(3): effects of provisions of act may be varied by agreement; certain obligations may not be varied by agreement (good faith), but parties may agree on the standards of measuring such things if those aren’t unreasonable

UCC is to be supplemented by other areas of law (incl CL) unless displaced by act

Undermines view of UCC as “Code”

UCC embraces expectancy principle

Problems with this:

If B obtains goods elsewhere (covers under 2-712), can B nevertheless seek to recover MP – KP? If MP is greater? That puts B in greater than its expectancy position

Or, even if B never covered, use “actual loss” as measure of damages rather than MP – KP, if MP – KP would be huge? (ludicrous shift in the market). That’s what happened in Allied Canners

Other courts (TexPar Energy): Follow literal language of code

Args against Allied:

Expectancy is not $$ profit, but getting the goods on the day you’re supposed to get them; what B does w/ goods is no business of S

Also, S stands to gain the MP difference that from breaching

There is nothing to “liberally administer” or to “construe” if statute is unambiguous. And statute unambiguously gives B the choice of remedies

Statute doesn’t guarantee “expectancy,” but rather “at least expectancy”

Plus, the statute is to be liberally construed so as not to limit B’s remedies – such construction is not limiting and doesn’t follow purpose (cmt)

Similar problem w/ S’s recovery under 2-708(1) vs. 2-708(2)

(2) allows recovery of profit when (1) is inadequate. But sometimes, when MP tanks, KP > Cost of production > MP, so Profit > [KP – MP]. Have similar type of overcompensation argument: should S be forced to take profit rather than statutory remedy? Courts have split

If Ct. follows 1-106 over 2-708, then can use 2-706 as the measure of damages even if S did not act properly to get to invoke that statute as measure of damages

Section captions are part of the act

Definitions for whole code

(3): “Agreement” = “bargain of parties in fact as found in their language or by implication from other circumstances...”

In fact = actual, subjective assent

Comment 3: intended to include full recognition of usage of trade, course of dealing, course of performance, surrounding circumstances, & of agreements allowed to displace parts of Code

Subject matter areas talked about but not formally agreed on (like price protection) can be part of the “agreement” even if no express terms on it – if you can tell that that was a condition of the agreement

(10): conspicuous: so written when a reasonable person against whom it is to operate would have noticed it
Goes on to cite examples of what is conspicuous and what is not, but (cmt 10) these are just examples and not the test itself (test is the above)
  - That invites an analysis of the relative levels of sophistication and of the circumstances under which the K was signed
  - This becomes important for disclaimer of implied warranties, 2-316
- (11): K = total legal obligation of the parties
- (17): Fungible = when any unit is the equivalent of any like unit, or is so treated
  - Archetype of this: corn; cars aren’t fungible
- (19): “Good faith” = honesty in fact in conduct / transaction concerned
  - But, means more for merchants, see 2-103(b)
- (37): “Security interest” = interest which secures payment or performance of obligation
  - But, special property interest under 2-401 is not a security interest (by identification of goods to the contract, B acquires a special property limited by act)
  - Security interest created if
    - (a): original term of lease >= remaining economic life of goods
    - (b): lessee is bound either become owner of goods or to renew lease for remaining economic life of goods
    - (c): lessee has option to renew lease for remaining economic life for no/nominal additional consideration
    - (d): lessee has option to become owner of goods for no/nominal additional consideration
  - Section on “transaction does not create security interest merely b/c ...”
  - Another section defining when additional consideration =/= “nominal”; what “reasonably predictable,” “remaining economic life,” and “present value” means
  - If there’s a security interest, no lease
  - Look @ whether, @ the end, Lessor had a meaningful residual interest in property
    - If goods have no value @ end of lease, nothing comes back to lessor
    - As a practical matter, if option price is so low that it makes no sense for the lessee not to exercise option, nothing is coming back to the lessor
- (39): “signed” = any symbol executed or adopted by a party w/ present intention to authenticate a writing
- **Insolvent** = “person who has ceased to pay a debt in the ordinary course of business, or cannot pay a debt when it becomes due, or insolvent w/in meaning of federal bankruptcy law”
  - Significance of bankruptcy definition of “insolvency” is to include “balance sheet” test

1-203: Obligation of good faith – every K or duty w/in act imposes obligation of good faith
  - Definitions cross-referenced to 1-201, 2-103 for good faith
- No separate cause of action for breach of this duty; rather, makes unavailable a right or power under act

1-204:
- (2): “Reasonable time” depends on the purpose for the action taken

1-205: Course of dealing and usage of trade
- (1): Course of dealing = sequence of previous conduct btw parties, fairly to be regarded as establishing common basis of understanding for interpreting expressions & other conduct
- (2): Usage of trade: any practice having such regularity in place/vocation/trade to justify expectation that it will be observed
- (3): Course of dealing & usage of trade give meaning to, supplement, qualify terms
- (4): Express terms + CoD & UoT shall be construed when reasonable as consistent w/ each other; when unreasonable, express > CoD > UoT
- (5)
- (6)
  o Cmt 6: custom and trade usage is prima facie reasonable if there is commercial acceptance of it, but if an “unconscionable or dishonest practice should become standard,” it is not protected by 1-205. Trade usage, etc., won’t always be reasonable.

2-102: UCC Art. 2 applies to all transactions in goods, unless the context requires otherwise
- Contains an exception for statutes regulating sales to consumers, farmers, other specified class of buyers (consumer fraud acts, e.g.)

2-103: Starting point for article 2 definitions
- (1)(b): good faith (for merchants) = honesty in fact + observance of reasonable commercial standards of fair dealing in trade.
  o Reigel: for things like output Ks (X yield from Y acres), even if you haven’t specified which acres, look to the commercial standards to determine a remedy, provide basis for enforcement

2-104:
- (1): merchant =
  o Person who deals w/ goods of the kind
  o Otherwise by occupation holds self out as having knowledge or skill peculiar to practices or goods involved in transaction
  o Such knowledge or skill may be imputed through employment of agent, broker, etc.
  o Decatur Coop: don’t get to be a merchant by selling grain 1x / yr.
  o Cmt. 1: talks about “transactions between professionals in a given field,” pretty wide definition of merchant. Cmt 2: definition roots in “law merchant” concept of a professional in business.
  o Further down in Cmt 2: “for purposes of these sections almost every person in business would ... be deemed to be a “merchant” ... since the practices involved in the transaction are non-specialized business practices. (Talking about 2-201, among other particular sections).
2-105:
- (1): defines “Goods” as “all things movable @ the time of ID to the contract for sale”
  - Acreage; structures not movable
  - “Identification” defined in 2-501
- (6): commercial unit: single whole for purposes of sale; division of which materially impairs character or value on market or in use. May be any unit treated in use or in relevant market as single whole.

2-106:
- (1): Sale = passing of title from S to B for a price
  - Doesn’t necessarily have to be a $$ price – barter transactions can be OK
- (2): Goods or conduct in performance are “conforming” when in accord w/ contractual obligations
  - What “conform” means may depend on trade usage, etc.; another limitation on perfect tender rule, 2-601

2-107 – Deals w/ Ks involving goods & realty, when they are “K for the sale of goods” w/in Act.

Anthony Pools – deals w/ mixed goods/services transactions, whether it is a contract for sale
- Under straightforward application of code, diving board falls under UCC: it is a contract for sale (title passes) and is identified as under 2-501(1)(b)
- But, if Art. 2 won’t apply to certain transactions, then mere passage of title not enough; while code talks about Ks involving goods & realty, says nothing about mixed goods / services Ks.
- Many states now that follow the “gravamen” test rather than the “predominant purpose test” (contrary to UCC purposes; rejected)
- Can I get definition of gravamen and predominant purpose tests?

Advent Systems: computer program in portable format is good under UCC
- Seemed to be applying the “predominant purpose” test
- Looking more at policy: UCC meant to govern transactions, establish stability, have working body of law to cover these Ks, etc.
  - Even if Article 2 doesn’t apply, rule may be desireable & court may adopt as a matter of common law. Hoffman
- Also, by analogy: CDs are goods though the music isn’t; books goods though the words aren’t

Architectronics: K for right to use software in creating & selling derivative product is not K for sale of goods under UCC.
- Confusion b/c it’s the service that predominates in the sale of specially manufactured goods, but the courts apply the UCC anyway

On software, 3 kinds:
- 1) Mass-marketed in commercial form
- 2) Specially designed for a particular user
- 3) Software always remains on creator/supplier’s computer; clients pay to access
- Judicial consensus that #1 is w/in UCC; no consensus on 2nd and 3rd
If all we have is a license, we don’t have a “K for sale,” which is a part of definition of goods

2-201 – Statute of Frauds
  - Important to keep separate the questions: did parties have contract? If so, does it meet requirements of SoF?
    o Just b/c there’s a writing sufficient to show, doesn’t mean a K has been made
  - (1) K for sale of goods for >$500 not enforceable unless
    o Some writing sufficient to indicate that K for sale has been made btw parties
      ▪ Cmt 1: writing need not contain all material terms; need only provide basis for believing that oral evidence rests on real transaction
      ▪ But, Cmt 1 seems to go beyond the language of the statute, and is not itself law; some cts. have concluded that the writing itself must justify the inference that the parties have reached an agreement
        • Sometimes, may have to look outside 4 corners of doc, though
      ▪ E-mails probably included in writing; are under revisions
        o Signed by party against whom enforcement is sought
        o Writing not insufficient b/c it omits or incorrectly states a term, but
        o K not enforceable beyond quantity of goods shown in writing
          ▪ Reigel: Terms like all the output of X acres are sufficiently definite to state an amount for SoF purposes
  - (2) Btw merchants, if w/in reasonable time, writing confirming K and sufficient against sender is received, & party receiving it has reason to know contents, satisfies (1) unless written notice of objection to contents given w/in 10 days after receipt
    o No req. that it must be signed by party against whom enforcement is sought; this can apply against both parties
  - (3) K which doesn’t satisfy requirements of (1), but valid in other respects, is enforceable
    o (a) specially manufactured goods
    o (b) party against whom enforcement has been sought admits (in ct., etc.)
    o (c) goods for which payment’s been made & accepted, or which have been received & accepted
      ▪ Courts have interpreted this to mean partial payment (say, in downpayment on a car)
      ▪ Raises the “commercial unit” question of 2-606(2)
  
SoF provision is mandatory; parties can’t contract around it. 1-205 Cmt. 4

Statute of frauds won’t preclude promissory estoppel. Nothing in code about this, but CL incorporated through 1-103. Decatur Coop.
  - Promissory estoppel would apply when:
Promise was made under circumstances where promisor intended & reasonably expected that promisee would rely on promise
- Promisee acted reasonably in reliance
- Refusal to enforce would be to “virtually sanction the perpetration of fraud or would result in other injustice.”
  - But, *Lige Dickson v. Newman Oil*: can’t invoke promissory estoppel; **2-201(3)** recognizes some forms of reliance, court lacks power to add others

**2-202** – Final written expression: parol or extrinsic evidence
- Terms w/ respect to which conformatory memoranda agree, or which are set forth in writing intended by parties as final expression of agreement may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.
- May be supplemented by:
  - (a) course of dealing, usage of trade (**1-205**) or course of performance (**2-208**)
    - **Cmt 2**: Writings to be read on the assumption that course of prior dealings, etc. were taken for granted when document was phrased; unless carefully negated, they become part of K
  - (b) by evidence of consistent additional terms, unless ct. finds the writing was also “complete & exclusive” statement of terms of agreement
    - Note no requirement of consistency for trade usage; trade usage et. al. still applies, even to complete integrations
    - But, **1-205(4)** talks about construing trade usage & course of dealing as consistent w/ express terms; when the cannot be so construed, express terms control (same for CoP under **2-208**)

Only consider the parol evidence rule after determining what the terms of the writing are. If we’re still interpreting the terms, trying to figure them out, we can look to parol (or other) evidence and there’s no problem with that.

*ARB, Inc. v. E-Systems, Inc.*
- Integration clauses = manifestation of assent to proposition that writing was complete & exclusive
  - **What words need to be used to make sth an integration clause?**
    - Sometimes clause isn’t enough; may have to look @ circumstances surrounding the deal
    - **2-202** may contemplate the *actual* intent, not *objective manifestation* thereof (when dealing w/ a K w/ integration clause that you sign, not knowing it’s there.
- Different possible meanings of “consistent” terms; 3 types of terms
  - Contradictory – not enforceable
  - Harmonious (court adopts this) – enforceable
    - Harmonious: about preserving the “natural balance” of the agreement – *doesn’t make much sense to me*
    - Talks about harmony in terms of language & respective obligations
  - Other terms (if the above don’t exhaust the universe: not-contradictory but not harmonious) – may be enforceable
- **Nanaluki**: terms imposed by trade usage, etc. are consistent if they do not amount to a *total negation* of the terms in the K (drawn from the fact that the statute says that trade usage, etc. can “qualify,” which must mean that some degree of inconsistency is allowed.” 1-205(3). That means “create an exception” – not harmonious).
  - Since “harmonious” isn’t used under 1-205(3), should it be used under 2-202?

*Noble v. Logan-Dees Chevrolet-Buick, Inc.*
- Critique of ct.’s opinion: if we view this in terms of interpreting the writing, & not as additional term, then 2-202 doesn’t come into play
- Court just wrong all over the place
- Also wrong b/c 2-202 only bars evidence of prior agreements; doesn’t say anything about subsequent agreements.

2-204 – Formation of K in general
- (1): K for sale may be made in any manner sufficient to show agreement:
- (2): Can find agreement sufficient to establish K, even w/o determining exact time
- (3): Even though 1 or more terms open, K for sale doesn’t fail for indefiniteness if parties intended to make K and there is a reasonably certain basis for giving remedy
  - Comment: “test is not certainty as to what the parties were to do nor as to the exact amount of damages due to plaintiff...Rather, commercial standards on the point of ‘indefiniteness’ are intended to be applied, this act making provision elsewhere for missing terms needed for ...”
  - So, if price is left open, but a range has been specified, can’t say w/ certainty that higher number is measure of damages (which S would want), but B can’t reasonably complain if lower # is used

What about following situation? B negotiating on buying car from S. They narrow down disagreement to $500. Then, something comes up, but before leaving, B: “I definitely want this car,” S: “OK.”
- Next day, B comes back: “No deal.”
- Seemed that there, class was saying there is a K.
- But if B comes back, and each party refuses to budge, class was saying, “No K.”
- Turns on Q of whether parties intended K to exist, or not until nailing down price (should be the same whether S backs out or whether they can’t agree)
- Is it just desire to protect the consumer that makes the difference
- Look to open price terms in 2-305 – under those, intent of parties still matters
- Possible for parties to assent to something and not have a K; tentative, express agreement doesn’t necessarily mean K
  - *Unique Designs* is good example of this: agreement to deal, but not much beyond that
- Also have to ask whether there’s a *reasonably certain basis for determining remedy*
Bacou Dallaz v. Continental Polymers

- A price term that talks in terms of market price or currently available price is sufficiently definite to (show agreement & ?) provide remedy
  - Dispute over price doesn’t make it indefinite; just raises q of fact
- Quality term that compares quality of goods to other products as a standard is not too indefinite
  - Possibility of manipulation doesn’t make it too indefinite; have duty of good faith

Southwest Engineering

- One party argued didn’t intend to be bound in absence of determining time for payment; but obviously if there was intent to be bound, 2-310 would supply the missing term

2-206 – Offer and acceptance in formation of K

- (1) Unless otherwise unambiguously indicated by language / circumstances
  - (a): Offer to make K shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances
    - Cmt. 1: meant to do away w/ technical requirements
  - (b): Order or other offer to buy goods for prompt or current shipment construed as inviting acceptance by prompt promise to ship, or prompt or current shipment
    - But shipment of non-conforming goods doesn’t constitute acceptance if S notifies B that shipment is accommodation
      - If no notification that goods are nonconforming & accommodation, S may still be in breach. See cmt. 4
- (2) If beginning performance is reasonable mode of acceptance, & offeror isn’t notified of acceptance (beginning performance) w/in reasonable time, may treat offer as having lapsed

2-207 – Additional terms in acceptance or confirmation (battle of the forms)

- (1): Definite & seasonable expression of acceptance, or written confirmation, sent w/in reasonable time, operates as acceptance though it states terms additional to or different from those offered, unless acceptance expressly made conditional on assent to additional or different terms
  - Mirror image rule does not apply
  - But, don’t get to 2-207(1) unless the terms are different; for that, have to look to context, incl. course of dealing & usage of trade
  - Can’t just look @ language of reply, have to look at whole context of statement to see whether there’s a “definite expression of acceptance” (“yes, but price is 50% higher” would not be)
  - Term in boilerplate unlikely to foreclose a conclusion that form is definite expression of acceptance
  - Itoh v. Jordan: very strict reading of “unless acceptance is expressly made conditional.” S needs to spell out that there are these other terms, and that B cannot accept without assent to those terms. Just pointing to terms or implying that acceptance is made conditional is not enough
(2): Additional terms to be construed as proposals for addition to K. Btw merchants, such terms become part of K unless
  o (a) Offer expressly limits acceptance to terms of offer
  o (b) Terms materially alter K
    ▪ Material, nowhere defined in the UCC, means: “important, more or less necessary, having influence and effect, going to the merits.”
      ▪ Various restatements define it as “something a reasonable person would attach importance to.”
      ▪ Cmts. 4, 5 give examples of what sorts of changes “materially alter” the K
    ▪ Most courts consider arbitration a material alteration – surrender of constitutional right to trial
    ▪ The presence of this subsection tells us that even material additions don’t necessarily take reply out of realm of “definite expression of acceptance.” Depends how material
    ▪ This subsection only deals with if a term was added; does not indicate whether a contract was made.
  o (c) Notification of objection to them has been given or is given w/in reasonable amount of time
    ▪ Cmt. 6: view conflict between forms as notice of objection – not requiring you to actually object after getting the other guy’s forms. But this only applies to confirming forms

Note that (2) says “additional,” not “additional or different.” Most courts apply this section in to “different” terms as well. 3 ways to handle “different” terms, Northrop Corp. v. Litronic:
  o Knockout rule: Discrepant terms drop out; default terms in UCC fill gap (majority)
    ▪ Under knock-out rule of Northrop, a party happy w/ default terms must express them in boilerplate to protect selves; otherwise terms might be “additional”
  o Offeree’s discrepant terms drop out; offerors make up contract (minority)
  o “Different” equated with “additional,” so whether they’re added or not turns on materiality (small minority, i.e. California). Also, Cmt. 3.

Sometimes the gap-fillers, default rules in UCC are outside the realm of what the parties agreed to (ex: B wants 30 days credit, S wants 50% on delivery, 50% 30 days later; UCC says “payment on delivery”). Should, perhaps, the breaching party be at least allowed the other party’s interpretation?

(3): Conduct recognizing existence of K sufficient to establish K for sale, even if writings of parties otherwise don’t establish K
  o If so, terms of K are: terms on which writings agree, + supplementary terms under UCC (most often, gap-fillers; also trade usage, etc.)
  o Terms on which the parties disagree are excluded from K & can’t come back in as supplementary term (unless it happens to agree w/ gap-fillers, trade usage, etc.)

This section just goes to show that you can’t necessarily protect a client by document-drafting. If a term is really important, must be a negotiated term.
**Hill and Kosec, on license agreements in the boxes**

- **G** thinks that, contrary to **Hill, 2-207** does apply in this context
- So the stuff in the box would be additional terms; consumer not a merchant, so rest of (2) wouldn’t apply; only become part of contract if agreed to.
- Act of keeping the computer past time period is only acceptance if that action was intended as acceptance of the offer – something that you’re going to do anyway can’t just be magically transformed into acceptance by whim of other party

**2-208 – Course of Performance**
- (1) – Where K involves repeated occasions for performance ... any course of performance accepted or acquiesced in w/o objection shall be relevant to determining meaning of agreement
  - **Cmt 4:** single occasion doesn’t fall w/in language of this section (but other sections deal w/ single occasions, esp. 2-605 and 2-607)
  - **Nanaluki** – 2 instances can be a course of performance
- (2) Express terms, CoP, CoD, UoT shall be construed whenever reasonable as consistent w/ each other. But where they’re not, Express terms > CoP > CoD & UoT
  - And, was hierarchy for CoD & UoT in 1-205
- (3) Subject to provisions of next section on waiver, such course of performance shall be relevant to show waiver or modification of any term inconsistent w/ such course of performance
  - **Cmt 3:** preference in favor of “waiver,” when hard to determine whether CoP waives condition or sheds light on meaning of whole agreement

**2-209 – modification, recision, waiver**
- (1) agreement modifying K w/in article need no consideration to be binding
- (2) signed agreement excluding modification or recision except by a signed writing cannot otherwise be modified or rescinded; except as between merchants, such a requirement on form supplied by merchant must be separately signed by other party
  - Validates no-oral-modification clauses
- (3) Requirements of SoF must be satisfied if K, as modified, is w/in provisions
  - **G** would read this as requiring a writing only when the quantity term is modified
  - But that’s not how courts have read it; courts have read it to be anytime there is a modification of the K, needs to comply w/ **2-201**
- (4) Although attempt at modification or recision does not satisfy requirements of (2) or (3), it can operate as a waiver
  - **Modification can** operate as waiver; doesn’t mean it does
  - **Wisconsin Knife Works:** sth else needed; reliance is the device for testing when “can” becomes “does”
  - But, Easterbrook dissent in **Hill v. Gateway:** that would pose construction problems w/ (5); waiver = “intelligent relinquishment of a known right.”
    - This would have us look more at course of performance
o BMC v. Barth: 3 requirements of waiver:
   ▪ Existence @ time of waiver of a right, privilege, or benefit that may be waived
   ▪ Actual or constructive knowledge of the right
   ▪ Intention to relinquish
o “No-oral-modification” clause can be waived ... orally ... Barth (e.g., not complaining when delivery is rescheduled). Failure to object in reasonable time can be viewed as waiver. Even failure to cancel the contract and failure to sue can be viewed as waiver!
   ▪ How can B protect self? Vocal enforcement of rights is bad business practice
   ▪ Could also parse out what’s waived (waiver of a specific delivery date vs. of any delivery date – recover for breach, lose damages due to delay)
   ▪ When sth comes up, parties need to get together and address it to preserve rights
o Possible to have waiver, but not modification, w/ proposal of new term. If this is the case, the new term doesn’t come in; rather, turn to gap-fillers
   - (5) party who has made waiver affecting executory portion of K may retract by reasonable notification, received by other party, that strict performance will be required of any termed waive – unless retraction would be unjust in view of material change in position in reliance on waiver

2-301 – General obligations of parties
   - S: tender & deliver; B accept and pay in accordance w/ K
     o Talking here about accepting the goods, not the manifestation of assent

2-302 – Unconscionability
   - (1): if court finds K or clause to be unconscionable @ time it was made, may refuse to enforce K, or enforce K w/o clause, or limit application of clause to avoid unconscionable result
     o Cmt 1: principle is one of prevention of oppression & unfair surprise
   - (2) Parties have a reasonable opportunity to present evidence to court.
   - Comes up a lot in disclaimer of warranties – see 2-316(2)
   - Does say that any clause (seemingly including disclaimer of warrantees) can be unconscionable

A&M Produce v. FMC Corp.: 2 part test for unconscionability:
   - Procedural & Substantive
     o Procedural: requires “oppression” and “surprise” (tiny type, denying opportunity to read)
       ▪ Fact that K isn’t read / understood not enough
       ▪ If all dealers do something, then Bs have 0 bargaining power
       ▪ Ks of adhesion (S won’t negotiate the boilerplate, take it or leave it) almost always satisfy procedural unconscionability
Substantive: is the term one that an adhering party would find unreasonable

- In this case, unreasonable to think that B would buy farm equipment w/o ANY guarantee that it would work, and sacrificing so much in damages
- Both elements are necessary, but the more of one you have, the less of the other you need
- Problem w/ ct.’s reasoning: losses are foreseeable, and most of the time are easiest avoided by disclaiming party – does this mean consequential damages can never be waived?

2-305 – Open price term
- (1) Parties can conclude K for sale even if price not settled; if so, price is a reasonable price @ time of delivery if
  - (a) Nothing said as to price, or
  - (b) Price is left to be agreed by parties & they fail to agree
  - (c) Price is to be fixed in terms of agreed market or other standard as set or recorded by 3rd party, and that doesn’t happen
  - So, failure to nail down a price won’t always make a contract fail for indefiniteness, so indefinite that it’s unenforceable
- (2) Price to be fixed by B or S means to be fixed in good faith
  - Cmt 3: talks about the “normal case” that satisfies good faith; also notes the distinction btw 2-103 and 1-201(19). The safe harbor conditions satisfy both the “objective” and “subjective” sense of good faith
  - Exxon v. Matthis: market price, or price comparable to what competitors are charging, may not be w/in the “normal case” in some circumstances
  - See 1-205, Cmt 6 (usage of trade is prima facie reasonable, but won’t always be)
- (3) When price left to be fixed otherwise than by agreement of parties fails to be fixed through fault of 1 party, the other may:
  - Treat K as cancelled
  - Or fix a reasonable price
- (4): If parties intended not to be bound unless price be fixed or agreed, & it isn’t fixed, then no K. B must return any goods; S must return any part of price

2-306: Output / Requirements K
- (1): Term that measures quantity by S’s output or B’s requirements means actual output/reqs as may occur in good faith; no quantity unreasonably disproportionate to ested estimate, or any normal/prior amount, may be tendered or demanded
  - Cmt 2: there’s some elasticity in requirements – depends on good faith
- (2): Lawful agreement by S or B for exclusive dealing imposes (unless otherwise agreed) an obligation by S to use best efforts to supply goods/promote sale

2-307: unless otherwise agreed, all goods must be tendered in 1 delivery; payment due only on such tender
- Where circumstances give either party the right to make / demand delivery in lots, price can be demanded for each lot

2-308 Absence of specific place for delivery. Unless otherwise agreed:
- (a): place for delivery of goods is S’s place of business (or, if none, S’s residence)
  - Of course, trade usage etc. informs this and might make a place “otherwise agreed” (furniture, for ex)
- (b): in K for sale of ID’ed goods which the parties, at time of King, know are in some other place, then that place
- (c): documents of title can be delivered through banking channels.

2-309 Absence of specific time provisions
- (1): Time for shipment, delivery, or other action (performance) = reasonable time
- (2): if K provides for successive performance but is indefinite in duration, it is valid for reasonable time. But unless otherwise agreed, may be terminated @ any time by either party
- (3): Termination of K by one party except on happening of agreed event requires that reasonable notification be received by other party and an agreement dispensing w/ notification is invalid if operation would be unconscionable

2-310 – Open time for Payment or running of credit. Unless otherwise agreed,
- Unless otherwise agreed
- (a) payment is due @ time & place where B is to receive goods, even if place of shipment is place of delivery
  - Cmt. 1: B has right of inspection b/f paying even under (a)
- (b) if S is authorized to send goods he may ship ... but B may inspect goods b/f payment is due unless that’s inconsistent w/ K
- (c) if delivery is authorized & made by way of docs of title, otherwise than in (b), then payment due @ time & place @ which B is to receive docs (regardless of where the goods are to be received)
- (d) where S is required/authorized to ship goods on credit, credit runs from time of shipment; can delay by postdating invoice

2-311 – Options and cooperation respecting performance.
- (1) Agreement sufficiently definite to be K isn’t invalid b/c it leaves particulars of performance to be specified by other parties – must be made in good faith & w/in limits of commercial reasonableness
  - Reigel: OK to allow S to pick acreage
  - Note that this applies the merchant standard of good faith to everyone, incl. nonmerchants (for duties under this section)
- (2) Unless otherwise agreed, buyer gets to select the assortment of goods & S gets to make specifications / arrangements relating to shipment
- (3) If specification would materially affect other party’s performance, but isn’t seasonably made, or where one party’s cooperation is necessary to performance of other but isn’t seasonably forthcoming, other party
  - (a) is excused for any resulting delay in own performance, and
(b) may proceed to perform in any reasonable manner, or after a time, treat failure as breach by failure to deliver/accept goods

2-313 – Express Warranties
- (1): Created by
  - (a): affirmation of fact/promise made by S to B, relating to goods & part of “basis of bargain,” creates express warranty that goods conform to description
    - Important to note that statements must relate to the goods (not required in (b) and (c))
    - Also, this definition seems to require privity. But see 2-318
  - (b): description of goods which is made part of basis of bargain creates an express warranty that goods conform to description
  - (c): sample or model, which is made part of basis of bargain, creates express warranty that the whole of the goods conform to that
- (2): Not necessary that S use particular words or have specific intention to make warranty; affirmation of value, or statement of opinion or commendation, doesn’t create a warranty.
- Connor v. Proto-Grind: for something to be an “affirmation of fact” vs. “opinion,” need not be detailed or specific
- Cmt 8: all statements of S become part of basis of bargain unless good reason can be shown to contrary
  - Doesn’t have to be the basis of the bargain; just must be part of such basis; therefore, can include something B already knew/believed (dispute on this)
  - No requirement in language requiring reliance on statements; drafters were seeking to reject that (but some courts disagree)
- Royal Business: requirement that statements become “part of basis of bargain” is reliance requirement
  - Court makes a lot of judgments on what is, isn’t warranty-creating language w/ little in the way of rationale
- Warranties all about quality; Cmt 4: purpose of law or warranty is to determine what it is that S in essence agreed to sell
- Factors to look at: knowledge of S & B’s relative knowledge/ignorance; relative position & knowledge of parties; kind & specificity of statement; if statement is qualified in any way; affirmation oral or written?

For any breach of warranty claim, need to establish causation: the warranty was breached & that’s what caused the injury
- Can do this by eliminating other possible causes
- But, don’t need to prove why the warranty was breached (e.g., what happened to the good)

2-314: Implied warranty: merchantability; usage of trade
- (1) Unless excluded or modified (see 2-316), a warranty that goods shall be merchantable is implied in K for their sale if S is merchant w/ respect to goods of that kind
  o Serving of food & drink to be consumed is a sale
    ▪ This provision removes the inquiry of whether good or service predominates
  o Cmt 3: even for nonmerchants, knowledge of defects imposes obligation that known material & hidden defects be fully disclosed
  o Cmt 4: even if not a merchant, if S “guarantees” the goods, this section can serve as a guide
- (2) Goods to be merchantable must be at least such as
  o Cmt 6: this list isn’t to be exhaustive
  o (a) pass w/o objection in trade under K description, and
    ▪ Price of goods isn’t really part of the “description” (in a situation where the S might argue that the low price implies something about the quality that you get)
    ▪ But, cmt 7: price of goods is an indicator of their quality – as to 2a & 2b, not 2c
  o (b) for fungible goods, are of fair average quality w/in description
    ▪ Cmt 7: these 2 paragraphs are to be read together
    ▪ See 1-201(17) for def. of “fungible”
  o (c) are fit for ordinary purposes for which such goods are used
    ▪ Improving good for one purpose & weakening it for another doesn’t make it unmerchantable; can maybe get around that by showing the range of purposes for which the modified product is inadequate
  o (d) Run, w/in permitted variations, of even kind, quality, quantity w/in each unit & among all units involved
  o (e) Adequately contained, packaged, labeled as agreement might require
  o (f) Conform to promise or affirmations of fact made on container or label
  o Most often used: (a) and (c)
- (3) Unless excluded or modified, other implied warranties may arise from course of dealing or usage of trade
  o Creation of other warranties wouldn’t detract from implied warranty of merchantability, though
- Breach of warranty is a breach of K
- Statute & warranty provisions applies equally well to used goods (despite Texas)
- 2-725(2) – a breach of warranty occurs when tender of delivery is made
  o So if it doesn’t breach at that point, the goods can’t breach later – you have to argue that the goods broke down later b/c there was something wrong with them at the outset
- 2-314 is a strict liability provision – S’s knowledge of the defect matters not at all (except maybe for some defenses in cmt 13)
  o Additionally, this is not coextensive w/ products liability for breach of warranty in tort (although it would be under the revisions): here, B’s expectation matters (there it doesn’t; just compare risk of not having
safety feature vs. saved cost). So you can have both claims, and failure on the tort claim doesn’t mean the K claim for breach of implied warranty can’t succeed.

2-315 – Implied warranty: fitness for particular purpose
- Where S, @ time of King, has reason to know of any particular purpose for which goods are required & that B is relying on S’s skill & judgment to select or furnish suitable goods, there is implied warranty that goods shall be fit for such purpose (unless excluded)

2-316 – Exclusion or modification of warranties
- (1) Words or conduct relevant to creation of express warranty & words/conduct tending to negate or limit warranty shall be construed when reasonable as consistent w/ each other; but negation or limitation is inoperative to the extent unreasonable
- (2) Subject to (3), to exclude or modify the implied warranty of merchantability, language must mention merchantability, must be conspicuous (in case of writing). To exclude or modify implied warranty of fitness, language must be by writing and conspicuous. Example of sufficiency.
  o Even though language of K must conform to this subsec. to be effective, can still have unconscionability even if the language conforms
  o But that seems wrong; if a party goes through the requirements of (2), the procedural prong of unconscionability should be satisfied
  o Sierra Diesel: requirement of conspicuousness requires real opportunity for inquiry into knowing the terms
    ▪ Courts differ on this: some take the position that so long as there’s no prevention of opportunity to read, it’s OK (CL duty to read – bound by sth you sign, even if you haven’t read it)
  o Gindy v. Carbondale: use of the word “merchantability” is what’s important (not discussing the concept of merchantability)
- (3) Nonwithstanding (2)
  o (a) All implied warranties excluded by language like “as is” or “with all faults,” similar phrases, unless circumstances indicate otherwise
    ▪ Could read it as “those phrases are sufficient” or “those two are sufficient so long as they meet the test”
    ▪ Cmt 7 suggests such terms are particulars of trade usage
  o (b) When B has examined goods as fully as desired, or has refused to examine, there is no implied warranty w/ regard to what examination out to have revealed
    ▪ This is about exclusion of implied warranties, whereas 2-313 (dealing w/ samples & models) is about express warranties
  o (c) Implied warranty can also be excluded or modified by course of dealing or course of performance or UoT
  o Gindy v. Carbondale: despite the statutory language, conspicuousness is required for disclaimers of warranties under this section, too
- Except maybe when usage of trade or some such, rather than language, is what disclaims the warranty
  - Statutory language seems to require conspicuousness even if buyer has actual knowledge of the disclaiming terms and what they mean, but G characterizes this as “hyper-technicality”
  - (4) Remedies for breach of warranty can be limited in accord w/ 2-718 and 2-719
  - Morrow: SL in tort for defect in products or personal injuries; extends beyond purely economic loss
  - B’s loss is [Full Market Value] – [K price]

2-317 – Cumulstion & Conflict of warranties
- To be construed as consistent if reasonable; if unreasonable, intention of parties indicates which dominates. Ordering for determining intent in statute, a-c

2-318 – Third party beneficiaries of warranties express or implied
- 3 alternatives; vary w/in states; seller cannot exclude or limit the section
- Vertical Privity: privity from mfg to ultimate buyer
  - About customer’s ability to recover from manufacturer
- Horizontal Privity: from ultimate B to ultimate user
  - About P (friend of B)’s ability to recover from S (retailer – party who sold to ultimate purchaser)
- Randy Knitwear: about expanding vertical privity: manufacturer liable even in absence of privity
  - This was about expanding vertical privity for express warranty, which most courts do – court in Morrow extends it to not require vertical privity for implied warranties either.
    - States have split on whether privity is necessary to recovery for breach of implied warranty
  - Some courts allow disregard of privity for personal injury but not for economic loss; Morrow v. New Moon rejects that
- A: warranty extends to any natural person who’s in family or household of B, or who is a guest if it’s reasonable to expect that the guest use / be affected by goods & who’s injured in person by breach
  - Cmt 3: this is about extending horizontal privity; not intended to enlarge or restrict developing case law on vertical privity (so doesn’t prevent it)
- B: Any natural person who may reasonably be expected to use, consume or be affected by goods & whose injured in person by breach
  - Cmt 3: destined for states whose case law has developed further
- C: Any person (omits word “natural”)
  - Cmt 3: goes even further, following trend of recent decisions to extend rule beyond injury to person (as noted by Restatement, 2d, of Torts)

2-319 – F.O.B. and F.A.S. terms
- (1): F.O.B., even if only used in connection w/ stated price, means
  - (a): FOB place of shipment: S must ship goods as under 2-504, & bear expense & risk of putting them into carrier’s possession
- Code doesn’t explicitly tell us that risk of loss transfers @ that point, but that’s an inferential point
- If FOB doesn’t mean what it normally does, & S has no shipping responsibility, look to other sections on risk of loss (see 2-509)
- **AM Knitwear:**
  - FOB plant as “FOB seller’s plant”
  - Not enough for S to load goods onto container & prep for shipment (if they’re stolen, say) – must actually be delivered to possession of carrier.
  - If parties are going to vary this term, must be absolutely clear in the language
  - (b): FOB place of destination, S must transport goods to that place & tender delivery under 2-503
  - (c): FOB vessel, S must additionally bear expense & risk of loading them
  - If it’s FOB B’s location, clear that B pays freight; statute doesn’t tell us who pays when FOB S’s location, but we make the inference that it’s B (and this is how it happens real-world)
  - (2): FAS (I don’t think we talked about this), requires
    - (a) S, at his expense & risk, deliver goods alongside vessel
    - (b) Obtain & tender receipt for goods in exchange for which carrier must issue bill of lading

2-320 – CIF and C&F Terms
- (1) CIF means price includes in lump sum the cost of goods + insurance & freight to named destination. C&F means cost + freight (no insurance
- (2) Unless otherwise agreed, CIF destination requires S, @ own expense & risk, to:
  - (a): Put goods in possession of carrier, obtain bill of lading for entire trans
  - (b): load goods & obtain receipt from carrier, showing freight has been paid / provided for
  - (c): Obtain policy/certificate of insurance
  - (d): Prepare invoice of goods & produce other documents required to effect shipment or comply w/ K
  - (e): Forward & tender all docs in due form & w/ endorsement necessary to protect B’s rights
  - Cmt 1: this is a shipment, not destination, K. Risk of loss passes upon shipment, governed by 2-509(1)(a)
- (3): Unless otherwise agreed, C&F: same, except for obligations as to insurance
- (4): Under either term, unless otherwise agreed, B must make payment against tender of docs; S may not tender nor B demand delivery of goods in substitution of docs.

2-401 – Passing of title
- (1): title to goods cannot pass prior to goods’ identification to the contract; by identification of the K, B acquires a special property in the goods

2-501 – Identification:
Identification of goods to contract can be made at any time & manner explicitly agreed to by parties. Otherwise:
  - (a) When contract is made, if for the sale of goods already existing & identified
  - (b) If for the sale of future goods other than (c), when the goods are shipped, marked, or otherwise designated by S as goods to which K refers
    - Materials specially acquired for this K probably fit definition, but getting the same sorts of materials that you get regularly probably doesn’t
    - Prepping the materials (cutting the mink) designates goods to which K relates
  - (c) about crops

2-502 – B’s right to goods on S’s insolvency
- (1) Subject to (2) and (3), even though goods haven’t been shipped, B who has paid part or all of price for goods under which he has special property under 2-501 may, if he makes good on tender of unpaid part of price
  - (a) in goods bought for personal/family/household purposes, S repudiates or fails to deliver
  - (b) in all cases, S becomes insolvent within 10 days after receipt of 1st installment on price
- (2) B’s right to recover goods vests upon acquisition of special property, even if S hadn’t then repudiated or failed to deliver
- (3) If identification creating special property has been made by B, B has right to recover goods only if they conform to K for sale

2-503 – Manner of S’s tender of delivery
- (1) Tender of delivery requires that S put & hold conforming goods at B’s disposition & give B any notification reasonably necessary to enable B to take delivery. Manner, time, place for tender:
  - (a): must be at reasonable hour; if of goods, must be kept available for period reasonably necessary to allow B to take possession
  - (b): unless otherwise agreed, B must furnish facilities reasonably suited to receipt
- (2): when case is w/in 2-504 on shipment, tender requires that S comply w/ 2-504
- Other provisions have more to do w/ docs.

2-504 – Shipment by S
- Where S is required/authorized to send goods to B & K doesn’t require delivery at particular destination, then unless otherwise agreed S must
  - (a) put goods in possession of carrier & make K for transportation as may be reasonable having regard to nature of goods & other circumstances, and
    - Doesn’t say who is to pay cost of transit, though – this will vary by agreement
- **Cmt 3 (end):** it is improper for S to agree w/ Carrier to limited valuation below true value, butting off B’s opportunity to recover from carrier in event of loss
  - (b) obtain & promptly deliver or tender any document necessary to allow B to obtain possession (or otherwise required by agreement or trade use), and
  - (c) promptly notify B of shipment
- Failure to notify under (c) or make proper K under (a) is ground for rejection only if delay or material loss
  - Have to decide on that b/f moving on to rejection; another limitation to perfect tender rule, if rejection is for failure to comply w/ 2-504

2-508 – Cure by S of improper tender or delivery; replacement
- (1) Where tender or delivery by S is rejected b/c nonconforming & time for performance has not yet expired, S may seasonably notify B of intention to cure & may then, w/in K, make a conforming delivery
  - **Cmt 1:** notes that time for performance may be modified / cut down after K formation
- (2) Where B rejects a nonconforming tender which S had reasonable grounds to believe would be acceptable (w/ or w/o money allowance) S may, if he seasonably notifies B, have further reasonable time to substitute a conforming tender
  - **Cmt 2:** if B gives notice of “no replacement,” S is held to rigid compliance
  - Conventional wisdom: this is for 2nd chance for S who knows goods aren’t perfect but thinks they conform, due to trade usage or some such
    - But, predominant view, *Wilson v. Scampoli* – S didn’t have to know of defect
  - If goods are sold by retailer who got them from mfg, and didn’t do anything else to them, then retailer has reasonable grounds to believe the goods conform to K
  - But, in dealing w/ something like a defective car, S probably would never have reason to believe that would be acceptable
- What standard for attempts at cure?
  - *Midwest Mobile v. Dynamics:* 2nd effort (cure) wasn’t up to snuff; substantially impaired the value of the K; B justified in cancelling
  - Ultimate standard that goods have to meet is debatable, but right to cure doesn’t depend on whether ultimate standard to be met is conformity in every respect, or conformity that substantially impairs
  - Probably S has a reasonable time to cure, need not get fully-conforming cure right on 1st try (curing not 1-shot deal); that doesn’t mean S has unlimited amt of time to offer goods that conform

2-509 – Risk of loss in absence of breach
- (1): Where K requires/authorizes S to ship goods by carrier
  - **Only** applies when shipping goods by carrier (not S’s trucks)
(a) if it doesn’t require delivery @ particular destination, risk passes to B when goods are duly delivered to carrier

- Cmt 2: in order to be “duly delivered,” have to enter into a contract that will satisfy requirements of 2-504 (shipment by S)

(b) but, if it does require delivery @ particular destination & goods are duly tendered while in possession of carrier, risk of loss passes to B when goods are duly tendered as to enable B to take delivery

- Delivery “to a city” may be shipment, not destination, K. (So not w/in 1b)

- (2): Bailment

- (3): in cases not w/in (1) or (2), risk of loss passes to B on receipt of goods if S is merchant; otherwise, passes to B on tender of delivery

- Reception means B taking physical possession, 2-103

- AM Knitwear: if it’s just in B’s container, he hasn’t received them for purposes of risk of loss (not sure if that’s really a case holding)

- Cmt 3: when K is delivery @ S’s place of business or situs of goods, merchant seller cannot transfer risk of loss until actual receipt by B

- Comment not consistent w/ code, and actually contradicted by 2-509(4)

- Silver v. Wycombe: S, by holding goods for B, does not become “bailee”

- (4): subjects this part to other parts of UCC, 2-327 and 2-510 (effect of breach on risk of loss)

- Nothing in this section deals w/ who pays cost of transportation – that’s irrelevant to the issue of risk of loss transferring

2-510 – Effect of breach on risk of loss

- (1) Where a tender or delivery so fails to conform to K as to give right of rejection, risk of loss remains on S until cure or acceptance

- 2-106 defines conforming

- Language of this part is misleading; does not require a certain quantum of nonconformance before it’s activated

- (2) Where B rightfully revokes acceptance, may treat risk of loss as having rested on S from beginning

- (3) Where B as to conforming goods repudiates or is in breach b/f risk has passed to him, S may, to extent of deficiency in insurance coverage, treat goods as resting on B for commercially reasonable time.

2-513 – B’s right to inspection of the goods

- (1) Unless otherwise agreed (& subject to (3)), where goods are tendered or delivered or ID’ed to K for sale, B has right b/f payment or acceptance to inspect @ any reasonable place, time, manner. Inspection may be after arriva, when S is required/authorized to send goods

- (2) Expenses of inspection borne by B, but may be recovered if goods don’t conform & are rejected

- (3) Unless otherwise agreed & subject to CIF provisions, B is not entitled to inspect goods before payment when:

  o (a) COD delivery term
o (b) When payment = against docs of title
- (4) Place or method of inspection fixed by parties is presumed to be exclusive; unless otherwise expressly agreed, it doesn’t postpone ID or shift place for delivery or passing of risk of loss. More stuff

2-601 – B’s rights on improper delivery
- Subject to provisions on installment Ks (2-612) & unless otherwise agreed under sections on contractual limitations on remedy (2-718, -719), if goods or tender of delivery fail in any respect to conform to K, B may:
  o (a) reject the whole, or
  o (b) accept the whole, or
  o (c) accept any commercial unit(s) and reject rest
    ▪ Cmt 1: Partial acceptance permitted whether the goods conform or not, limited only by good faith
- Perfect tender vs. substantial performance rule:
  o PT: if performance not in perfect compliance w/ K, B can reject goods w/ relief from own obligations (payment)
  o Substantial performance rule: if S substantially performs, B must accept goods & pay, but has claim against S to the extent that S’s performance fails to be in conformity w/ K
- This provision adopts perfect tender rule, and most states adhere to that
  o But, DP Technology: this provision is read less severely, to require only substantial performance, when goods are specially manufactured for B + nonconformity is a delay in delivery
- Of course, obligation of good faith in performance/enforcement of any K or duty under the act, 1-203 (which, if B is a merchant, imposes additional restrictions)
  o And, there is a duty to accept, 2-301
- Once risk of loss passes to B, then a loss (damage, theft of some of the products, etc.) doesn’t produce a nonconformity
- Sections that qualify this one: 2-612 (installments); 1-203 (good faith); 2-504 (w/ respect to particular kinds of nonconformities); 2-106 (gloss on “conforming” – only if goods are nonconforming that B can reject); 2-719 (if parties agree on some other remedy as B’s exclusive remedy, then B can’t reject even though goods don’t conform); 2-508 (cure)

2-602 – Manner and effect of rightful rejection
- (1) Rejection of goods must be w/in reasonable time after delivery/tender. Ineffective unless B seasonably notifies S
- (2) Subject to 2-603 and 2-604
  o (a) After rejection, any exercise of ownership by B over any commercial unit is wrongful against S;
  o (b) If B has, b/f rejection, taken physical possession of goods, is under duty to hold them for reasonable time to permit S to remove
  o (c) B has no further obligation w/ respect to goods rightfully rejected
- (3) S’s rights w/ respect to goods wrongfully rejected are as under 2-703
Rejection can be effective/ineffective, rightful/wrongful, and any combination of the two
- **Myron**: wrongful (didn’t prove that goods failed to conform) & ineffective (too late, failure to give notice in reasonable time) rejection
- If rejection is wrongful but effective, S loses out on some remedies, such as 2-709 (right to price); no acceptance under 2-606

2-603 – Merchant B’s duties as to rightfully rejected goods (only applies to merchants)
- Must follow reasonable instructions in disposing of the goods

2-604 – B’s options as to salvage of rightfully rejected goods
- Disposal of goods for insurance purposes, for S’s account, isn’t necessarily an act inconsistent w/ S’s ownership

2-606
(1) Acceptance of goods occurs when
- **(a)** After reasonable opportunity to inspect, B signifies to S that goods are conforming or that he will keep/take in spite of nonconformity
- **(b)** Fails to make an effective rejection, but this doesn’t occur until B has had reasonable opportunity to inspect goods
  - No definition in code of rejection
  - **Myron v. Yonkers Raceway**: reasonable time for rejection was extremely short (animals subject to self-inflicted injury)
  - Does “reasonable opportunity” or time to inspect vary depending on the type of defect that you’re inspecting for? If “reasonable time” is longer for 2 types of defects, shouldn’t it be longer for just the one?
    - Not quite as severe as that, see 2-608
- **(c)** Does any act inconsistent w/ S’s ownership. But if such act is wrongful against S, it’s only acceptance against B and only at S’s option (Cmt. 4)
  - **Cmt 4**: these provisions are subject to provisions that allow B to take certain actions w/ respect to goods, w/o accepting.
  - **Jorgansen v. Presnall**: continuing to live in mobile home after revocation was not inconsistent w/ S’s ownership; B had security interest under 2-711(3); continuing use of goods can be appropriate as a means of mitigating loss

- (2): Acceptance of a part of any commercial unit is acceptance of that entire unit.

2-607 – Effect of acceptance, notice of breach
- **(1)**: B must pay @ K rate for any goods accepted
- **(2)** Acceptance by B precludes rejection of goods; if made w/ knowledge of nonconformity it can’t be revoked b/c of non-conformity, unless on the assumption of cure
  - Acceptance does not impair any other remedy for nonconformity
  - Even if they didn’t conform @ time of sale, once B accepts he may not reject; but 2-608 allows revocation
- **(3)**: Where tender has been accepted
(a): B must notify S of breach or be barred from any recovery, w/in reasonable time after discovering (or after he should have discovered) any breach

- Difference of opinion in case law whether this requires notice of breach in cases where breach is late delivery: Zimmerman v. General Mills (no; obviously S knows of breach) Eastern Airlines (yes, b/c purpose is to inform S that B considers it a breach, to notify S that there might be a suit)

(b): if Claim is for infringement ... (warranty of title, etc.)

(4) Burden on B to establish breach of any goods accepted

- Even if B is revoking, still bears the burden of proof on this matter (acceptance is a necessary precondition to revocation, after all)

(5), (6) – less relevant

2-608 – Revocation of acceptance in whole or in part

- (1) B may revoke acceptance of lot or commercial unit when non-conformity substantially impairs value &

  - Note perfect tender rule applies only to rejection, & not to revocation
  - B much better off rejecting than revoking – burden of proof shifts, B loses benefit of perfect tender rule
  - (a) On reasonable assumption that such nonconformity would be cured, but it hasn’t been
  - (b) W/o discovery of such nonconformity, if acceptance induced by difficulty of discovery or by S’s assurances

    - Gappelburg v. Landrum – S gets no right to cure in (1)(b) revocation (minority view); if S wants right to cure, should characterize B’s actions as rejection, not revocation

- (2) Revocation of acceptance must occur w/in reasonable time after B discovers or should have discovered ground for it & before any substantial change in condition of goods (unless that change is caused by own defect). Not effective until B notifies S

  - Measured from date that discovery happened or should have happened, not from date of purchase or K

- (3) B who so revokes has same rights & duties as if rejecting

2-609 – Right to adequate assurance of performance

- (1) K for sale imposes obligation on each party that other’s expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise w/ respect to performance of either, other party may in writing demand adequate assurance of due performance; until receipt, may (if commercially reasonable) suspend performance for which hasn’t received agreed return.

  - Have to look @ circumstances to determine “reasonable” grounds for insecurity
  - Mere existence of a loan may, in certain situations, create grounds for insecurity
Even if K defines nonpayment as default, the statute gives B a right to withhold payment pending assurance – it’s not default (not sure if parties can K around this)

*Due Performance* is what must be assured, a statement of “look, you’ll be fine, you have X” doesn’t assure of *due performance*

- **(2)** Btw merchants, reasonable grounds for insecurity & adequacy of assurance shall be determined according to commercial standards
- **(3)** Acceptance of improper delivery / payment doesn’t prejudice aggrieved party’s right to demand adequate assurance in future.
- **(4)** After receipt of justified demand, failure to provide adequate assurance w/in reasonable time (not exceeding 30 days) is a repudiation

### 2-610 – Anticipatory repudiation

- When either party repudiates K w/ respect to performance not yet due, loss of which will substantially impair value of K to other, aggrieved party may
- **(a)** for commercially reasonable time, await performance
  - People were concerned about this – it seems to let Bs rack up costs of waiting for performance; wanted to treat anything that a party does to indicate repudiation as forcing into (b)-land. But that’s not what the statute says
- **(b)** resort to any remedy for breach, even though he has notified repudiating party that he would await latter’s performance & has urged retraction
- **(c)** suspend own performance or proceed under provisions on S’s right to ID goods to K or salvage, 2-704
- Repudiation may be by:
  - Overt communication of intent not to perform
  - Action:
    - Rendering performance impossible
    - Demonstrating determination not to perform
- Failure to provide adequate assurance, 2-609
- If repudiation, recovery is by the aggrieved party, as normal (I think)

### 2-611 – Retraction of Anticipatory Repudiation

- **(1)** Until repudiating party’s next performance is due, he can retract repudiation – unless aggrieved party has, since repudiation, cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.
  - Not allowing retraction of repudiation immediately after a comment like “fine, I’m suing” might violate good faith.
- **(2)** Retraction may be by any method which clearly indicates to the aggrieved party that repudiating party intends to perform, but must include any assurance justifiably demanded under 2-609
- **(3)** Retraction reinstates the repudiating party’s rights under K, but w/ due excuse & allowance to aggrieved party for any delay occasioned by repudiation

### 2-612 – Installment contract
- (1): is one that requires/authorizes delivery of goods in separate lots to be separately accepted, even in spite of language like “each delivery is a separate K”
- (2): B may reject any installment that is nonconforming if nonconformity substantially impairs value of installment & cannot be cured, or if nonconformity is defect in required docs
  o If nonconformity doesn’t fall w/in (3), and if S gives adequate assurance of cure, B must accept installment
- (3) Whenever nonconformity of 1 or more installments substantially impairs value of whole K, then breach of the whole. Aggrieved party reinstates K if he accepts non-conforming installment w/o seasonably notifying of cancellation or if ...
  (couple other possibilities)
  o Cmt 6: don’t look at the future; likelihood of future deliveries don’t give right to cancel; can only cancel if nonconformity substantially impairs the value of the whole
  o But, S has right to demand adequate assurance of proper future performance
  o If this section satisfied, B may cancel as under 2-711

2-703 – S’s remedies in general
- Where B wrongfully rejects or revokes, or fails to make payment due on or before delivery, or repudiates w/ respect to any part or whole, then S may:
  o (a) Withhold delivery of such goods
  o (b) Stop delivery by any bailee
  o (c) Proceed under next section respecting goods unidentified to K
  o (d) Resell & recover damages, 2-706
  o (e) recover damages for nonacceptance, 2-708, or in a proper case the price, 2-709
  o (f) Cancel

2-705 – S’s stoppage of delivery in transit or otherwise
- (1) S may stop delivery of goods in possession of carrier/bailee when S discovers B to be insolvent, & may stop delivery of large shipments when B repudiates, fails to make payment due delivery, or if for any other reason S has right to withhold goods
  o Significance of bankruptcy definition of “insolvency” is to include “balance sheet” test
- (2) As against such B, S may stop delivery until
  o (a) Receipt of goods by B
  o (b) Acknowledgement to B by bailee except carrier that bailee holds goods for B
  o (c)Such acknowledgement to B by carrier by reshipment
  o (d) Negotiation to B of negotiable doc
- (3)
  o (a) To stop delivery, S must so notify as to enable bailee by reasonable diligence to prevent delivery
o (b) After such notification, bailee must hold & deliver goods according to directions of S; S is liable to bailee for ensuing charges or damages
o (c) If negotiable doc of title has been issued for goods, bailee is not obliged to obey notification to stop until surrender of doc
o (d) Carrier who has issued non-negotiable bill of lading is not obligated to obey notification to stop received from any but cosignor

2-706 – S’s resale, including K for resale
- (1): S may resell goods; where done w/ good faith & in commercially reasonable manner, S can recover [Resale Price] – [KP] + incidental damages under 2-710, expenses saved
  o Failure to meet requirements of this section doesn’t bar S’s remedies; just bars S’s remedies under this section. Can still recover KP – MP
- (2): Resale may be @ public or private sale; may be sale of units, but every aspect must be commercially reasonable; resale must be reasonably identified as relating to the broken K, but need not be in existence or have been ID’d to K pre-breach
- (3) Where resale is @ private sale, S must give B notice of intent to resell
  o Cmt 4: public sale = auction, private = solicitation & negotiation, directly or by broker
- (4) Where @ public sale:
  o (a): only ID’d goods can be sold, except where recognized market for futures
  o (b): must be @ usual place or market for public sale; except for perishable goods or goods declining in value, S must give B reasonable notice of time & place
  o (c): If goods are not in view of those attending, notification must state place where located & provide for reasonable inspection by bidders
  o (d): S may buy
- (5) Bona fide purchaser
- (6) S not accountable to B for profit on resale
- Under 1-106, if that’s read to supercede other statutory provisions, 2-706 can be used as a measure of damages even if S isn’t eligible for it, if Resale > MP (and Ct. thinks that S shouldn’t get to recover KP – MP, but should be limited to KP – Resale)

2-708 – S’s damages for nonacceptance or repudiation
- (1) Subject to (2), and to section on proof of market price 2-723, measure of damages is difference btw MP @ time and place of tender & unpaid KP, + incidental damages (2-710), but less expenses saved in consequence of the breach
  o “@ time and place of tender” – if you have an installment K that is breached or repudiated by B, would be looking @ future market price
  o 2-723(1): that is set @ time that S learned of repudiation
  ▪ Only applies if case comes to trial b/f those dates; if not, we look to actual MP on those dates. 2-723(1)
  o Problem interpreting “expenses saved” – if literal, it would exclude almost all remedies unless S has finished producing good. Can’t mean that
- Means thinks like 3rd party inspection (under K but not market), transportation costs (that MP doesn’t include)

- (2) If measure of damages above is inadequate to put S in as good a position as performance would have, measure of damages is profit (including reasonable overhead) which S would have made from full performance + incidental damages + due allowance for costs reasonably incurred + due credit for payments & proceeds of sale
  - Only kicks in if (1) is inadequate, but have same 1-106 problem
  - To calculate profit + reasonable overhead, can just subtract out variable costs
  - “Due credit” – same problem as “less expenses saved,” if we take it literally it will obliterate S’s right to recover
  - So, confine that amount to what S recovered in process of salvage

2-709 – Action for the price

- (1) When B fails to pay price as it becomes due, S may recover (w/ incidental damages under 2-710) the price
  - (a) Of goods accepted or of conforming goods lost or damaged w/in commercially reasonable time after the risk of their loss has passed to B
    - Under 2-602, B must reject w/in reasonable time after delivery or tender, else B accepted
  - (b) Of goods ID’ed to K if S is unable, after reasonable effort, to resell @ reasonable price (or circumstances reasonably indicate that will be unavailing
    - With sth like mink coat pelts that will be cut or are cut, Q becomes when goods are ID’d to K, 2-501
  - Cmt 6: These are the ONLY circumstances in which B is entitled to price

- (2) Where S sues for price, must hold for B ...

- (3) After B has wrongfully rejected or revoked, or has failed to make payment, or has repudiated, 2-610, S who isn’t entitled to price can get damages under 2-708
- If product was to be sold for $5K, and S invested only $1.5 K b/f B’s breach – statute seems to indicate that S could recover price, but that seems ludicrous. Only 1 ct. case (trial ct.), which held “don’t be ridiculous.”

2-711 – B’s remedies in general; B’s security interest in rejected goods

- (1) When S fails to make delivery/repudiates, or B rightfully rejects/justifiably revokes, B may cancel, whether or not he has done so may in addition to recovering portion of price already paid
  - (a) “cover” and have damages under 2-712 as to all goods affected whether or not they have been identified to the contract;
  - (b) Recover damages for non-delivery as under 2-713

- (2) Where S fails to deliver or repudiates, B may also
  - (a) If goods have been ID’ed, recover them as under 2-502
  - (b) In proper case, obtain specific performance under 2-716

- (3) On rightful rejection or justifiable revocation of acceptance, B has security interest in goods
2-712 – Cover; B’s procurment of substitute goods
   - (1) After breach, B may “cover” by making in good faith & w/o unreasonable delay any reasonable purchase of or K to purchase goods in substitution for those due from S
     - Cmt 2: It is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.
     - Cmt 2: goods need not be identical; need only be commercially usable as reasonable substitutes.
     - As long as purchase is reasonable purchase in substitution, B can recover, whether the subject matter (not price) is comparable
     - If market is declining, probably not unreasonable for B to wait before entering substitute transaction
   - (2) B may recover [Cover] – KP, + incidental & consequential damages, less expenses saved
   - (3) Failure to effect cover doesn’t bar any other remedy

2-713 – B’s damages for nondelivery or repudiation
   - (1) Subject to 2-723 on proof of MP, measure of damages is MP @ time that B learned of breach) minus KP, + incidental and consequential damages (2-715), less expenses saved in consequence of breach
     - Same sort of “expenses saved” problem as under 2-708: unless B has prepaid or almost entirely paid, unpaid K balance will be greater than MP – KP differential
       - Term doesn’t mean much
     - MP @ time B learned of breach means that, in a case of repudiation, that B learns of the breach on the date of the breach, not on the date of repudiation. Doesn’t matter if B could have entered a substitute transaction earlier & avoided loss
       - But, 2-609(4) – repudiation is treated like a breach! And Cmt 5 of that section – refers to repudiation as a breach
       - Or, 2-610, since can await performance for a commercially reasonable time, MP could be determined as of the expiration of that commercially reasonable time.
   - (2) MP determined as of place for tender, or in cases of rejection after arrival or revocation of acceptance, as of place for arrival.
     - Have to identify relevant market: market where B buys might be different than market where B sells, but B is only damaged by one.

2-714 – B’s damages for breach in regard to accepted goods
   - (1): Where B has accepted goods & given notification (2-607(3)), can recover damages, for any nonconformity of tender, the loss resulting in ordinary course of events from S’s breach
     - Comes into play only for accepted and kept goods
- (2) Measure of damages for breach of warranty = difference @ time & place of acceptance btw value of goods accepted & value that they would have had if they’d been as warranted, unless special circumstances

- (3) In a proper case, allows recovery of incidental & consequential damages
  - No real clue as to what a “proper case” is, although the best idea was that it is a limit on double-recovery (since this section explicitly lists some things as recoverable that would be consequential damages)

2-715 – B’s incidental and consequential damages
- (1) Incidental damages = expenses reasonably incurred in inspection/receipt/transit/care/custody of goods rightly rejected, commercially reasonable charges in connection w/ covering, expense incident to delay or other breach.
- (2) Consequential damages include
  - (a) Any loss resulting from general/particular reqs & needs which S had reason to know, @ time of K, and couldn’t reasonably be prevented by cover or otherwise.
    ▪ Adopts Hadley v. Baxendale foreseeability rule
    ▪ This requirement has to be about the kind of loss, not about magnitude of that loss
  - (b) Injury to person or property proximately resulting from breach of warranty

- While this section defines incidental & consequential damages, doesn’t say what they are (look to other provisions to authorize their recovery)
- Cmt 4: liberalizes standard for proving B’s lost profits resulting from breach – rejects any doctrine of certainty

2-716 – B’s right to specific performance
- (1) Specific perf. may be decreed when goods are unique or in other circumstances
  - Cmt 1: continues prior policy (legal remedies have to be inadequate)
- (2) Decree for specific performance may include terms & conditions
- (3) B has right of repleving

2-718 – Liquidated damages
- (1): Damages for breach may be liquidated, but only @ amount reasonable in light of anticipated or actual harm caused by breach, difficulties of proof of loss, and inconvenience or nonfeasibility of otherwise obtaining adequate remedy. Term fixing unreasonably large liq. dam. is void as penalty
- Kvassay v. Murray: reasonableness is the only measure of liquidated damages. Comparison of liquidation clause to salary from previous, unrelated employment is erroneous. But liquidation provision of large % over projected profits might be unreasonable
- Superfos: “take or pay” K can be OK, if B has “real choice for alternatives” (right to make up shortfalls at later time) or if S needed such contract to provide incentive to manufacture the product”
Most common for natural gas; tend to be enforced there

- B has to have a reason why he would ever pay but not take

- Martin v. Sheffler (might be on the ounts): K clause mandating specific performance as remedy might be different from liquidated damages

- (2): B entitled to some return of the price already paid, even when S justifiably withholds delivery – by the amount that his payments exceeds
  o (a): liquidation clause in (1), or
  o (b): in absence of liquidation terms, smaller of 20% of total performance or $500

2-719 – Contractual Modification or Limitation of Remedy

- (1) Subject to (2) and (3), and to 2-718 on liquidated damages,
  o (a) Agreement may provide for remedies in addition to or substitution for those provided in Art. 2; may limit or alter measure of damages recoverable under Art. 2 (ex: return of goods & refund of price, or repair-and-replace)
  o (b) Resort to remedy as provided is optional unless remedy is expressly agreed as exclusive. If so agreed, it is sole remedy.

- (2) Where circumstances cause exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided for in the Act
  o High amount of repairs over short time period might be example of this
  o All article 2 remedies then become available, including revocation of acceptance under 2-608

- (3) Consequential damages may be limited or excluded unless limitation or exclusion is unconscionable. Limitation for PI is prima facie unconscionable, limitation of commercial loss is not.
  o Test exclusion of consequential damages under this section. Even if an exclusive remedy failed of its essential purpose, and part of that remedy was a waiver of consequential damages, doesn’t mean that consequential dams are automatically reinstated (they are if they pass this test, otherwise no)
  o But, if an exclusive r-or-r K doesn’t expressly exclude consequential dams (it implicitly does) and that remedy’s tossed, consequential dams will be reinstated. Have to disclaim it separately

- Can’t disclaim all remedies: Cmt 1: very essence of sales contract that at least minimum adequate remedies be available

2-723 – Proof of MP

Leases

- Need to go back and review definition, from class after Architectronics and Advent

Revised Article 1

CISG

Magnuson-Moss Act – p. 93-94 of notes, end of Warranties chapter