

Agenda
Consumer Issues Subgroup
May 3, 2021

1. The Subgroup recommends that the committee consider whether to place limits on the use of remote disablement in Articles 9 and 2A. The committee might consider:

A. Whether the issues can be appropriately dealt with by comment alone. The comments might be amended to address any or all of the issues identified below. On the other hand, the committee might conclude that the issue is too important to leave entirely to comment.

B. Whether explicitly referencing remote disablement in the text or comments would cause, or be perceived as causing, more harm than good even if the text or comments place limits on exercise of the right.

C. If remote disablement is dealt with in the text, standards for exercise of the right would need to be established. For example:

- Remote disablement might be banned for goods that provide medical benefits and other categories of essential goods;
- Remote disablement might be conditioned on notification to the debtor that would include information on how to avoid disablement;
- As with the breach-of-the-peace standard with self-help repossession, a general standard for remote disablement might be established (for example, the right might be limited to situations that do not create a danger to health or safety);
- The text might clarify the distinction between remote disablement and repossession;
- The text might clarify the distinction between physical disablement, which is currently permitted for equipment only by Sections 9-609(a)(2) and 2A-525(2), and remote disablement;
- The text might deal with the effect of remote disablement on the debtor's right to use licensed software embedded in the goods

2. The Subgroup recommends that the committee consider whether the definition of "conspicuous" in Section 1-201(b)(10) or the comments should be revised to more fully address issues related to conspicuousness in a high-tech environment. The current definition provides:

"Conspicuous", with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:

(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

A. The committee might consider deleting the examples and dealing with the issues by comment alone. This would permit a more fulsome discussion of conspicuousness in an online environment. Such a discussion might differentiate between transactions involving a consumer, or perhaps between merchants at different levels of sophistication. The following language was suggested in the final report of the Consumer Issues Subgroup and is reproduced here as an example of how some of the issues described above might be handled:

What a reasonable person ought to notice may vary depending upon the market in which a transaction occurs. For example, a merchant with respect to goods of the kind that wishes to disclaim the implied warranty of merchantability may sell to business buyers, consumer buyers, or both, and even within those broad markets there might be buyers who can be expected to have greater and lesser levels of sophistication. When a business uses the same standard form documents in transactions both with other businesses and with consumers, a term in the documents might be conspicuous to other businesses (because it is so presented that a reasonable business person against whom it is to operate ought to have noticed it) but not be conspicuous to consumers (because it is not the case that a reasonable consumer against whom it is to operate ought to have noticed it). Concerns over conspicuousness are particularly acute in online transactions.

The comments might also make the point that the harder a person has to work to access a non-obvious term, the less likely it is that the term is conspicuous with respect to that person. For example, there might be a difference between a situation in which a person can discover a term by clicking a single link and a situation in which the term can only be discovered by clicking more than one link. Even if a term can be accessed by clicking a single link, how the link is labeled might affect whether a term is conspicuous. For example, a disclaimer of implied warranties might not be conspicuous if the link to the disclaimer is labeled “terms and conditions”.

Commentary regarding the online environment might also note that how words are displayed on a user’s screen depends on the user’s equipment and display settings and is not within the sole control of the party drafting the language. For example, a term that is seen easily when displayed on a 24-inch monitor may not be so noticeable when displayed on a cell phone. This is different from the paper environment, where the person supplying the form chooses how the relevant terms are displayed.

B. The committee might also consider revising the examples in the text to deal with any or all of the above issues, or with other issues. The examples might be expanded to include

additional references to online presentations, revised so that some examples are explicitly tied to writings and some to online presentations, or revised so that the focus is exclusively on online presentations.

C. The committee might consider whether “conspicuous” has any meaning if the term at issue appears in a document which most people do not read.

D. The committee might consider whether, especially in consumer contracts, a term can be conspicuous if it is not separately assented to or if it is explained in language that cannot be understood by an average consumer.