true*
14 *contrast, and a heading in capitals isn't conspicuous if it is in minuscule type even if it is larger*
15 *than the surrounding text. See Comment 10 to Section 1-201.]*

16 (11) “Consumer” means an individual that buys or contracts to buy goods
17 that, at the time of contracting, are intended by the individual to be used primarily for personal,
18 family, or household purposes. Personal, family, or household purposes do not include
19 professional or commercial purposes, including agriculture, business management, and investment
20 management, other than management of the individual's personal or family investments.

21 (12) “Consumer contract” means a contract between a merchant seller and
22 a consumer.

23 (13) “Contract” means a present sale of goods or a contract to sell goods
24 at a future time.

25 (14) “Copy” means the medium on which information is fixed on a
26 temporary or permanent basis and from which it can be perceived, reproduced, used, or

communicated, either directly or with the aid of a machine or device.

[Reporter's Note – This definition comes from UCITA.]

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

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

[Reporter's Note – This definition comes from UCITA.]

(17) “Electronic agent” means a computer program, or electronic or other automated means, used by a person to initiate an action, or to respond to electronic record or performances, on the person’s behalf without review or action by an individual at the time of the action, response, or performance.

[Reporter's Note – This definition comes from UCITA, except that UCITA uses “electronic message” and this draft uses “electronic record”.]

(18) “Electronic record” means a record that is stored, generated, or transmitted by electronic means for the purpose of communication to another person or electronic agent.

[Reporter's Note – This is a slightly modified version of UCITA’s definition of “electronic message”.]

(19) "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

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

4 (20) "Foreign exchange transaction" means a transaction in which one
5 party agrees to deliver a quantity of a specified money or unit of account in consideration of the
6 other party's agreement to deliver another quantity of different money or unit of account either
7 currently or at a future date, and in which delivery is to be through funds transfer, book entry
8 accounting, or other form of payment order, or other agreed means to transfer a credit balance.
9 The term includes a transaction of this type involving multiple moneys and spot, forward, option,
10 or other products derived from underlying moneys and any combination of these transactions.
11 The term does not include a transaction involving multiple moneys in which one or both of the
12 parties is obligated to make physical delivery, at the time of contracting or in the future, of
13 banknotes, coins, or other form of legal tender or specie.

14 (21) "Future goods" means goods that are not both existing and identified.

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

17 (23) "Goods" means all things (including specially manufactured goods)
18 that are movable at the time of identification to the contract for sale. The term includes the
19 unborn young of animals, growing crops, and other identified things to be severed from realty
20 under Section 2-107. The term does not include money in which the price is to be paid, the
21 subject matter of foreign exchange transactions, computer information, documents, letters of
22 credit, letter-of-credit rights, instruments, investment property, accounts, chattel paper, deposit

accounts, or general intangibles.

(24) “Information” means data, text, images, sounds, mask works, or computer programs, including collections and compilations of them.

[Reporter’s Note – This definition comes from UCITA.]

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

[Reporter’s Note – This definition comes from UCITA.]

(26) “Installment contract” means a contract which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a term “each delivery is a separate contract” or its equivalent.

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

(28) “Merchant” means a person who deals in goods of the kind or otherwise by its occupation holds itself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by its employment of an agent or broker or other intermediary who by its occupation holds itself out as having such knowledge or skill.

(29) “Present sale” means a sale that is accomplished by the making of the contract.

(30) “Receipt” means:

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

(B) with respect to a notice:

1 (i) coming to a person's attention; or
2 (ii) being delivered to and available at a location or
3 information processing system designated by agreement for that purpose or, in the absence of an
4 agreed location or system:

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

9 (II) in the case of a notice that is an electronic
10 record, coming to existence in a system or at an address in that system in a form capable of being
11 processed by or perceived from a system of that type by a recipient, if the recipient uses, or
12 otherwise has designated or holds out, that system or address for receipt of notices of the kind to
13 be given and the sender does not know that the notice cannot be accessed from that place.

14 *[Reporter's Note – This definition is adapted from UCITA. A comment will make clear that it*
15 *must be read in a manner that is consistent with 1-201(27) on receipt by an organization.]*

16 (31) "Receive" means to take receipt.

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

19 *[Reporter's Note – This definition is used in both UCITA and UETA.]*

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

22 (34) "Sale" means the passing of title to goods from the seller to the

1 buyer for a price.

2 (35) “Seller” means a person that sells or contracts to sell goods.

3 (36) “Send” means, with any costs provided for and properly addressed or
4 directed as reasonable under the circumstances or as otherwise agreed, to deposit a record in the
5 mail or with a commercially reasonable carrier, to deliver in a reasonable manner a record for
6 transmission to or re-creation in another location or information processing system, or to take the
7 steps necessary to initiate transmission to or re-creation of a record in another location or
8 information processing system. In addition, with respect to an electronic record, the term
9 includes to initiate operations that in the ordinary course will cause the record to come into
10 existence in an information processing system or at an address within that system in a form
11 capable of being processed by or perceived from a system of that type by the recipient, if the
12 recipient uses, or otherwise has designated or holds out, that system or address as a place for the
13 receipt of communications of the kind sent. Receipt within the time in which it would have
14 arrived if properly sent has the effect of a proper sending.

15 *[Reporter’s Note – This definition is a slightly modified version of UCITA.]*

16 (37) “Termination” means that either party pursuant to a power created
17 by agreement or law has put an end to the contract otherwise than for its breach.

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

19 (1) “Accounts” Section 9-102(a)(2).

20 (2) “Chattel paper” Section 9-102(a)(11).

21 (3) “Check” Section 3-104(e).

22 (4) “Deposit accounts” Section 9-102(a)(29).

1	(5) “Dishonor”	Section 3-502.
2	(6) “Draft”	Section 3-104(e).
3	(7) “General intangibles”	Section 9-102(a)(42)
4	(8) “Injunction against honor”	Section 5-109(b).
5	(9) “Instruments”	Section 3-104(b).
6	(10) “Investment property”	Section 9-102(a)(49).
7	(11) “Letter of credit”	Section 5-102(a)(10).
8	(12) “Letter-of-credit rights”	Section 9-102(a)(51).

9 (c) In addition Article 1 contains general definitions and principles of construction
10 and interpretation applicable throughout this article.

11 *[Reporter’s Note – All definitions used in more than one section should be set out in a single*
12 *section. This is consistent with Article 2A, although it deviates from present Article 2, which has*
13 *definitions in multiple sections.]*

14 **SECTION 2-104. TRANSACTION SUBJECT TO OTHER LAW.**

15 (a) Except as otherwise provided in subsection (b), this Article does not impair or
16 repeal:

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

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

22 (3) any other law of this State to which the transaction is subject, such as
23 laws dealing with:

(A) the sale of agricultural products;

(B) the transfer of blood, blood products, human tissues, and parts;

(C) the consignment or transfer by artists of works of art or fine prints;

(D) distribution agreements, franchises, and other relationships through which goods are sold;

(E) tort liability for products that cause injury to person or property;

(F) the making and disclaimer of warranties;

(G) the misbranding or adulteration of food products and drugs;

and

(H) dealers in particular products, such as automobiles, motorized wheelchairs, agricultural equipment, and hearing aids.

(b) If another law of this State applies to a transaction subject to this Article and requires that a term, waiver, notice, or disclaimer be in a writing, or requires that a writing, term, waiver, notice, or disclaimer be signed, the requirement is satisfied by a record or by an authentication unless one of the parties to the transaction is a consumer and it is clear that the other law intended the formalism of a writing or a signature to protect that party.

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

(d) Failure to comply with laws of the kind referred to in subsection (a) has only

the effect specified in those laws.

[Reporter's Note – This section deviates from existing numbering. In the present text, this is covered in the scope section (2-102).]

SECTION 2-105. INTEREST AND PART INTEREST IN GOODS.

(a) Goods must be both existing and identified before any interest in them can pass.

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

(c) A purported present sale of future goods or of any interest therein operates as a contract to sell.

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

[Reporter's Note – The language is the same as existing Article 2. However, the section has been renamed and the text abridged because the definitions have been moved to 2-103.]

SECTION 2-106. EFFECT OF TERMINATION AND CANCELLATION.

On termination all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives. The effect of cancellation is the same as that of termination except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

[Reporter's Note – Termination and cancellation are now defined in section 2-103.]

[Reporter's Note – The second sentence is from the existing code, and therefore is being

1 *preserved. However, a comment will be useful to give examples of other rights that may also*
2 *survive termination or cancellation.]*

3 **SECTION 2–107. GOODS TO BE SEVERED FROM REALTY: RECORDING.**

4 (a) A contract for the sale of minerals or the like (including oil and gas) or a
5 structure or its materials to be removed from realty is a contract for the sale of goods within this
6 Article if they are to be severed by the seller but until severance a purported present sale thereof
7 which is not effective as a transfer of an interest in land is effective only as a contract to sell.

8 (b) A contract for the sale apart from the land of growing crops or other things
9 attached to realty and capable of severance without material harm thereto but not described in
10 subsection (a) or of timber to be cut is a contract for the sale of goods within this Article whether
11 the subject matter is to be severed by the buyer or by the seller even though it forms part of the
12 realty at the time of contracting, and the parties can by identification effect a present sale before
13 severance.

14 (c) The provisions of this section are subject to any third party rights provided by
15 the law relating to realty records, and the contract for sale may be executed and recorded as a
16 document transferring an interest in land and shall then constitute notice to third parties of the
17 buyer's rights under the contract for sale.

18 *[Reporter's Note – There is no from change from current law.]*

1 **PART 2**
2 **FORM, FORMATION, TERMS, AND READJUSTMENT**
3 **OF CONTRACT; ELECTRONIC CONTRACTING**

4 *[Reporter's Note – The heading has been amended to add a reference to electronic contracting.]*

5 **SECTION 2-201. FORMAL REQUIREMENTS.**

6 (a) A contract for the sale of goods for the price of \$5,000 or more is not
7 enforceable by way of action or defense unless there is some record sufficient to indicate that a
8 contract has been made between the parties and authenticated by the party against which
9 enforcement is sought or by its authorized agent or broker. A record is not insufficient because it
10 omits or incorrectly states a term agreed upon but the contract is not enforceable under this
11 paragraph beyond the quantity of goods shown in such record.

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

16 (c) A contract which does not satisfy the requirements of subsection (1) but which
17 is valid in other respects is enforceable

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

23 (2) if the party against whom enforcement is sought admits in the party's

pleading, or in the party's testimony or otherwise under oath that a contract for sale was made,
but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
(3) with respect to goods for which payment has been made and accepted
or which have been received and accepted. (Sec. 2– 606).

(d) An enforceable contract under this section is not rendered unenforceable
merely because it is not capable of being performed within one year or any other applicable period
after its making.

[Reporter's Note – The following substantive changes have been made to existing 2-201(a):

1. The amount has been raised from \$500 to \$5,000.

*2. The first clause ("Except as otherwise provided in this section") has been eliminated.
This is intended to allow courts to bring in promissory estoppel and other common-law equitable
doctrines. The courts have been split on this issue.*

3. "Writing" has been changed to "record".]

*[Reporter's Note – Subsection (c) is retained from existing law. The only substantive change is
that admissions under oath (e.g., in depositions, in affidavits attached to motions) now satisfy
the statute under subsection (c)(2)(current 2-201 refers to admissions in "court").]*

[Reporter's Note – Subsection (d) is new and is derived from the July draft.]

SECTION 2-202. PAROL OR EXTRINSIC EVIDENCE.

(a) Terms with respect to which the confirmatory records of the parties agree or
which are otherwise set forth in a record intended by the parties as a final expression of their
agreement with respect to 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 supplemented
(1) by evidence of course of performance, course of dealing or usage of
trade; and

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

(b) 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.

[Reporter's Note - Subsection (a) is consistent with current law except that any reference to interpretation issues has been eliminated. Interpretation is dealt with in subsection (b).]

[Reporter's Note - The present law provides for the admission of "evidence" of additional terms, and course of performance, course of dealing, or usage of trade. This text provides for "evidence" of additional terms as well as "evidence" of course of performance, course of dealing, or usage of trade. This change reflects the acknowledgment that course of performance, course of dealing, or usage of trade are not absolutes, but are just categories of evidence.]

[Reporter's Note – Subsection (b), which is not in the present law and which is derived from the July draft as amended at the annual meeting, brings up into the statutory text what has always existed in the comments. See comment 1(c) to 2-202: "The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a)[now (b)] is an original determination by the court that the language used is ambiguous." It is clear that this is what subsection (a) has always been intended to mean, and this is a clear statement that we reject those cases that hold to the contrary.]

SECTION 2-203. SEALS INOPERATIVE.

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

[Reporter's Notes – There is no substantive change to the law; however, "writing" has been changed to "record."]

SECTION 2-204. FORMATION IN GENERAL.

1 (a) 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 contract, or the interaction of electronic agents.

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

6 (c) Even though one or more terms are left open a contract 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 [(d) Subject to Section 2-204A, if a party uses language that indicates, or if
10 circumstances give notice that a party has, an intention to defer contract formation pending
11 agreement by the other party to terms proposed prevents contract formation until the other party
12 agrees to the terms or conduct by both parties recognizes the existence of a contract.]

13 (e) Except as otherwise provided in Sections 2-211 through 2-214, the following
14 rules apply:

15 (1) A contract may be formed by the interaction of electronic agents. If the
16 interaction resulting from the electronic agents' engaging in operations shows an agreement
17 sufficient to constitute a contract under this section, a contract is formed.

18 (2) A contract may be formed by the interaction of an electronic agent and an
19 individual. A contract is formed if the individual takes actions that the individual is free to refuse
20 to take or makes a statement that the individual has reason to know will:

21 (A) cause the electronic agent to complete the transaction or performance;
22 or

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

(3) In an interaction between individuals, if an offer evokes an electronic record in response, a contract is formed, if at all:

(A) if the electronic message operates as an acceptance under Section 2-206, when the message is received; or

(B) if the offer is accepted under Section 2-206 by an electronic performance, when the electronic performance is received.

[Reporter's Notes – There is no change from existing law in subsections (a)-(c).]

[Reporter's Note – This draft contains two alternatives dealing with the Gateway problem – subsection (d) to this section and Section 2-207(d). A third alternative, and the one agreed to at the drafting committee meeting last year in Baltimore, is to not address the question and leave the issue for development in the courts. Subsection (d) to this section is predicated on the concept of deferred contract formation and depends for its development on the comment in the next Reporter's Note; Section 2-207(d) assumes that a contract is formed and focuses on its terms and the buyer's right of return.]

[Reporter's Note – Subsection (d) states the general proposition that the time of contracting can be postponed even though the language or conduct of the parties would ordinarily indicate that a contract exists. It deals, inter alia, with what is sometimes referred to as a "rolling" contract. In a typical case, the buyer will call the seller's toll-free telephone number and order goods, giving the seller a credit card number to pay for all or part of the price. See, e.g., Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997). The seller will then ship the goods with its standard terms, and the issue is whether the buyer's retention of the goods will constitute acceptance of the seller's terms. If i) the buyer knows, perhaps because of the telephone conversation or from material in an ad or catalog, or from the circumstances surrounding the transaction has notice, perhaps having dealt with the seller before or having dealt with another seller in a similar transaction, of the seller's intention to defer contract formation, ii) the standard terms are packaged in such a way that they would come to the attention of a reasonable buyer, and iii) the terms expressly permit the buyer to avoid contract formation by returning the goods without use (except as may be necessary to have an opportunity to review the terms and as stated below), then the terms should be effective if the buyer chooses to retain the goods (subject, of course, to policing doctrines like unconscionability applicable to all terms in a contract for sale). Since the transaction has many of the features of a sale on approval, the buyer should be

1 *permitted to make use of the goods consistent with that concept for the purpose of trial before*
2 *making a final decision whether to return them. Of course, they must still be in like-new*
3 *condition upon their return. Under no circumstances should a seller's standard terms in a*
4 *rolling contract be permitted to vary terms, like price, that were expressly agreed to by the*
5 *parties. A seller should not be able to revoke its offer after initiating the process. The*
6 *imposition of a fee, such as a restocking fee, upon return of the goods is inconsistent with the*
7 *seller's claim that contract formation is being deferred.*

8 *If the buyer does not know or have notice of the seller's intention to delay contract*
9 *formation, a contract may be formed when the seller takes the buyer's credit card number. The*
10 *terms of the contract are those expressly agreed to by the parties and terms derived from any*
11 *relevant course of dealing or usage of trade, supplemented by the gap-filling provisions of this*
12 *Article. A record containing standard terms that accompanies the goods should be treated for*
13 *the most part like a confirmation under Section 2-207(b); that is, the terms are proposals to*
14 *modify the contract and are not effective unless expressly agreed to by the buyer. However, the*
15 *buyer should be deemed to have agreed to any terms that are more favorable to the buyer than*
16 *those contained in the contract.]*

17 *[Reporter's Note – Subsection (e) is new and is designed to reflect rules of electronic commerce.*
18 *It is derived from both UETA and UCITA.]*

19 *[Reporter's Note – Subsection (e)(1) will require a comment that formation under that*
20 *subsection is subject to equitable defenses, such as fraud, (electronic) mistake, etc.]*

21 **SECTION 2-204A. EXPRESS CONDITION IN RECORD; EXPRESS**

22 **AGREEMENT**

23 (a) An offer in a record that contains conspicuous language that expressly
24 conditions intent to make a contract upon the offeree's assent to its terms prevents formation of a
25 contract unless the offeree accepts the offer without proposing additional or different terms or
26 conduct of the parties recognizes the existence of a contract. If the offeree accepts the offer
27 without proposing additional or different terms, the terms of the contract are as stated in Section
28 2-207(a). If conduct of the parties recognizes the existence of a contract, its terms are as stated in
29 Section 2-207(b).

30 (b) If a record that would otherwise be a definite expression of acceptance but that

1 contains conspicuous language that expressly conditions intent to make a contract upon the
2 offeror's assent to its terms is sent by an offeree, no contract is formed unless the offeror
3 expressly accepts the record without proposing additional or different terms or conduct of the
4 parties recognizes the existence of a contract. If the offeror expressly accepts the record without
5 proposing additional or different terms, the terms of the contract are as stated in Section 2-207(a).
6 If conduct of the parties recognizes the existence of a contract, its terms are as stated in Section
7 2-207(b).

8 (c) If a record contains language that is not conspicuous and that expressly
9 conditions intent to make a contract upon the other party's assent to its terms, the language is not
10 effective unless the other party knows of it. If the other party knows of the language, it has the
11 effect stated in subsections (a) and (b).

12 (d) For purposes of this Section and Section 2-207, a party does not expressly
13 accept or expressly agree to a record or term by the mere retention or use of goods or by the
14 mere retention of payment.

15 *[Reporter's Note – This section, which is new, deals with what are commonly called “my way or*
16 *the highway” clauses. Subsection (a) deals with a conspicuous clause in a record that is an*
17 *offer. The clause prevents contract formation unless the other party accepts without proposing*
18 *additional or different terms or conduct of the parties recognizes the existence of a contract.*
19 *Acceptance can be inferred from conduct unless “the language or circumstances unambiguously*
20 *indicate” a different, exclusive method of acceptance (Section 2-206(a); cf. subsection (d)). If*
21 *the offeree accepts, the terms of the resulting contract are as stated in Section 2-207(a)(terms in*
22 *the offer plus other terms supplied or incorporated by other provisions of the Code). If the*
23 *offeree does not accept, no contract is formed; but if subsequent conduct of the parties*
24 *recognizes the existence of a contract its terms will be governed by Section 2-207(b).*

25 *Subsection (b) deals with the effect of a conspicuous “my way or the highway” clause in*
26 *a response to an offer that would otherwise be a definite and seasonable expression of*
27 *acceptance (Section 2-206(c)). The response does not operate as an acceptance; rather it*
28 *operates as a counteroffer, albeit one that can be accepted only by express assent. If the*
29 *original offeror expressly and unconditionally accepts, the terms of the resulting contract are as*

1 *stated in Section 2-207(a)(terms in the response plus other terms supplied or incorporated by*
2 *other provisions of the Code). If the original offeror does not expressly and unconditionally*
3 *accept, no contract is formed; but if subsequent conduct of the parties recognizes the existence*
4 *of a contract its terms will be governed by Section 2-207(b).*

5 *Subsection (c) states the rule for cases where a record contains a “my way or the*
6 *highway” clause that is not conspicuous. Such a clause should only be effective if the other*
7 *party knows of it.]*

8 **SECTION 2-205. FIRM OFFERS.**

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

14 *[Reporter’s Note – There is no change in substance, but this section is revised to change “signed*
15 *writing” to “authenticated record” and “form” has been changed to “form record” to*
16 *acknowledge nonpaper transactions,.]*

17 **SECTION 2-206. OFFER AND ACCEPTANCE.**

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

19 (1) An offer to make a contract shall be construed as inviting acceptance
20 in any manner and by any medium reasonable under the circumstances.

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

26 (b) Where the beginning of a requested performance is a reasonable mode of

1 acceptance an offeror who is not notified of acceptance within a reasonable time may treat the
2 offer as having lapsed before acceptance.

3 (c) A definite and seasonable expression of acceptance operates as an acceptance
4 even if it contains terms that add to or differ from the offer.

5 *[Reporter's Note – There is no change in substance in subsections (a) and (b).]*

6 *[Reporter's Note – Subsection (c) has been moved from former 2-207(1).]*

7 **SECTION 2-207. TERMS OF CONTRACT; EFFECT OF CONFIRMATION.**

8 (a) If a contract is formed by offer and acceptance and the acceptance does not
9 contain terms additional to or different from the offer, the terms of the contract are:

10 (1) terms in the offer; and

11 (2) terms supplied or incorporated under any provision [The Uniform
12 Commercial Code].

13 (b) If conduct of the parties recognizes the existence of a contract but the records
14 of the parties do not establish a contract, or if a contract is formed by an offer and a definite
15 expression of acceptance in a record but the record contains terms additional to or different from
16 the offer, the terms of the contract, subject to Section 2-202, are:

17 (1) terms in the records of the parties to the extent that they show
18 agreement of the parties;

19 (2) terms not in a record to which the parties have agreed;

20 (3) terms in a record supplied by a party to which the other party has
21 expressly agreed; and

22 (4) terms supplied or incorporated under any provision [The Uniform

Commercial Code].

(c) If a party confirms a contract by a record received by the other party which contains terms that add to or differ from those in the contract being confirmed, the contract includes:

(1) terms in a confirming record that add to or differ from the confirmed contract to which the other party expressly agrees;

(2) terms in a confirming record that add to or differ from the confirmed contract to the extent that they show agreement with terms in a confirming record received from the other party.

[(d) If the parties enter into a contract and terms that are not otherwise part of the contract under subsection (a) are delivered to the buyer at or before the time the goods are received by the buyer, the terms become part of the contract only if (i) the seller gives the buyer a right to return the goods for a full refund within thirty days after receipt of the goods, (ii) prior to receipt of the goods the buyer agrees to be bound by such terms, or (iii) the terms do not materially alter the contract to the detriment of the buyer or of a person similarly situated.]

[Reporter's Note – The approach taken here is consistent with the approach taken in the July draft, but a number of changes have been made for the sake of clarity. Subsection (a) is new and deals with the terms of contracts where there are no battle-of-the-forms issues. Note that the introductory phrase to subsections (a) and (b) states that the terms of the contract “are” those that are listed -- that is, the listing in those subsections is intended to be complete. By contrast, the introductory phrase to subsection (c) states that the terms “include” those that are listed. A comment will make clear that the confirmed contract, including gap-fillers, remains in effect in a case governed by subsection (c) except to the extent that it is modified as described in that subsection. A comment will also stress that terms derived from an implied-in-fact source may also be part of the contract under each subsection.]

[Reporter's Note – The comments should indicate that “offer” in subsection (a) includes a “counteroffer” that is created by a record that would be a definite expression of acceptance but

1 *for the inclusion of a “my way or the highway” clause (see Section 2-204A(b), (c) and*
2 *accompanying Reporter’s Note).]*

3 *[Reporter’s Note – The following examples flesh out the draft’s approach to the battle of the*
4 *forms. Some of the examples should probably be placed after Section 2-204A.*

5 *Example 1: Offeror uses a record that contains an express condition; offeree accepts*
6 *orally, or by a record that does not contain any additional or different terms, or by*
7 *conduct (retention or use of the goods, retention of payment). Offeror’s terms control.*

8 *Example 2: Offeror uses a record that contains an express condition; offeree responds*
9 *with a record that is a definite expression of acceptance containing terms that add to or*
10 *differ from the offer. No contract is formed.*

11 *Example 3: Offeror uses a record that contains an express condition; offeree responds*
12 *with a record that contains terms that add to or differ from the offer and that also*
13 *contains an express condition. Without the condition the response would be a definite*
14 *expression of acceptance. No contract is formed.*

15 *Example 4: Offeror makes offer by use of a record or otherwise; offeree responds with a*
16 *record that contains terms that add to or differ from the offer and that also contains an*
17 *express condition. No contract is formed.*

18 *Example 5: In Examples 2, 3 and 4, if either party expressly agrees to the other party’s*
19 *record a contract is formed. Subsection (a) or (b) will state the terms of the contract,*
20 *depending upon whose record is being assented to.*

21 *Example 6: In Examples 2, 3 and 4, if subsequent conduct of the parties recognizes that a*
22 *contract exists, its terms are as stated in subsection (c).]*

23 *[Reporter’s Note – Subsection (d) is an alternative to Section 2-204(d). See Reporter’s Notes to*
24 *that section.]*

25 **SECTION 2–208. COURSE OF PERFORMANCE OR PRACTICAL**
26 **CONSTRUCTION.**

27 (a) Where the contract for sale involves repeated occasions for performance by
28 either party with knowledge of the nature of the performance and opportunity for objection to it
29 by the other, any course of performance accepted or acquiesced in without objection shall be

1 relevant to determine the meaning of the agreement.

2 (b) The express terms of the agreement and any such course of performance, as
3 well as any course of dealing and usage of trade, shall be construed whenever reasonable as
4 consistent with each other; but when such construction is unreasonable, express terms shall
5 control course of performance and course of performance shall control both course of dealing and
6 usage of trade (Section 1–205).

7 (c) Subject to the provisions of the next section on modification and waiver, such
8 course of performance shall be relevant to show a waiver or modification of any term inconsistent
9 with such course of performance.

10 *[Reporter’s Note – There is no change from existing law.]*

11 *[Reporter Note – A legislative note might be placed here to suggest that this section should be*
12 *deleted upon adoption of revised Article 1, which will cover this area.]*

13 **SECTION 2–209. MODIFICATION, RESCISSION AND WAIVER.**

14 (a) An agreement modifying a contract within this Article needs no consideration
15 to be binding.

16 (b) An agreement in an authenticated record which excludes modification or
17 rescission except by an authenticated record cannot be otherwise modified or rescinded, but
18 except as between merchants such a requirement on a form record supplied by a merchant must
19 be separately authenticated by the other party.

20 (c) The requirements of the statute of frauds section of this Article (Section
21 2–201) must be satisfied if the contract as modified is within its provisions.

22 (d) Although an attempt at modification or rescission does not satisfy the

requirements of subsection (b) or (c) it can operate as a waiver.

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

[Reporter's Note – There is no substantive change. The only textual change in this section is in subsection (b). This change reflects the acknowledgment of electronic transactions by replacing “signed writings” with “authenticated records.”]

SECTION 2-210. ASSIGNMENT OF RIGHTS; DELEGATION OF PERFORMANCE

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

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

(2) The other party may treat an assignment of rights that is a breach as creating reasonable grounds for insecurity and may without prejudice to the party's rights against the assignee demand adequate assurance of due performance from the assignor (Section 2-609).

(3) The creation, attachment, perfection, or enforcement of a security

1 interest in the seller's interest under a contract is not an assignment that materially changes the
2 duty of or materially increases the burden or risk imposed on the buyer or materially impairs the
3 buyer's chance of obtaining return performance within the purview of paragraph (1) of this
4 subsection unless, and then only to the extent that, enforcement of the security interest results in a
5 delegation of a material performance of the seller. Even in that event, the creation, attachment,
6 perfection, and enforcement of the security interest remain effective. However, the seller is liable
7 to the buyer for damages caused by the delegation, and a court having jurisdiction may grant
8 other appropriate relief, including cancellation of the contract or an injunction against
9 enforcement of the security interest or consummation of the enforcement.

10 (b) If the seller or buyer delegates performance of its duties under a contract of
11 sale, the following rules apply:

12 (1) A party may perform its duties through a delegate unless otherwise
13 agreed or unless the other party has a substantial interest in having its original promisor perform
14 or control the acts required by the contract. No delegation of performance relieves the party
15 delegating of any duty to perform or any liability for breach.

16 (2) Acceptance of a delegation of duties by the assignee constitutes a
17 promise by it to perform those duties. This promise is enforceable by either the assignor or the
18 other party to the original contract.

19 (3) The other party may treat any delegation of duties as creating
20 reasonable grounds for insecurity and may without prejudice to its rights against the assignor
21 demand assurances from the assignee (Section 2-609).

22 (4) A contractual term prohibiting the delegation of duties otherwise

delegable under paragraph (1) of this subsection is enforceable, and an attempted delegation is not effective.

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

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

[Reporter’s Note – This section is an amalgamation of current law, conforming amendments in Revised Article 9, and the July draft. That is, it follows the July draft’s general approach of breaking assignment and delegation apart; incorporates the changes dictated by revised Article 9; and uses language from existing Article 2 whenever possible.]

[Reporter’s Note – A comment will describe the relationship between this provision and Section 9-406. That provision, which trumps this provision under Section 2-102(c), broadly invalidates anti-assignment terms in agreements between account debtors and assignors, and also invalidates terms that render assignments a breach. In a transaction that is not within the scope of Section 9-406, this provision governs the effect of an anti-assignment term. It does not address terms that render assignments a breach, and such terms are enforceable under this Article.]

SECTION 2-211. LEGAL RECOGNITION OF ELECTRONIC RECORDS AND AUTHENTICATIONS.

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

(b) This Article does not require a record or authentication to be created, generated, sent, communicated, received, stored, or otherwise processed by electronic means or

1 in electronic form.

2 (c) In any transaction, a person may establish requirements regarding the type of
3 record or authentication acceptable to it.

4 (d) A person that uses an electronic agent that it has selected for making an
5 authentication, performance or agreement is bound by the operations of the electronic agent, even
6 if no individual was aware of or reviewed the agent's operations or the results of the operations.

7 *[Reporter's Note – This section comes from UETA and UCITA:*

8 *1. subsection (a) is from UETA sec. 7(a).*

9 *2. subsection (b) is from UETA sec.5(a) with a slight language change (UETA uses*
10 *“signature” and this subsection uses “authentication”).*

11 *3. subsection (c) is based on UCITA sec. 107(c).*

12 *4. Subsection (d) is based on UCITA sec. 107(d)]*

13 **SECTION 2-212. ATTRIBUTION.**

14 An electronic record or electronic authentication is attributed to a person if the
15 record was created by or the authentication was the act of the person or the person's electronic
16 agent or the person is otherwise bound by the act under the law.

17 *[Reporter's Note – This section is based on the concept of attribution found in both UETA (sec.*
18 *9) and UCITA (sec. 215); however, its language is not precisely the same as that found in either*
19 *Act.]*

20 **SECTION 2-213 . CONTRACT FORMATION; ELECTRONIC RECORD.**

21 (a) Except as otherwise provided in subsection (b), an electronic record is
22 effective when received even if no individual is aware of its receipt.

23 (b) Receipt of an electronic acknowledgment of an electronic record establishes
24 that the record was received but, in itself, does not establish that the content sent corresponds to
25 the content received.

1 **SECTION 2-214. CONTRACT FORMATION; TERMS; ELECTRONIC AGENT.**

2 (a) An individual that uses an electronic agent for authentication, agreement, or
3 performance is bound by the operations of the electronic agent even if the individual using the
4 electronic agent was unaware of or did not review the agent's actions or the results of the
5 operations.

6 (b) The terms of a contract formed under Section 2-204 do not include terms
7 provided by the individual not using an electronic agent if the individual had reason to know that
8 the electronic agent could not react to the terms as provided.

1 **PART 3**
2 **GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT**

3 **SECTION 2–301. GENERAL OBLIGATIONS OF PARTIES.**

4 The obligation of the seller is to transfer and deliver and that of the buyer is to
5 accept and pay in accordance with the contract.

6 *[Reporter’s Note – There is no change from existing law.]*

7 **SECTION 2–302. UNCONSCIONABLE CONTRACT OR TERM.**

8 (a) If the court as a matter of law finds the contract or any term of the contract to
9 have been unconscionable at the time it was made the court may refuse to enforce the contract,
10 or it may enforce the remainder of the contract without the unconscionable term, or it may so
11 limit the application of any unconscionable term as to avoid any unconscionable result.

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

15 *[Reporter’s Note – With the exception of changing the word “clause” to “term” the text of this*
16 *section is consistent with current Article 2. However, it might be supplemented with a new*
17 *comment along the following lines:*

18 *1. This section is intended to make it possible for the courts to police explicitly against the*
19 *contracts or terms which they find to be unconscionable instead of by adverse construction of*
20 *language, by manipulation of the rules of offer and acceptance or by determinations that the term*
21 *is contrary to public policy or to the dominant purpose of the contract. The section is intended to*
22 *allow a court to pass directly on the unconscionability of the contract or a particular term of the*
23 *contract and to make a conclusion of law as to its unconscionability. The basic test is whether, in*
24 *the light of the general commercial background and the commercial needs of the particular trade*
25 *or case, the term or contract involved is so one-sided as to be unconscionable under the*
26 *circumstances existing at the time of the making of the contract. However, for example, a court*
27 *ought not, on the basis of substantive unconscionability alone, refuse to enforce a term disclaiming*
28 *an implied warranty that is procedurally effective (Section 2-316) or a procedurally effective term*
29 *limiting the buyer’s remedies(as long as that term provides a minimum adequate remedy) (Section*

2-719).

Generally a finding of unconscionability requires that a court find both “procedural” and “substantive” unconscionability. Accordingly, courts also should seldom invalidate a contract, or a term of a contract, that is not substantively unconscionable and that merely allocates risk, even disproportionately, or that otherwise significantly cuts against the complaining party, on the basis of the other party’s conduct standing alone. In those cases that call out for relief often the conduct will constitute an invalidating cause, such as fraud or duress. However, consistent with the provisions of Section 2A-108(2) and the Uniform Consumer Credit Code (Section 5.108), in an appropriate case a court may invoke procedural unconscionability to invalidate a term or contract. For example, a court might invalidate a contract because of high pressure sales tactics used in a consumer buyer’s home even though the conduct does not constitute fraud or duress. The principle is one of the prevention of oppression and unfair surprise. Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948). The doctrine is not intended to allow disturbance of allocation of risks because of superior bargaining power.

The operation of this section is illustrated by the results in cases such as the following:

Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 93 Utah 414, 73 P.2d 1272 (1937) (where a term limiting time for complaints was held inapplicable to latent defects in a shipment of catsup which could be discovered only by microscopic analysis); *Brower v. Gateway 2000, Inc.* 676 N.Y.S.2d 569 (N.Y.A.D. 1998) (term requiring arbitration in Chicago pursuant to rules requiring \$4,000 advance fee, of which \$2,000 was nonrefundable even if claimant prevailed, substantively unconscionable as applied to consumer even if consumer was aware of the term); *New Prague Flouring Mill Co. v. G. A. Spears*, 194 Iowa 417, 189 N.W. 815 (1922) (holding that a clause permitting the seller, upon the buyer’s failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction, does not indefinitely postpone the date of measuring damages for the buyer’s breach, to the seller’s advantage); *Green v. Arcos, Ltd.* (1931 CA) 47 T.L.R. 336 (blanket clause prohibiting rejection of shipments by the buyer restricted to apply to shipments where discrepancies represented merely mercantile variations); *Austin Co. v. J. H. Tillman Co.*, 104 Or. 541, 209 P. 131 (1922) (clause limiting the buyer’s remedy to return held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description).

These cases are but a small number of the cases decided prior to the Code and after its enactment; they nonetheless indicate how various courts have applied the concept of unconscionability in various contexts. A researcher desiring a more elaborate study of the meaning of the doctrine as derived from the numerous decisions should consult the many sources available.

2. Under this section the court, in its discretion, may refuse to enforce the contract as

1 *a whole if it is permeated by the unconscionability, or it may strike any single term or group of terms*
2 *which are so tainted or which are contrary to the essential purpose of the agreement or to material*
3 *terms to which the parties have expressly agreed, or it may simply limit unconscionable results.*

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

8 **SECTION 2-303. ALLOCATION OR DIVISION OF RISKS.**

9 Where this Article allocates a risk or a burden as between the parties "unless otherwise
10 agreed", the agreement may not only shift the allocation but may also divide the risk or burden.

11 *[Reporter's Note – There is no change from current law.]*

12 **SECTION 2-304. PRICE PAYABLE IN MONEY, GOODS, REALTY, OR** 13 **OTHERWISE.**

14 (a) The price can be made payable in money or otherwise. If it is payable in whole or
15 in part in goods each party is a seller of the goods which that party is to transfer.

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

19 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

20 **SECTION 2-305. OPEN PRICE TERM.**

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

23 (1) nothing is said as to price; or

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

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

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

5 (c) When a price left to be fixed otherwise than by agreement of the parties is not fixed
6 in good faith under subsection (b), or fails to be fixed through fault of one party, the other may at its
7 option treat the contract as canceled or itself fix a reasonable price.

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

12 *[Reporter's Note – The only substantive change is that subsection (c) adds the circumstance where*
13 *the price is not fixed pursuant to subsection (b).]*

14 **SECTION 2–306. OUTPUT, REQUIREMENTS AND EXCLUSIVE DEALINGS.**

15 (a) A term which measures the quantity by the output of the seller or the requirements
16 of the buyer means such actual output or requirements as may occur in good faith, except that no
17 quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate
18 to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

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

22 *[Reporter's Note – There is no change from existing law.]*

1 **SECTION 2–307. DELIVERY IN SINGLE LOT OR SEVERAL LOTS.**

2 Unless otherwise agreed all goods called for by a contract for sale must be tendered
3 in a single delivery and payment is due only on such tender but where the circumstances give either
4 party the right to make or demand delivery in lots the price if it can be apportioned may be demanded
5 for each lot.

6 *[Reporter’s Note – There is no change from existing law.]*

7 **SECTION 2–308. ABSENCE OF SPECIFIED PLACE FOR DELIVERY.**

8 Unless otherwise agreed

9 (1) the place for delivery of goods is the seller's place of business or if the seller
10 has none, its residence; but

11 (2) in a contract for sale of identified goods which to the knowledge of the
12 parties at the time of contracting are in some other place, that place is the place for their delivery;
13 and

14 (3) documents of title may be delivered through customary banking channels.

15 *[Reporter’s Note – There is no change from existing law.]*

16 **SECTION 2–309. ABSENCE OF SPECIFIC TIME PROVISIONS; NOTICE OF**
17 **TERMINATION.**

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

20 (b) Where the contract provides for successive performances but is indefinite in
21 duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time
22 by either party.

(c) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

[Reporter's Note – There is no change from existing law.]

**SECTION 2–310. OPEN TIME FOR PAYMENT OR RUNNING OF CREDIT;
AUTHORITY TO SHIP UNDER RESERVATION.**

Unless otherwise agreed

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

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

(3) if tender of delivery is agreed to be made by way of documents of title otherwise than by subsection (2) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

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

[Reporter's Note – Subsection (2) has been changed from original Article 2 so that it applies when the seller is “required or authorized to send the goods.” The “required or” language was added to make this section consistent with other usages throughout Article 2, as well as being consistent with the common understanding of business practice.]

1 *[Reporter's Note – Although no substantive change is intended, subsection (3) picks up clarifying*
2 *language from section 2-611(c) of the July draft.]*

3 **SECTION 2–311. OPTIONS AND COOPERATION RESPECTING**
4 **PERFORMANCE.**

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

9 (b) Unless otherwise agreed specifications relating to assortment of the goods are at
10 the buyer's option and specifications or arrangements relating to shipment are at the seller's option.

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

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

15 (2) may also either proceed to perform in any reasonable manner or after the
16 time for a material part of its own performance treat the failure to specify or to cooperate as a breach
17 by failure to deliver or accept the goods.

18 *[Reporter's Note – In subsection (b), the cross-reference in existing Article 2 to various subsections*
19 *of 2-319 has been deleted as those provisions no longer exist. The introductory phrase “Unless*
20 *otherwise agreed” is sufficient.]*

21 **SECTION 2–312. WARRANTY OF TITLE AND AGAINST INFRINGEMENT;**
22 **BUYER'S OBLIGATION AGAINST INFRINGEMENT.**

23 (a) Subject to subsection (c) there is in a contract for sale a warranty by the seller that:

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

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

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

(c) A warranty under this section may be disclaimed or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in itself, that it is purporting to sell only such right or title as the party or a third person may have, or that it is selling subject to any claims of infringement or the like.

[Reporter's Note – Subsection (a) brings up from the comments the doctrine of marketable title (“shall not, because of any colorable claim to or interest in the goods, unreasonably expose the buyer to litigation”). Although the concept was in the July draft, the exact language is new to this draft.]

[Reporter's Note – The order of subsections (b) and (c) has been reversed for logical clarity.]

SECTION 2–313. EXPRESS WARRANTIES BY AFFIRMATION, PROMISE, DESCRIPTION, SAMPLE, MODEL; REMEDIAL PROMISE.

(a) In this section, “immediate buyer” means a buyer that has a contract with the seller.

(b) Express warranties by the seller to the immediate buyer are created as follows:

1 (1) Any affirmation of fact or promise made by the seller which relates to the
2 goods and becomes part of the basis of the bargain creates an express warranty that the goods shall
3 conform to the affirmation or promise.

4 (2) Any description of the goods which is made part of the basis of the bargain
5 creates an express warranty that the goods shall conform to the description.

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

8 (c) It is not necessary to the creation of an express warranty that the seller use formal
9 words such as "warrant" or "guarantee" or that the seller have a specific intention to make a warranty,
10 but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's
11 opinion or commendation of the goods does not create a warranty.

12 (d) Any remedial promise made by the seller creates an obligation that the promise will
13 be performed upon the happening of the specified event.

14 *[Reporter's Note – This section now deals with remedial promises, but the positioning of that*
15 *concept within the section makes it clear (as will a comment) that there is no basis of the bargain*
16 *test for these promises and that the term is used in conjunction with Section 2-725(b)(3) to clarify*
17 *the appropriate limitations period. In addition, the comments will explain the difference between*
18 *a promise as in “affirmation of fact or promise” (representation as to future quality of the goods)*
19 *and a remedial promise (commitment regarding seller's future obligations).]*

20 *[Reporters's Note – The term “immediate buyer” is used to differentiate the party to whom an*
21 *express warranty runs under this section from the party to whom an express warranty obligation*
22 *runs under sections 2-313A and 2-313B. We may eventually need to move “immediate buyer” to*
23 *section 2-103, along with “remote purchaser” from sections 2-313A and 2-313B.]*

24 *[Reporter's Note – A comment should indicate that a representation in advertising may constitute*
25 *an express warranty if it meets the tests set forth in this section. This is consistent with judicial*
26 *decisions and is necessitated by the fact that we have a separate section (2-313B) dealing with*
27 *advertisements to remote purchasers.]*

1 **SECTION 2-313A. EXPRESS WARRANTY OBLIGATION TO REMOTE**
2 **PURCHASER CREATED BY RECORD PACKAGED WITH OR ACCOMPANYING**
3 **GOODS.**

4 (a) In this section:

5 (1) “Goods” means new goods and goods sold or leased as new goods in a
6 transaction of purchase that occurs in the normal chain of distribution.

7 (2) “Immediate buyer” means a buyer that has a contract with the seller.

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

10 (b) If a seller makes an affirmation of fact or promise that relates to the goods, or
11 provides a description that relates to the goods, or makes a remedial promise, in a record packaged
12 with or accompanying the goods, and the seller reasonably expects the record to be, and the record
13 is, furnished to the remote purchaser, the seller has an obligation to the remote purchaser that the
14 goods will conform to the affirmation of fact, promise or description or that the seller will perform
15 the remedial promise unless a reasonable person in the position of the remote purchaser would not
16 believe that the affirmation of fact, promise or description created an obligation.

17 (c) It is not necessary to the creation of an express warranty obligation under this
18 section that the seller use formal words such as "warrant" or "guarantee" or that the seller have a
19 specific intention to undertake an obligation, but an affirmation merely of the value of the goods or
20 a statement purporting to be merely the seller's opinion or commendation of the goods does not
21 create an obligation.

22 (d) The following rules apply to the remedies for breach of an express warranty

obligation created under this section:

(1) Damages may be proved in any manner that is reasonable. Unless special circumstances show proximate damages of a different amount, the measure of damages if the goods do not conform to an affirmation of fact, promise or description is the value of the goods if they had been as represented less the value of the goods as delivered, and the measure of damages for breach of a remedial promise is the value of the promised remedial performance less the value of any remedial performance completed.

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

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

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

[Reporter's Note – This section contains a modified version of the “card-in-the-box” warranty provisions from section 2-408 of the July draft. It does not contain the advertising provisions from that section, and they are set forth in Section 2-313B. Some of the definitions have been slightly altered from the revision draft. Note that the extension-of-warranty rules have been removed to section 2-318.]

[Reporter's Note – The comments will make it clear that even though the obligations in this section and in Section 2-313B are referred to as “express warranty” obligations, they are not subject to a basis-of-the-bargain test.]

[Reporter's Note – Subsection (e) is included draft because it is important for us to pinpoint the time

1 *of breach for express warranty obligations. The accrual rule is stated in 2-725(c)(2) as the time the*
2 *remote purchaser receives the goods, but the point in time at which the goods must conform is a*
3 *different matter.]*

4 *[Reporter's Note – Although this section is limited to obligations created by a record, a comment*
5 *should indicate that the logic of the section may extend to samples and models.]*

6 **SECTION 2-313B. EXPRESS WARRANTY OBLIGATION TO REMOTE**
7 **PURCHASER CREATED BY COMMUNICATION TO PUBLIC.**

8 (a) In this section:

9 (1) “Goods” means new goods and goods sold or leased as new goods in a
10 transaction of purchase that occurs in the normal chain of distribution.

11 (2) “Immediate buyer” means a buyer that has a contract with the seller.

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

14 (b) If a seller makes an affirmation of fact or promise that relates to the goods, or
15 provides a description that relates to the goods, or makes a remedial promise, in a medium for
16 communication to the public, such as advertising, and the remote purchaser enters into a transaction
17 of purchase with knowledge of and with the expectation that the goods will conform to the
18 affirmation of fact, promise, or description, or that the seller will perform the remedial promise, the
19 seller has an obligation to the remote purchaser that the goods will conform to the affirmation of fact,
20 promise or description or that the seller will perform the remedial promise unless a reasonable person
21 in the position of the remote purchaser would not believe that the affirmation of fact, promise or
22 description created an obligation.

23 (c) It is not necessary to the creation of an express warranty obligation under this

1 section that the seller use formal words such as "warrant" or "guarantee" or that the seller have a
2 specific intention to undertake an obligation, but an affirmation merely of the value of the goods or
3 a statement purporting to be merely the seller's opinion or commendation of the goods does not
4 create an obligation.

5 (d) The following rules apply to the remedies for breach of an express warranty
6 obligation created under this section:

7 (1) Damages may be proved in any manner that is reasonable. Unless special
8 circumstances show proximate damages of a different amount, the measure of damages if the goods
9 do not conform to an affirmation of fact, promise or description is the value of the goods if they had
10 been as represented less the value of the goods as delivered, and the measure of damages for breach
11 of a remedial promise is the value of the promised remedial performance less the value of any
12 remedial performance completed.

13 (2) The seller may modify or limit the remedies available to the remote
14 purchaser if the modification or limitation is furnished to the remote purchaser no later than the time
15 of purchase. The modification or limitation may be furnished as part of the communication that
16 creates the obligation.

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

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

22 *[Reporter's Note – This section contains the media-created express warranty obligations to remote*

1 *parties. I have drafted it to parallel section 2-313A as closely as possible. Even though the*
2 *provisions are consistent with those set forth in section 2-313A, they are placed in a separate section*
3 *to stress the differences.]*

4 **SECTION 2–314. IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF**
5 **TRADE.**

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

10 (b) Goods to be merchantable must be at least such as

11 (1) pass without objection in the trade under the contract description; and

12 (2) in the case of fungible goods, are of fair average quality within the
13 description; and

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

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

18 (5) are adequately contained, packaged, and labeled as the agreement may
19 require; and

20 (6) conform to the promises or affirmations of fact made on the container or
21 label if any.

22 (c) Unless excluded or modified (Section 2–316) other implied warranties may arise

1 from course of dealing or usage of trade.

2 *[Reporter's Note – The only change from original Article 2 is the use of “goods of that description”*
3 *rather than “such goods” in subsection (b)(3). The substituted language comes from the July draft.]*

4 **SECTION 2–315. IMPLIED WARRANTY: FITNESS FOR PARTICULAR PURPOSE.**

5 Where the seller at the time of contracting has reason to know any particular purpose
6 for which the goods are required and that the buyer is relying on the seller's skill or judgment to select
7 or furnish suitable goods, there is unless excluded or modified under the next section an implied
8 warranty that the goods shall be fit for such purpose.

9 *[Reporter's Note – There is no change from current law.]*

10 **SECTION 2–316. DISCLAIMER OR MODIFICATION OF WARRANTIES.**

11 (a) Words or conduct relevant to the creation of an express warranty and words or
12 conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with
13 each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2–202)
14 negation or limitation is inoperative to the extent that such construction is unreasonable.

15 (b) Notwithstanding subsection (c), unless the circumstances indicate otherwise, all
16 implied warranties are disclaimed by expressions such as “as is” or “with all faults” or similar
17 language or conduct which in common understanding make it clear to the buyer that the seller
18 assumes no responsibility for the quality or fitness of the goods. In a consumer contract evidenced
19 by a record, the requirements of this subsection must be satisfied by conspicuous language in the
20 record.

21 (c) Subject to subsection (b), to disclaim or modify an implied warranty of
22 merchantability or fitness, or any part of either implied warranty, the following rules apply:

1 (1) In a contract other than a consumer contract, the language is sufficient if:

2 (A) in the case of an implied warranty of merchantability, it mentions
3 merchantability; and

4 (B) in the case of an implied warranty of fitness, the language states,
5 for example, “There are no warranties that extend beyond the description on the face hereof.”

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

8 (A) in the case of an implied warranty of merchantability, state “The
9 seller makes no representations about and is not responsible for the quality of the goods, except as
10 otherwise provided in this contract”; and

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

14 (3) Language that is sufficient to disclaim or modify an implied warranty under
15 paragraph (2) is also sufficient to disclaim or modify an implied warranty under paragraph (1).

16 (d) An implied warranty may also be disclaimed or modified by course of
17 performance, course of dealing, or usage of trade.

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

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

2-718 and 2-719).

[Reporter's Note – This provision is essentially the same as the July draft (as modified by the errata sheet distributed in Denver).]

**SECTION 2–317. CUMULATION AND CONFLICT OF WARRANTIES EXPRESS
OR IMPLIED.**

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

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

(2) A sample from an existing bulk displaces inconsistent general language of description.

(3) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

[Reporter's Note – There is no change from existing law.]

**SECTION 2–318. THIRD PARTY BENEFICIARIES OF WARRANTIES EXPRESS
OR IMPLIED, WARRANTY OBLIGATIONS, AND REMEDIAL PROMISES.**

(a) In this section:

(1) “Immediate buyer” means a buyer that has a contract with the seller.

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

Alternative A to Subsection (b)

1 (b) A seller's warranty whether express or implied to an immediate buyer, a seller's
2 remedial promise to an immediate buyer, or a seller's obligation under Section 2-313A or Section 2-
3 313B to a remote purchaser extends to any natural person who is in the family or household of the
4 immediate buyer or the remote purchaser or who is a guest in the home of either person if it is
5 reasonable to expect that such person may use, consume or be affected by the goods and who is
6 injured in person by breach of the warranty, remedial promise or obligation. A seller may not exclude
7 or limit the operation of this section.

8 **Alternative B to Subsection (b)**

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

14 **Alternative C to Subsection (b)**

15 (b) A seller's warranty whether express or implied to an immediate buyer, a seller's
16 remedial promise to an immediate buyer, or a seller's obligation under Section 2-313A or Section 2-
17 313B to a remote purchaser extends to any person who may reasonably be expected to use, consume
18 or be affected by the goods and who is injured by breach of the warranty, remedial promise or
19 obligation. A seller may not exclude or limit the operation of this section with respect to injury to
20 the person of an individual to whom the warranty, remedial promise or obligation extends.

21 *[Reporter's Note – This section retains the existing Code's approach to issues of (at least)*
22 *horizontal privity but adapts them in light of new sections 2-313A and 2-313B.]*

1 **SECTION 2–319. SHIPMENT TERMS; SOURCE OF MEANING.**

2 The effect of a party’s use of shipment terms such as “FOB”, “CIF” must be
3 interpreted in light of any applicable usage of trade or course of performance or course of dealing
4 between the parties.

5 *[Reporter’s Note – This is a slightly modified version of Section 2-309 from the July draft. This is*
6 *a necessary change, as the existing definitions of shipping terms are woefully outdated and do not*
7 *reflect modern practice.]*

8 **SECTIONS 2–320 THROUGH 2-324.**

9 **Reserved.**

10 **SECTION 2–325. FAILURE TO PAY BY AGREED LETTER OF CREDIT.**

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

13 (1) The buyer’s obligation to pay is suspended by seasonable delivery to the
14 seller of a letter of credit issued or confirmed by a financing agency of good repute in which the issuer
15 and any confirmer undertake to pay against presentation of documents evidencing delivery.

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

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

20 *[Reporter’s Note – This is section 2-308 from the July draft. This revision conforms to revised*
21 *Article 5.]*

22 **SECTION 2–326. SALE ON APPROVAL AND SALE OR RETURN;**
23 **CONSIGNMENT SALES AND RIGHTS OF CREDITORS.**

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

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

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

5 (b) Goods held on approval are not subject to the claims of the buyer's creditors until
6 acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

7 (c) Any "or return" term of a contract for sale is to be treated as a separate contract
8 for sale within the statute of frauds section of this Article (Section 2–201) and as contradicting the
9 sale aspect of the contract within the provisions of this Article on parol or extrinsic evidence (Section
10 2–202).

11 *[Reporter's Note – This is section 2-326 as amended by revised Article 9.]*

12 **SECTION 2–327. SPECIAL INCIDENTS OF SALE ON APPROVAL AND SALE OR**
13 **RETURN.**

14 (a) Under a sale on approval unless otherwise agreed

15 (1) although the goods are identified to the contract the risk of loss and the
16 title do not pass to the buyer until acceptance; and

17 (2) use of the goods consistent with the purpose of trial is not acceptance but
18 failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods
19 conform to the contract acceptance of any part is acceptance of the whole; and

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

22 (b) Under a sale or return unless otherwise agreed

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

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

[Reporter's Note – There is no change in current law.]

SECTION 2-328. SALE BY AUCTION.

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

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

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

(d) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the

1 buyer may at its option avoid the sale or take the goods at the price of the last good faith bid prior
2 to the completion of the sale. This subsection shall not apply to any bid at an auction required by law.

3 *[Reporter's Note – This section is an amalgamation of original Article 2 and the July draft.*
4 *Stylistically, original Article 2 is followed whenever possible. Retained from the revision draft are*
5 *“process of completing the sale” rather than “hammer falling” (subsection (b)), “right to withdraw*
6 *the goods” rather than “with reserve” (subsection (c)), and “sale required by law” rather than*
7 *“forced sale” (subsection (d)).]*

1 **PART 4**

2 **TITLE, CREDITORS AND GOOD FAITH PURCHASERS**

3 **SECTION 2–401. PASSING OF TITLE; RESERVATION FOR SECURITY;**
4 **LIMITED APPLICATION OF THIS SECTION.**

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

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

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

21 (A) if the contract requires or authorizes the seller to send the

goods to the buyer but does not require the seller to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(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 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 revesting occurs by operation of law and is not a "sale".

[Reporter's Note – In subsection (2), “physical delivery” has been changed to “delivery” because we define “delivery” in section 2-103(15) as “the voluntary transfer of physical possession or control of goods”.]

SECTION 2-402. RIGHTS OF SELLER'S CREDITORS AGAINST SOLD GOODS.

(a) Except as provided in subsections (b) and (c), 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).

(b) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor a retention of possession by the seller is

1 fraudulent under any rule of law of the state where the goods are situated, except that retention of
2 possession in good faith and current course of trade by a merchant-seller for a commercially
3 reasonable time after a sale or identification is not fraudulent.

4 (c) Nothing in this Article shall be deemed to impair the rights of creditors of the
5 seller

6 (1) under the provisions of the Article on Secured Transactions (Article 9);
7 or

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

13 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

14 **SECTION 2-403. POWER TO TRANSFER; GOOD FAITH PURCHASE OF**
15 **GOODS; "ENTRUSTING".**

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

21 (1) the transferor was deceived as to the identity of the purchaser, or

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

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

2 (4) the delivery was procured through criminal fraud.

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

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

10 (d) The rights of other purchasers of goods and of lien creditors are governed by
11 the Articles on Secured Transactions (Article 9), [Bulk Sales (Article 6): if the state retains the
12 remnants of Article 6] and Documents of Title (Article 7).

13 *[Reporter's Note – References to "larceny", a somewhat dated term, have been replaced in*
14 *subsections (a) and (c) by more general language referring to "criminal fraud" (subsection (a))*
15 *and conduct "punishable under the criminal law" (subsection (c)).]*

16 *[Reporter's Note – Subsection(b) has been modified to conform with Revised Article 9's*
17 *treatment of "remote entrusting" (Revised 9-315(a)).]*

1 **PART 5**

2 **PERFORMANCE**

3 **SECTION 2-501. INSURABLE INTEREST IN GOODS; MANNER OF**
4 **IDENTIFICATION OF GOODS.**

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

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

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

15 (3) when the crops are planted or otherwise become growing crops or the
16 young are conceived if the contract is for the sale of unborn young to be born within twelve
17 months after contracting or for the sale of crops to be harvested within twelve months or the next
18 normal harvest season after contracting whichever is longer.

19 (b) The seller retains an insurable interest in goods so long as title to or any
20 security interest in the goods remains in the seller and where the identification is by the seller
21 alone the seller may until default or insolvency or notification to the buyer that the identification is
22 final substitute other goods for those identified.

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

[Reporter's Note – This section remains unchanged except for gender neutral language.]

SECTION 2-502. BUYER'S RIGHT TO GOODS ON SELLER'S REPUDIATION, FAILURE TO DELIVER OR INSOLVENCY.

(a) Subject to subsections (b) and (c) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which the buyer has a special property under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if

(1) in the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or

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

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

(c) If the identification creating the special property has been made by the buyer, the buyer acquires the right to recover the goods only if they conform to the contract for sale.

[Reporter's Note – This section is derived from a conforming amendment to Article 2 that was promulgated as part of the Article 9 revision process.]

[Reporter's Note – Because Section 2-402 is limited to the rights of unsecured creditors, a comment along the following lines may be helpful in each of the referenced sections: "This 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."]

1 **SECTION 2-503. MANNER OF SELLER'S TENDER OF DELIVERY.**

2 (a) Tender of delivery requires that the seller put and hold conforming goods at the
3 buyer's disposition and give the buyer any notification reasonably necessary to enable the buyer to
4 take delivery. The manner, time and place for tender are determined by the agreement and this
5 Article, and in particular

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

8 (2) unless otherwise agreed the buyer must furnish facilities reasonably
9 suited to the receipt of the goods.

10 (b) Where the case is within the next section respecting shipment tender requires
11 that the seller comply with its provisions.

12 (c) Where the seller is required to deliver at a particular destination tender requires
13 that the seller comply with subsection (a) and also in any appropriate case tender documents as
14 described in subsections (d) and (e) of this section.

15 (d) Where goods are in the possession of a bailee and are to be delivered without
16 being moved

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

20 (2) tender to the buyer of a nonnegotiable document of title or of a record
21 directing the bailee to deliver is sufficient tender unless the buyer seasonably objects, and except
22 as otherwise provided in Article 9 receipt by the bailee of notification of the buyer's rights fixes

those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(e) Where the contract requires the seller to deliver documents

(1) the seller must tender all such documents in correct form; and

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

[Reporter's Note – Consistent with the July draft, subsection (d)(1) clarifies that the bailee's acknowledgment must be made to the buyer. See Jason's Foods, Inc. v. Peter Eckrick & Sons, Inc., 774 F.2d 214 (7th Cir. 1985). See similar amendment to Section 2-509(b)(3)(B).]

[Reporter's Note – Subsection (d)(2) has the following changes from current law: "of a written direction to the bailee" is changed to "a record directing the bailee"; and, the phrase "except as otherwise provided in Article 9" has been added to bring this subsection in line with the recent revisions to Article 9 (Revised 9-313).]

[Reporter's Note – The present version of what is now designated as subsection (e)(2) has the language "except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2-323". This has been deleted because we have not retained section 2-323. However, we intend to draft a comment that refers to bills in a set and indicates that if they are used they must be in "correct form" (emphasizing the language of subsection (e)(1)).]

SECTION 2-504. SHIPMENT BY SELLER.

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

(1) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other

1 circumstances of the case; and

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

5 (3) promptly notify the buyer of the shipment.

6 Failure to notify the buyer under paragraph (3) or to make a proper contract under paragraph (1)
7 is a ground for rejection only if material delay or loss ensues.

8 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

9 **SECTION 2-505. SELLER'S SHIPMENT UNDER RESERVATION.**

10 (a) Where the seller has identified goods to the contract by or before shipment:

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

15 (2) a nonnegotiable bill of lading to the seller or the seller's nominee
16 reserves possession of the goods as security but except in a case of conditional delivery
17 (subsection (b) of Section 2-507) a nonnegotiable bill of lading naming the buyer as consignee
18 reserves no security interest even though the seller retains possession of the bill of lading.

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

1 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

2 **SECTION 2-506. RIGHTS OF FINANCING AGENCY.**

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

7 (b) Except as otherwise provided in Article 5, the right to reimbursement of a
8 financing agency which has in good faith honored or purchased the draft under commitment to or
9 authority from the buyer is not impaired by subsequent discovery of defects with reference to any
10 relevant document which was apparently regular on its face.

11 *[Reporter's Note - This section remains unchanged except that it now explicitly provides that*
12 *Article 5 governs in the event of a conflict.]*

13 **SECTION 2-507. EFFECT OF SELLER'S TENDER; DELIVERY ON**
14 **CONDITION.**

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

18 (b) Where payment is due and demanded on the delivery to the buyer of goods or
19 documents of title, the seller may reclaim the goods delivered upon a demand made within a
20 reasonable time after the seller discovers or should have discovered that payment was not made.

21 (c) The seller's right to reclaim under subsection (b) is subject to the rights of a
22 buyer in ordinary course or other good faith purchaser.

1 *[Reporter's Note – Subsection (a) remains unchanged except for gender neutral language. A*
2 *comment such as the following should be added to this section: “If the seller has agreed to*
3 *assemble or install the tendered goods, completion of that performance is also a condition to the*
4 *buyer's duty to accept and pay for the goods.” This comes from the black letter text of the July*
5 *draft.]*

6 *[Reporter's Note – Subsection (b) has been changed to state more directly the seller's right of*
7 *reclamation from a nonpaying buyer in a cash-sale transaction. The current provision says this*
8 *very indirectly: “the buyer's right as against the seller to retain or dispose of them is conditional*
9 *upon the buyer making the payment due.” The revision makes subsection 2-507(b) parallel to*
10 *subsection 2-702(b), as it was always intended to be. Because the buyer is actually in breach in*
11 *the cash sale situation, as opposed to the insolvency situation, there is no reason to put the seller*
12 *to an election of remedies here.]*

13 *[Reporter's Note – A comment should clarify that “due and demanded” in subsection (b), which*
14 *is from the current law, refers to the situation where the seller takes a check for payment.]*

15 **SECTION 2-508. CURE BY SELLER OF IMPROPER TENDER OR DELIVERY;**
16 **REPLACEMENT.**

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

23 (b) Where the buyer rejects goods or a tender of delivery under Section 2-601 or
24 [except in a consumer contract] justifiably revokes acceptance under Section 2-608(a)(2) and the
25 agreed time for performance has expired, the seller, upon seasonable notice to the buyer and at
26 the seller's own expense, may cure the breach of contract, if the cure is appropriate and timely
27 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 and subsequent cure.

[Reporter's Note – Current 2-508(2) provides that the seller may cure after the time of performance has run if “the seller had reasonable grounds to believe” the goods or tender would be acceptable. This standard has created problems because it focuses on the seller's reasonable beliefs to the exclusion of the buyer's rights, expectations and inconveniences. Courts have, of course, filled this gap, but this is an area where it is appropriate for us to clarify. Thus, the proposed new standard is: “if the cure is appropriate and timely under the circumstances”. This language comes from the July draft. In addition, this draft states explicitly what current law only implies: that subsection(b) deals with cure after the time of performance has expired.]

[Reporter's Note – A comment should be added indicating what should be obvious – that the rejection must be rightful or the revocation justifiable for this section to be triggered. In the case of a wrongful but effective rejection there is no breach by the seller to be cured. This point is reinforced by the language in the last sentence of each subsection (“seller's breach and subsequent cure”).]

[Reporter's Note – Consistent with the July draft, this draft accepts as a default rule a seller's right to cure following a revocation of acceptance under section 2-608(a)(2). The bracketed language permits us to discuss whether the default rule should be otherwise in consumer contracts.]

[Reporter's Note – This draft clarifies that even though the breach has been cured the buyer is entitled to compensation for the reasonable expenses caused by the seller's breach and subsequent cure. A comment should clarify that such expenses might go beyond incidental damages.]

[Reporter's Note – The consumer exception for the seller's right to cure after justifiable revocation has been bracketed for further discussion.]

SECTION 2-509. RISK OF LOSS IN THE ABSENCE OF BREACH.

(a) This section is subject to the contrary agreement of the parties and to Section 2-327 and Section 2-510.

(b) Risk of loss passes to the buyer regardless of the conformity of the goods to the contract as follows:

1 (1) Except as otherwise provided in this subsection, the risk of loss passes
2 to a buyer upon receipt of the goods. If a buyer does not intend to take possession, the risk of
3 loss passes when the buyer receives control of the goods.

4 (2) If the contract requires or authorizes the seller to ship goods by carrier,
5 the following rules apply:

6 (A) If the contract does not require delivery at a particular
7 destination, the risk of loss passes to the buyer when the goods are delivered to the carrier and the
8 seller complies with subsection (b) of Section 2-503 and Section 2-504, even if the shipment is
9 under reservation.

10 (B) If the contract requires delivery at a particular destination and
11 the goods arrive there in the possession of the carrier, the risk of loss passes to the buyer when
12 the goods are tendered in the manner required by subsection (c) of Section 2-503.

13 (3) If the goods are held by a bailee to be delivered without being moved,
14 the risk of loss passes to the buyer:

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

17 (B) on acknowledgment by the bailee to the buyer of the buyer's
18 right to possession of the goods; or

19 (C) after the buyer's receipt of a nonnegotiable document of title or
20 record directing delivery as provided in subsection (d)(2) of Section 2-503.

21 *[Reporter's Note – This is taken directly from the July draft with only the most minor,*
22 *nonsubstantive changes. However, I have taken the last subsection of the July draft and have*
23 *carved it out into a separate section (what was one section in the July draft has now been*

1 retained as two sections as in the current law).

2 As for the reasons for the changes from current law, I have reproduced here the rationale
3 given in that draft:

4 *“This section is derived from former Sections 2-509 and 2-510 but has made several*
5 *substantive changes in the rules regarding passage from the seller to the buyer of the risk*
6 *of loss for the goods. The underlying theory of this section is that risk of loss passes to*
7 *the buyer at a stated point in time based upon assumptions about who is in the best*
8 *position to prevent the harm to the goods or to insure against that harm regardless of*
9 *who has title to the goods or who has a property interest in the goods and regardless of*
10 *whether either party is in breach of contract except for the limited circumstances in*
11 *subsection (c)[now the new Section 2-510]. Thus the conformity or nonconformity of the*
12 *goods to the contract is not relevant to the passage of the risk of loss for the goods except*
13 *as provided in subsection (c) [Section 2-510]. Whether one or both parties have insured*
14 *against the loss is not relevant to determine who has the risk of loss for the goods.*

15 *The effect of the seller having the risk of loss for the goods is that if the goods are lost or*
16 *damaged, the seller must still deliver goods conforming to the contract or answer in*
17 *damages for breach of contract. Similarly, if the buyer has the risk of loss for the goods,*
18 *the buyer must perform its obligations under the contract or answer in damages for*
19 *breach of contract. Of course, the obligations of either the buyer or the seller may be*
20 *excused in an appropriate case under [Sections 2-613 through 2-616] on excuse.*

21 *Subsection (a) continues the rule that the risk of loss rules in this section are subject to*
22 *the rules on risk of loss found in [Section 2-327] for sale on approval or sale and*
23 *return.”]*

24 **SECTION 2-510. EFFECT OF BREACH ON RISK OF LOSS.**

25 A breach of contract by either party affects risk of loss only in the following cases:

26 (1) If the buyer rightfully rejects or justifiably revokes acceptance of the
27 goods, the seller has the risk of loss from the time the rejection or revocation is effective.

28 (2) If the seller has tendered nonconforming goods so that the buyer
29 would have the right to reject or revoke acceptance of the goods, the goods are damaged or lost
30 before the buyer effectively rejects or revokes acceptance, and the risk of loss would have
31 otherwise passed to the buyer under Section 2-509, the seller has the risk of loss to the extent the

1 nonconformity of the goods caused the damage or loss.

2 (3) If conforming goods are identified to the contract when the buyer
3 breaches and the risk of loss has not otherwise passed to the buyer, the buyer has the risk of loss
4 for those goods for a commercially reasonable time after the breach.

5 *[Reporter's Note – The explanation for the changes in this section are noted in the Reporter's*
6 *Note to section 2-509.]*

7 **SECTION 2-511. TENDER OF PAYMENT BY BUYER; PAYMENT BY CHECK.**

8 (a) Unless otherwise agreed tender of payment is a condition to the seller's duty to
9 tender and complete any delivery.

10 (b) Tender of payment is sufficient when made by any means or in any manner
11 current in the ordinary course of business unless the seller demands payment in legal tender and
12 gives any extension of time reasonably necessary to procure it.

13 (c) Subject to the provisions of this Act on the effect of an instrument on an
14 obligation (Section 3-310), payment by check is conditional and is defeated as between the
15 parties by dishonor of the check on due presentment.

16 *[Reporter's Note – This section remains unchanged.]*

17 **SECTION 2-512. PAYMENT BY BUYER BEFORE INSPECTION.**

18 (a) Where the contract requires payment before inspection nonconformity of the
19 goods does not excuse the buyer from so making payment unless

20 (1) the nonconformity appears without inspection; or

21 (2) despite tender of the required documents the circumstances would
22 justify injunction against honor under this Act (Section 5-109(b)).

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

[Reporter's Note – This section remains unchanged except for gender neutral language.]

SECTION 2-513. BUYER'S RIGHT TO INSPECTION OF GOODS.

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

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

(c) Unless otherwise agreed the buyer is not entitled to inspect the goods before payment of the price when the contract provides

(1) for delivery on terms that under applicable course of performance, course of dealing, or usage of trade are interpreted to preclude inspection before payment; or

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

(d) A place, method or standard of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place, method or standard fixed was clearly intended as an indispensable condition failure of which avoids the contract.

1 *[Reporter’s Note – Subsection (d) now provides that, in addition to the place and method of*
2 *inspection, the parties may provide for the standard of inspection. This addition reflects the*
3 *large number of cases where there is a dispute about the standard of inspection anticipated by*
4 *the parties. The second sentence of subsection (d) is unchanged from current law. The*
5 *comments will note that the word “compliance” in that sentence means compliance with an*
6 *agreed mode of inspection.]*

7 *[Reporter’s Note – Subsection (c)(1) has been redrafted to acknowledge that we have removed*
8 *the sections on shipping terms (section 2-319 to 2-322) and are leaving the meaning of shipping*
9 *terms to the custom and usage employed by the parties.]*

10 *[Reporter’s Note – The second sentence*

11 **SECTION 2-514. WHEN DOCUMENTS DELIVERABLE ON ACCEPTANCE;**
12 **WHEN ON PAYMENT.**

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

16 *[Reporter’s Note – I have added the phrase “and except as provide by Article 5”. This section is*
17 *designed to track section 4-503, which notes that Article 4 in this respect is also subject to a*
18 *contrary rule under Article 5. The specific question is what constitutes a time draft as opposed*
19 *to a sight draft. Under Article 5, because an issuer may have up to seven days to determine*
20 *compliance of documents (section 5-108), the delay beyond three days may not necessarily*
21 *indicate that the draft should be treated as a time draft.]*

22 **SECTION 2-515. PRESERVING EVIDENCE OF GOODS IN DISPUTE.**

23 In furtherance of the adjustment of any claim or dispute

24 (1) either party on reasonable notification to the other and for the purpose
25 of ascertaining the facts and preserving evidence has the right to inspect, test and sample the
26 goods including such of them as may be in the possession or control of the other; and

27 (2) the parties may agree to a third party inspection or survey to determine
28 the conformity or condition of the goods and may agree that the findings shall be binding upon

1 them in any subsequent litigation or adjustment.

2 *[Reporter's Note – This section remains unchanged.]*

1 **PART 6**

2 **BREACH, REPUDIATION AND EXCUSE**

3 **§ 2–601. BUYER'S RIGHTS ON IMPROPER DELIVERY.**

4 Subject to the provisions of this Article on breach in installment contracts (Section
5 2–612) and shipment contracts (Section 2-504) and unless otherwise agreed under the sections on
6 contractual limitations of remedy (Sections 2–718 and 2–719), if the goods or the tender of
7 delivery fail in any respect to conform to the contract, the buyer may

8 (1) reject the whole; or

9 (2) accept the whole; or

10 (3) accept any commercial unit or units and reject the rest.

11 *[Reporter's Note – The only change is the addition of a cross-reference to Section 2-504 on*
12 *breach in shipment contracts. This makes no substantive change, but flags in this section that*
13 *there is a limitation on the perfect tender rule in section 2-504.]*

14 **§ 2–602. MANNER AND EFFECT OF REJECTION.**

15 (a) Rejection of goods must be within a reasonable time after their delivery or
16 tender. It is ineffective unless the buyer seasonably notifies the seller.

17 (b) Subject to subsection (d) of Section 2-608 and to Sections 2–603 and 2–604,

18 (1) after rejection any exercise of ownership by the buyer with respect to
19 any commercial unit is wrongful as against the seller; and

20 (2) if the buyer has before rejection taken physical possession of goods in
21 which the buyer does not have a security interest under the provisions of this Article (subsection
22 (c) of Section 2–711), the buyer is under a duty after rejection to hold them with reasonable care
23 at the seller's disposition for a time sufficient to permit the seller to remove them; but

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

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

[Reporter's Note – The title has been changed to eliminate the word “Rightful” before “rejection” since the section deals with both effective and rightful rejections.]

[Reporter's Note – The only change in the text is a cross-reference to 2-608(d), which contains the rule governing reasonable post-rejection and post-revocation use.]

§ 2-603. MERCHANT BUYER'S DUTIES AS TO REJECTED GOODS.

(a) Subject to any security interest in the buyer (subsection (c) of Section 2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in its possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. In the case of a rightful rejection instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

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

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

damages.

[Reporter's Note – "Rightful" has been eliminated from the title (see Reporter's Note to 2-602).]

[Reporter's Note – The only changes in the text are to clarify that the buyer is not entitled to indemnity for expenses (subsection (a)) or to a commission (subsection (b)) following a wrongful rejection.]

[Reporter's Note – Rather than incorporate references to revocation of acceptance in this section, this draft continues the practice of tying the revoking buyer's rights into those of the rejecting buyer. Notice that Section 2-608(c) contains an expanded cross-reference that includes Sections 2-603 and 2-604. This approach has the added advantage of reducing the need to make tenuous distinctions between justified revocations of acceptance and wrongful revocations (a concept that exists only in atom smashers, where it can be observed for nanoseconds before disappearing).]

§ 2–604. BUYER'S OPTIONS AS TO SALVAGE OF RIGHTFULLY REJECTED GOODS.

Subject to the provisions of this Article on the duties of a merchant buyer (Section 2-603), the buyer may store the rejected goods for the seller's account or reship them to the seller or resell them for the seller's account with reimbursement as provided in the preceding section.

Such action is not acceptance or conversion.

[Reporter's Note – The format (but not the effect) of the introductory clause has been changed. The change emphasizes the fact that Section 2-604 is available to all buyers, including nonmerchants. (The current language is "Subject to the provisions of the immediately preceding section on perishables.")]

§ 2–605. WAIVER OF BUYER'S OBJECTIONS BY FAILURE TO PARTICULARIZE.

(a) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection or in connection with revocation of acceptance a known defect precludes the buyer from relying on the unstated defect to justify rejection or

1 revocation of acceptance

2 (1) where the seller had a right to cure the defect (Section 2-508) and
3 could have cured it if stated seasonably; or

4 (2) between merchants when the seller has after rejection or revocation of
5 acceptance made a request in writing for a full and final written statement of all defects on which
6 the buyer proposes to rely.

7 (b) A buyer's payment against documents tendered to the buyer made without
8 reservation of rights precludes recovery of the payment for defects apparent on the face of the
9 documents.

10 *[Reporter's Note – Subsection (a) has been revised so that a failure to particularize waives only*
11 *the right to rely on the unstated defect to justify the remedies of rejection and revocation of*
12 *acceptance, not other remedies. This is consistent with revised section 2-607.]*

13 *[Reporter's Note – The addition of a reference to revocation in subsection (a) is necessitated by*
14 *the expansion of the right to cure (section 2-508) to cover revocation in nonconsumer contracts.]*

15 *[Reporter's Note – Subsection (a)(1) has been revised to make it clear that the seller must have*
16 *had both the right and the ability to cure (current law refers only to ability).]*

17 *[Reporter's Note – Subsection (b) has been revised to make clear that the buyer who makes*
18 *payment upon presentation of the documents to the buyer may waive defects, but a person who is*
19 *not the buyer (e.g., a letter-of-credit issuer) does not waive the buyer's right to assert defects in*
20 *the documents as against the seller.]*

21 **§ 2-606. WHAT CONSTITUTES ACCEPTANCE OF GOODS.**

22 (a) Acceptance of goods occurs when the buyer

23 (1) after a reasonable opportunity to inspect the goods signifies to the seller
24 that the goods are conforming or will be taken or retained in spite of their nonconformity; or

25 (2) fails to make an effective rejection (subsection (a) of Section 2-602),

1 but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect
2 them; or

3 (3) except as otherwise provided in Section 2-608(d), does any act
4 inconsistent with the seller's ownership; but if such act is ratified by the seller it is an acceptance..

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

6 *[Reporter's Note – The only substantive change is a cross-reference to new Section 2-608(d),*
7 *which deals with reasonable use following rejection or revocation of acceptance. The last clause*
8 *of subsection (a)(3) has been revised to eliminate the word “wrongful”. That word is fully*
9 *handled by the combination of 2-602(b)(1) and 2-608(d).]*

10 **§ 2–607. EFFECT OF ACCEPTANCE; NOTICE OF BREACH; BURDEN OF**
11 **ESTABLISHING BREACH AFTER ACCEPTANCE; NOTICE OF CLAIM OR**
12 **LITIGATION TO PERSON ANSWERABLE OVER.**

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

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

19 (c) Where a tender has been accepted

20 (1) the buyer must within a reasonable time after the buyer discovers or
21 should have discovered any breach notify the seller; however, failure to give timely notice bars the
22 buyer from a remedy only to the extent that the seller is prejudiced by the failure.

23 (2) if the claim is one for infringement or the like (subsection (c) of Section

2–312) and the buyer is sued as a result of such a breach it must so notify the seller within a reasonable time after it receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

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

(e) Where the buyer is sued for indemnity, breach of a warranty or other obligation for which another party is answerable over

(1) the buyer may give the other party notice of the litigation in a record. If the notice states that the other party may come in and defend and that if the other party does not do so it will be bound in any action against it by the buyer by any determination of fact common to the two litigations, then unless the other party after seasonable receipt of the notice does come in and defend it is so bound.

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

(f) The provisions of subsections (c), (d) and (e) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (c) of Section 2–312).

[Reporter's Note – There is a change in subsection (c)(1), where the effect of a failure to give timely notice is reduced to a prejudice rule instead of an absolute bar to any recovery as under the current provision.]

[Reporter's Note – Consistent with the July draft, the vouching-in procedure in subsection (e)

1 *has been expanded to include indemnity actions and persons other than the seller who are*
2 *answerable over.]*

3 **§ 2-608. REVOCATION OF ACCEPTANCE IN WHOLE OR IN PART; USE OF**
4 **GOODS FOLLOWING RIGHTFUL REJECTION OR JUSTIFIABLE REVOCATION**
5 **OF ACCEPTANCE.**

6 (a) The buyer may revoke acceptance of a lot or commercial unit whose
7 nonconformity substantially impairs its value to the buyer if the buyer has accepted it

8 (1) on the reasonable assumption that its nonconformity would be cured
9 and it has not been seasonably cured; or

10 (2) without discovery of such nonconformity if the buyer's acceptance was
11 reasonably induced either by the difficulty of discovery before acceptance or by the seller's
12 assurances.

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

17 (c) A buyer who so revokes has the same rights and duties with regard to the
18 goods involved as if the buyer had rejected them (subsection (b) of Section 2-602 and Sections 2-
19 603 and 2-604).

20 (d) If a buyer uses the goods after a rightful rejection or justifiable revocation of
21 acceptance, the following rules apply:

22 (1) Any use by the buyer that is unreasonable under the circumstances is

wrongful as against the seller and is an acceptance only if ratified by the seller (subsection (a)(3) of Section 2-606).

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

[Reporter's Note – Subsection (c) contains an expanded cross-reference to provisions which, by their terms, deal with rejection.]

[Reporter's Note – Subsection (d), which is new, permits a buyer who rightfully rejects or justifiably revokes acceptance to make reasonable use of the goods and only be liable, where appropriate, for the value of the use. The language has been streamlined somewhat from the July draft. The Comments will need to flesh out the concept and give examples of circumstances where the buyer would not be obligated to pay for the use of the goods (e.g., where the use is solely for the purpose of protecting the buyer's security interest). The Comments will also clarify that the value that is being measured is the value to the buyer of nonconforming goods.]

§ 2-609. RIGHT TO ADEQUATE ASSURANCE OF PERFORMANCE.

(a) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in a record demand adequate assurance of due performance and until the party receives such assurance may if commercially reasonable suspend any performance for which it has not already received the agreed return.

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

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

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

[Reporter's Note – This section remains unchanged except for gender neutral language.]

§ 2–610. ANTICIPATORY REPUDIATION.

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

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

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

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

(b) Repudiation includes language that a reasonable party would interpret to mean that the other party will not or cannot make a performance still due under the contract or voluntary, affirmative conduct that would appear to a reasonable party to make a future performance by the other party impossible.

[Reporter's Note – The only change of substance is the addition of subsection (b) from the July draft.]

1 **§ 2–611. RETRACTION OF ANTICIPATORY REPUDIATION.**

2 (a) Until the repudiating party's next performance is due that party can retract its
3 repudiation unless the aggrieved party has since the repudiation canceled or materially changed
4 position or otherwise indicated that the repudiation is final.

5 (b) Retraction may be by any method which clearly indicates to the aggrieved party
6 that the repudiating party intends to perform, but must include any assurance justifiably demanded
7 under the provisions of this Article (Section 2–609).

8 (c) Retraction reinstates the repudiating party's rights under the contract with due
9 excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

10 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

11 **§ 2–612. BREACH OF INSTALLMENT CONTRACT.**

12 (a) In an installment contract, the buyer may reject any installment which is
13 nonconforming if the nonconformity substantially impairs the value of that installment to the buyer
14 or if the nonconformity is a defect in the required documents; but if the nonconformity does not
15 fall within subsection (b) and the seller has a right to cure the defect (Section 2-508) and gives
16 adequate assurance of cure the buyer must accept that installment.

17 (b) Whenever nonconformity or default with respect to one or more installments
18 substantially impairs the value of the whole contract [to the buyer] there is a breach of the whole.
19 But the aggrieved party reinstates the contract if it accepts a nonconforming installment without
20 seasonably notifying of cancellation or if it brings an action with respect only to past installments
21 or demands performance as to future installments.

22 *[Reporter's Note – The title has been changed because the definition of installment contract now*

1 *appears in 2-103. Concomitantly, current subsection (1), where installment contracts are*
2 *defined, has been deleted.]*

3 *[Reporter's Note – The bracketed words “to the buyer” in subsections(a) and (b) are added to*
4 *equate the standard for rejecting an installment with the standard for revocation of acceptance.*
5 *This language appears in the July draft.]*

6 *[Reporter's Note – Subsection (a) has been revised to clarify the relationship between this*
7 *section and the section on cure (section 2-508).]*

8 **§ 2–613. CASUALTY TO IDENTIFIED GOODS.**

9 Where the contract requires for its performance goods identified when the contract
10 is made and the goods suffer casualty without fault of either party before the risk of loss passes to
11 the buyer then

12 (1) if the loss is total the contract is terminated; and

13 (2) if the loss is partial or the goods have so deteriorated as no longer to
14 conform to the contract the buyer may nevertheless demand inspection and at its option either
15 treat the contract as terminated or accept the goods with due allowance from the contract price
16 for the deterioration or the deficiency in quantity but without further right against the seller.

17 *[Reporter's Note – I have deleted the underlined part of the following text: “ before the risk of*
18 *loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2–324)”*
19 *because we have deleted section 2-324. A comment will be needed to make the same point.]*

20 *[Reporter's Note – Paragraphs (1) and (2) have been revised to use “terminated” rather than*
21 *the current law's “avoided”. This preserves pre-termination breaches, which I believe to be the*
22 *appropriate rule in this context.]*

23 **§ 2–614. SUBSTITUTED PERFORMANCE.**

24 (a) Where without fault of either party the agreed berthing, loading, or unloading
25 facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery
26 otherwise becomes commercially impracticable but a commercially reasonable substitute is

1 available, such substitute performance must be tendered and accepted.

2 (b) If the agreed means or manner of payment fails because of domestic or foreign
3 governmental regulation, the seller may withhold or stop delivery unless the buyer provides a
4 means or manner of payment which is commercially a substantial equivalent. If delivery has
5 already been taken, payment by the means or in the manner provided by the regulation discharges
6 the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

7 *[Reporter's Note – There is no change from the current law.]*

8 **§ 2-615. EXCUSE BY FAILURE OF PRESUPPOSED CONDITIONS.**

9 Except so far as a seller may have assumed a greater obligation and subject to the
10 preceding section on substituted performance:

11 (1) Delay in performance or nonperformance in whole or in part by a seller
12 who complies with paragraphs (2) and (3) is not a breach of the seller's duty under a contract for
13 sale if performance as agreed has been made impracticable by the occurrence of a contingency the
14 nonoccurrence of which was a basic assumption on which the contract was made or by
15 compliance in good faith with any applicable foreign or domestic governmental regulation or
16 order whether or not it later proves to be invalid.

17 (2) Where the causes mentioned in paragraph (1) affect only a part of the
18 seller's capacity to perform, the seller must allocate production and deliveries among the seller's
19 customers but may at the seller's option include regular customers not then under contract as well
20 as the seller's own requirements for further manufacture. The seller may so allocate in any
21 manner which is fair and reasonable.

22 (3) The seller must notify the buyer seasonably that there will be delay or

nonperformance and, when allocation is required under paragraph (2), of the estimated quota thus made available for the buyer.

[Reporter's Note –subsection (1) is changed to cover delays “in performance or nonperformance” rather than “in delivery or nondelivery.” This change reflects an understanding of the broader range of obligations a seller may have other than the delivery of the goods.]

§ 2–616. PROCEDURE ON NOTICE CLAIMING EXCUSE.

(a) Where the buyer receives notification of a material or indefinite delay or an allocation justified under Section 2-615 the buyer may by notification in a record to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this Article relating to breach of installment contracts (Section 2–612), then also as to the whole,

(1) terminate and thereby discharge any unexecuted portion of the contract;

or

(2) modify the contract by agreeing to take its available quota in substitution under Section 2-615.

(b) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract is terminated with respect to any performance affected.

(c) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

[Reporter's Note – Consistent with section 2-613 (see Reporter's Note to that section), subsection (b) is amended to refer to “termination” and “performance” rather than “avoidance” and “delivery”.]

1 **PART 7**

2 **REMEDIES**

3 **SECTION 2-701. REMEDIES FOR BREACH OF COLLATERAL CONTRACTS**
4 **NOT IMPAIRED.**

5 Remedies for breach of any obligation or promise collateral or ancillary to a
6 contract for sale are not impaired by the provisions of this Article.

7 *[Reporter's Note – This section remains unchanged.]*

8 **SECTION 2-702. SELLER'S REMEDIES ON DISCOVERY OF BUYER'S**
9 **INSOLVENCY.**

10 (a) Where the seller discovers the buyer to be insolvent the seller may refuse
11 delivery except for cash including payment for all goods theretofore delivered under the contract,
12 and stop delivery under this Article (Section 2-705).

13 (b) Where the seller discovers that the buyer has received goods on credit while
14 insolvent the seller may reclaim the goods upon demand made within a reasonable time after the
15 buyer's receipt of the goods. Except as provided in this subsection the seller may not base a right
16 to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent
17 to pay.

18 (c) The seller's right to reclaim under subsection (b) is subject to the rights of a
19 buyer in ordinary course or other good faith purchaser. Successful reclamation of goods excludes
20 all other remedies with respect to them.

21 *[Reporter's Note – Subsection (b) is changed from the current provision. Under the current law,*
22 *the seller must make the reclamation claim within 10 days of the buyer's receipt of the goods*
23 *(subject to an active misrepresentation of solvency, in which case the 10 day limitation does not*

1 *apply). A comment should remind sellers of the risk of delay in asserting their reclamation*
2 *claims in bankruptcy.]*

3 **SECTION 2-703. SELLER'S REMEDIES IN GENERAL.**

4 (a) A breach of contract by the buyer includes the buyer's wrongful rejection or
5 wrongful attempt to revoke acceptance of goods, wrongful failure to perform a contractual
6 obligation, failure to make a payment when due, or repudiation.

7 (b) If the buyer is in breach of contract, or in the case of an installment contract is
8 in breach of the whole (subsection (c) of Section 2-612), the seller may:

- 9 (1) withhold delivery of the goods under subsection (a) of Section 2-702;
10 (2) stop delivery of the goods under Section 2-705;
11 (3) proceed with respect to good unidentified to the contract or unfinished
12 under Section 2-704;
13 (4) reclaim the goods under subsection (b) of Section 2-702;
14 (5) cancel (Section 2-106);
15 (6) resell and recover damages under Section 2-706;
16 (7) recover damages for nonacceptance or repudiation under subsection (a)
17 of Section 2-708;
18 (8) recover lost profits under subsection (b) of Section 2-708;
19 (9) recover the price under Section 2-709;
20 (10) obtain specific performance under Section 2-716;
21 (11) recover liquidated damages under Section 2-718;
22 (12) recover incidental and consequential damages under Section 2-710; or

(13) in a case not within any of the preceding paragraphs, recover damages in any manner that is reasonable under the circumstances.

(c) If a buyer becomes insolvent but is not in breach of contract under subsection (a), the seller may:

(1) withhold delivery under subsection (a) of Section 2-702;

(2) stop delivery of the goods under Section 2-705; or

(3) reclaim the goods under subsection (b) of Section 2-702.

[(d) Unless the contract provides for liquidated damages enforceable under Section 2-718 an aggrieved party may not recover that part of a loss resulting from a breach of contract that could have been avoided by reasonable measures under the circumstances.]

[Reporter's Note – This section is a substantial revision of current 2-703 and gives a laundry list of the seller's remedies for breach. In addition, the section now states the seller's remedies upon the buyer's insolvency. It also defines the buyer's statutory breaches (as opposed to contractually defined breaches) with more specificity, although it is drafted to be inclusive rather than exclusive.]

[Reporter's Note – A comment should indicate that subsection (b)(13), which is open-ended, is designed to deal with remedies for contractually defined breaches.]

[Reporter's Note – Subsection (d) is bracketed for discussion both here and in Section 2-711.]

SECTION 2-704. SELLER'S RIGHT TO IDENTIFY GOODS TO THE CONTRACT NOTWITHSTANDING BREACH OR TO SALVAGE UNFINISHED GOODS.

(a) An aggrieved seller under the preceding section may

(1) identify to the contract conforming goods not already identified if at the time the seller learned of the breach they are in the seller's possession or control;

1 (2) treat as the subject of resale goods which have demonstrably been
2 intended for the particular contract even though those goods are unfinished.

3 (b) Where the goods are unfinished an aggrieved seller may in the exercise of
4 reasonable commercial judgment for the purposes of avoiding loss and of effective realization
5 either complete the manufacture and wholly identify the goods to the contract or cease
6 manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

7 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

8 **SECTION 2-705. SELLER'S STOPPAGE OF DELIVERY IN TRANSIT OR**
9 **OTHERWISE.**

10 (a) The seller may stop delivery of goods in the possession of a carrier or other
11 bailee when the seller discovers the buyer to be insolvent (Section 2-702) or when the buyer
12 repudiates or fails to make a payment due before delivery or if for any other reason the seller has a
13 right to withhold or reclaim the goods.

14 (b) As against such buyer the seller may stop delivery until
15 (1) receipt of the goods by the buyer; or
16 (2) acknowledgment to the buyer by any bailee of the goods except a
17 carrier that the bailee holds the goods for the buyer; or
18 (3) such acknowledgment to the buyer by a carrier by reshipment or as
19 warehouseman; or

20 (4) negotiation to the buyer of any negotiable document of title covering
21 the goods.

22 (c)(1) To stop delivery the seller must so notify as to enable the bailee by

1 reasonable diligence to prevent delivery of the goods.

2 (2) After such notification the bailee must hold and deliver the goods
3 according to the directions of the seller but the seller is liable to the bailee for any ensuing charges
4 or damages. A carrier or other bailee need not stop delivery if the seller does not provide
5 indemnity for charges or damages upon demand of the carrier or bailee.

6 (3) If a negotiable document of title has been issued for goods the bailee is
7 not obliged to obey a notification to stop until surrender of the document.

8 (4) A carrier who has issued a nonnegotiable bill of lading is not obliged to
9 obey a notification to stop received from a person other than the consignor.

10 *[Reporter's Note – Subsection (a) eliminates the restriction on the right of stoppage in transit to*
11 *“carload, truckload, planeload or larger shipments” when the buyer fails to pay or repudiates*
12 *the agreement, but protects the bailee by allowing a demand for indemnity. This change comes*
13 *from the July draft, and it is based on the assumption that the present limitation is incompatible*
14 *with current shipping capabilities.]*

15 **SECTION 2–706. SELLER'S RESALE INCLUDING CONTRACT FOR RESALE.**

16 (a) Under the conditions stated in Section 2–703 on seller's remedies, the seller
17 may resell the goods concerned or the undelivered balance thereof. Where the resale is made in
18 good faith and in a commercially reasonable manner the seller may recover the difference between
19 the contract price and the resale price together with any incidental and consequential damages
20 allowed under the provisions of this Article (Section 2–710), but less expenses saved in
21 consequence of the buyer's breach.

22 (b) Except as otherwise agreed a resale may be at public or private sale including
23 sale by way of one or more contracts to sell or of identification to an existing contract of the
24 seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every

1 aspect of the sale including the method, manner, time, place and terms must be commercially
2 reasonable. The resale must be reasonably identified as referring to the broken contract, but it is
3 not necessary that the goods be in existence or that any or all of them have been identified to the
4 contract before the breach.

5 (c) Where the resale is at private sale the seller must give reasonable notification of
6 an intention to resell.

7 (d) Where the resale is at public sale

8 (1) only identified goods can be sold except where there is a recognized
9 market for a public sale of futures in goods of the kind; and

10 (2) it must be made at a usual place or market for public sale if one is
11 reasonably available and except in the case of goods which are perishable or threaten to decline in
12 value speedily the seller must give the buyer reasonable notice of the time and place of the resale;
13 and

14 (3) if the goods are not to be within the view of those attending the sale the
15 notification of sale must state the place where the goods are located and provide for their
16 reasonable inspection by prospective bidders; and

17 (4) the seller may buy.

18 (e) A purchaser who buys in good faith at a resale takes the goods free of any
19 rights of the original buyer even though the seller fails to comply with one or more of the
20 requirements of this section.

21 (f) The seller is not accountable to the buyer for any profit made on any resale. A
22 person in the position of a seller (Section 2-707) or a buyer who has rightfully rejected or

justifiably revoked acceptance must account for any excess over the amount of any security interest, as hereinafter defined (subsection (3) of Section 2-711).

[(g) A seller who does not resell in the manner required under this section is not barred from any other remedy.]

[Reporter's Note – Consistent with the expansion in 2-710 to allow consequential damages for sellers, subsection (a) now provides for the seller's consequential damages in appropriate situations.]

[Reporter's Note – Current law measures damages by the difference between the resale price and the contract price. Subsection (a) 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. The same change has been made in section 2-708(a). Compare sections 2-712 and 2-713 on buyer's remedies, where the contract price is listed after the cover or market price.]

[Reporters Note – I have bracketed subsection (g) for discussion. This subsection is new and it comes from the July draft. The obvious reason for this provision is that the same provision is currently in the concomitant provision for buyers. (See section 2-712.) This provision is not innocuous, however, and it is intended to overrule some very specific cases and to address a very specific situation – when the seller would receive a higher measure of damages under section 2-708 than the seller would receive under section 2-706. This problem arises when the seller resells the goods, but by a commercially unreasonable does not meet the requirements of section 2-706, and therefore is "relegated" to collecting a higher amount of damages under the default measure of section 2-708. Many courts have taken the position that when there is a commercially unreasonable resale, the seller cannot receive more under section 2-708 than the seller would have received under section 2-706. This provision would overrule those cases.

Note also that this provision eliminates any argument a buyer would have that the seller had an obligation to mitigate damages by reselling (although, unlike the problem discussed above, I have never seen this mitigation argument made in any cases).]

SECTION 2-707. "PERSON IN THE POSITION OF A SELLER".

(a) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of the principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(b) A person in the position of a seller has the same remedies as a seller under this

Article.

[Reporter's Note – This section has been changed to allow the "person in the position of a seller" to have the full range of remedies that the seller would have. The current provision is more limited, and it provides that: "A person in the position of a seller may as provided in this Article withhold or stop delivery (Section 2–705) and resell (Section 2–706) and recover incidental damages (Section 2–710)." I can think of no reason for the present limitation, nor have I been able to find any commentary that would justify the limitation (although there is plenty of commentary that expresses the same puzzlement with the limitation.)]

SECTION 2-708. SELLER'S DAMAGES FOR NONACCEPTANCE OR REPUDIATION.

(a) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2–723)

(1) the measure of damages for nonacceptance by the buyer is the difference between the contract price and the market price at the time and place for tender together with any incidental or consequential damages provided in this Article (Section 2–710), but less expenses saved in consequence of the buyer's breach; and

(2) the measure of damages for repudiation by the buyer is the difference between the contract price and the market price at the place for tender and at the expiration of a commercially reasonable time after the seller learned of the repudiation, but no later than the time stated in paragraph (1), together with any incidental or consequential damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

(b) If the measure of damages provided in subsection (a) or in Section 2-706 is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental and consequential damages

provided in this Article (Section 2–710).

[Reporter’s Note – Subsection (a) has been divided into two paragraphs rather than the one paragraph in existing law. The second paragraph, which is new, clarifies the proper measurement of damages in cases of anticipatory repudiation. The measurement is consistent with the better reasoned cases. The same approach has been taken in 2-713 on buyer’s market-based damage claims.]

[Reporter’s Note – The current provision sets the measure of damages as the difference between the market price and the unpaid contract price. I have deleted the word unpaid as being superfluous and misleading. It is a word that is never mentioned in the cases or commentary, because it is generally recognized as meaningless. It is also unnecessary, because if the buyer has already paid a portion of the price, the buyer is entitled to that back as restitution under section 2-718. Thus the word, in the current provision, sits there waiting to cause mischief. I have also reversed the order of the terms “market price” and “contract price” – see the second Reporter’s Note to section 2-706.]

[Reporter’s Note – Consistent with the revision of section 2-710, this section now provides for consequential as well as incidental damages in both subsections (a) and (b).]

[Reporter’s Note – Subsection (b) now has the following underlined language added: “provided in subsection (a) or section 2-706 is inadequate...” Courts generally have correctly assumed that 2-708(b) was an alternative to section 2-706 as well as 2-708(a), but the courts still have been forced to ask and analyze the question. See e.g., R.E. Davis Chemical Corp. v. Disonics, Inc., 826 F.2d 678 (7th Cir. 1987). This change makes this result explicit.]

[Reporter’s Note – In subsection (b) the language “due credit for payments or proceeds of resale” from the current provision has been deleted. As has been noted repeatedly, (see e.g., Harris, A Radical Restatement of the Law of Seller’s Damages: Sales Act and Commercial Code Results Compared, 18 Stanford. L. Rev. 66; White & Summers, Uniform Commercial Code pp. 275-66, 4th Ed.)) the language makes no sense whatsoever (at least in the context of the lost-volume seller) and it has been universally ignored in order to make this provision work as it was intended.]

[Reporter’s Note – The existing version of subsection (b) contains the phrase “due allowance for costs reasonably incurred”. This draft deletes that language because it can cause mischief in certain contexts. The proper application of the concept will be worked out in the comments.]

SECTION 2-709. ACTION FOR THE PRICE.

(a) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental or consequential damages under the next section, the price

(1) of goods accepted

(2) of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; but, if the seller has retained or regained control of the goods, the seller may recover the price only if the loss or damage has occurred within a commercially reasonable time after the risk of loss has passed to the buyer; and

(3) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(b) A seller who sues for the price must hold for the buyer any goods which have been identified to the contract and are still in the seller's control except that if resale becomes possible the seller may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles the buyer to any goods not resold.

(c) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated, a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under the preceding section.

[Reporter's Note – Consistent with the revision of section 2-710, this section now provides for consequential as well as incidental damages.]

[Reporter's Note – Subsection (a) has been changed from two to three paragraphs. This structural change is made for the purpose of making the section more readable. Within subsection (a)(2) the risk of loss rule has been clarified to conform with section 2-510.]

SECTION 2-710. SELLER'S INCIDENTAL AND CONSEQUENTIAL

1 **DAMAGES.**

2 (a) Incidental damages to an aggrieved seller include any commercially reasonable
3 charges, expenses or commissions incurred in stopping delivery, in the transportation, care and
4 custody of goods after the buyer's breach, in connection with return or resale of the goods or
5 otherwise resulting from the breach.

6 (b) Consequential damages resulting from the buyer's breach include any loss
7 resulting from general or particular requirements and needs of which the buyer at the time of
8 contracting had reason to know and which could not reasonably be prevented by resale or
9 otherwise.

10 (c) Unless otherwise agreed, in a consumer contract a seller may not recover
11 consequential damages from a consumer.

12 *[Reporter's Note- this section has been amended to provide for seller's consequential as well as*
13 *incidental damages. The title of the section has also been changed to reflect this. In addition, a*
14 *comment will make it clear (with examples) that it is very difficult to have seller's consequential*
15 *damages. Subsection (c) reflects the view that recovery of a seller's consequential damages*
16 *ought not be the default rule in consumer contracts.]*

17 **SECTION 2-711. BUYER'S REMEDIES IN GENERAL; BUYER'S SECURITY**
18 **INTEREST.**

19 (a) A breach of contract by the seller includes the seller's wrongful failure to
20 deliver or to perform a contractual obligation, making of a nonconforming tender of delivery or
21 performance, or repudiation.

22 (b) If the seller is in breach of contract under subsection (a) or in breach of the
23 whole contract under subsection (c) of Section 2-612, the buyer may:

(1) in the case of rightful cancellation, rightful rejection or justifiable revocation of acceptance recover so much of the price as has been paid;

(2) deduct damages from any part of the price still due under Section 2-717);

(3) cancel (Section 2-106);

(4) cover and have damages under the Section 2-712 as to all goods affected whether or not they have been identified to the contract;

(5) recover damages for nondelivery or repudiation under Section 2-713;

(6) recover damages for breach with regard to accepted goods or breach with regard to a remedial promise under Section 2-714;

(7) recover identified goods under Section 2-502;

(8) obtain specific performance or obtain the goods by replevin or the like under Section 2-716;

(9) recover liquidated damages under Section 2-718;

(10) recover incidental and consequential damages under Section 2-715; or

(11) in a case not within any of the preceding paragraphs, recover damages in any manner that is reasonable under the circumstances.

(c) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in the buyer's possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

1 [(d) Unless the contract provides for liquidated damages enforceable under
2 Section 2-718 an aggrieved party may not recover that part of a loss resulting from a breach of
3 contract that could have been avoided by reasonable measures under the circumstances.]

4 *[Reporter's Note –This section is a substantial revision of current 2-711. The rationale for*
5 *many of the changes is discussed in the Reporter's Notes to section 2-703.]*

6 **SECTION 2-712. COVER; BUYER'S PROCUREMENT OF SUBSTITUTE**
7 **GOODS.**

8 (a) If the seller wrongfully fails to deliver or repudiates or the buyer rightfully
9 rejects or justifiably revokes acceptance, the buyer may cover by making in good faith and
10 without unreasonable delay any reasonable purchase of or contract to purchase goods in
11 substitution for those due from the seller.

12 (b) The buyer may recover from the seller as damages the difference between the
13 cost of cover and the contract price together with any incidental or consequential damages as
14 hereinafter defined (Section 2–715) but less expenses saved in consequence of the seller's breach.

15 (c) Failure of the buyer to effect cover within this section does not bar the buyer
16 from any other remedy.

17 *[Reporter's Note – The changes from current law in subsection (a) make the application of the*
18 *section more precise. Cover is not available if the buyer accepts the goods and does not*
19 *rightfully revoke that acceptance.]*

20 **SECTION 2-713. BUYER'S DAMAGES FOR NONDELIVERY OR**
21 **REPUDIATION.**

22 (a) Subject to the provisions of this Article with respect to proof of market price
23 (Section 2–723), if the seller wrongfully fails to deliver or repudiates or the buyer rightfully rejects

1 or justifiably revokes acceptance the following rules apply:

2 (1) the measure of damages in the case of wrongful failure to deliver by the seller
3 or rightful rejection or justifiable revocation of acceptance by the buyer is the difference between
4 the market price at the [time when the buyer learned of the breach][time for tender under the
5 agreement] and the contract price together with any incidental and consequential damages
6 provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's
7 breach; and

8 (2) the measure of damages for repudiation by the seller is the difference
9 between the market price at the expiration of a commercially reasonable time after the buyer
10 learned of the repudiation, but no later than the time stated in paragraph (1), and the contract
11 price together with any incidental or consequential damages provided in this Article (Section 2-
12 710), but less expenses saved in consequence of the seller's breach.

13 (b) Market price is to be determined as of the place for tender or, in cases of
14 rejection after arrival or revocation of acceptance, as of the place of arrival.

15 *[Reporter's Note – This section now provides a rule for anticipatory repudiation cases. This is*
16 *consistent with the new rule in section for 2-708(1) and resolves a problem that is in the current*
17 *Code.]*

18 *[Reporter's Note – The changes in subsection (a) make application of the section more precise.*
19 *See Reporter's Note to Section 2-712.]*

20 *[Reporter's Note – I have bracketed the time of the measurement for the normal case for the*
21 *buyer's damages for repudiation or rejection. The current provision sets it at the time the buyer*
22 *learns of the breach, and this is reflected in the first bracketed language. The second bracketed*
23 *language sets the time at the time of performance under the agreement.*

24 *This second approach is consistent with the seller's remedy under section 2-708(1),*
25 *consistent with the Uniform Sales Act from which it is derived, and also consistent with any*
26 *notion of what the damage measurement would be at the time of formation. These two*
27 *measurements reflect two different theories of contract damages. Measurement at the time the*

1 *buyer learned of the breach assumes a theory that damages are best measured by what the*
2 *parties actually do after a breach. This theory supports sections 2-706 and 2-712, as well as the*
3 *current version of 2-713 (the comments to section 2-713 make it clear that the section is*
4 *specifically intended to reflect party response to the breach as opposed to the bargain ex ante).*
5 *The second theory of contract damages presupposes that a party is entitled to that which would*
6 *in fact actually result from the agreement (i.e., a baseline of what actual performance would*
7 *have yielded, irrespective of what the parties in fact do after a breach.) This theory supports the*
8 *measurement of damages in 2-708(1) and is what the common law and the Uniform Sales Act*
9 *would have yielded for the buyer prior to section 2-713.*

10 *The July draft adopted the latter theory, and therefore made the assumption that the*
11 *bargain ex ante is the correct measurement : “at the time for tender of delivery or when the*
12 *buyer learned that the tender of delivery did not occur, whichever is later.” I have chosen not to*
13 *adopt this language because, although it begins with the assumption that the measurement is the*
14 *bargain ex ante, (which I believe is the correct view) it then adds the further stipulation that the*
15 *time may be delayed until the buyer’s knowledge of the breach. This sneaks the theory of actual*
16 *party response in the back door results in a measurement of damages grounded in no consistent*
17 *theory.*

18 *It is clear that current Article 2 assumes one theory for buyers and another one for*
19 *sellers. There has never been an explanation for this, and my choice would be to have a*
20 *consistent theory. I would adopt the latter bracketed language because it is more consistent with*
21 *traditional contract theory that one takes the risk at the time of contracting as to what the actual*
22 *outcome will be. This is consistent with the recommendations of the original Study Committee*
23 *as well as the A.B.A. Task Force. The recommendation of those reports noted the difficulty with*
24 *the current standard, as it is hard to prove or disprove when a buyer was aware of the breach.]*

25 **SECTION 2-714. BUYER'S DAMAGES FOR BREACH IN REGARD TO**
26 **ACCEPTED GOODS AND REMEDIAL PROMISES.**

27 (a) Where the buyer has accepted goods and given notification (subsection (c) of
28 Section 2–607) the buyer may recover as damages for any nonconformity of tender the loss
29 resulting in the ordinary course of events from the seller's breach as determined in any manner
30 which is reasonable.

31 (b) The measure of damages for breach of a warranty is the difference at the time
32 and place of acceptance between the value of the goods accepted and the value they would have
33 had if they had been as warranted, unless special circumstances show proximate damages of a

different amount.

(c) The measure of damages for breach of a remedial promise value is the difference between the value of the promised remedial performance less the value of any remedial performance made.

(d) In a proper case any incidental and consequential damages under the next section may also be recovered.

[Reporter's Note – Prior drafts have added the underlined clause to subsection (a): “A buyer that has accepted goods and not justifiably revoked acceptance”. I have not added it, as it appears to be superfluous. However, we can point this out in a comment with a cross reference to 2-608(c).]

[Reporter's Note – Subsection (c) is new. This section is necessary because the provisions on express warranties and express warranty obligations (sections 2-313, 2-313A, and 2-313(B)) explicitly refer to remedial promises.]

SECTION 2-715. BUYER'S INCIDENTAL AND CONSEQUENTIAL DAMAGES.

(a) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(b) Consequential damages resulting from the seller's breach include

(1) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(2) injury to person or property proximately resulting from any breach of warranty.

1 *[Reporter's Note – There is no change from current law.]*

2 *[Reporter's Note – It will be useful to put in a comment as a reminder that a buyer who has*
3 *justifiably revoked acceptance has the same rights as a rejecting buyer. See Section 2-608(c).]*

4 **SECTION 2-716. RIGHT TO SPECIFIC PERFORMANCE OR REPLEVIN OR**
5 **THE LIKE.**

6 (a) Specific performance may be decreed where the goods are unique or in other
7 proper circumstances. In a contract other than a consumer contract, the court may enter a decree
8 for specific performance if the parties have agreed to that remedy. However, even if the parties
9 agree to specific performance, the court may not enter a decree for specific performance if the
10 breaching party's sole remaining contractual obligation is the payment of money.

11 (b) The decree for specific performance may include such terms and conditions as
12 to payment of the price, damages, or other relief as the court may deem just.

13 (c) The buyer has a right of replevin or the like for goods identified to the contract
14 if after reasonable effort he is unable to effect cover for such goods or the circumstances
15 reasonably indicate that such effort will be unavailing or if the goods have been shipped under
16 reservation and satisfaction of the security interest in them has been made or tendered.

17 (d) The buyer's right under subsection (c) vests upon acquisition of a special
18 property, even if the seller had not then repudiated or failed to deliver.

19 *[Reporter's Note – Consistent with the content of the section, the section heading has eliminated*
20 *the reference to "Buyer" and has been expanded to refer to ". . . replevin or the like." The*
21 *assumption is that either the seller or the buyer can demand specific performance in appropriate*
22 *circumstances (see the next Reporter's Note).]*

23 *[Reporter's Note – A comment should indicate that in subsection (a) the phrase "other proper*
24 *circumstances" is not limited to the goods. The obligation of the parties may be more than the*
25 *tendering of the goods or the payment of money – there may be unusual terms that neither party*

1 *can replicate in the marketplace.]*

2 *[Reporter’s Note – Subsection (a) adds the following sentence to current law: “In a contract*
3 *other than a consumer contract, the court may enter a decree for specific performance if the*
4 *parties have agreed to that remedy.” This recognizes that under the general principle of freedom*
5 *of contract, as well as the development of commercial practices consistent with this principle,*
6 *parties should be able to arrange for specific performance if they so agree.]*

7 *[Reporter’s Note – The last sentence of subsection (a) is new. Because we have extended the*
8 *right of specific performance to seller’s as well as buyers, we have opened up the possibility of*
9 *sellers using this provision to force the payment of money judgments. The specific performance*
10 *provision should not be read as creating a new right to enforce money judgments.]*

11 *[Reporter’s Note – Subsection (c) has been changed from the current provision. After the word*
12 *“replevin” is added the clause “or the like” to reflect that under the governing state law, the*
13 *right of replevin may be called “detinue”, “sequestration,” “claim and delivery”, or*
14 *something else. A comment will make this point clear.]*

15 *[Reporter’s Note – Subsection (d) is new, and it corresponds with Section 2-502(b), which in*
16 *turn is derived from the conforming amendments to Article 9. This is a necessary clarification in*
17 *the Articles 2 and 9 interrelationship.]*

18 *[Reporter’s Note – Because Section 2-402 is limited to the rights of unsecured creditors, a*
19 *comment along the following lines may be helpful in each of the referenced sections: “This rule*
20 *assumes application of a ‘first in time’ priority rule. In other words, if the buyer’s rights vest*
21 *under this rule before a creditor acquires an in rem right to the goods, including an Article 9*
22 *security interest and a lien created by levy, the buyer should prevail.”]*

23 **SECTION 2–717. DEDUCTION OF DAMAGES FROM THE PRICE.**

24 The buyer on notifying the seller of an intention to do so may deduct all or any
25 part of the damages resulting from any breach of the contract from any part of the price still due
26 under the same contract.

27 *[Reporter’s Note – This section remains unchanged except for gender neutral language.]*

28 **SECTION 2–718. LIQUIDATION OR LIMITATION OF DAMAGES;** 29 **DEPOSITS.**

1 (a) Damages for breach by either party may be liquidated in the agreement but only
2 at an amount which is reasonable in the light of the anticipated or actual harm caused by the
3 breach and, in a consumer contract, the difficulties of proof of loss and the inconvenience or
4 nonfeasibility of otherwise obtaining an adequate remedy. Section 2-719 determines the
5 enforceability of a term that limits but does not liquidate damages.

6 (b) Where the seller justifiably withholds delivery of goods or stops performance
7 because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum
8 of the buyer's payments exceeds the amount to which the seller is entitled by virtue of terms
9 liquidating the seller's damages in accordance with subsection (a).

10 (c) The buyer's right to restitution under subsection (b) is subject to offset to the
11 extent that the seller establishes

12 (1) a right to recover damages under the provisions of this Article other
13 than subsection (a), and

14 (2) the amount or value of any benefits received by the buyer directly or
15 indirectly by reason of the contract.

16 (d) Where a seller has received payment in goods their reasonable value or the
17 proceeds of their resale shall be treated as payments for the purposes of subsection (b); but if the
18 seller has notice of the buyer's breach before reselling goods received in part performance, the
19 resale is subject to the conditions laid down in this Article on resale by an aggrieved seller
20 (Section 2-706).

21 *[Reporter's Note – Subsection (a) simplifies the test for enforcing a liquidated damages clause in*
22 *a commercial contract (but retains the original test in a consumer contract).]*

1 *[Reporter's Note – The draft deletes the last sentence in current 2-718(1)(unreasonable*
2 *liquidated-damages clause void as a penalty). Removing the sentence assures that it cannot be*
3 *read by a court as imposing an additional condition. The sentence merely reiterates what is in*
4 *the first sentence and may cause more harm than good.]*

5 *[Reporter's Note – The last sentence in subsection (a) comes from the July draft and is a useful*
6 *signpost.]*

7 *[Reporter's Note – The following underlined language is added to subsection (b): “ Where the*
8 *seller justifiably withholds delivery of goods or stops performance because of the buyer's*
9 *breach”. This comes from the July draft and is useful in that it points out that the seller's*
10 *obligations may well be greater than mere delivery of the goods.]*

11 *[Reporter's Note – Subsection (b) also drops the statutory liquidated damages clause that*
12 *operates in the absence of an express liquidated damages provision. In the current law, this*
13 *provides that “in the absence of such terms, twenty per cent of the value of the total performance*
14 *for which the buyer is obligated under the contract or \$500, whichever is smaller.”]*

15 **SECTION 2-719. CONTRACTUAL MODIFICATION OR LIMITATION OF**
16 **REMEDY.**

17 (a) Subject to the provisions of subsections (b), (c) and (d) of this section and of
18 the preceding section on liquidation and limitation of damages,

19 (1) the agreement may provide for remedies in addition to or in substitution
20 for those provided in this Article and may limit or alter the measure of damages recoverable under
21 this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price
22 or to repair and replacement of nonconforming goods or parts; and

23 (2) resort to a remedy as provided is optional unless the remedy is
24 expressly agreed to be exclusive, in which case it is the sole remedy.

25 (b) Where circumstances cause an exclusive or limited remedy to fail of its
26 essential purpose in a contract other than a consumer contract, remedy may be had as provided in
27 this Act. However, an agreement expressly providing that consequential damages are excluded is

1 enforceable to the extent permitted under subsection (d).

2 (c) Where circumstances cause an exclusive or limited remedy to fail of its
3 essential purpose in a consumer contract, remedy may be had as provided in this Act including the
4 right to recover consequential damages notwithstanding any term purporting to exclude or limit
5 such damages.

6 (d) Subject to subsection (c), consequential damages may be limited or excluded
7 unless the limitation or exclusion is unconscionable. Limitation of consequential damages for
8 injury to the person in the case of consumer goods is prima facie unconscionable but limitation of
9 damages where the loss is commercial is not.

10 *[Reporter's Note – Subsections (b) and (c) clarify the relationship between a limited remedies*
11 *clause and a clause limiting or excluding consequential damages. The current law does not*
12 *expressly state whether the right to pursue all available remedies upon the failure of the*
13 *essential purpose includes the right of consequential damage. The courts have had a difficult*
14 *time with this question, and the decisions have been inconsistent. The formulation in this draft is*
15 *based on the July draft and in my opinion reflects as sound a resolution of this problem as we*
16 *are likely to come up with.]*

17 **SECTION 2-720. EFFECT OF "CANCELLATION" OR "RESCISSION" ON**
18 **CLAIMS FOR ANTECEDENT BREACH.**

19 Unless the contrary intention clearly appears, expressions of "cancellation" or
20 "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any
21 claim in damages for an antecedent breach.

22 *[Reporter's Note – There is no change in this section.]*

23 **SECTION 2-721. REMEDIES FOR FRAUD.**

24 Remedies for material misrepresentation or fraud include all remedies available
25 under this Article for nonfraudulent breach. Neither rescission or a claim for rescission of the

1 contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a
2 claim for damages or other remedy.

3 *[Reporter's Note – There is no change in this section.]*

4 **SECTION 2-722. WHO CAN SUE THIRD PARTIES FOR INJURY TO GOODS.**

5 Where a third party so deals with goods which have been identified to a contract
6 for sale as to cause actionable injury to a party to that contract

7 (1) a right of action against the third party is in either party to the contract
8 for sale who has title to or a security interest or a special property or an insurable interest in the
9 goods; and if the goods have been destroyed or converted a right of action is also in the party
10 who either bore the risk of loss under the contract for sale or has since the injury assumed that
11 risk as against the other;

12 (2) if at the time of the injury the party plaintiff did not bear the risk of loss
13 as against the other party to the contract for sale and there is no arrangement between them for
14 disposition of the recovery, the party plaintiff's suit or settlement is, subject to its own interest, as
15 a fiduciary for the other party to the contract;

16 (3) either party may with the consent of the other sue for the benefit of
17 whom it may concern.

18 *[Reporter's Note – This section remains unchanged except for gender neutral language.]*

19 **SECTION 2-723. PROOF OF MARKET PRICE: TIME AND PLACE.**

20 (a) If evidence of a price prevailing at a time or place described in this Article is
21 not readily available the price prevailing within any reasonable time before or after the time
22 described or at any other place that in commercial judgment or under usage of trade would serve

1 as a reasonable substitute for the one described may be used, making any proper allowance for the
2 cost of transporting the goods to or from such other place.

3 (b) Evidence of a relevant price prevailing at a time or place other than the one
4 described in this Article offered by one party is not admissible unless and until that party has given
5 the other party such notice as the court finds sufficient to prevent unfair surprise.

6 *[Reporter's Note – Current subsection (1), which deals with the measurement of market price*
7 *when there has been an anticipatory repudiation, has been deleted as unnecessary, as this has*
8 *now been incorporated into sections 2-708(1) and 2-713.]*

9 **SECTION 2-724. ADMISSIBILITY OF MARKET QUOTATIONS.**

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 in
12 newspapers, periodicals or other means of communication in general circulation published as the
13 reports of such market shall be admissible in evidence. The circumstances of the preparation of
14 such a report may be shown to affect its weight but not its admissibility.

15 *[Reporter's Note – The only change from current Article 2 is the addition of the language “or*
16 *other means of communication in . . .” This addition is made to reflect nonpaper media and*
17 *other forms of communication in common usage.]*

18 **SECTION 2-725. STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE.**

19 (a) An action for breach of any contract for sale must be commenced within the
20 later of four years after the cause of action has accrued under subsection (b) or (c) or one year
21 after the breach was or should have been discovered, but no longer than five years after the cause
22 of action accrued. By the original agreement the parties may reduce the period of limitation to
23 not less than one year but may not extend it; however, in a consumer contract, the period of
24 limitation may not be reduced.

1 (b) Except as otherwise provided in subsection (c), the follow rules apply:

2 (1) Except as otherwise provided in this subsection, a cause of action for
3 breach of a contract accrues when the breach occurs, even if the aggrieved party did not have
4 knowledge of the breach.

5 (2) For breach of a contract by repudiation, a cause of action accrues at
6 the earlier of when the aggrieved party elects to treat the repudiation as a breach or when a
7 commercially reasonable time for awaiting performance has expired.

8 (3) For breach of a remedial promise, a cause of action accrues when the
9 remedial promise is not performed when due.

10 (4) In an action by a buyer against a person that is answerable over to the
11 buyer for a claim asserted against the buyer, the buyer's cause of action against the person
12 answerable over accrues at the time the claim was originally asserted against the buyer.

13 (c) If a breach of warranty is claimed the definitions in Sections 2-313, 2-313A
14 and 2-313B and the following rules apply:

15 (1) Except as otherwise provided in paragraph (4), a cause of action for
16 breach of warranty arising under Section 2-313, 2-314 or 2-315 accrues when the seller has
17 tendered delivery to the immediate buyer and has completed performance of any agreed
18 installation or assembly of the goods.

19 (2) Except as otherwise provided in paragraph (4), a cause of action for
20 breach of an obligation arising under Section 2-313A or 2-313B accrues when the remote
21 purchaser receives the goods.

22 (3) A cause of action for breach of warranty arising under Section 2-312

1 accrues when the aggrieved party discovers or should have discovered the breach. However, an
2 action for breach of the warranty of noninfringement may not be commenced more than [six]
3 years after tender of delivery of the goods to the aggrieved party.

4 (4) Where a warranty or obligation arising under Section 2-313, 2-313A or
5 2-313B explicitly extends to future performance of the goods and discovery of the breach must
6 await the time for performance the cause of action accrues when the immediate buyer or the
7 remote purchaser discovers or should have discovered the breach.

8 (d) Where an action commenced within the time limited by subsection (b) or (c) is
9 so terminated as to leave available a remedy by another action for the same breach such other
10 action may be commenced after the expiration of the time limited and within six months after the
11 termination of the first action unless the termination resulted from voluntary discontinuance or
12 from dismissal for failure or neglect to prosecute.

13 (e) This section does not alter the law on tolling of the statute of limitations nor
14 does it apply to causes of action which have accrued before this Act becomes effective.

15 *[Reporter's Note – Consistent with the July draft, subsection (a) changes the flat four-year rule*
16 *of current law and provides for a limited one-year discovery rule with a five-year cap.]*

17 *[Reporter's Note – Subsection (a) differs from current law in that it does not permit reduction of*
18 *the limitations period in consumer contracts.]*

19 *[Reporter's Note – This section contains a new provision governing a breach of the warranty of*
20 *noninfringement under section 2-312. This period is stated in brackets as six years. The July*
21 *draft used eight years. It is difficult to assess what time period is most appropriate here, and*
22 *this provision is extremely important to some commercial concerns. We should discuss.]*

23 *[Reporter's Note – There are new rules governing remedial promises, express warranty*
24 *obligations under new sections 2-313A and 2-313B, and repudiations.]*