

PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE

MINUTES OF PEB MEETING

Held Via Conference Call

October 31, 2003

Lance Liebman, Chair of the PEB, called the meeting to order at 12:35 p.m. EST. On the call in addition to Professor Liebman, were the following PEB Members: Boris Auerbach, Gerald Bepko, Amelia Boss, Patricia Fry, William Henning, Frederick Miller (Emeritus), Donald Rapson, Curtis Reitz, Carlyle Ring, Linda Rusch, Steven Weise, and James White. Also on the call were ALI Deputy Director Elena Cappella, PEB Research Director Neil Cohen, NCCUSL Legislative Director John McCabe, NCCUSL Division Chair Raymond Pepe, and ABA Adviser to the PEB Edwin Smith.

Agenda Item #1: Status of UCC Enactments. A report on the current status of enactments of new and revised Articles of the Uniform Commercial Code was given by Professor Henning. (A written version of the report was distributed in advance and is attached to these minutes as Appendix 1.) Professor Henning indicated that NCCUSL's UCC Committee discussed enactment issues relating to the amendments to Articles 2 and 2A at its meeting in September. Based in part on that discussion, he indicated that he considered it unlikely that NCCUSL's Legislative Committee, which meets in November, would decide to "target" the amendments for enactment in 2004. Thus, it is likely that the number of legislatures in which the amendments are introduced next year will be relatively low (Professor Rusch indicated that Minnesota's might be one, but only if the final text and comments are available very soon) and could be zero.

Professor Boss asked whether the completed version of the comments to the amended sections of Articles 2 and 2A will be circulated. After some discussion on this point, it was decided without objection that the completed version would be circulated to the Standby Committee for Articles 2 and 2A (the former Drafting Committee for these Articles), with a short timetable for feedback.

Finally, it was noted that recent passage of the federal "Check 21" Act might increase the chances of New York's enactment of the 1990 and 2002 texts of Articles 3 and 4.

Agenda Item #2: Possible amendments to text of Amended Articles 2 and 2A. Technical amendments to two sections of Articles 2 and 2A, as approved by NCCUSL in 2002 and by ALI in 2003, were proposed. (The amendments, to UCC Sections 2-606(1)(c) and 2A-204(1), are described in the memorandum that was distributed in advance and is attached to these minutes as Appendix 2.) Professor Reitz stated that the Standby Committee for Articles 2 and 2A should not be bypassed in the process of considering these proposed amendments. After discussion, it was agreed to submit the changes to that Committee with the recommendation of the PEB. Assuming approval by that Committee, the proposals will be submitted to ALI and NCCUSL for approval in accordance with their procedures.

Agenda Item #3: Proposed new comments for Amended Articles 2 and 2A. The PEB considered proposals to change certain comments to amendments to sections in Articles 2 and 2A (from versions of those comments that appeared in the 2003 ALI Annual Meeting draft of the amendments to these Articles). (The proposals were distributed in advance and are attached to these minutes as Appendix 3.) Professor Reitz indicated some concerns about the proposed substitute for comment 5 to amended Section 2-207. After discussion, it was agreed that Professor Reitz would submit his suggestions in writing and, after consideration by the Articles 2 & 2A Committee Chair (Boris Auerbach) and Reporter (Henry Gabriel), the latest version of the comment will be circulated to the Standby Committee for its consideration. With respect to the proposed substitute for the first paragraph of comment 3 to amended Section 2-207, the suggestion was made that the point needed expansion, but it was also noted that this paragraph is only the first of five paragraphs of the comment. The suggestion was also made that the penultimate sentence of the paragraph be deleted. It was agreed that these issues would be considered further, and the final version of the comment will be circulated to the Standby Committee for its consideration. Finally, it was agreed that the phrase “under this section” would be added to the end of the penultimate sentence in the third paragraph of comment 8 to amended Section 2-608.

Several points were made with respect to the proposed new comments to Article 2A. In particular, Mr. Rapson stated that the first paragraph of the new comment to amended Section 2A-101 exaggerates the differences between leases and sales, and that the warranty paragraph of the same comment is factually incorrect with respect to mass-market advertising of automobile leasing. Professor Boss and Mr. Rapson will propose revisions to the proposed comment. Professor Boss also noted that the comment to amended Section 2A-201 was not entirely accurate and would upset the existing balance in the statute of frauds. Professors Rusch and Cohen agreed. Mr. Auerbach indicated that the comment would be adjusted to take these points into account.

Agenda Item #4: Consideration of new comment to Revised Section 3-602. Mr. Rapson explained the proposed new comment describing the interaction between the “payment rule” and the holder in due course rules. (The proposal was distributed in advance and is attached to these minutes as Appendix 4.) Several members expressed support, including Mr. Smith, who chaired the Articles 3 and 4 Drafting Committee. The PEB, by consensus, approved the comment.

Agenda Item #5: Consideration of whether to authorize the drafting of an omnibus PEB Commentary on several issues arising under Revised Article 9. At the fall 2002 PEB meeting, it had been suggested that the practice of piecemeal correction and augmentation of the comments to Revised Article 9 should end and, perhaps, that any remaining changes should be combined in an omnibus PEB Commentary. Accordingly, Mr. Weise prepared a list of issues that have been raised with respect to the Revised Article 9 comments. (His list was distributed in advance and is attached to these minutes as Appendix 5.) This generated extensive discussion. Some members noted that the issues ranged from insignificant corrections (e.g., typographical errors and the like) to substantive matters to important policy concerns, suggested that the correction of minor errors might trivialize the concept of PEB Commentaries, and pointed out that minor errors in the 1990 text of Articles 3 and 4 have not been similarly addressed. Others, however, suggested that it is important

to have the comments to Revised Article 9 be accurate and helpful, that a similar omnibus Commentary (PEB Commentary No. 11) had been promulgated to address a variety of suretyship issues that arose under the 1990 text of Article 3, that the final product need not be labeled a “PEB Commentary” if that is deemed inappropriate, and that the list of issues does not include any changes to the statutory text (as would be necessary to address issues in Articles 3 and 4). Eventually, Professor Liebman concluded the discussion by encouraging Mr. Weise to continue developing the project.

Agenda Item #6: Consideration of final approval of the draft PEB Report on the Effect of Non-Uniform Scope Provisions in Enactments of Revised Article 9. Professor Cohen’s draft Report (which was distributed in advance and is attached to these minutes as Appendix 6) had been presented to the PEB for consideration in 2002, and has been amended to reflect comments and suggestions made at that meeting. The draft met with general approval, but two additional suggestions were made. First, it was pointed out there is an ambiguity in part II.A.2.b. as to whether the discussion assumes that the litigation is taking place in a forum with a non-uniform exclusion from the scope of Revised Article 9. Second, it was suggested that the PEB should not take a position inconsistent with Revised Article 1 by indicating that courts should apply the UCC to transactions not governed by it. The italicized language in parts II.A.2.a. and II.B. of the draft will be modified so as to avoid express reference to UCC Sections 1-105 and 1-301. The draft was tentatively approved, subject to these changes. Professor Cohen, with Professor Miller, will make the changes and distribute a final text to the PEB, which may be asked to approve it electronically without a formal meeting. If approved, the report will be published as a final PEB Report.

Agenda Item #7: Impact of the federal check-truncation act (“Check 21”) on the UCC. Professor White reported that the federal check-truncation act (“Check 21”), which was signed by the President on October 28, 2003, and will go into effect in October 2004, may necessitate some small changes in UCC Articles 3 and 4 (*e.g.*, to UCC Section 3-604) so that those Articles will mesh with procedures under the federal act. Others on the call suggested that some changes to comments to Articles 3 and 4 might also be advisable. NCCUSL’s Study Committee on Electronic Payment Systems, chaired by Professor White, will prepare a report on any necessary changes in time for discussion at the Spring 2004 meeting of the ABA Section on Business Law. NCCUSL’s Chicago office will distribute that report to the PEB, as well as the preliminary report on which Professor White’s comments were based.

Agenda Item #8: Report on an ABA meeting on whether additional law is necessary to undergird developing payment systems. Professor White attended this ABA meeting and reported that no interest in such an endeavor was expressed at it. He recommended that the PEB take no action in this area. The PEB agreed.

Agenda Item #9: International developments. Professor Reitz reported on the current status of the Cape Town Convention on Mobile Goods, the United Nations Convention on the Assignment of Receivables in International Trade, and the Hague Convention on the Law Applicable to

International Interests in Securities. He also pointed out that Unidroit is embarking on a project on the substantive law of indirectly-held securities; a meeting on the project will be held in November.

Agenda Item #10: Status of possible new ALI project on information and its relationship to UCC Article 2. ALI Director Liebman reported that a preliminary meeting was held in June 2003, attended by NCCUSL Executive Director Henning, about a potential ALI project concerning the law governing information transactions. Professor Liebman said that any project is in the early stages of development, that further ALI steps await the availability for additional work of Professor Jay Feinman, and that he (Professor Liebman) will keep the PEB fully informed. Professor Henning requested that the PEB be consulted on any matters in the ALI project that would affect the UCC. Professor Liebman assured that all drafts would be made available with no lack of opportunity to be heard.

Agenda Item #11: Financial report. Ms. Cappella stated that her written report (which was distributed in advance and is attached here as Appendix 7) was provided for information only.

Agenda Item #12: Next meeting. Professor Liebman indicated that the PEB will be notified at a later date of the next meeting, which may again be held by teleconference.

Agenda Item #13: Other Business. Professor Cohen reported on communication he and Professor Liebman received from Harry Sigman, a member of the Article 9 Drafting Committee with particular expertise in the operation of the Article 9 filing system. Mr. Sigman sits on a task force created by the National Association of Secretaries of State and IACA (the national organization of UCC and corporate filing administrators), which is charged with looking into, and suggesting remedies for, the phenomenon of “bogus” UCC filings. The task force may suggest that the phenomenon be addressed by amendments to UCC Article 9. The task force has asked if the PEB would be willing to comment (on an expedited basis) on any proposed changes to Article 9. There was general agreement that the PEB would consider any proposed changes and, if necessary, respond expeditiously.

Professor Rusch inquired as to the availability of a well-drafted “hip-pocket” amendment that would replace the Official Text of Section 1-301 of Revised Article 1 with a version consistent with former Section 1-105. Mr. Auerbach responded that such an amendment would be available shortly. Mr. Rapson then suggested that a similar hip-pocket amendment be prepared for states that wish to extend the rules for remotely-created consumer items to similar non-consumer items.

Agenda Item #14: Adjournment. Professor Liebman adjourned the meeting at 2:05 p.m. EST.

Minutes were prepared by Neil Cohen, with Elena Cappella, and reviewed by Lance Liebman.
November 5, 2003