

August 1, 1996

**To: Article 2 Drafting Committee**  
**From: Richard E. Speidel, Reporter**  
**Re: Status of Article 2 revision**

As we begin our busiest year, here is a section by section review of Revised Article 2. Starting from the July, 1996 Draft, parts of which were read for the third time at the NCCUSL Annual Meeting, I have tried to capture what was done and said at the annual meeting and identify issues still to be resolved.

I have also summarized some of the conclusions of the Coordination meeting in DC in late May, 1996 (see Fred Miller's Report of the Coordinating Group, dated 6/27/96) and raised questions where appropriate.

This Report draws upon my Progress Report for NCCUSL on the July, 1996 and Larry Bugge's Procedure and Policy Issues memo which were distributed to the annual meeting. *Italicized language* indicates where a relevant motion was made or a significant action taken at the annual meeting.

### **Part 1. General Provisions**

#### 2-101. Short Title

#### 2-102. Definitions

(a)(2). Banker's credit. Conform to revised Article 5. A.2 only

(a)(5). Cancellation. This definition ties into 2-708. A. 2 uses "breach" and 2B will conform to 2. 2A uses "default" and will continue to use that word.

(a)(6). Don't define in A. 2. Cross-reference to A. 3.

(a)(7). Commercial unit. Conform to 2A in substance. 2 and 2B will work for a common definition.

(a)(8). Conforming. Conform 2 to 2A.

(a)(9). Conspicuous. Ideally, this should be a common definition for each Article and be moved to A. 1. For now, work out an appropriate definition for each Article.

There was some discussion of this at the Annual Meeting. More than one person pointed out that the language starting with "A term or clause" on line 19 makes no sense.

We should carefully review this definition and how it is used in A.2.

(a)(10-12). Is it possible to have a unitary definition of "consumer" here?

(a)(16). Cover. Delete this definition.

(a)(17). Delivery. Does "control" have a special meaning in A. 2? If not, this should be an A. 1 definition.

(a)(17). Draft. Cross-reference to A. 3 unless "draft" has a special meaning in A. 2.

(a)(19-21). The "electronic" definitions will be developed in 2B. 2 and 2A will conform.

(a)(24). Good faith. *The Conference approved a version of Alternative C: "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing. The phrase "in the conduct or transaction concerned" was deleted.*

This definition should be coordinated with A. 1.

(a)(25). Goods. The definition should exclude "information" rather than "intangibles contracts" under 2B.

Apparently, "foreign exchange transactions" will be excluded from A. 2. [See recent correspondence to Larry Bugge.] Is this correct? If so, the exclusion should be in 2-103 rather than in the definition of goods.

(a)(28). Manifests assent. This important definition has been elaborated in 2B-113. The Coordinating Committee concluded that 2 should follow 2B and that 2A should conform to 2. This means that (a)(28) will be expanded and, perhaps, put in 2-206.

On a broader policy point, the question is the extent to which "manifests assent" should be an operative concept in A. 2. Care must be taken in using and defining "agreement", "express agreement", "manifests assent", and any other concept showing assent.

Can anyone suggest a workable definition of "express agreement?"

(a)(30). Opportunity to review. Conform this to 2B-114.

(a)(32). Record, and (36), Sign. Conform to evolving 2B.

(a)(37). Standard form. Conform to evolving 2B and ultimately put in A. 1.

(a)(38). Standard terms. Conform to evolving 2B.

(a)(39). Substantial performance. See 2-602. The definition is not in 2A and is unique to 2B.

## 2-103. Scope.

Sub. (a): (1) Illustrate relevant factors used to determine whether a sale of goods "predominates" in the comments; (2) Illustrate cases where goods fail to conform in a service contract; and (3) Resolve recurring doubts about whether A. 2 should deal with this brand of service contract and, if so, tighten application of sections in Part 5, 2-501 through 2-504. Don't bite off more than we can chew.

Sub. (b). Is this clear enough? What about sub. (c)? Coordination among the articles is needed.

Does A. 2 need a section like 2B-105? The Coordination Committee urged 2 to conform to 2B.

Section 2-104. Transactions Subject to Other Law.

We should use 2B-104(b) and 9-203 as the style for this section.

Coordinations recommended the deletion of (a)(1) as not needed. If federal law preempts it preempts. Need we say more?

In (a)(2), "consumer protection law" is intended to include caselaw developments. How is this made clearer?

A mesh with state certificate of title laws should be accomplished in (a)(3).

Section 2-105. Unconscionable Conduct, Contract or Clause.

*The Annual Meeting rejected a motion to delete the "induced by unconscionable conduct" clause by a 84-38 vote. Also, there was no motion to limit the clause to consumer contracts. We need some references to comparable legislation and some illustrations in the comments.*

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

2-105 states that the court is the decision maker. However, other tribunals, such as an arbitral forum, may be asked to decide these questions and revised Art. 2 should not limit the cases to "courts" unless we intend it.

Section 2-106. Allocation or Division of Risks

Section 2-107. Interests and Part Interests in Goods.

Section 2-108. Goods to be Severed from Realty

A number of questions came up in reading this section:

First, miners apparently use "structure" to refer to subsurface deposits. A revision in sub (a) that clarifies that a "structure" is something to be removed rather than extracted ought to do it.

Second, there was some surprise that "oil and gas" when extracted by the seller and sold was goods within the scope of Article 2. We should let that sleeping dog lie unless it attacks.

Third, the treatment of long-term sale and leasebacks of buildings and structures was raised and not clearly answered. Does this fall under real property law? Those doing the transactions hope not.

Finally, questions about "water" bubbled forth. Is water like oil and gas or is there something different. What about contracts conferring water and mineral rights?

Section 2-109. Effect of Agreement.

Coordination recommended that this section be deleted. Why? Because it is impossible to implement.

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

### Section 2-201. No Formal Requirements.

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

2A should conform to 2 on the statute of frauds. Differences in 2B justify retention of the statute there.

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

*Coordination recommended that sub. (b) be deleted.* There is opposition to stating what courts should do in the code. Thus, the effect of a merger clause and the process of determining whether there was an intention to integrate the record are left to the courts.

### Section 2-203. Formation in General.

Formation questions arise in structured and unstructured deals and may or may not involved records, standard forms or standard terms. Sec. 2-203 and 2-205 are designed to deal with all formation questions except, perhaps, 2-206 where all of the terms of the agreement are contained in a standard form to which the adhering party manifests assent. But even there, the standard form is probably the offer and the manifested assent is the acceptance. Is this clear enough?

Again, contract formation questions where standard forms and standard forms are involved are decided under 2-203 and 2-205 rather than 2-207. See sub. (b). Sub. (d), however, deals with efforts by either party to condition formation upon agreement to their terms. When such language is in a standard form or is a standard term it must be clear and conspicuous. Coordination recommends that this be moved to 2-205. Does this make sense. Coordination also recommends that 2-203 conform in style to 2B.

### 2-204. Firm Offers.

Coordination recommends that 2 conform to 2B-203 and use "manifest assent" rather than conspicuous.

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

Coordination recommends that 2-203(d) be moved here and that 2-205 conform to 2B where electronic contracting terms are involved.

### 2-206. Standard Form Records.

This section got considerable attention at the Annual Meeting. The following issues still are around.

1. Are the crucial definitions of "standard forms" and "standard terms" satisfactory?

Article 2 is supposed to conform to 2B on these.

2. In commercial cases, does the concept of "manifest assent" adequately protect against unfair surprise? If so, what is left for unconscionability to do? Several commentators think that the Restatement test for standard forms should apply to commercial cases.

3. Should sub. (a), which is subject to sub. (b), be limited to cases where "all" of the terms are contained in a standard form? Compare 2B-307, where "all or part of an agreement" is in a standard form. If so, then the concept of "manifest assent" is limited and the role of 2-207, with a different test for assent, is expanded. For example, suppose that the parties exchange two or more standard forms in an effort to reach agreement. Suppose, also, that the forms are not read and not signed by the other party. Does the concept of "manifested assent", with its dependence upon an "opportunity to review", respond to the classic battle of the forms? My answer is that it does not.

4. A separate test for consumers was apparently approved by the Annual Meeting since a motion to delete sub. (b) was defeated by a voice vote. The test, however, should be an objective test: a "reasonable consumer" who manifested assent to the form or term would not have expected it. Note that this is not the test in Restatement 211(c): It is from UNIDROIT. There should be redrafting for clarity and illustrations in the comments. For example: "(b) A term in a record which is a standard form or which contains standard terms to which a consumer has manifested assent is not part of the agreement if a reasonable consumer would not have expected it unless the consumer understood and expressly agreed to the term." Sub. (b) also refers to what a court shall do and should be revised.

5. Although 2B has a special provision for mass market licenses, 2B-308, Article 2 does not yet have a comparable term for the so-called "warranty in the box." Arguably, 2-206 and 2-207 do not adequately cover this problem. We should cover this problem.

#### Section 2-207. Effect of Varying Terms.

At this point, 2-207 is at odds with both 2A (they have no comparable term) and 2B-309. The tension with 2B, which deals only with conflicting standard terms, is over the scope of the section on standard forms and the concept of manifest assent. How should we proceed?

Coordination agreed that 2A need not have a 2-207 and recommended that 2 and 2B seek conformity. The current differences seem to reflect a policy disagreement on the extent to which the "manifest assent" concept should cover unfair surprise when standard forms or terms are used. Under 2B all standard terms wherever contained are part of the agreement if there is manifest assent unless they conflict, in which case the "knock out" rule applies.

#### Section 2-208. Electronic Transactions: Formation

2 and 2A should conform to 2B on this and all other electronic contracting sections.

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

Coordination recommended 2 and 2A conform to 2B-302 and that the section be moved to Article 1.

#### Section 2-210. Modification, Rescission, and Waiver

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

2A should conform to 2, except for the consumer exception in sub. (b). 2B-303 will not conform unless directed by the Whole.

See 2-604, which deals with post-breach waiver.

Section 2-211. Delegation of Performance.

Reintegrate this section with 2-403, conform to 2A-303 (to the extent possible) and move to Part 4.

Section 2-212. Electronic Messages; Attribution.

Conform to 2B.

Section 2-213. Intermediaries in Electronic Messages.

Conform to 2B.

**Part 3. General Obligation and Construction of Contract.**

[Note that Sections 2-301 through 2-311 were not read at the 1996 Annual Meeting.]

Section 2-301. How Price Payable.

Section 2-302. Transfer at a Single Time.

Coordination recommended that the language in 2 should control 2B.

Is there a conflict with 2-510(a)?

Section 2-303. Open Contract Price Term.

This section follows the original 2-305 on price and follows with a series of sections dealing with other "gap fillers." 2B has a more integrated approach to the problem, with the focal point being 2B-305 dealing with "open terms." Coordination recommended that 2 conform in substance with 2B even though the structure may vary. Exactly how this can be done is not clear.

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

2-304 should try to conform in substance to 2B and 2A should conform to 2.

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

Section 2-306. Time for Performance Not Specified.

Coordination: 2A follows 2 except for sub. (b), which is not in 2A. 2 and 2B should be the same, except for the extra language in 2B.

Section 2-307. Options and Cooperation Respecting Performance.

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

Has 2-308 been conformed satisfactorily to revised Article 5?

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

Are we still happy with this approach?

2-310. Termination; Survival of Obligations.

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

2-311. Termination; Notice.

Coordination recommended that 2B-629 be conformed to 2-310 to the extent that 2-310 requires notice to be received.

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

This section was read at the annual meeting, but there was little discussion of substance.

One commentator has argued that sub. (b) should require a disclaimer to be "conspicuous." We have rejected that requirement here and in 2-316(b), at least in commercial cases, unless someone seeks a safe harbor. Any second thoughts?

It is my understanding that the Drafting Committee approved a separate statute of limitations period for 2-312 claims--a "discovery" statute with a four year tolling period. That decision will be implemented in 2-714.

2-313. Express Warranties.

There was considerable discussion of 2-313 at the annual meeting but no motions were made. Some of the concerns raised (but not all of the potential issues) include:

1. The definitions in sub. (a) should be revised to include injury to person and property and be made applicable to 2-312 as well.

2. Allocation of the burden of proof in "direct response" sales should be reviewed. Should those sales be treated as if there was privity of contract? The answer should depend upon the type of transaction and the technology employed.

3. Questions were raised about the meaning of "intermediary" and "chain of distribution." We still have more work to do on the treatment of express warranties made through intermediaries--except for their creation, should they be treated as if there was privity of contract?

4. Should we be clearer that "used" good express warranties arise only when the goods sold are used goods, not when the goods sold were new goods that were resold as used goods?

5. The "warranty in the box" issue has yet to be resolved.



Please review the Notes in the July, 1996 Draft. Many concerns of those who wrote memos and letters to the Commissioners were not, despite the efforts of Commissioner Macey, squarely addressed. For a critique that our current draft does not go far enough in protecting buyers against advertising, see Holdych & Mann, *The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties--Getting What You Pay For and Paying For what You Get*, 45 De Paul L. Rev. 781 (1996).

Section 2-314. Implied Warranty: Merchantability; Usage of Trade

This section was not read at the annual meeting. Its comments, however, will now house much of the residue of deleted 2-319. In light of that, should we consider any different definition of merchantability?

Section 2-315. Implied Warranty: Fitness for Particular Purpose.

This section was not read at the annual meeting.

Section 2-316. Exclusion or Modification of Warranties.

This section was read and produced some interesting discussion. In addition to Commissioner Burdick's suggestion that "negated" rather than "excluded" should be used for implied warranties and "disclaimed" not "excluded" should be used for express warranties, the following points are worth noting.

1. Shouldn't "conspicuous" language be required to exclude or modify in sub. (b)(1)?
2. Arguably, the "magic words" for the safe harbors in sub. (b)(2) tell the buyer too much and should be softened.
3. Sub. (b)(3), dealing with the effect of a pre-contract examination of the goods, should apply to both consumer and commercial buyers. Although intended to stand alone, it does not clearly do so.
4. Coordinate more carefully 2-206 on standard form contracts and 2-316.
5. Sub. (c), which is still a work in progress, might need a safeharbor for consumer contracts. What should that be?

Articles 2, 2A and 2B have consistent approaches to disclaimers and should try to conform language.

Section 2-317. Cumulation and Conflict of Warranties.

This section is not in 2A. 2B and 2 should conform except for the consumer exception in (3).

Section 2-318. Extension of Express or Implied Warranties.

The annual meeting discussion was limited to comments and quibbles over clarity and meaning. There were no motions. Does this mean (after a third reading) that the concepts and policies of 2-318 have been accepted by the Conference? Or does it mean that the land mines have been avoided for now?



The argument against extending warranties beyond the immediate buyer rests upon a rather narrow conception of contract and a judgment that so long as the buyer has a contract with someone in the chain of distribution adequate protection can be achieved. Unless the buyer has relied upon the representations of a remote seller, a claim for breach of warranty can be made only against the immediate seller.

If this argument is accepted by the Drafting Committee (so far it has been rejected), then sub. (a) should either be stated as an Alternative or be deleted. It rests upon a broader conception of contract and public policy. Sub. (b), on the other hand, is consistent with the express warranty case law and leaves room for judicial developments in the privity arena. It should be retained. Sub. (c), which applies to claims under sub. (b) not sub. (a), introduces some limitations on claims by remote buyers against the seller, mainly where consequential damages are involved. A subsection like this is needed for non-privity claims other than those under sub. (a).

Do warranty claims for damage to person and property pose different problems?

At the insistence of Commissioner Macey, the Drafting Committee agreed to devote more time to 2-318.

#### Section 2-319. Injury to Person or Property Resulting from Breach of Warranty.

After considerable discussion of 2-319, particularly sub. (b), *a motion to the effect that if goods are not defective under applicable products liability law (tort) they can not be unmerchantable under 2-314 (contract) was defeated* 82-58. The motion was inconsistent with the Denny case and would have foreclosed an opportunity to establish in the particular case that the requirements of merchantability were broader than the concept of defect.

*In response, the Drafting Committee proposed the following approach to a solution:*

- 1. Delete 2-319, preserving the definitions in sub. (a) where relevant.*
- 2. Deal with the relationship between warranty and defect in a comment to 2-314. The comment might state that in most cases a non-defective product will also be merchantable and urge the court to implement tort rather than contract policies where the two concepts overlap. On the other hand, the comment should illustrate where warranty concepts, especially express warranties and the implied warranty of fitness, may be broader than defect in tort and state that when these cases are established Article 2 applies.*
- 3. Review carefully the extent to which the usual contract defenses should be available when a claim for damage to property or injury to person resulting from a breach of warranty is made. These defenses include: (a) Lack of privity, 2-318(a); (b) Failure to give timely notice, 2-608(c)(1); (c) A disclaimer of an implied warranty, 2-316(b); (d) An agreement excluding or limiting liability for consequential injury to person or property, 2-709(c); and (e) Expiration of the statute of limitations, 2-714. The policy question is whether these contract defenses should be less available in cases of personal injury or property damage than in cases of commercial loss and, if so, to what extent and why.*
- 4. Consider whether Article 2 should cover other affirmative defenses, such as assumption of risk, typically associated with products liability litigation. In short, does Article 2 need tort as well as contract defenses?*

#### Section 2-320. Sale by Auction.

This neglected section should get some treatment before next July.

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

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

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

Not read. Unique to Article 2.

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

Not read.

##### Section 2-403. Assignment of Rights.

Not read. Coordination recommends that 2-403 be reintegrated with 2-211, conformed to 2A-303 and moved to Part 4.

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

This section was read but there was little discussion.

A better integration with state certificate of title laws is required. The baseline should be that unless the CTA specifically provides otherwise, a certificate of title is only presumptive evidence that title has passed. Section 2-404 controls the ultimate question.

2A should conform to 2, but 2B is conceptually different.

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

Section 2-405 was read and stimulated a flurry of Article 9 activity. The concern was whether 2-405(c)(1) stated the dividing line between Articles 2 and 9 where creditors of the seller have security interests in goods retained after sale.

The answer is no where 2-404(c) is concerned and, so far as rights to the goods are concerned, no under 2-724 and 2-707. In all three situations, however, ultimate priorities turn on whether the Article 2 buyer is a buyer in the ordinary course of business, as defined in Article 1 or Article 9.

What changes are proposed for the BIOCB in Article 9? The baseline in 2-404(c)(1) is suspect if, under revised Article 9, the BIOCB cannot arise until after the buyer takes possession. This would undercut, for example, claims of the pre-paying buyer under 2-724.

A clear, acceptable solution is needed here.

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

The rights of a seller or consignor to goods delivered against creditors of the buyer, primarily a secured party, are involved in 2-406 and 2-407. Both sections were read.

As for 2-406, apart from a question challenging the source as reasons for sub. (d) [see old

2-326(4)], there was no discussion of bracket sub. (e) or the bold language in Note (2) in the July, 1996 Draft.

Section 2-407. Consignment Sales and Rights of Creditors.

This section was read without much enlightenment. As of this date, the rights of consignors against goods delivered will not be treated under Article 2 and, where secured parties are involved, will be treated in Article 9. How they will be treated, however, is still not clear.

These sections and others signal that coordination between the 2 and 9 drafting committees has not been completed.

**Part 5. Performance**

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

Section 2-501. General Obligations; Substantial Performance.

Except in 2-501, revised Article 2 does not use or define "substantial performance" or "material" breach. Rather, the question is whether the breach "substantially impaired" the value of the contract to the other. See 2-602. Thus, sub. (b) and (c), if retained, will have to be revised.

Coordination agreed that 2-501 could be omitted from 2A and conceded that 2B used "substantial performance" as a key concept. Thus, conformity here is not essential.

Section 2-502. Quality of Performance.

This section applies to obligations of the parties that are within the scope of Article 2. Those obligations may or may not involve service terms as included in 2-103(a)(3).

It was strongly suggested from the floor that 2-502 and the next two sections be coordinated with and clearly limited to the terms included in 2-103(a)(3). This is the alternative to deleting them altogether.

Section 2-503. Support Contracts.

See comments to 2-502, above.

Section 2-504. Maintenance and Repair of Goods.

See comments to 2-502, above.

Section 2-505. Waiver of Objection.

Do we need a section like this in Article 2? It is related to the modification/waiver issues in 2-210.

Section 2-506. Manner of Seller's Tender of Delivery.

Section 2-506 and the next three sections state technical aspects of the seller's performance. They are, perhaps, unique to Article 2. No comments were made on any of them at the annual meeting.

Section 2-507. Shipment by Seller.

Should we follow CISG, Art. 31 and 32 here?

Except for 2-516, Risk of Loss, none of the remaining Part 5 sections were read at the annual meeting.

Section 2-508. Seller's Shipment Under Reservation.

Section 2-509. Rights of Financing Agency.

Section 2-510. Effect of Seller's Tender; Delivery on Condition.

Is sub. (b) consistent with 2-501(b)?

Section 2-511. Tender of Payment by Buyer; Payment by Check

Section 2-512. Payment by Buyer Before Inspection.

Section 2-513. Buyer's Right to Inspect Goods.

Section 2-514. When Documents Deliverable on Acceptance or Payment.

Section 2-515. Open Time for Payment or Running of Credit; Authority to Ship Under Reservation.

Section 2-516. Risk of Loss.

This section was read at the annual meeting. The only comment was a concern that the word "carrier" did not clearly exclude the seller's transportation vehicles. Apparently Note 3 is not clear enough.

Coordination: 2A should conform to 2 except for language dealing with finance leases; and 2B should conform to 2 except for 2B-624(c) & (d).

## **Part 6. Breach, Repudiation, and Excuse**

Section 2-601. Breach Generally.

This section was read without comment.

Coordination: Try to conform 2-601 and 2-601 to 2B-109. This will be difficult to do.

Section 2-602. Breach of the Whole Contract; Substantial Impairment.

This section was read without comment.

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

There was some discussion of the so-called "perfect tender rule." Notably, Chief Justice Ellen Peters, an ALI representative, rose to oppose it and to suggest a substantial performance test. No motions were made from the floor.

Substantial performance is the test adopted in 2B-610(a). Coordination agreed that the problems in 2B were different from those in 2 and 2A and that a substantial performance test was justified.

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

This section was read without objection.

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

This section, although new in parts, was not read. The changes and issues are stated in the Notes to the July, 1996 Draft. Are we happy with this?

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

Section 2-607. What Constitutes Acceptance of Goods.

This section was read without comment.

Section 2-608. Effect of Acceptance; etc.

This section was not read.

Comments suggest that the "vouching in" language in sub. (e) is awkward and that the best language for this is found in 3-119.

Coordination suggests that 2A conform to 2 except for finance leases and that 2B-605 conform except for indemnity problems.

Section 2-609. Revocation of Acceptance.

Section 2-610. Cure.

The current draft, which is still in transition, contains a somewhat broader and more flexible cure standard than does 2-508 of the 1990 Official Text. Since changes were made after the March, 1996 meeting, they are not necessarily reflected in other affected sections or the notes. Clearly, more work is needed.

The section was read at the annual meeting and the following questions were raised:

1. Suppose the seller is one minute late in a tender. Is the right to cure after a rejection determined under 2-610(2) and, if so, why?

2. Are consumer interests adequately protected?

3. Does the buyer have a right to cure a late payment? If so, put it in the statute. If not, why not?

4. When does a buyer have a "legitimate interest" in refusing a cure? Should that limitation also apply to 2-610(a)?

5. Why preserve a perfect tender rule and then introduce flexibility in the option to cure? The answer, I suppose, is that the remedy of rejection with notice represents a demand for cure and that the cure step must be passed before the buyer can cancel the contract for breach. Perfect tender can be justified at the demand stage but flexibility is needed for the cure process itself.

Coordination recommends that 2A conform to 2. Differences in 2B-620 are justified.

Section 2-611. Installment Contract; Breach.

This section was not read at the annual meeting.

Coordination recommends that treatment of a buyer's failure to pay one installment, now in sub. (b), be deleted. If so, this leaves open the entire problem of the buyer's default in payment, including the buyer's right, if any, to cure.

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

Not read. 2A and 2B should conform to 2-612.

Section 2-613. Anticipatory Repudiation.

Not read. 2A and 2B should conform to 2-613.

Section 2-614. Retraction of Anticipatory Repudiation.

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

Section 2-615. Casualty to Identified Property.

Not read. Coordination recommends that 2A and 2B conform to the concept of 2-615, with allowable variations based on practice.

A commentator has asked what the effect is of not giving the required notice in 2-615(1). The answer is that the seller loses the excuse claim.

Section 2-615. Substituted Performance.

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

Not read. The attempt to include a buyer's excuse for frustration of purpose remains troublesome.

Section 2-618. Procedure on Notice Claiming Excuse.

Not read. The planned attempt to provide specific procedures for a buyer excused under 2-616(a) has been abandoned.

## **Part 7. Remedies**

## [A. In General]

All of Part 7 was read at the annual meeting.

### Section 2-701. Subject to General Limitations.

Style wants to delete this section. They say it is a surplus "roadmap." I disagree, since 2-701 is a general limitation upon the remedies in subparts 7B and 7C. This limitation has to be expressed somewhere, and 2-701 seemed like the place to do it.

There is no comparable provision in 2A and 2B.

### Section 2-702. Breach; Procedures.

This new section, which is a hub-spoke survivor, has no counterpart in 2A and appears only by implication in 2B-701.

### Section 2-703. Remedies in General.

See 2B-701. 2A has no equivalent section.

It is less likely that there will be conformity between 2 and 2A and 2B in the area of remedies. 2A has its own structure designed for leases and 2B is developing a more concise approach to licenses.

### Section 2-704. Damages in General.

See 2A-513(3), 2A-523(2), and 2B-702, which should conform to 2-704.

### Section 2-705. Incidental Damages.

### Section 2-706. Consequential Damages.

*The "unreasonably disproportionate" language in 2-706(1), although subject to extensive discussion, survived a sense of the house motion to delete it. We must review its positioning in 2-706 and provide some illustrations in the comments. 2B-706(b) is contra, providing that no consequential damages are recoverable unless the parties specifically contract for them.*

There were no motions on whether 2A should conform to 2-706, but they assumption is that it will.

Unlike the 1995 annual meeting, there was no motion to delete claims for "injury to person or property" from Article 2. The tentative decision regarding 2-319 is consistent with 2-706(2) as now written.

### Section 2-707. Specific Performance.

2-707 and 2B-705 will conform, except for the treatment of confidentiality and a separate section on replevin. 2A should consider permitting specific performance by the lessor.



Section 2-708. Cancellation; Effect.

2 and 2B-704 should conform, although 2B's structural differences survive. 2A-505(1) should conform to 2. Should notice of cancellation be effective on dispatch or on receipt?

Section 2-709. Contractual Modification of Remedy.

After a request from the floor, the Drafting Committee agreed to reverse the order of 2-709 and 2-710. This makes the current statement that 2-709 is "subject to Section 2-710" more coherent and restores the order in the 1990 Official Text.

Although there were no motions from the floor, there was a request for illustrations of "minimum adequate" remedy in the comments.

Clearly, 2-709 is still in flux and efforts to conform with 2A and 2B are premature.

Section 2-710. Liquidation of Damages; Deposits.

*After extended discussion of sub. (a) at the annual meeting, a motion to delete the second sentence was made and accepted by the Drafting Committee.* The objective was to clarify that a court should not make an ex post determination that the attempt at liquidation was either too high or too low. The Drafting Committee may, however, clarify that a liquidation that is unreasonable ex ante breach is unenforceable. Review the transcript here.

Clarify the relationship to 2-709, particularly where under liquidated damages are involved. Also, reverse the order of 2-709 and 2-710.

In sub. (b), check what happened to the enforceability of deposits?

Referee Hillman noted that setoff and recoupment were "alive and well" in bankruptcy and that sub. (c) should be reviewed with this in mind.

When 2-710 is ready, 2A-504 and 2B-707 should conform to it.

Section 2-711. Remedies for Misrepresentation and Fraud.

2A-505(4) conforms. 2B need not conform.

Section 2-712. Proof of Market Price.

2A-507 conforms. 2B need not conform.

This section should be reviewed and the comments revised in light of the current drafts of 2-721 and 2-726.

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

2A-531 conforms. 2B need not conform.

Section 2-714. Statute of Limitations.

Much work remains to be done in and around 2-714. See Notes to draft provision. For example:

1. A limitation provision for breach of warranty of title needs to be drafted.
2. The proper limitation period in an action by a remote buyer, see 2-318(c)(3), should be determined;
3. Should there be a different statute of limitations when claims for personal injury and property damage are asserted?

Doubtless, there are other lingering questions as well.

Finally, the assumption is that transactional differences justify different treatment of the statute of limitations in 2A and 2B.

### **[B. Seller's Remedies]**

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

Is this an impermissible catalogue of remedies that should be deleted as surplusage? Commissioner Daykin of Nevada thinks so.

2-715 should be reviewed with 2-602 to clarify exactly when the seller may cancel for breach.

Seller's damage remedies, 2-715, 2-719 and 2-721, conform structurally to 2A-523, 527 and 528 but substantive differences are warranted. See 2B-709, which also reflects different subject matter.

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

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

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

See 2A-514 and 2B-710. Language inconsistencies should be conformed, but there are some transactional differences.

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

2A-526 should conform to revised 2-718. 2B need not conform.

#### Section 2-719. Seller's Resale.

#### Section 2-720. Person in Position of Seller.

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

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

Section 2-722. Action For Price.

2A-529 should conform. 2B need not conform.

**[C. Buyer's Remedies]**

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

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

The buyer's damage remedies, 2-723, 725, 726 and 727, structurally conform to 2A-508, 518 and 519 but subject matter differences are warranted. See 2B-714, which contains justified subject matter differences.

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

This section states when a prepaying buyer has a right to recover goods from the seller but does not say when that buyer takes free of a security interest in the goods created by a third person. Presumably, the prepayer must be a BIOCB under Article 1, as influenced by revised Article 9. We should be clear exactly when that status arises and then evaluate whether the intended rights created under 2-724 are undercut. For example, if BIOCB cannot arise before the buyer takes possession or control, a special definition for Article 2 needs to be considered.

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

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

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

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

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

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

Section 2-728. Deduction of Damages From Price.

2-728 should conform to 2A-508(6), but differences in 2B-715 are justified.