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ALI-ABA Course of Study
The Emerged and Emerging New Uniform Commercial Code

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The Emerging Article 2: Remedies for Breach of the Contract for Sale

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1. Introduction.

Article 2, Sales is being revised by a Drafting Committee of the National Conference of Commissioners on Uniform State Laws. To date, the Drafting Committee has held eight meetings and two more are scheduled for early 1995. The first reading of revised Article 2 occurred at the annual meeting of NCCUSL in August, 1994. A target completion date for the Article 2 project is August, 1996.

In this Outline, the revisions in the remedial provisions of Article 2, Part 7 are identified and discussed. If a section is not mentioned, no revision of substance has been made.

A copy of the latest draft of revised Article 2 can be obtained from the National Conference of Commissioners on Uniform State Laws, 676 N. St. Clair Street, Suite 1700, Chicago, IL 60611. Background references include: 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. of Corp. Law 981 (1991); PEB Study Group, Uniform Commercial Code, Article 2 Executive Summary, 46 Bus. Law. 1869 (1991); Symposium, The Revision of Article 2 of the Uniform Commercial Code, 35 Wm & Mary L. Rev. 1299-1750 (1994). See also, Symposium, Is the UCC Dead, Or Alive and Well?, 26 Loyola of Los Angeles L. Rev. 535-842 (1993).

2. Remedies in General

§2-701 Remedies in General

Revised Section 2-701 has been expanded to accomplish the following purposes.

1. Revised subsection (a) provides a comprehensive definition of breach for both seller and buyer. This definition controls the availability of remedies under Sections 2-703 and 2-711.

2. Revised subsection (c), drawing on §1-106(1), states that Article 2 shall be liberally administered to protect the expectation interest. If, however, Article 2 remedies do not put

the plaintiff in as good a position as if the other party had fully performed, an alternative measure of damages is provided: The court may award damages "measured by the loss resulting in the ordinary course of events from the breach as determined in any manner which is reasonable." Under this measure, courts may protect reliance and restitution interests where appropriate. But see Kwan v. Mercedes-Benz of North American, Inc., 28 Cal.Rptr. 371 (Cal.App. 1994)(damages for mental distress not recoverable in action for breach of warranty).

3. Revised subsection (d) states a general mitigation of damages principle to supplement the specific mitigation rules found throughout Part 7. See, e.g., §§2-704(b) and 2-715(b)(1). A failure to mitigate means that the plaintiff cannot recover for "that part of the loss that could have been avoided" by taking reasonable measures. The burden of establishing a failure to mitigate is placed on the party in breach.

4. Revised subsection (e) states that remedies are cumulative but then imposes a limitation upon remedial choice: A court may deny or limit a remedy if under the circumstances it would put the aggrieved party "in a substantially better position than if the other party had fully performed." This limitation implements the compensation principle stated in revised subsection (c). Thus, if a seller sues for the difference between contract price and market price under §2-708(a) and these damages would substantially exceed the profit the seller would have made under §2-708(b), a court should deny the §2-708(a) remedy. See also, Fertico Belgium S.A. v. Phosphate Chemicals Export Association, Inc., 510 N.E.2d 334 (N.Y. 1987)(buyer's use of "cover" remedy arguably overcompensated).

3. Seller's Remedies

§2-702. Seller's Right to Reclaim Goods After Delivery to Buyer.

1. Revised Section 2-702 combines in one place the right of a seller to reclaim goods delivered to a buyer in either a cash sale where payment is not made or in a credit sale where the buyer was insolvent. Subsection (a) states when reclamation is available and the time, which varies with the grounds, within which reclamation must be made. Thus, if the grounds are insolvency the seller must reclaim within 10 days after receipt and if the grounds are nonpayment the demand must be made "within a reasonable time" after the seller discovers or should have discovered the nonpayment.

2. Revised subsection (b) states that the seller's right to reclaim is subject to the rights of a buyer in the ordinary course of business or other good-faith purchaser "under this article" but

adds that the rights must arise before the seller "takes possession under a timely demand for reclamation." The limitation in the 1990 Official Text that "successful reclamation of goods excludes all other remedies with respect to them" has been deleted.

3. The revision still protects a secured party whose security interest in the buyer's after acquired property becomes perfected upon delivery before a timely reclamation of the goods is made if the secured party is a "good faith purchaser under this Article."

§2-703. Seller's Remedies in General.

1. The catalogue of seller's remedies in §2-703 refers to Section 2-701(a) for the definition of breach and is expressly made subject to the general remedial policies in §2-701.

§2-705. Seller's Refusal to Deliver for Buyer's Insolvency; Stoppage in Transit or Otherwise.

1. A seller's power to refuse delivery to an insolvent buyer except for cash, previously found in §2-702(1), has been moved to revised subsection (a). The seller's power to recover delivered goods from an insolvent buyer is covered in §2-702(a).

2. Section 2-705(b) deals with stoppage of goods in transit. Under revised subsection (b), the prior limitation upon the size of the shipment, i.e., "carload, truckload, planeload," where stoppage is for reasons other than insolvency has been deleted. The seller now has power to stop any shipment upon insolvency of or breach by the buyer, subject to the condition that the carrier or other bailee have a "reasonable opportunity" to prevent delivery. Subsection (d)(1).

§2-706. Seller's Resale, Including Contract for Resale.

1. Except where a buyer with a security interest in the seller's goods sells them under §2-711(c), notice of an intended resale is no longer required for a private resale under Section 2-706(b). The notice requirement in a sale by auction, i.e., a public sale, has not been changed. Section 2-706(c)(2).

§2-708. Seller's Damages for Non-Acceptance, Failure to Pay or Repudiation.

1. Revised subsection (a) measures damages based on market price in two ways.

First, for breach other than repudiation, damages are the "contract price less the market price of comparable goods at the time and place for tender." There are no major changes here.

For example, suppose the contract requires the seller to ship "fob" point of shipment 1,000 units of goods at $100 per unit, with payment 30 days after delivery. The buyer wrongfully rejects them upon arrival. The seller's damages are $100 less the contract price at the point of shipment times the number of units, plus incidental and consequential damages.

Second, a separate measure is provided for breach by repudiation. Damages are "the contract price less the market price of comparable goods prevailing at the place for tender and at the time when a commercially reasonable period after the seller learned of the repudiation has expired." This measure applies whether or not the case comes to trial before the agreed time for performance. See Section 2-723. The measure adopts what might called the "snap shot" approach to breach by repudiation in long term contracts. Neither the case law nor learned commentary have fully explored this problem. See Roye Realty & Development, Inc. v. Arkla, Inc., 863 P.2d 1150 (Okl. 1993)(adopting "snapshot" approach).

For example, suppose the contract requires the seller to ship "fob" point of shipment 100 units per month for three years at $100 per unit, with payment 10 days after delivery. After one year, the buyer, on February 1, 1992, wrongfully rejects an installment. On February 10, (relevant market price $90) the buyer writes a clear letter of repudiation which the seller receives on February 15 (market price $85). After efforts by the seller to urge performance, by March 1, 1992 (market price $80) it is clear that the repudiation is final. The Seller sues for damages and the case comes to trial on March 1, 1993 (market price $90). It is estimated that the market price will strengthen over the next 12 months. The seller's damages are the contract price ($100) less the market price of comparable goods at the place of shipment at the time when a commercially reasonable time expires ($80 on March 1) times the undelivered balance of the contract, some 2200 units.

2. Revised subsection (b) measures damages based on other than market price. A seller may choose this remedy rather than market price damages unless the choice puts it in a substantially better position than full performance. Section 2-701(c). The measure of damages includes lost profits determined in any reasonable manner, subsection (b)(1), and reasonable, unreimbursed expenditures made in preparing for or performing the contract, subsection (b)(2). Lost profits, including reasonable overhead, are determined by subtracting the seller's total variable performance costs from the contract price. In addition, the seller

can recover unsalvageable reliance expenditures and incidental and consequential damages.

No attempt is made to state when §2-708(b) is proper or to provide a detailed solution to the lost volume problem. Whether the plaintiff is a protected lost volume seller and the measure of lost profits if it is are left to the courts. Presumably, the precedents developed under former §2-708(2) will still control. See A. Deviance, An Analysis of the Lost Volume Seller Doctrine Under Article 2 of the UCC, 97 Com. L. J. 198 (1992). See also, Robert E. Scott, The Case for Market Damages: Revisiting the Lost Profits Puzzle, 57 U. Chi. L. Rev. 1155 (1990).

Section 2-709. Action for the Price.

There are no revisions of substance in this section.

§2-710. Seller's Incidental and Consequential Damages.

1. A seller may now recover consequential damages under revised subsection (b). Ultimately, the test for recovery will be conformed to the test for buyers in Section 2-715(b)(1). This change rejects the result reached in cases like Abex Corp./Jetway Division v. Controlled Systems, Inc., 22 UCC Rep.Serv.2d 166 (4th Cir. 1993)(unpublished). See Roy R. Anderson, In Support of Consequential Damages for Sellers, 11 J. L. & Comm. 123 (1992).

2. In most cases, the recovery of incidental damages under §2-710(a) will protect a seller from losses resulting from a buyer's breach by wrongful rejection or revocation of acceptance. New §2-710(b) protects the seller's lost opportunities in excess of pre-and post-judgment interest when the buyer fails to pay when agreed.

4. Buyer's Remedies

§2-711. Buyer's Remedies in General.

1. This section has been revised for clarity and better organization. As with Section 2-703, the seller's breach is defined in §2-701(a) and the buyer's remedial choices are controlled by §2-701(c).

2. Under revised §2-508, the seller is given a broader power to cure a nonconformity after the buyer has properly rejected a tender or revoked an acceptance. If a cure is made, the contract is preserved: The buyer cannot cancel or pursue remedies consistent with a breach of the whole contract. Nevertheless, the buyer still may recover incidental and consequential damages under §2-715.

3. The buyer's goods oriented remedies, §2-711(b), have been broadened somewhat. Thus, a prepaying buyer seeking to recover identified goods under §2-502 and a buyer seeking specific performance under an agreement permitting that remedy, §2-716(a), are in a better position to recover than in the original version.

4. Subsection (c) has been revised to require a buyer with a security interest in goods possessed after rejection or revocation to give notice to the seller of an intention to resell those goods and satisfy the security interest under §2-706.

§2-712. Cover

There are no revisions of substance in this Section. As with all damage sections, the measure is stated in terms of the cost of cover less the contract price.

§2-713. Buyer's Damages for Non-Delivery or Repudiation.

1. The measure of market damages for the buyer, like Section 2-708(a), depends upon the type of breach by the seller. For breach other than by repudiation, the measure is that provided in Section 2-713(1) of the 1990 Official Text. For breach by repudiation, the measure is that provided in revised Section 2-708(a)(2): Damage is the "market price for comparable goods prevailing at the time when a commercially reasonable period after the seller learned of the repudiation has expired less the contract price" determined at the place stated in subsection (b). This measure applies whether or not the case has come to trial before the time for performance.

2. Again, the "snap shot" approach has been adopted. To test the effect of this, assume that the parties have a 20 year contract for the supply of goods at a price subject to escalation. Assume that the seller repudiates after 5 years and the case comes to trial after six years. How does §2-713(a)(2) protect the buyer's expectation interest?

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

There are no revisions of substance in this section.

§2-715. Buyer's Incidental and Consequential Damages.

1. After considerable discussion, the Drafting Committee voted to modify the standard for permitting consequential damages now stated in Section 2-715(2)(a) to conform to Section 351 of the Restatement, Second of Contracts. In so doing, they rejected the options of leaving §2-715(2) alone or stating that no consequential damages shall be recovered unless the parties have agreed to permit

them.

2. Under this revision, the seller must have reason to know at the time of contracting the losses will "probably result" from the general or particular requirements of the buyer. Courts and commentators have concluded that the word "probably" expands rather than restricts recovery, since the defendant need not know that the losses would definitely or certainly result. Moreover, the word "probably" as so understood is redundant when the language of §2-715(2)(a) is considered: If the defendant has reason to know of the plaintiff's "particular needs or requirements" won't she have reason to know that the loss will "probably" result from the breach? Perhaps, then, this change is not necessary.

3. In addition, the court is given power, where "justice" requires, to reduce disproportionate consequential losses by limiting damages to reliance losses or by excluding lost profits. This additional hurdle assumes, in effect, that no rational party would assume the risk of consequential damages greatly in excess of the value received under the contract. Courts, however, have either ignored the hurdle or limited it to "unique circumstances." In unique cases, such as product recall liability, evidence of disproportion is used as one factor in deciding whether the parties have allocated the risk. Thus, a better approach might be to focus on the factors relevant to whether the risk has been allocated rather than to rely upon the test of disproportion. If some but not all of the risk of foreseeable loss has been allocated to the seller, the court should have discretion to tailor a remedy limitation to the circumstances.

4. The Drafting Committee, so far, has retained the concept that consequential damages include "injury to person or property proximately resulting from breach of warranty." §2-715(b)(2).

<u>§2-716. Buyer's Right to Specific Performance or Replevin.</u>

1. Under revised subsection (a), a court may order specific performance "if the parties have expressly agreed in the contract for sale." No effort is made to state when such an agreement goes too far. See King Aircraft Sales, Inc. v. Lane, 846 P.2d 550 (Wash.App. 1993)(specific performance granted to enforce contract to sell "rare" but not "unique" aircraft).

<u>§2-718. Liquidation of Damages; Deposits</u>

1. Revised subsection (a) deletes the word "actual" from the first sentence and deletes the second full sentence in previous Section 2-718(1). The revised first sentence now reads: "Damages for breach by either party may be liquidated in the agreement, but only at an amount that is reasonable in the light of the then

anticipated loss caused by the breach and the difficulties of proof of loss." This revision increases the chances that an otherwise conscionable liquidated damage clause will be enforceable in a commercial contract. On the overlap between §2-718(1) and §2-719, see Colorado Interstate Gas Co. v. Chemco, Inc., 854 P.2d 1232 (Colo. 1994)(agreed remedy for buyer's breach of long-term gas supply contract).

2. The second sentence in subsection (a) states that in a consumer contract "a term fixing unreasonably large or small liquidated damages is unenforceable and the third sentence adds that if a liquidated damage term is unenforceable under subsection (a), remedies may be had as provided in Article 2.

<u>§2-719. Contractual Modification or Limitation of Remedy, Including Damages.</u>

1. Revised subsection (b) clarifies the effect when an agreed, exclusive remedy fails of its essential purpose: The aggrieved party has remedies provided in the Article to the extent that the agreed remedy has failed, but agreed remedies outside the scope of and not dependent on the failed agreed remedy are enforceable as provided in Section 2-719.

2. Revised subsection (d) provides special rules for consumer contracts. If an agreed, exclusive remedy fails of its essential purpose and the seller is still in breach, the consumer buyer may revoke acceptance, obtain either a refund or replacement of the goods from the seller and pursue other remedies as provided in Part 7. See, generally, Myrtle Beach Pipeline Corp. v. Emerson Electric Co., 843 F. Supp. 1027 (D.S.C. 1993).

3. In a commercial contract, consequential damages may be limited or excluded by agreement unless the agreement is unconscionable. A limitation or exclusion of commercial loss is presumed to be conscionable. §2-719(c).

4. Different rules are provided for consumer contracts. A term limiting or excluding consequential damages is inoperative unless the excluding party proves by clear and convincing evidence that the consumer understood and expressly agreed to the term. An exclusion or limitation of consequential damages for injury to the person is unconscionable as a matter of law. §2-719(d)(2) & (3).

<u>§2-723. Proof of Market Price; Admissibility of Market quotations.</u>

1. Section 2-723 no longer contains a proof of damages principle for cases where a breach by repudiation comes to trial before the agreed time for performance. This principle is replaced

by the measure of damages for breach by repudiation in revised §§2-708(a)(2) and 2-713(a)(2). Revised §2-723 combines without change the remaining proof principles and those previously contained in §2-724 into one section.

§2-725. Statute of Limitations.

1. Subsection (c) provides a choice for the Drafting Committee in breach of warranty cases between the tolling principle now found in Section 2-725(2) and a discovery principle, i.e., the cause of action does not accrue until the buyer "discovers or should have discovered the breach."

5. Some Hypothetical Cases To Test and Explain Part 7 of Revised Article 2

A. Assume seller enters two long-term contracts with two buyers for the sale of coal. The contracts have twenty-year terms and the contract price escalates at 8 percent per year compounded on one and under "most favored nation" term in the other. In the most favored nation case the contract price rises to the highest level enjoyed by any new producer in the same geographic area. Assume that the spot market for coal is flat and that the buyer repudiates both contracts to get out of the steeply rising contract prices. Repudiation occurs on 12/1/94 and the case comes to trial two years later in December of 1996. In computing damages:

1. When is the market price measured?

2. When is the contract price measured?

3. Assuming the contract market difference at the time shortly after repudiation is used for most of the contract, is that also used for the gap period after repudiation but before trial (for 1995 and 1996)?

4. What market should one use? The spot market on a day shortly after the repudiation? The price under long-term coal contracts? If the latter, how does one calculate the long-term market if the contract prices in those long-term contracts escalate?

B. Instead of repudiating in the foregoing case, assume that buyer invited the seller to negotiate a reduction in the contract price. Seller agreed to negotiate but ultimately was unwilling to agree to the terms that the buyer proposed. Assume that the negotiations proceeded on-off for more than year and that during that time the buyer rejected various shipments for what appeared to be inconsequential faults and generally nitpicked the seller's performance. Assume further that letters went back and forth between the buyer and seller and that the letters

were probably drafted by each party's lawyers. (The seller may have even sent a 2-609 letter and received a letter from the buyer that "assured" the seller of performance.) At the end of that year-and-one-half or two-year period, seller is exasperated and tells his lawyer that he wants to cancel the contract and sue the buyer. When are damages measured?

1. Upon buyer's refusal (in month one) to take certain coal on the basis of inconsequential defects?

2. On buyer's failure completely to satisfy the conditions of a 2-609 letter in month six?

3. Only in month 18 when buyer made his most threatening and explicit plea for reduction in the price?

4. Never, because there was no repudiation and the seller's cancellation of the contract was itself a repudiation?

C. Seller has a contract to sell residual oil that seller produces from its refinery. The contract is for 15 years. Shortly after it is signed the price of oil declines, the demand for electricity goes down and the contract becomes uneconomic for the buyer utility. When the relevant market price is $15 per barrel and the contract price for the fuel is $30 per barrel, buyer repudiates the contract. Shortly after the repudiation the seller sells off part of its refinery, modifies the rest so that it no longer produces residual oil.

Assume that the contract-market difference under 2-708, applied to the contract volumes and reduced to present value is $100 million. Assume that the probable loss to seller if it revamped the refinery but negotiated out of the contract would have been $10 million. What is the seller's recovery under 2-708? How, if at all, would 2-701(c) apply to this case? Can buyer restrict the damages to $10 million on the ground that was seller's entire loss?

D. Assume that seller signs a contract to sell polyvinyl chloride to buyer. In preparation for performance of this contract, the seller spends $5 million in overhauling its plant and building new piping. By the time for performance two things have happened. First, the buyer's need for polyvinyl chloride disappears and second, the market price has risen slightly above the contract price in the contract that buyer repudiates. Seller would like to recover the $5 million preparation costs from buyer. Seller argues under a reliance theory found in section 2-701(c). Buyer argues that its breach resulted in a gain, not a loss, and therefore there should be no recovery. Buyer cites revised 2-701(d). What outcome?

E. Seller has a contract to sell $20 million of grain in each of the next three years to buyer. The grain market turns sour and buyer repudiates. As a result of that repudiation, seller is able to sell only $10 million of its grain the first year, and having bought grain in anticipation of sale has to store the grain over the first winter. In the next two years the same thing happens. The consequence of this is that seller sells in all only $30 million of grain. Seller asks the contract market differential on the grain sold and consequential damages under 2-710 on the grain never sold. It seeks interest payments on the amount it would have received had the buyer purchased and paid promptly in each case. What must the seller prove? What will it recover?

REVISED ARTICLE 2 SALES
AUGUST 1994 DRAFT

Revised Section 2-701. Remedies in General.

(a) The sales agreement and this article determine whether a seller or buyer is in breach under a contract for sale. A breach includes but is not limited to the following:

(1) A buyer is in breach if the buyer wrongfully rejects or revokes acceptance of goods, fails to make a payment due, or repudiates with respect to a performance not yet due.

(2) A seller is in breach if the seller fails to make a delivery or repudiates, or if the buyer rightfully rejects or justifiably revokes acceptance.

(b) If the seller or the buyer is in breach, the other party has rights and remedies provided by this article and, except as limited in this article, as provided in the sales agreement.

(c) The remedies provided by this article must be liberally administered to put the aggrieved party in as good a position as if the other party had fully performed. If those remedies fail to place the aggrieved party in that position, the court may award damages measured by the loss resulting in the ordinary course of events from the breach as determined in any manner which is reasonable.

(d) An aggrieved party shall take measures that are reasonable under the circumstances to avoid any loss resulting from the breach and may not recover for that part of a loss that could have been avoided by taking those measures. Except as otherwise provided in this article, the burden of establishing a failure to take reasonable measures under the circumstances is on the party in breach.

(e) Except as otherwise provided in this article, or the agreement, the rights and remedies provided by this article are cumulative. However, a court may deny or limit a remedy if, under the circumstances, it

would put the aggrieved party in a substantially better position than if the other party had fully performed.

(f) This article must not be construed to impair a remedy for breach of any obligation or promise collateral or ancillary to a contract for sale.

Revised Section 2-706. Seller's Resale, including Contract for Resale.

(a) If a buyer has breached under Section 2-701(a), the seller may resell the good concerned or the undelivered balance. If the resale is made in good faith and in a commercially reasonable manner, the seller may recover the contract price less the resale price together with any consequential or incidental damages under Section 2-710, less expenses avoided as a result of the buyer's breach.

(b) Unless otherwise agreed, a resale:

(1) may be at a public or private sale including sale by one or more contracts to sell or by identification to an existing contract of the seller;

(2) may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale, including the method, manner, time, place, and terms, must be commercially reasonable;

(3) must be reasonably identified as referring to the breached contract but, it is not necessary that the goods be in existence or that any of them have been identified to the contract before the breach.

(c) If the resale is at an auction sale, the following rules apply:

(1) Only identified goods may be sold unless there is a recognized market for the public sale of futures in goods of the kind.

(2) The resale must be made at a usual place or market for public sale if one is reasonably available. Except in the case of goods that are

perishable or which threaten to decline in value speedily, the seller must give the buyer reasonable notice of the time and place of the resale.

(3) If the goods are not to be within the view of those attending the sale, the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders.

(4) The seller may buy the goods.

(d) A good-faith purchaser at a resale takes the goods free of any rights of the original buyer even if the seller fails to comply with this section.

(e) A seller is not accountable to the buyer for any profit made on a resale. However, a person in the position of a seller or a buyer who has rightfully rejected or justifiably revoked acceptance shall account for any excess over the amount of the security interest provided in Section 2-711(c).

Revised Section 2-708. Seller's Damages for Nonacceptance, Failure to Pay, or Repudiation.

(a) Subject to Sections 2-701(e) and 2-723(a) with respect to proof of market price, if the buyer breaches under Section 2-701(a), the seller may recover damages based upon market price as follows:

(1) For breach by other than repudiation, the measure of damages is the contract price, less the market price of comparable goods at the time and place for tender, together with any incidental and consequential damages provided in Section 2-710, less expenses avoided as a result of the buyer's breach;

(2) For breach by repudiation, the measure of damages is the contract price less the market price of comparable goods prevailing at the place for tender and at the time a commercially reasonable period after the seller learned of the repudiation, together with any incidental and consequential damages provided in Section 2-710, less expenses avoided as a result of the buyer's breach. This measure applies whether the case is heard before or after the agreed time for

performance.

(b) Subject to Section 2-701(e), a seller may recover damages measured by other than the market price including:

(1) lost profits, including reasonable overhead, resulting from the breach determined in any reasonable manner, together with incidental and consequential damages under Section 2-710, less expenses avoided as a result of the buyer's breach; and

(2) reasonable expenditures made in preparing for or performing the contract if, after the breach, the seller is unable to obtain reimbursement by salvage, resale, or other reasonable measures.

Revised Section 2-709. Action for Price.

(a) If a buyer fails to pay the price as it becomes due, the seller may recover, together with any incidental and consequential damages under Section 2-710, the price of:

(1) goods accepted;

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

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

(b) A seller who remains in control of the goods and sues for the price must hold any goods identified to the contract for the buyer. If the seller is entitled to the price and resale becomes possible, the seller may resell the goods at any time before the collection of the judgment. The net proceeds of the resale must be credited to the buyer. Payment of the

judgment entitles the buyer to any goods not resold.

(c) If a buyer has committed a breach under Section 2-703, a seller who has sued for and is held not entitled to the price under this section may still claim damages under Section 2-706 or 2-708.

Revised Section 2-710. Seller's Incidental and Consequential Damages.

(a) Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses, or commissions incurred:

(1) in stopping delivery;

(2) in the transportation, care, and custody of goods after the buyer's breach;

(3) in making a return or resale of the goods; and

(4) in connection with reasonable efforts otherwise to minimize the consequences of the breach.

(b) Consequential damages resulting from a buyer's breach include any loss resulting from general or particular requirements and needs of the seller of which the buyer at the time of contracting had notice and which the seller could not prevent by reasonable measures under the circumstances.