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Revised Article 2 of the Uniform Commercial Code - Section-by-Section Analysis

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REVISED ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE*—SECTION-BY-SECTION ANALYSIS

Mark E. Roszkowski**

I. INTRODUCTION

In early 1988, the Permanent Editorial Board for the Uniform Commercial Code, with the approval of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI), appointed a Study Group, directed by Professor Richard E. Speidel, to determine whether Article 2 of the Uniform Commercial Code (Sales) should be revised. On March 1, 1990, the Study Group issued its report, which recommended a significant revision. In May 1990, a Task Force of the American Bar Association Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code, was assembled to appraise the preliminary report. Its section-by-section analysis was published, together with the Study Group report, in March 1992.1 On August 6, 1991, NCCUSL authorized creation of an Article 2 Drafting Committee, which generated a number of tentative drafts of Revised Article 2, resulting in the July 1999 draft submitted for final approval. After this draft, which encountered significant industry opposition, was withdrawn from consideration at the NCCUSL annual meeting, the reporters resigned. A new drafting committee was thereafter appointed,2 which generated inter alia, a July 2000 draft for consideration at the NCCUSL annual meeting.3 This draft, which closely tracks existing Article 2, was

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* UNIFORM COMMERCIAL CODE REVISED ARTICLE 2—SALES (July 2000 Draft).
** Professor of Business Law, University of Illinois at Urbana-Champaign. An earlier version of this article, based on the July 1997 draft, appears at 30 UCC L.J. 199 (1998).
1. A.B.A. Task Force, An Appraisal of the March 1, 1990 Preliminary Report of the Uniform Commercial Code Article 2 Study Group, 16 DEL. J. CORP. L. 981 (1991). This article presents for each Code section the text of the Study Group Preliminary Report followed by the A.B.A. Task Force Appraisal. The author is a member of the Task Force and in that capacity has attended and participated in most of the Drafting Committee meetings.
2. Members of this drafting committee include William H. Henning, Chair; Boris Auerbach, Enactment Plan Coordinator; Marion W. Benfield, Jr.; Amelia H. Boss, American Law Institute Representative; Neil B. Cohen, American Law Institute Representative; James C. McKay, Committee on Style Liaison; Byron D. Sher; James J. White; and Henry Deeb Gabriel, Jr., Reporter.
itself withdrawn to rework its scope provisions.4

The purpose of this paper is to provide a section-by-section summary of changes the July 2000 draft proposes to make in Article 2. Section titles and numbers are to existing Article 2. The new section title and number, if any, is indicated in parentheses.

II. COMPARISON OF EXISTING AND REVISED ARTICLE 2

Section 2-101 Short Title

No significant change.

Section 2-102 Scope; Certain Security and Other Transactions Excluded From This Article (Revised Section 2-103, Scope; and Section 2-104, Transaction Subject to Other Law)

Revised Section 2-103(a), like existing Section 2-102, limits the scope of Article 2 to “transactions in goods.” The rest of Section 2-103 states the rules governing conflicts between Article 2 and other Code articles,5 and the application of Revised Article 2 to “computer information,” “computer programs,”6 and “foreign exchange transactions.”7 Section 2-104 provides that a transaction subject to Article 2 also is subject to certificate

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4. This issue was considered by the Drafting Committee at its meeting in St. Louis, Missouri, on November 18-19, 2000.

5. Revised Section 2-103(e) provides that if a conflict exists between Article 2 and another Code article, “that article governs.”

6. Under Revised Article 2, a “computer” is “an electronic device that can perform substantial computations, including numerous arithmetic operations or logic operations, without human intervention during the computation or operation.” U.C.C. § 2-102(a)(6) (Revision Draft). “Computer information” is “information in electronic form which is obtained from or through the use of a computer, or which is in a form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy.” U.C.C. § 2-102(a)(7) (Revision Draft). A “computer program” is “a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result. The term does not include separately identifiable informational content.” U.C.C. § 2-102(a)(8) (Revision Draft).

7. Under Revised Section 2-102(a)(20), a “foreign exchange transaction” is: a transaction in which one party agrees to deliver a quantity of a specified money or unit of account in consideration of the other party’s agreement to deliver another quantity of different money or unit of account either currently or at a future date, and in which delivery is to be through funds transfer, book entry accounting, or other form of payment order, or other agreed means to transfer a credit balance. . . .
of title statutes, consumer protection statutes, and other specialized statutes involving goods.\(^8\)

### Section 2-103 Definitions and Index of Definitions (Revised Section 2-102, Definitions)

Revised Section 2-102 collects definitions now scattered throughout Article 2 and elsewhere in the Code. It also adds several new definitions: authenticate; computer;\(^9\) computer information;\(^10\) consumer;\(^11\) consumer contract;\(^12\) copy;\(^13\) electronic agent;\(^15\) electronic;\(^16\) electronic record;\(^17\) foreign exchange transaction;\(^18\) information;\(^19\) informational content;\(^20\) informational rights;\(^21\) information processing sys-

Revised Section 2-103(d) provides that Revised Article 2 “does not apply to a foreign exchange transaction.”

8. Revised Section 2-104(a)(3) provides that a transaction governed by Article 2 also is subject to:

any other statute of this State to which the transaction is subject, such as statutes dealing with:

- (A) the sale or lease of agricultural products;
- (B) the transfer of blood, blood products, human tissues or 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) the misbranding or adulteration of food products or drugs; and
- (F) dealers in particular products, such as automobiles, motorized wheelchairs, agricultural equipment, and hearing aids.


10. See id.

11. See id.

12. A “consumer” is “an individual that buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes. . . .” U.C.C. § 2-102(a)(11) (Revision Draft).


14. A “copy” is “the medium on which information is fixed on a 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.” U.C.C. § 2-102(a)(14) (Revision Draft).

15. An “electronic agent” is “a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.” U.C.C. § 2-102(a)(17) (Revision Draft).


17. An “electronic record” is “a record created, generated, sent, communicated, received, or stored by electronic means.” U.C.C. § 2-102(a)(18) (Revision Draft).

18. See supra note 7.

19. “Information” is “data, text, images, sounds, mask works, or computer programs, including collections or compilations of them.” U.C.C. § 2-102(a)(24) (Revision Draft).

20. “Informational content” is “information that is intended to be communicated to or perceived by an individual in the ordinary use of the information, or the equivalent of that information.” U.C.C. § 2-102(a)(25) (Revision Draft).

21. “Informational rights” are:
all rights in information created under laws governing patents, copyrights, mask works, trade secrets, trademarks, publicity rights, or any other law that gives a person, independently of contract, a right to control or preclude another person’s use or access to the information on the basis of the rights holder’s interest in the information. U.C.C. § 2-102(a)(26) (Revision Draft).
Although substantive changes in the existing definitions are few, Revised Section 2-102(a)(22) redefines "good faith" for Article 2 purposes to include in all cases both "honesty in fact and the observance of reasonable commercial standards of fair dealing." Current Section 2-103(1)(b) applies this expanded definition only "in the case of a merchant."

Revised Section 2-102 facilitates electronic commerce by expanding the definitions of "writing" and "signature" in "record" and "authenticate," respectively. A "record" is "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." To "authenticate" means "(i) to sign, or (ii) to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with present intent of the authenticating person to identify the person or to adopt or accept a record or term."

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

Section 2-105 Definitions: Transferability; "Goods"; "Future" Goods; "Lot"; "Commercial Unit"

Section 2-106 Definitions: "Contract"; "Agreement"; "Contract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation" (Revised Section 2-102, Definitions; Section 2-105, Interest and Part Interest in Goods; Section 2-106, Effect of Termination and Cancellation)

The definitions in these sections have been moved to Revised Section 2-102. The substantive rules of existing Section 2-105 have been retained in Revised Section 2-105. Revised Section 2-106 restates the rules governing the effect of "termination" and "cancellation" now contained in Sections 2-106(3)-(4).

Section 2-107 Goods to be Severed From Realty; Recording

No substantial change.

Section 2-201 Formal Requirements; Statute of Frauds

Drafts of Revised Article 2 through November 1996 repealed the Statute of Frauds for sales contracts, including those not capable of performance within one year. Because this change had been criticized, both at

22. An "information processing system" is "an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information." U.C.C. § 2-102(a)(27) (Revision Draft).
23. A "remedial promise" is "a promise by the seller to repair or replace the goods or to refund all or part of the price upon the happening of a specified event." U.C.C. § 2-102(a)(35) (Revision Draft).
25. Id. § 2-102(a)(1).
26. For example, Section 2-201(a) of the November 1, 1996 draft provides "a contract or modification thereof is enforceable, whether or not there is a record signed by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year after its making."
Drafting Committee and NCCUSL meetings, the Drafting Committee reinstated the Statute of Frauds at its January 24-26, 1997 meeting. Revised Section 2-201 makes the following changes in existing Section 2-201: (1) the dollar amount has been raised from $500 to $5,000; (2) the one-year provision does not apply;\(^{27}\) (3) the admissions exception of Section 2-201(3)(b) now makes clear that an admission under oath but not in court satisfies the statute;\(^{28}\) (4) "authenticated record" is substituted for "signed writing"; and (5) the language "Except as otherwise provided in this section," contained in existing Section 2-201(1), is omitted. This latter omission indicates that the statutory exceptions to the writing requirement\(^{29}\) should not be interpreted to "preclude the possibility that a promisor will be estopped to raise the statute of frauds defense in appropriate cases."\(^{30}\) Thus, promissory estoppel should provide an additional exception to the Statute's application.

Section 2-202 Final Written Expression: Parol or Extrinsic Evidence (Revised Section 2-202, Parol or Extrinsic Evidence)

Revised Section 2-202 retains the parol evidence rule with minor changes. First, the rule now applies to writings or records intended by the parties as an integration. "Record," as previously noted, encompasses electronic forms of communication and transmission. Second, the integration may be explained by course of dealing, usage of trade, or course of performance "without a preliminary determination by the court that the language used is ambiguous."\(^{31}\) Finally, the word "explained" has been deleted to make it clear that the rule applies "only to issues of supplementation, not interpretation."\(^{32}\)

Section 2-203 Seals Inoperative

No substantial change.

Section 2-204 Formation in General

No substantial change except to add that a contract also may be formed by the "interaction of electronic agents," and to provide rules for formation of such contracts.\(^ {33}\)

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27. That is, an oral sales contract outside the Statute of Frauds "is not rendered unenforceable merely because it is not capable of being performed within one year or any other applicable period after its making." U.C.C. § 2-201(d) (Revision Draft).
28. Id. § 2-201(c)(2).
29. Id. § 2-201(c) (mirroring existing Section 2-201(3)).
30. Id. § 2-201 cmt. 2.
31. Id. § 2-202(b).
33. Revised Section 2-204(d) states:
   Except as otherwise provided in Sections 2-211 through 2-213, the following rules apply:
   (1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.
   (2) A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes actions that the individual is free to
Section 2-205 Firm Offers

No substantial change.

Section 2-206 Offer and Acceptance in Formation of Contract (Revised Section 2-206, Offer and Acceptance)

Revised Section 2-206 first restates existing Section 2-206. To accommodate the revision of Section 2-207 it also adds as Section 2-206(c) that "[a] definite and seasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer."

Section 2-207 Additional Terms in Acceptance or Confirmation (Revised Section 2-207, Terms of Contract; Effect of Confirmation)

A major task of the Drafting Committee was the revision of Section 2-207, described by Grant Gilmore as "arguably the greatest statutory mess of all time." Existing Section 2-207 encourages devious form drafting and resolves cases based upon the order in which preprinted forms are sent. Revised Section 2-207 scraps the current approach, instead stating simple rules governing the terms of a contract formed under other provisions of Article 2. That is, Revised Section 2-207 governs only terms, not formation.

Specifically, Revised Section 2-207 provides that if (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed then the terms of the contract are:

1. terms that appear in the records of both parties;
2. terms, whether in a record or not, to which both parties agree; and
3. terms supplied or incorporated under any provision of the Uniform Commercial Code.

In short, Revised Section 2-207 simply uses UCC gap fillers to supply terms that the parties fail, in their records or otherwise, to agree upon.

refuse to take or makes a statement that the individual has reason to know will:

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

(3) If an offer evokes an electronic record in response, a contract is formed, if at all:

(A) if the electric record operates as an acceptance under Section 2-206, when the record is received; or
(B) if the offer is accepted under Section 2-206 by an electronic performance, when the electronic performance is received.

35. Revised Article 2's redraft of Section 2-207 adopts in substance the approach outlined in Mark E. Roszkowski, Ending the Battle of the Forms: A Proposed Revision of UCC
Section 2-208 Course of Performance or Practical Construction
No substantial change. This provision, however, is scheduled to be moved to Revised Article 1, currently being drafted.\(^{36}\)

Section 2-209 Modification, Rescission and Waiver
No substantial change except to replace “signed” and “writing” with “authenticate” and “record.”

Section 2-210 Delegation of Performance; Assignment of Rights (Revised Section 2-210, Assignment of Rights; Delegation of Performance)
Reorganized without significant change. A provision to conform the section to Revised Article 9 also has been added.\(^{37}\)

Section 2-301 General Obligations of Parties
No significant change.

Section 2-302 Unconscionable Contract or Clause
No significant change.

Section 2-303 Allocation or Division of Risks
No change.

Section 2-304 Price Payable in Money, Goods, Realty, or Otherwise
No substantial change.

Section 2-305 Open Price Term
No substantial change.

Section 2-306 Output, Requirements and Exclusive Dealings
No substantial change.

Section 2-307 Delivery in Single Lot or Several Lots
No substantial change.

Section 2-308 Absence of Specified Place for Delivery
No substantial change.

\(^{36}\) U.C.C. § 2-208, Reporter’s Notes (Revision Draft).

\(^{37}\) U.C.C. § 2-210(a)(2) (Revision Draft) states:
The creation, attachment, perfection, or enforcement of a security interest in the seller’s interest under a contract is not an assignment that materially changes the duty of or materially increases the burden or risk imposed on the buyer or materially impairs the buyer’s chance of obtaining return performance within paragraph (1) unless, and then only to the extent that, enforcement of the security interest results in a delegation of a material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective. However, the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and a court having jurisdiction may grant other appropriate relief, including cancellation of the contract or an injunction against enforcement of the security interest or consummation of the enforcement.
Section 2-309 Absence of Specific Time Provisions; Notice of Termination

No substantial change, except to add the following sentence to existing Section 2-309(3): “However, a term specifying standards for the nature and timing of notice is enforceable if the standards are not manifestly unreasonable.”

Section 2-310 Open Time for Payment or Running of Credit; Authority to Ship Under Reservation

No substantial change.

Section 2-311 Options and Cooperation Respecting Performance

No substantial change.

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

Revised Section 2-402 provides not only that the title to be conveyed is “good and its transfer is rightful” but also that the transfer “shall not, because of any colorable claim to or interest in the goods, unreasonably expose the buyer to litigation.”

Section 2-313 Express Warranties by Affirmation, Promise, Description, Sample (Revised Section 2-313, Express Warranties by Affirmation, Promise, Description, Sample, Model; Remedial Promise; Section 2-313A, Obligation to a Remote Purchaser Created by Record Packaged With or Accompanying Goods; Section 2-313B, Obligation to Remote Purchaser Created by Communication to Public)

Revised Section 2-313 restates the substantive rules of existing Section 2-313, and makes two important changes. First, Revised Section 2-313 applies only to an “immediate buyer,” one that “enters into a contract with the seller.”38 Second, it introduces the term “remedial promise,” defined as “a promise by the seller to repair or replace the goods or to refund all or part of the price upon the happening of a specified event.”39 Under Revised Section 2-313(d), such a promise “creates an obligation that the promise will be performed upon the happening of the specified event.”

Revised Sections 2-313A and 2-313B address obligations that run to a “remote purchaser,” defined as a “person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution.”40 They apply to new goods sold or leased in the normal chain of distribution.41 Section 2-313A deals with the “warranty in the box” situation in which

the seller makes an affirmation of fact or promise that relates to the goods, provides a description that relates to the goods, or makes a remedial promise, in a record packaged with or accompanying the

38. U.C.C. § 2-313(a) (Revision Draft).
39. Id. § 2-102(a)(35).
40. Id. §§ 2-313A(a)(3), 2-313B(a)(3).
41. Id. §§ 2-313A(a)(1), 2-313B(a)(1).
goods, and the seller reasonably expects the record to be, and the record is, furnished to the remote purchaser.

In this case the seller has an obligation to the remote purchaser that: "(1) the goods will conform to the affirmation of fact, promise or description unless a reasonable person in the position of the remote purchaser would not believe that the affirmation of fact, promise or description created an obligation; and (2) the seller will perform the remedial promise."

Revised Section 2-313B deals with the "advertising warranty." It applies the same rule listed above to warranties or remedial promises made "in advertising or a similar communication to the public" but only if the remote purchaser buys "with knowledge of and with the expectation that the goods will conform to the affirmation of fact, promise, or description, or that the seller will perform the remedial promise."[42]

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

No substantive change is made in Section 2-314 except to provide substitute "goods of that description" for "such goods" in Section 2-314(2)(c). This change "emphasizes the importance of the agreed description in determining fitness for ordinary purposes."[43]

Section 2-315 Implied Warranty: Fitness for Particular Purpose

No change.

Section 2-316 Exclusion or Modification of Warranties

Revised Section 2-316 restates existing law with two changes. First, in a consumer contract evidenced by a record, the "as is" disclaimer of Section 2-316(3)(a) "must be satisfied by conspicuous language in the record."[44] Second, Section 2-316(2) has been reformulated to distinguish consumer and commercial contracts. For commercial contracts, Revised Section 2-316(c)(2) provides that a disclaimer of the warranty of merchantability is sufficient if it mentions "merchantability," and the warranty of fitness may be disclaimed by the statement "there are no warranties that extend beyond the description on the face hereof." Under Revised Section 2-316(c)(1), consumer contracts require a record and more explicit conspicuous language. For example, a merchantability disclaimer requires the statement: "The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract." Fitness may be disclaimed by the statement: "The seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract."

Section 2-317 Cumulation and Conflict of Warranties Express or Implied

No change.

42. Id. § 2-313B(b).
43. U.C.C. § 2-314 prelim. cmt. (Revision Draft).
44. Id. § 2-316(b).
Section 2-318 Third Party Beneficiaries of Warranties Express or Implied
(Revised Section 2-318, Third Party Beneficiaries of Warranties Express
or Implied, Warranty Obligations, and Remedial Promises)

Revised Section 2-318 retains the three alternatives of existing law, but
reformulates them to include obligations arising under new Sections 2-
313A and 2-313B, and remedial promises.

Section 2-319 F.O.B. and F.A.S. Terms

Section 2-320 C.I.F. and C. & F. Terms

Section 2-321 C.I.F. or C. & F.: “Net Landed Weights”; “Payment on
Arrival”; Warranty of Condition on Arrival

Section 2-322 Delivery “Ex-Ship”

Section 2-323 Form of Bill of Lading Required in Overseas Shipment;
“Overseas”

Section 2-324 “No Arrival, No Sale” Term

On January 28, 1994, the Drafting Committee approved a proposal to
repeal Sections 2-319 to 2-324. The elimination of shipping terms defini-
tions from Article 2 is controversial, particularly because it adds uncer-
tainty to the shipment and risk of loss terms.

Section 2-325 “Letter of Credit” Term; “Confirmed Credit” (Revised
Section 2-325, Failure to Pay by Agreed Letter of Credit)

No substantial change, except that the terminology is revised to con-
form to Revised Article 5.

Section 2-326 Sale on Approval and Sale or Return; Consignment Sales
and Rights of Creditors (Revised Section 2-326, Sale on Approval and
Sale or Return)

This section is modified as part of the conforming amendments to Re-
vised Article 9.

Section 2-327 Special Incidents of Sale on Approval and Sale or Return

No substantial change.

Section 2-328 Sale by Auction

No substantial change.

Section 2-401 Passing of Title; Reservation for Security; Limited Applica-
tion of This Section

No substantial change.

Section 2-402 Rights of Seller’s Creditors Against Sold Goods

No change, except that the introductory phrase of Section 2-402(3) is
modified to reflect the change in Section 2-403.

Section 2-403 Power to Transfer; Good Faith Purchase of Goods;
“Entrusting”

Section 2-403 has been rewritten with minor changes and to conform to
Revised Article 9. For example, the entrusting rule has been amended to
provide that “any entrusting of goods to a merchant that deals in goods of
that kind gives the merchant power to transfer all of the entruster's rights to the goods and to transfer the goods free of any interest of the entruster to a buyer in the ordinary course of business."45 The operation of this provision may be explained as follows:

[N]ormally, a buyer in the ordinary course of business will take free of a security interest ‘created by his seller’ under Section 9-307(1), even though the secured party was not an entruster under [existing section 2-403(3)]. . . . Occasionally, a secured party will gain control of goods in which it has a security interest and entrust them to a merchant who did not create the security interest. . . . Under Revised section 2-403, the entrusting secured party will lose the security interest to a buyer in the ordinary course of business.46

Section 2-501 Insurable Interest in Goods; Manner of Identification of Goods
No substantial change.

Section 2-502 Buyer's Right to Goods on Seller's Insolvency (Revised Section 2-502, Buyer's Right to Goods on Seller's Repudiation, Failure to Deliver or Insolvency)
This section has been revised as part of the conforming amendments to Revised Article 9. Revised Section 2-502 expands the reclamation right to buyers of consumer goods if the “seller repudiates or fails to deliver as required by the contract.”47 In both the consumer goods and insolvency cases the buyer's rights vest upon identification, “even if the seller had not then repudiated or failed to deliver.”48

Section 2-503 Manner of Seller's Tender of Delivery
No substantial change except to clarify that the bailee's acknowledgment under Section 2-503(4)(a) be made “to the buyer.”49

Section 2-504 Shipment by Seller
No change, except to add the requirement to Section 2-504(a) that the goods put in possession of the carrier be “conforming.”

Section 2-505 Seller's Shipment Under Reservation
Section 2-505(1)(b) has been modified to reflect the change in Section 2-507.

Section 2-506 Rights of Financing Agency
No substantial change, except to provide explicitly that Article 5 governs in case of a conflict.

Section 2-507 Effect of Seller's Tender; Delivery on Condition
Section 2-507(2) has been modified from a conditional payment to a reclamation rule. That is, Revised Section 2-507(b) now reads “where

45. Id. § 2-403(b) (emphasis added).
46. U.C.C. § 2-504, Reporter's Note 2 (July 1997 Revision Draft).
47. U.C.C. § 2-502(a)(1) (Revision Draft).
48. Id. § 2-502(b).
49. Id. § 2-503(d)(1).
payment is due and demanded on the delivery to the buyer of goods or
documents of title, the seller may reclaim the goods delivered upon a
demand made within a reasonable time after the seller discovers or
should have discovered that payment was not made.” In addition, the
comment to Section 2-507 will note that “if the seller has agreed to as-
semble or install the tendered goods, completion of that performance is
also a condition to the buyer’s duty to accept and pay for the goods.”\(^{50}\)

**Section 2-508 Cure by Seller of Improper Tender or Delivery;
Replacement**

Revised Section 2-508 significantly alters and expands the seller’s right
to cure a nonconforming tender stated in existing Section 2-508. First, the
right to cure applies both after a rejection and a revocation of accept-
ance\(^{51}\) when the goods were accepted without knowledge of the defect
because of the “difficulty of discovery before acceptance or by the seller’s
assurances.”\(^{52}\) Second, an effective cure requires that the seller both
tender conforming goods and “compensate the buyer for all of the
buyer’s reasonable expenses caused by the seller’s breach of contract and
subsequent cure.”\(^{53}\) Third, although Revised Section 2-508(a) (governing
cure when the agreed time for performance has not expired) tracks ex-
isting Section 2-508(a), Revised Section 2-508(b) significantly expands the
remedy when the agreed time for performance has expired. In this situa-
tion a seller who has performed in good faith may, in all cases, cure “if
the cure is appropriate and timely under the circumstances.” Existing
Section 2-508(2) allows cure in such cases only if the seller had “reasona-
ble grounds to believe” that its nonconforming tender “would be accept-
able with or without money allowance.”

The expansion of the cure remedy, based in part upon Unidroit Princi-
bles, Article 7.1.4\(^{54}\) is controversial. Critics assert that it eviscerates the
perfect tender rule and wrongly places the burden on the buyer to prove
that a proffered cure is not “appropriate and timely.” Further, the right

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\(^{50}\) *Id.* § 2-507, Reporter’s Notes.

\(^{51}\) *Id.* § 2-508(a)-(b). Note that the right to cure after revocation of acceptance does
not extend to consumer contracts.

\(^{52}\) U.C.C. § 2-608(a)(2) (Revision Draft).

\(^{53}\) *Id.* § 2-508(a)-(b).

\(^{54}\) Article 7.1.4 provides:

1. The nonperforming party may, at its own expense, cure any nonperform-
ance, provided that
   1. without due delay, it gives notice indicating the proposed manner
      and timing of the cure;
   2. cure is appropriate in the circumstances;
   3. the aggrieved party has no legitimate interest in refusing cure; and
   4. cure is effected promptly.
2. The right to cure is not precluded by notice of termination.
3. Upon effective notice of cure, rights of the aggrieved party that are in-
consistent with the nonperforming party’s performance are suspended until
the time for cure has expired.
4. The aggrieved party may withhold performance pending cure.
5. Notwithstanding cure, the aggrieved party retains the right to claim dam-
gages for delay as well as for any harm caused or not prevented by the cure.
to cure after revocation of acceptance may saddle the buyer with nonconforming goods for an unreasonable period of time. That is, because revocation of acceptance "will be generally resorted to only after attempts at adjustment have failed," the revised cure remedy gives the seller yet another "adjustment" opportunity and prevents an already frustrated buyer from making alternative arrangements.

Section 2-509 Risk of Loss in the Absence of Breach

Revised Section 2-509(c) simplifies the residual rule of Section 2-509(3) by making risk of loss pass in all cases upon the buyer's receipt of the goods. Existing Section 2-509(3) provides that risk of loss passes on receipt if the seller is a merchant, and upon tender of delivery in other cases. Revised Section 2-509 also clarifies that the bailee's acknowledgment under Section 2-509(2)(b) be made "to the buyer."^56

Section 2-510 Effect of Breach on Risk of Loss

No substantial change.

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

No substantial change.

Section 2-512 Payment by Buyer Before Inspection

No substantial change.

Section 2-513 Buyer's Right to Inspection of Goods

Section 2-513(3) has been rewritten to reflect the deletion of shipping terms definitions from Article 2.\(^57\) Section 2-513(4) has been expanded to provide that the parties may provide for the standard of inspection, in addition to the place or method.\(^58\)

Section 2-514 When Documents Deliverable on Acceptance; When on Payment

No substantial change, except to defer to Article 5 in case of conflict.

Section 2-515 Preserving Evidence of Goods in Dispute

No substantial change.

Section 2-601 Buyer's Rights on Improper Delivery

No substantial change.

Section 2-602 Manner and Effect of Rightful Rejection (Revised Section 2-602, Manner and Effect of Rejection)

No substantial change, except to subject the rules of Section 2-602(2) to new Section 2-608(d) governing reasonable post-rejection and post-revocation use.\(^59\)

55. U.C.C. § 2-608 cmt. 4.
56. U.C.C. § 2-509(b)(2) (Revision Draft).
57. Id. § 2-513(c). See discussion of Sections 2-319 to 2-324, supra.
58. Id. § 2-513(d).
59. Id. § 2-602(b).
Section 2-603 Merchant Buyer's Duties as to Rightfully Rejected Goods
(Revised Section 2-603, Merchant Buyer's Duties as to Rejected Goods)
Revised to make it clear that a wrongfully-rejecting buyer is not entitled to indemnity for expenses or to a commission.

Section 2-604 Buyer's Options as to Salvage of Rightfully Rejected Goods
(Revised Section 2-604, Buyer's Options as to Salvage of Rejected Goods)
No substantial change.

Section 2-605 Waiver of Buyer's Objections by Failure to Particularize
Revised Section 2-605 applies the rule of existing Section 2-605 to revocation of acceptance in addition to rejection.

Section 2-606 What Constitutes Acceptance of Goods
No substantial change, except to add a cross reference to Revised Section 2-608(d) in Revised Section 2-606(a)(3).

Section 2-607 Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over
Revised Section 2-607 mirrors existing Section 2-607 with one significant change. Under existing Section 2-607(3)(a), the buyer of accepted goods must within a reasonable time after it discovers (or should have discovered) any breach notify the seller of breach "or be barred from any remedy." Revised Section 2-607(c)(1) provides that failure to give proper notice bars the buyer from a remedy only to the extent that the seller "is prejudiced by the failure."

Section 2-608 Revocation of Acceptance in Whole or in Part
This section is unchanged except to add new Section 2-608(d), dealing with the buyer's post-rejection or post-revocation use of the goods. Under this provision, after a rightful rejection or justifiable revocation of acceptance, "[a]ny 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." If, however, the use is reasonable, it does not constitute an acceptance, but in an appropriate case, the buyer must pay the seller for "the value of the use to the buyer."61

60. U.C.C. § 2-606(1)(c) (Revision Draft).
61. Preliminary Comment 7 to Revised Section 2-608 explains Section 2-608(d) as follows:
The courts have developed several alternative approaches. Under original Article 2, a buyer's post-rejection or revocation use of the goods could be treated as an acceptance, thus undoing the rejection or revocation, could be a violation of the buyer's obligation of reasonable care, or could be a reasonable use for which the buyer must compensate the seller. Subsection (d) adopts the third approach. If the buyer's use after an effective rejection or a justified revocation of acceptance is unreasonable under the circumstances, it is inconsistent with the rejection or revocation of acceptance and is wrongful as against the seller. This gives the seller the option of ratifying the use, thereby treating it as an acceptance, or pursuing a non-Code remedy for conversion.
Section 2-609 Right to Adequate Assurance of Performance
No substantial change.

Section 2-610 Anticipatory Repudiation
Revised Section 2-610 restates current Section 2-610, but incorporates a definition of repudiation. Revised Section 2-610(b) defines repudiation to include "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."

Section 2-611 Retraction of Anticipatory Repudiation
No substantial change.

Section 2-612 "Installment Contract"; Breach (Revised Section 2-612, Breach of Installment Contract)
No substantial change, except that the definition of "installment contract" in Section 2-612(1) has been moved to Revised Section 2-102.

Section 2-613 Casualty to Identified Goods
Revised Section 2-613 replaces the term "avoided" in existing Sections 2-613(a) and 2-613(b) with "terminated," and omits reference in the introductory phrase to Section 2-324, which has been deleted in Revised Article 2.

Section 2-614 Substituted Performance
No substantial change.

Section 2-615 Excuse by Failure of Presupposed Conditions
Revised Section 2-615 continues the impracticability principles of existing Section 2-615, but changes the language of Section 2-615(a) from "delay in delivery or nondelivery" to "delay in performance or nonperformance."62 "This change reflects the broad range of obligations a seller may have other than the obligation to deliver the goods."63

Section 2-616 Procedure on Notice Claiming Excuse
To make Section 2-616 consistent with the changes in Sections 2-613 and 2-615, "termination" and "performance" replace "avoidance" and "delivery" in Section 2-616(2).

Section 2-701 Remedies for Breach of Collateral Contracts Not Impaired
No substantial change.

Section 2-702 Seller’s Remedies on Discovery of Buyer’s Insolvency
The seller’s reclamation right stated in Section 2-702(2) has been amended to provide for reclamation "upon demand made within a reasonable time after the buyer’s receipt of the goods."64 Although existing Section 2-702(2)’s time limitations are thus eliminated, a successful recla-
mation against a bankrupt buyer also requires that the seller comply with Section 546(c) of the Bankruptcy Code.65

Section 2-703 Seller's Remedies in General
This section has been expanded to provide a more complete list of the seller's statutory remedies for breach upon the buyer's insolvency.

Section 2-704 Seller's Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods
No substantial change.

Section 2-705 Seller's Stoppage of Delivery in Transit or Otherwise
Revised Section 2-705 eliminates the distinction between the seller's right to stop delivery of goods in the possession of a carrier for insolvency and for other reasons (for example, the buyer's repudiation or nonpayment). Under existing Section 2-705 the seller can stop delivery for reasons other than insolvency only of truckload, planeload, or larger shipments. Now the seller has a right to stop in all cases without regard to the size of the shipment.

Section 2-706 Seller's Resale Including Contract for Resale
Revised Section 2-706 continues the formula of existing Section 2-706(1) but permits the seller also to recover consequential damages in appropriate cases.66

Section 2-707 “Person in the Position of a Seller”
Under Revised Section 2-707, a person in the position of a seller has the same remedies as the seller, not merely the right to withhold or stop delivery, resell, and recover incidental damages.

Section 2-708 Seller's Damages for Non-acceptance or Repudiation
Several important changes have been made in existing Section 2-708. First, two separate market price tests are provided in Revised Section 2-708(a). In general (for example, breach by nonacceptance or nonpayment), market price is that of comparable goods “at the time and place for tender.” In contrast, if the buyer repudiates the contract, market

65. 11 U.S.C. § 546(c) (1994), provides
(c) Except as provided in subsection (d) of this section, the rights and powers of a trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but—
(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods—
(A) before 10 days after receipt of such goods by the debtor; or
(B) if such 10-day period expires after the commencement of the case, before 20 days after receipt of such goods by the debtor; and
(2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court—
(A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title; or
(B) secures such claim by a lien.

66. See discussion of Revised Section 2-710, infra.
price is determined "at the place for tender at the expiration of a commercially reasonable time after the seller learned of the repudiation," but not later than the time of tender under the agreement. This rule "is designed to put the seller in the position the seller would have been in if the buyer had performed by approximating the harm the seller has suffered without allowing the seller an unreasonable time to speculate on the market at the buyer’s expense."\textsuperscript{67}

Revised Section 2-708(b) reworks the lost profit remedy of Section 2-708(2) by: (1) providing for consequential damages in appropriate cases, (2) providing that it applies if either the market price remedy (Section 2-708(1)), or the resale remedy (Section 2-706), is inadequate; and (3) omitting the language "due allowance for costs reasonably incurred and due credit for proceeds of resale." As explained by the drafters, the omitted language makes no sense in the context of the lost-volume seller and has been universally ignored in that context to make the provision work as it was intended. It is assumed as obvious that when a seller ceases manufacture and resells component parts for scrap or salvage value under Section 2-704(b), a credit for the proceeds is due the buyer to offset the damages under this section.\textsuperscript{68}

\textbf{Section 2-709 Action for the Price}

No substantial change, except to allow the seller to recover consequential damages in appropriate cases.

\textbf{Section 2-710 Seller’s Incidental Damages (Revised Section 2-710, Seller’s Incidental and Consequential Damages)}

Under current Article 2, consequential damages are available only to buyers, although courts have awarded sellers consequential damages (resulting from the buyer’s failure to pay) in certain extraordinary cases. Revised Section 2-710(b) now explicitly authorizes seller’s consequential damages using the same standard applicable to buyers under existing Section 2-715(b)(1).\textsuperscript{69} Revised Section 2-710(c), however, provides that a seller may not recover consequential damages from a consumer buyer.\textsuperscript{70}

\textsuperscript{67}. U.C.C. § 2-708 cmt. 3 (Revision Draft).
\textsuperscript{68}. Id. § 2-708 prelim. cmt. 5.
\textsuperscript{69}. Id. § 2-715(b)(1).
\textsuperscript{70}. The extension of consequential damages to sellers is controversial. Although Professor Anderson has argued persuasively for such an approach, protecting the “occasional seller” with a consequential damage claim may have broader adverse consequences. \textit{See} Roy Anderson, \textit{In Support of Consequential Damages for Sellers} 11 J.L. & Com. 123, 153 (1992). For example, in an April 11, 1994 letter to Reporter Richard E. Speidel, United States Bankruptcy Judge, Eugene R. Wedoff notes:

I am writing to suggest that this change not be adopted, primarily because of the delay and expense that it would inject into the bankruptcy system. Nearly all business bankruptcies are accompanied by unpaid receivables. Under the proposed change to Section 2-710, these receivables could give rise to a cause of action for consequential damages, in which it would be argued that, but for the buyer’s failure to pay, bankruptcy would have been avoided. Even to determine the merits of such claims, trustees would be required to expend substantial resources, and the litigation of such claims
Section 2-711 Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods (Revised Section 2-711, Buyer's Remedies in General; Buyer's Security Interest)

Revised Section 2-711 rewrites existing Section 2-711 to provide a more comprehensive listing of remedies available to the buyer.

Section 2-712 "Cover”; Buyer’s Procurement of Substitute Goods

No substantial change.

Section 2-713 Buyer's Damages for Nondelivery or Repudiation

Revised Section 2-713 provides a buyer's market price remedy that mirrors the two-part standard for sellers under Revised Section 2-708.71 Under Revised Section 2-713(a)(1), market price generally is determined "at the time for tender under the agreement.” This differs from existing Section 2-713(1), which measures market price “at the time when the buyer learned of the breach.” Like Revised Section 2-708(a)(2), Revised Section 2-713(a)(2) measures market price in repudiation cases when: [a] commercially reasonable time after the buyer learned of the repudiation has expired, but not later than the time for tender under the agreement. This time is designed to approximate the market price at the time the buyer would have covered even though the buyer has not done so under Section 2-712.72

Section 2-714 Buyer's Damages for Breach in Regard to Accepted Goods

No substantial change.

Section 2-715 Buyer’s Incidental and Consequential Damages

No substantial change.

Section 2-716 Buyer's Right to Specific Performance or Replevin (Revised Section 2-716, Right to Specific Performance or Replevin or the Like)

Under Revised Section 2-716(a), like existing Section 2-716(1), a court may grant specific performance if the breaching party's performance is “unique or in other proper circumstances.” Revised Section 2-716(a), however, expands the availability of the specific performance remedy: (1) to both buyers and sellers; and (2) if merchant parties have “agreed to that remedy” in their contract. Even if the parties agree to specific performance, however, it “may not be decreed if the breaching party's sole remaining contractual obligation is the payment of money.” In this case, the appropriate remedy is an action for the price under Section 2-709.

Section 2-717 Deduction of Damages From the Price

No substantial change.

would be fact-intensive, involving issues such as the buyer's state of mind, the cause of bankruptcy, and the extent of lost profits. Litigation of such issues could greatly delay the closing of estates and increase the costs of administration.

71. See discussion of Revised Section 2-708, supra.
72. U.C.C. § 2-713 cmt. 3 (Revision Draft).
Section 2-718 Liquidation or Limitation of Damages; Deposits

Revised Section 2-718 makes several changes to existing Section 2-718. For example, under Revised Section 2-718, the liquidation must be reasonable only in light of the anticipated or actual loss. The second and third factors, “difficulties of proof of loss,” and “the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy” stated in existing Section 2-718(1), now apply only to consumer contracts. Revised Section 2-718 also omits the last sentence of existing Section 2-718(1), but makes it clear that if the court finds the liquidated damages provision unenforceable, ordinary Article 2 remedies are reinstated.73 Finally, existing Section 2-718(2)(b) has been omitted.

Section 2-719 Contractual Modification or Limitation of Remedy

No substantial change.

Section 2-720 Effect of “Cancellation” or “Rescission” on Claims for Antecedent Breach

No substantial change.

Section 2-721 Remedies for Fraud

No substantial change.

Section 2-722 Who Can Sue Third Parties for Injury to Goods

No substantial change.

Section 2-723 Proof of Market Price: Time and Place

Revised Section 2-723 deletes existing Section 2-723(1), governing anticipatory repudiation. This issue is now covered in Revised Sections 2-708 and 2-713, previously discussed.

Section 2-724 Admissibility of Market Quotations

No substantial change.

Section 2-725 Statute of Limitations in Contracts for Sale

This section has been rewritten with several changes. Under Revised Section 2-725(a), the limitation period is now “the later of four years after the right of action has accrued . . . or one year after the breach was or should have been discovered, but no longer than five years after the right of action accrued.” The parties may reduce the limitation period to not less than one year by agreement, except in a consumer contract. Second, Revised Section 2-725(b) provides the general rule that the statute begins to run when the breach occurs, even if the aggrieved party had no knowledge of the breach. In repudiation cases a right of action accrues “at the earlier of when the aggrieved party elects to treat the repudiation as a breach or when a commercially reasonable time for awaiting performance has expired.” For “remedial promises” the right of action accrues “when the remedial promise is not performed when due.” Under Revised Section 2-725(c), actions for breach of warranty generally accrue upon delivery of nonconforming goods to the immediate buyer (or receipt of the

73. Id. § 2-718 cmts. 2, 3.
goods by the remote buyer in a “warranty in the box” or “advertising” warranty). If, however, the warranty extends to performance of the goods after delivery, or is a warranty of title or against infringement, the right of action accrues when the buyer “discovers or should have discovered” the breach. Finally, Revised Sections 2-725(d) and (e) restate existing Sections 2-725(3) and (4) without substantial change.

III. NEW SECTIONS

In addition to new Sections 2-313A and 2-313B, governing “warranty-in-the-box” and “advertising” warranties,74 Revised Article 2 adds several provisions concerning electronic contracting. As previously noted,75 Revised Section 2-204(d) states rules governing formation of contracts between electronic agents, and between an electronic agent and an individual. Revised Sections 2-211 through 2-213, derived largely from the Uniform Electronic Transactions Act (UETA), supplement these provisions.76 Most important are Section 2-211(a), which guarantees the legal effect and enforceability of electronic records and authentications, and Section 2-211(b), which guarantees legal effect and enforceability of contracts formed using electronic records.

74. See discussion of Revised Section 2-313, supra.
75. See supra note 33.
76. These sections provide:
   SECTION 2-211. LEGAL RECOGNITION OF ELECTRONIC CONTRACTS, RECORDS AND AUTHENTICATIONS.
   (a) A record or authentication may not be denied legal effect or enforceability solely because it is in electronic form.
   (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
   (c) Subsection (a) and Section 2-104(b) and (c) only apply to transactions between parties each of which agrees to conduct transactions by electronic means. Whether the parties agree to conduct transactions by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.
   (d) This article does not require a record or authentication to be created, generated, sent, communicated, received, stored, or otherwise processed by electronic means or in electronic form.
   (e) A contract formed by the interaction of an individual and an electronic agent under Section 2-204(d)(2) does not include terms provided by the individual if the individual had reason to know that the agent could not react to the terms as provided.
   SECTION 2-212. ATTRIBUTION. An electronic record or electronic authentication is attributed to a person if the record was created by or the authentication was the act of the person or the person's electronic agent or the person is otherwise bound by the act under the law.
   SECTION 2-213. ELECTRONIC RECORD.
   (a) An electronic record is effective when received even if no individual is aware of its receipt.
   (b) Receipt of an electronic acknowledgement of an electronic record establishes that the record was received but, in itself, does not establish that the content sent corresponds to the content received.