APPENDIX

COMPARISON OF ORIGINAL AND AMENDED ARTICLES 2 AND 2A

As noted in Chapter One of RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH (2d ed. 2015), the American Law Institute (ALI) and the Uniform Law Commission (ULC) adopted amendments to Articles 2 and 2A in 2003. They then made some minor changes to these amendments in 2005. Many of the amendments were controversial and most were withdrawn from the official text of the UCC in 2011.[1]

Both Articles 2 and 2A have also been amended as part of the process of revising other articles in the UCC.[2] For example, when the ALI and ULC proposed amendments to Article 7, they also proposed "conforming amendments" to Article 2. The conforming amendments to Articles 2 and 2A that accompanied revisions to other articles of the UCC have not been controversial and the states have routinely adopted them at the same time they adopted the revisions to the other articles of the UCC.

This Appendix explains how the 2003/2005 amendments (the ones that generated controversy and were withdrawn) would have changed the law by comparing them to the provisions of Articles 2 and 2A that have been and remain in effect in most U.S. jurisdictions.[3] The Appendix discusses only the withdrawn amendments that would have had substantive effect.[4]

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[1] *See* LINDA J. RUSCH AND STEPHEN L. SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH 7 (2d ed. 2015).

[2] The other articles were Article 1 (2001), Article 3 (1990 & 2002), Article 4 (1990 & 2002), Article 4A (1994), Article 5 (1995), Article 6 (1989), Article 7 (2003), Article 8 (1994), and Article 9 (1999 & 2010).

[3] *See also* Linda J. Rusch, *Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What NCCUSL Finally Approved*, 6 DEL. L. REV. 41 (2003).

[4] Some provisions were amended with stylistic or grammatical changes and those provisions are not discussed.

SECTION 1. AMENDMENTS TO ARTICLE 2

A. SCOPE OF ARTICLE 2

1. Amending the Definition of Goods

The 2003 amendments would not have altered the scope section of Article 2. UCC § 2-102. They would, however, have amended the definition of "goods," which would have had the effect of changing the scope of Article 2. The revised definition of "goods" in amended § 2-103(1)(k) would have been substantially the same as the definition in UCC § 2-105(1) except that it would have added two exclusions: one for "information" and another for "foreign exchange transactions."[5]

The first exclusion, stating that goods does not include "information," was the subject of heated debate lasting years. The term "information" was not defined in the amendments but was prompted by the drafter's concern about what body of law governs software licenses. At the time the drafting process started, courts were wrestling with that issue. Should Article 2 be applied to software licenses or should such licenses be governed by common law contract principles?

The Article 2 drafting committee initially pursued a drafting project that would have provided a hub of basic contract law principles, with spokes containing provisions devoted to different types of transactions, such as sale of goods and licenses of information. That "hub and spoke" approach was eventually abandoned as unworkable and the ULC and the ALI formed a separate drafting committee to prepare a new Article 2B of the UCC concerning software contracting.

That decision meant that there had to be some way to define the scope of Article 2 in relation to the scope of Article 2B. Eventually the nomenclature that evolved out of that division was that Article 2 would apply to "goods" transactions and Article 2B would apply to "information" transactions, and that such "information" transactions would include but not be limited to software licensing (for example, information transactions would also include database access contracts).

Eventually, for various reasons, some substantive and some political, the Article 2B drafting committee was reconstituted as a committee to promulgate the Uniform

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[5] The amended definition changes the term "things in action" to "choses in action" but that should not be a substantive change in meaning.

Computer Information Transactions Act (UCITA) that would not be part of the UCC.[6] That Act was eventually adopted in two states.

Because these two drafting committees were operating at the same time, there was some degree of coordination regarding the relevant scope of each. The final resolution of the Article 2 scope, as it related to the scope of UCITA, was contained in the exclusion of "information" from the category of "goods." In essence, the idea was that downloaded software and other transactions involving electronic files or information were to be excluded from Article 2 and governed by UCITA. If a transaction was mixed and involved both tangible items and software, or other information, then the courts would have to decide whether to apply Article 2 to the transaction. A revised comment to amended § 2-103 indicated that the intent was to include within the scope of Article 2 transactions involving "smart goods" such as cell phones or other goods where computer programming was embedded within the good to make it function. For other transactions involving both goods and information, but not a "smart good," the revised comment offered no guidance on whether Article 2 would or should govern some or all of the transaction or whether the predominate purpose test would apply to help courts make that decision. If the amendments to Article 2 had been adopted in a state that did not adopt UCITA, a transaction involving "information" that was excluded from Article 2 would be governed by the common law.

The second exclusion from the scope of amended Article 2 dealt with "foreign exchange transactions," as defined in amended § 2-103(1)(i). The effect of this exclusion would have been to prevent Article 2 from applying to a currency exchanges settled through book entries, instead of through the physical exchange of specie. The purpose of this exclusion was to prevent Article 2's rules on

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[6] Part of the controversy centered on the legal issue of the coverage of Article 2 to provide rights and remedies to licensees. Of particular concern was the intersection of contract principles under Article 2 with copyright principles under federal law. One problem was the extent to which a license of software was considered a "sale" of the copy of the software for the "first sale" doctrine under federal law. Another problem was the ability of a software licensor to override by the terms of the license the protections of "fair use" of copyrighted information as provided under federal law. *See, e.g.*, Amelia H. Boss, *Taking UCITA on the Road: What Lessons Have We Learned?*, 7 ROGER WILLIAMS U. L. REV. 167 (2001); Richard E. Speidel, *Revising UCC Article 2: A View From the Trenches*, 52 HASTINGS L.J. 607 (2001); Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683 (1999).

reclamation (UCC § 2-702(2) and § 2-502) from applying so as to unwind these types of transactions.

2. Relationship to other Law

The amendments to Article 2 also included an express provision that would have mediated the relationship between Article 2 and other law in a more explicit manner than does UCC § 2-102. A new section, § 2-108, would have provided that a transaction under Article 2 is subject to any applicable certificate-of-title law, consumer-protection law, or statute dealing with specialized goods, such as artwork or human body parts, or specialized transactions, such as franchises. It also would have explicitly provided that Article 2 provisions would override the provisions of the federal Electronic Signatures in Global and National Commerce Act (E-Sign), except for the consumer protection provisions of E-Sign.

B. CONTRACT FORMATION AND BARRIERS TO ENFORCEABILITY

The amendments proposed three major types of changes to the contract formation sections. The first set of changes dealt with electronic contracting. The second set of changes dealt with the battle of the forms. The third set of changes dealt with the statute of frauds.

The amendments to Article 2 would have changed the word "writing" to "record," to allow for an electronic file, such as an email message, to satisfy the statute of frauds. The term "record" is defined uniformly throughout the UCC. *See* amended § 2-103(1)(m); UCC § 1-201(b)(31). The amendments defined "sign" so that it would encompass both tangible and electronic records. *See* amended § 2-103(1)(p). In addition, the amendments included new provisions added to make clear that electronic communication could be used in the formation of contracts. Thus, a new § 2-211, following the Uniform Electronic Transactions Act (UETA) and E-Sign, would have provided that a record or signature could not be denied effect because it was in electronic form and a contract could not be denied legal effect because an electronic record was used in contract formation. A new § 2-212 would have provided that normal attribution principles should be used to attribute electronic records or signatures to a person and new § 2-213 would have provided that a record has legal effect when received, regardless of whether someone was

aware of its receipt. Section 2-211 also would have made clear that no one would be required to use electronics.[7] At the time Article 2 was drafted, some expressed concern about whether computer programs that were used to find and purchase goods could evidence the "intent" to contract. Amended § 2-204 would have provided that electronic agents may be used in the formation of contracts even though no individual is reviewing the actions of the agent.

The second major change was a rewrite of § 2-207, involving the battle of the forms. UCC § 2-207 deals with two issues: subsection (1) deals with whether an agreement was formed through the parties' communications; and subsection (2) deals with what the terms of the resulting agreement were. Subsection (3) deals with both issues – the existence and terms of an agreement – if an agreement is formed though conduct rather than through communications. Amended § 2-207 would have dealt only with the second issue: the terms of the parties' agreement. The contract-formation rule of UCC § 2-207(1) would have been moved to amended § 2-206(3) and the contract-formation part of UCC § 2-207(3) would have been deleted, presumably on the assumption that is was already covered in UCC § 2-204(1).

These structural and organizational changes were minor compared to the substantive changes these amendments would have made to the rules used to determine the terms of the parties' agreement. Under amended § 2-207, once an agreement is formed, the terms of the agreement would be determined based upon the terms that agree in the records of both parties, supplementary terms from the UCC, and any term not in both records but to which the parties agreed. The key to the new section was what it meant to "agree" to a term not in the records of both parties. New comments three and four to amended § 2-207 provided minimal guidance on how to apply that concept.

The revisions to the statute of frauds in amended § 2-201 were modest, even though there was extensive debate in the drafting process about whether to retain the statute of frauds at all. The dollar amount would have been raised to $5,000 and the word "writing" would have been changed to "record," to accommodate electronic communications in the contracting process. The admission exception in subsection (3)(b) would have been expanded from statements made "in court" to statements "under oath." This would have made it clear that statements in answer to discovery, such as those made during depositions, would count for purposes of

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[7] Given the widespread adoption of UETA by the states and the federal E-Sign provisions, these amendments would have had little substantive effect. *See* RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH 76 (2d ed. 2015)

this exception to the "record" requirement. Finally, a new subsection (4) would have dealt with the relevance of other statutes of frauds. It provided that if amended § 2-201 was satisfied, no other statute of frauds would bar enforcement.

C. CONTRACT TERMS

1. Warranties

a. Merchantability

The amendments proposed to modify the implied warranty of merchantability in one minor respect by changing the requirement that the goods be "fit for the ordinary purposes for which such goods are used" to "fit for the ordinary purposes for which goods of such description are used." Amended § 2-314(2)(c). The amended comment to § 2-314 proposed a solution to the divergence in the tests of merchantability and product defect by stating that the tests should be the same. This was a direct attempt to counter the divergence of tests for defective products under tort and contract principles, discussed by the court in *Castro v. QVC Network, Inc*. (RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH at 364–70 (2d ed. 2015)).

b. Title and noninfringement

The warranty of title in amended § 2-312 would have been broadened to include a warranty that the buyer would not be unreasonably exposed to litigation because of a colorable claim to the goods. This amendment adopted the position of the *Colton v. Decker* court, quoted on pages 140–41 of RUSCH AND SEPINUCK, SALES AND LEASES: A PROBLEM-SOLVING APPROACH (2d ed. 2015). In addition, subsection (3) would have been broadened to make clear that both the warranty of title and the warranty of noninfringement could be disclaimed.

c. Express warranty and remote sellers

The drafters spent a considerable amount of time on express warranties made by remote sellers. The result was to revise § 2-313 to limit its application to buyers and sellers in privity and to add two new sections, § 2-313A and § 2-313B, to address the rights of buyers against remote sellers.

Section 2-313A addressed express warranty-like obligations that are in records that a remote seller actually furnished to and are expected to be provided to the remote purchaser of new goods. Section 2-313B addressed express warranty-like obligations made in advertisements or similar communications to the public concerning new goods. The remote seller's affirmations of fact, promises relating to the goods, and description of the goods would have created binding obligations to remote purchasers of the new goods if the person in the position of the remote purchaser reasonably believed that it created an obligation. This "reasonable belief" test was a functional substitute for the basis-of-the-bargain test in amended § 2-313. The distinction between affirmations of fact and "puffing" would have been maintained in evaluating the remote seller's statements. In addition, as to the advertisement or other public communications covered under new § 2-313B, the purchaser must have had knowledge of the seller's representations and must have had the expectation that the goods will comply with the representations. The tradeoff for this direct liability scheme would have been to allow the remote seller to limit or modify the remedies available to the buyer and to provide that the remote seller would never be liable for the purchaser's lost profits.

d. Remedial promise

Another innovation was that a "warranty" regarding the quality of the goods would have been separated from a seller's promise to take remedial action with respect to goods. Some courts construe a seller's promise to take remedial action as a warranty, rather than as a covenant. This subjects the promise to the basis-of-the-bargain test and makes a cause of action for breach of that promise accrue on tender of the goods, instead of when the seller failed to provide the promised performance. To change this line of reasoning, a definition of "remedial promise" was included in amended § 2-103(1)(n), and amended § 2-313(4) would have provided that a seller's remedial promise created an obligation to the buyer that was not a "warranty" of the goods. A remote seller would also have been responsible under

new § 2-313A and § 2-313B for any remedial promise the remote seller made. This construct would have ensured that the basis-of-the-bargain test did not apply to a remedial promise and that a cause of action for breach of a remedial promise would accrue upon the seller's breach of that promise. Amended § 2-725(2)(c)).

e. Extension of warranty

Amended § 2-318 incorporated the concept of remedial promise and the warranty-like obligations of remote sellers into the three alternative formulations for extension of the remedial promise and warranty-like obligations to parties other than the purchaser. To illustrate, if an immediate seller made a remedial promise, that remedial promise might have been extended to entities not in privity with the seller under the applicable alternative. Similarly, if a remote seller had a warranty-like obligation or made a remedial promise under either new § 2-313A or § 2-313B, those obligations would have been extended to entities specified under the applicable alternative provision.

2. Other terms

a. Delivery, payment,[8] and inspection

The amendments to Article 2 would have made a significant change to the delivery terms. The provisions defining the meaning of various shipment terms (§ 2-319 through § 2-324) would have been deleted. This would have relegated the parties to proving the meaning of these terms through trade usage or other conventions. Of course, the parties could have explicitly agree to what they meant in using such a shipping term.

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[8] The amendments to Article 2 also made some changes to provisions concerning payment by letter of credit. *See* amended § 2-325 (suspension of obligation to pay for goods when deliver a letter of credit and revival of obligation to pay if letter of credit is dishonored); amended § 2-506 (clarifying that if a financing agency issues a letter of credit, its rights are governed by Article 5), and amended § 2-514 (providing that rights concerning documents provided pursuant to a letter of credit are governed by Article 5).

The elimination of the shipping terms provisions would have affected several important rights, including how to determine if the parties meant to preclude inspection before payment (see amended § 2-513(3)) and whether the parties meant to have a shipment or a destination contract. The presumption of a shipping contract, however, would not have changed. UCC § 2-503, cmt. 5. In the context of shipping contract, amended § 2-504 would have explicitly required that the goods be conforming when the goods were put in the possession of the carrier.

Amended § 2-503(4)(a) would have made clear that, when delivery was to be through a bailee, the bailee must acknowledge to the buyer the buyer's right to possession.[9]

b. Risk of loss

Amended § 2-509 would have eliminated the default rule that risk of loss passes in the case of a non-merchant seller upon tender of delivery to the buyer. The new default rule would have been that the buyer obtains the risk of loss upon receipt of the goods.

In addition, if delivery was made through a bailee, the risk of loss would have passed when the bailee acknowledged to the buyer that the buyer has a right to possess the goods. This would have dovetailed with the change to the tender of delivery provision noted above. *Compare* amended § 2-509(2)(b) *with* amended § 2-503(4)(a).

c. Warranty disclaimers

The rules regarding disclaimers of implied warranties in consumer contracts[10] would have been significantly revised by amended § 2-316. New safe harbors were added for consumer contracts. To disclaim the implied warranty of merchantability in a consumer contract, the seller could have provided in a record the following

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[9] Amended § 2-503(4)(b) also makes clear that the priority rules of Article 9 control to fix rights as against third persons.

[10] A new definition of "consumer contract" was added to amended § 2-103(1)(d). *See also* the definition of "consumer" in amended § 2-103(1)(c).

language in a conspicuous[11] manner: "The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract." To disclaim the implied warranty of fitness for a particular purpose in a consumer contract, the seller could have provided in a record the following language in a conspicuous manner: "The seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying the goods, except as otherwise provided in the contract." Alternatively to disclaim both implied warranties, the seller could have used words such as "as is" or "with all faults" and, if the consumer contract is evidenced by a record, made those words conspicuous. In a nonconsumer contract, the seller could have continued to use the existing methods for disclaiming the implied warranties or could have used the new methods.

The only other substantive change to the disclaimer provision was to provide in amended § 2-316(b) that the seller must make a demand for the buyer's examination of the goods in order for that examination to result in a disclaimer of the implied warranties.

d. Remedy limitations

The only significant change[12] to the ability of the parties to craft their own remedies was in amended § 2-718(1), which would have tested the reasonableness of a liquidated damages clause in a nonconsumer contract only by its reasonableness in light of the anticipated or actual harm (not also by the difficulty in proving loss or the nonfeasability of obtaining an appropriate remedy). This would have made such clauses more likely to be enforceable. The rule for consumer contracts would have remained unchanged. The language that an unreasonably large liquidated damages clause is void as a penalty would have been deleted because the enforceability of such a clause would be determined by the test stated in the section.

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[11] "Conspicuous" was defined in amended § 2-103(1)(b).

[12] A new sentence was added to state that if the remedy was a limited remedy, as opposed to a liquidated damages clause, the enforceability of the limited remedy was to be determined under § 2-719. That was a not a change in the law.

e. Parol evidence

The parol evidence rule, § 2-202, would have been amended to separate the issues of "explanation" and "supplementation." "Explanation" would have been dealt with in the new subsection (2), which indicated that evidence of usage of trade, course of dealing, and course of performance are admissible to explain terms even if the writing is not ambiguous. This would have put into the statutory text what was in a comment to this section.

There was no substantive change to the treatment of "supplementation." The comment to the section would have been modified to indicate that merger clauses are not conclusive on the question of the intent of the parties to integrate some or all of their terms into the record. Neither of these changes would have changed the parol evidence analysis.

D. CONTRACT PERFORMANCE

1. Assignment and delegation

The amendments made no significant change to § 2-210[13] but they would have added a new rule specifying that a delegation that is accepted by the delegatee constitutes a promise by the delegatee to perform and is enforceable either by the delegator or the other original party to the contract.

2. Termination

Amended § 2-309 on termination would have provided that a term specifying the manner and timing of a notice of termination is enforceable as long as it is not manifestly reasonable.

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[13] The substantive amendments to § 2-210 were made as conforming amendments to the Article 9 revision in 1999.

3. Repudiation

Amended § 2-610 would have added a new subsection describing what qualifies as a repudiation. This subsection was based upon the Restatement (Second) of Contracts and the prior comment to this section. Under this rule, a repudiation would include language that a person could reasonably interpret as indicating that a party will not perform, or conduct that would make it appear that performance is impossible. The new subsection would have been a non-exclusive description of repudiation and would not have changed the analysis of what constitutes a repudiation.

4. Excuse

The only significant change to the excuse provisions would have been to allow a seller to be excused from "performance," not merely from "delivery." *See* amended §§ 2-614, 2-615.

E. BUYER'S REMEDIES

Amended § 2-711 was reorganized to more fully list the buyer's remedies and would have added a provision that allowed for the buyer to recover damages in any manner that is reasonable if none of the other remedies were appropriate.

1. Obtaining the goods from the seller

Under amended § 2-716, the parties would have been permitted to agree to specific performance and courts would have been encouraged, although not required, to order specific performance if there was such an agreement. The new provision would not have applied to consumer contracts.

2. Damages when the seller does not tender the goods

Amended § 2-713 would have specified the time for measuring the market price in a case of the seller's repudiation. That time would have been a reasonable time

after the buyer learned of the repudiation.[14] In other cases, the time for measuring market price would have remained the same: the time for tender of the goods.

3. Rejection, Acceptance, and Revocation of Acceptance

Amended Article 2 would have retained the distinction between the perfect-tender rule in § 2-601 and the substantial-impairment test for rejection of goods in an installment contract under § 2-612. An amendment to § 2-612 would have made it clear that the substantial impairment must be to the buyer.

The provisions on providing notification of rejection, § 2-602, and taking care of the goods after rejection, §§ 2-603, 2-604, would have been expanded to apply in the case of wrongfully rejected goods.[15] The amendments would have expanded the provision on particularizing notice so that it applied to cases involving revocation of acceptance as well as rejection. Amended § 2-605. However, the notification would have had to particularize the ascertainable defect only if the seller had both the right and the ability to cure, not just the ability to cure. Failure to particularize when required would not have barred all remedies, only the ability of the buyer to rely on the unstated ascertainable defect to justify rejection or revocation. Finally, the notification rule of § 2-607 would have been changed to provide that, if the buyer did not timely notify the seller in the case of accepted goods, the buyer would be barred from a remedy only to the extent that the lack of timely notice prejudiced the seller was prejudiced.

The right of the seller to cure in the face of a buyer's rejection would have been broadened to include a right to cure in a nonconsumer contract when the buyer revoked acceptance because of the difficulty of discovery. In addition, the right to cure would have been expanded as against a buyer who rejected goods in an installment contract. In order to be entitled to cure, the seller must have rendered performance in good faith and given a seasonable notice of intent to cure to the buyer. The cure would have been provided at the seller's own expense and the seller would have provided compensation to the buyer for the buyer's reasonable expenses caused by the breach and the subsequent cure. If the time for performance of the

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[14] Thus, amended § 2-723 no longer addressed the time for measuring damages in the case of a repudiation.

[15] The wrongfully rejecting buyer, however, was not entitled to reimbursement as provided for a rightfully rejecting buyer under amended § 2-603.

contract has expired, the amendments would have permitted the seller to cure only if cure was appropriate and timely under the circumstances. A cure would have been limited to providing a conforming tender. Amended § 2-508.

One of the most important changes would have been to allow a buyer to use the goods, if such use was reasonable, after rejection or revocation of acceptance without making that use an acceptance of the goods. Amended §§ 2-608(4), 2-606, 2-602.

F. SELLER'S REMEDIES

Amended § 2-703 would have provided a more complete list of the seller's remedies and added a provision that allowed for the seller to recover damages in any manner that is reasonable if none of the other remedies were appropriate.

1. Seller's ability to withhold or recover the goods

Amended § 2-705 would have broadened the right of the seller to withhold or stop delivery of the goods if the buyer repudiated or breached prior to delivery of the goods. The limitation on the seller's right to keep the goods from the buyer that depended upon the seller being able to stop delivery on a "carload, truckload, planeload, or larger shipments of express or freight" would have been eliminated. In other words, the seller would have had the right to withhold or stop delivery of goods in the event the buyer breached prior to delivery even if the seller did not have the right to stop the entire container holding the goods affected by the buyer's breach.

In some situations, a seller has a right to reclaim goods after delivery. The amendments would have broadened a credit seller's right to reclaim by eliminating the requirement that a reclamation demand be made within ten days of receipt of the goods. Instead the seller would have been required to make the demand within a reasonable time. Because the ten-day time period would have been eliminated, the extension of the time period based upon a misrepresentation of solvency during the preceding three months would also have been eliminated. Amended § 2-702(2). The cash seller's right to reclaim following a conditional delivery, mentioned in the comments to § 2-507, would have been codified in the statutory text of amended § 2-507(2) but remained unchanged in substance.

2. Seller's damages or specific performance

Generally a seller who has delivered accepted goods is entitled to the price. UCC §§ 2-709, 2-607. This right is akin to specific performance because it provides the seller with precisely what the seller expected to receive under the contract. Amended § 2-716(1) would have entitled a seller to specific performance (by eliminating the section caption that restricts it to a buyer's remedy) as long as the buyer had some obligation remaining other than the payment of money.[16] Thus, a seller would have been be entitled, in an appropriate case, to a specific performance order requiring the buyer to accept the goods.

If a breaching buyer does not accept the goods, the seller is entitled to damages. The amendments would have made several changes to the seller's damage remedies, the most notable of which would have been to entitle the seller in a nonconsumer contract to consequential damages, in addition to incidental damages and damages based on the price for the goods, the resale price, the market price, or lost profit. Amended §§ 2-710, 2-706, 2-708, 2-709.

The measure of damages based on a resale price would have been unchanged except for an additional provision that made clear that a seller's failure to properly resell the goods would not bar other remedies. Amended comment 11 would have stated that the seller is free to choose between damages based upon resale or damages based upon the market price or the lost profit measurement.

The measure of damages based on the market price would have been changed in a case of anticipatory repudiation. In such a case, the market price would have been measured at a commercially reasonable time after the seller learned of the repudiation. This changed paralleled the change to the buyer's market-price based remedy discussed earlier.

A seller's measure of lost profits in amended § 2-708(2) would have been changed to delete the language for due allowance for costs reasonably incurred and due credit for payments or proceeds of resale and to make clear that lost profit may be available if the resale remedy is inadequate. Revisions to comment 1(e) would have noted that unreimbursed reliance costs are recoverable.

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[16] The difference between a specific performance order for money and a judgment for money is that the former may be enforced through contempt proceedings.

3. Breaching buyer's restitution

The breaching buyer's right to restitution in amended § 2-718 would have been changed to eliminate the statutory "liquidated damages" and broaden the right of restitution to any time the seller justifiably refused performance, whether it be because of the buyer's breach or the buyer's insolvency.

G. STATUTE OF LIMITATIONS

Amended § 2-725 would have made significant changes to the statute of limitations. Most notably, it would have provided specific accrual rules, each keyed to a various type of breach. The basic rule that a cause of action accrues when the breach happens would have been retained. That rule would then have been subject to several exceptions. In a breach by repudiation, the cause of action would have accrued at the earlier of when the aggrieved party elected to treat it as a breach or at the end of the commercially reasonable time for awaiting performance. In a breach of a remedial promise, the cause of action would have accrued when the remedial promise was not performed when due. In a breach of warranty of quality against an immediate seller, the cause of action would have accrued upon tender of delivery and, if required under the contract, completion of installation or assembly of the goods. In the case of a warranty-like obligation under new § 2-313A or § 2-313B, the cause of action would have accrued when the remote purchaser received the goods. In the case of a breach of warranty of quality or breach of a warranty-like obligation, if the warranty or the warranty-like obligation explicitly extended to the future performance of the goods and the discovery of the breach must await that discovery, the cause of action would have accrued when the breach was or should have been discovered. In the case of breach of warranty of title or noninfringement, the cause of action would have accrued when the breach was or should have been discovered. An action for breach of warranty of noninfringement, however, could not have been commenced more than six years after tender of delivery of the goods to the aggrieved party.

The other major change would have been to provide for a slightly longer limitations period and to attempt to restrict the ability of parties to reduce the limitations period by contract. A suit for breach must have been brought within the later of four years after the cause of action accrued or one year after the breach was or should have been discovered, but no longer than five years after the cause of

action accrued. The parties in a nonconsumer contract would have remained permitted to reduce the limitations period but not to less than one year. The parties in a consumer contract would not have been permitted to reduce the limitations period.

H. RIGHTS OF THIRD PARTIES

1. Buyer's rights to the goods

Both amended § 2-502 (prepaying buyer's rights to the goods) and amended § 2-716 (buyer's right to replevin) contained a vesting rule that would have provided when the buyer's rights vested. This vesting rule would have been important in determining when the buyer's rights arise against a seller's creditor, as provided in amended § 2-402(1). Amended § 2-402(3) also would have provided that the seller's secured creditor's rights would be subject to the entrustment rule in § 2-403(2).

2. Seller's rights to the goods

Both amended § 2-702(3) and amended § 2-507 would have provided that the seller's reclamation rights would be subject to the rights of a good faith purchaser for value or a buyer in ordinary course of business.

SECTION 2. AMENDMENTS TO ARTICLE 2A

Most of the amendments to Article 2A followed the amendments to Article 2. Other changes were made for reasons related to changes in other laws that apply to Article 2A transactions. For example, the definition of "lessee in ordinary course" would have been changed to conformed to the definition of "buyer in ordinary course." Amended § 2A-103(1)(u). Section 2A-105 would have been amended so that the intersection Article 2A and certificate of title laws would have dovetailed with related provisions in Article 9. Other changes would have been made to deal with particular leasing issues, such as broadening the definition of "finance leases" to encompass subleases. Amended § 2A-103(1)(*l*).

A. LEASE FORMATION AND TERMS

The amendments to § 2A-204 and § 2A-205 would have mirrored the changes to § 2-204 and § 2-205. The changes to § 2A-201 would have followed the changes to § 2-201, except that the dollar amount of lease payments that make a lease subject to the statute of frauds would not have not changed. The amendments to Article 2 regarding electronic contracting would also have been incorporated into Article 2A. *See* amended § 2A-222 through § 2A-224.

The changes to the warranty of title and noninfringement, would have paralleled the changes to Article 2. In addition, the warranty of title would have been slightly broadened in a nonfinance lease to include any claims that did not arise from the lessee's conduct, instead of focusing merely on claims that arise out of conduct of the lessor alone. The changes to the implied warranty of merchantability in Article 2A would have been the same as the changes in Article 2.

One set of significant changes to Article 2 would not have been incorporated into Article 2A. The changes to the express warranty section and the addition of remote warranty-like obligations would not have been incorporated into Article 2A. Amended § 2A-214 would have incorporated the changes to warranty disclaimers made by amended § 2-316.

The changes to the parol evidence rule in amended § 2A-202 would have followed the changes to amended § 2-202.

The change to the risk of loss rule in amended § 2A-219 would have been the same as in amended § 2-509.

The changes to the liquidated damages provision in amended § 2A-504 partially followed the changes to amended § 2-718(1) by providing that if a limited remedy is involved, its enforceability would be determined under amended § 2A-503. Otherwise, the liquidated damage provision in § 2A-504 would not have changed.

B. BREACH AND REMEDIES

The definition of repudiation from amended § 2-610 would have been replicated in amended § 2A-402. Just as in amended Article 2, the lessor's excuse provisions would have been broadened to excuse "performance," instead of merely "delivery." *Compare* amended §§ 2A-404, 2A-405 *with* amended §§ 2-614, 2-615.

A lessor's right to stop delivery under § 2A-526 would have been expanded in the same manner that a seller's right was expanded under amended § 2-705. The

changes to the specific performance remedy in amended § 2-716 would have been followed in amended § 2A-507A. A buyer's expanded ability to recover the goods in amended § 2-502 would have been applied to lessees in amended § 2A-522.

The damage remedies of a lessor and lessee would have been essentially unchanged except to allow for a lessor to recover consequential damages. Amended § 2A-530. The changes to Article 2 regarding the time for measuring market price would not have been incorporated into Article 2A. A breaching lessee's right to restitution would have been amended to mirror a breaching buyer's right to restitution in amended § 2-718. Amended § 2A-504(3).

The changes to the Article 2 rules regarding rejection, acceptance, and revocation of acceptance would have been incorporated into Article 2A. Amended §§ 2A-510, 2A-515, 2A-517. A lessee's obligations regarding rejected goods or goods as to which acceptance has been revoked would have been changed to conform to a buyer's obligations under amended Article 2. *See* amended §§ 2A-511, 2A-512. Similarly, the amendments to a lessor's right to cure under § 2A-513 would have tracked the amendments to § 2-508 regarding a seller's right to cure. A lessee's obligation under § 2A-514 to specify defects would have been expanded in the same manner as a buyer's obligation in amended § 2-605. A lessee's obligation to give notification of breach as to accepted goods would have been the same as a buyer's obligation. *Compare* amended § 2A-516(3) *with* amended § 2-607(3).

The statute of limitations in amended § 2A-506 would have incorporated only one change from amended § 2-725: the restriction on the ability to reduce the limitations period in a consumer lease.