ISSUES LIST: ARTICLE 2B
ALI COUNCIL MEETING

Connie Ring, Chair of the Committee
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To provide guidance for our discussion on December 11, 1998, the following lists the issues that have been most discussed with respect to proposed Article 2B and indicates approaches to these issues contained in the Draft to be considered by the Council. At the meeting, the Council will be provided with an up-dated summary (that is in the process of being prepared) comparing all Article 2B provisions to existing law and reflecting the decisions made at the November meeting of the Committee.

1. Scope of the Article.

Over a period of several years, concerns have been expressed by ALI and others about the scope of the proposed article. At the November, 1998 meeting of the Drafting Committee, the Committee unanimously adopted a proposal made by the Chair and the Reporter to refocus the scope of the article. The results of this vote are reflected in Section 2B-103 and 2B-104, along with the Section 2B-102 definitions of "computer information" and "computer information transaction"

The revised scope of the article focuses on "computer information transactions." This is a defined term that centers on contracts "whose subject matter is (i) creation, development, support, or maintenance of computer information or (ii) access to, acquisition, transfer, use, license, or distribution of computer information." The scope thus excludes distribution of information in print form. This scope does not apply to the many cases in which a person provides information to another person for purposes of another transaction such as making an employment or loan application. Neither is an agreement within the scope in which a prospective client provides information to a service provider aware that the information will be converted into digital form for purposes of monitoring, for example, the status of the client's account with the provider. In such cases, the subject matter of the transaction is the job or the loan, the information is incidental to that purpose.

The new scope abandons the previous concept of a broad scope with numerous exclusions, which nonetheless continued to have significant support by a number of the affected industries. *One question for the Council is whether this more limited scope is a correct approach.*

The narrower scope creates many transactions in which Article 2B may apply to part of the transaction, while other law applies to other aspects of the transaction. In some cases, this may lead to a conflict of provisions. In dealing with this problem, the scope provisions take the following provisions:

- Section 2B-103(d) provides the parties with a broad right to opt into or out of the article with respect to the entire transaction, except with respect to mandatory consumer protection rules in mass market transactions and except in transactions governed by Article 2 or 2A and not involving computer information at all.
- Section 2B-103(b) and (c) provide generally that where a mixed transaction involves subject matter of another article of the U.C.C. and Article 2B subject matter, Article 2B does not apply to the subject matter of the other articles.
- The comments to the draft invite the court to apply a "predominant purpose" test for transactions involving both Article 2B subject matter and subject matter not within the remainder of the U.C.C.

The Council should consider whether this treatment is appropriate.

2. Public Policies on Information.

At successive ALI and NCCUSL annual meetings over the past two years, various positions have been taken by the membership on whether Article 2B should contain provisions allowing or requiring invalidation of some contract terms based on considerations of public policy such as "fair criticism", "fair use" and the like. Section 2B-105(b) and related comments were adopted at the November meeting in response to a sense of the house vote at the NCCUSL meeting.

The subsection allows a court to invalidate a term of a contract that violates a fundamental public policy if the interest in invalidating the term clearly outweigh the interest in enforcing the term. The comments discuss aspects of information policy related to this power. The new subject has created concern in a number of industries, some of which is expressed in memoranda to the Committee. However, the provision has drawn the support of the proponent of the NCCUSL motion and the ALI member (Professor McManis) who twice proposed an analogous provision.

The Committee vote reflects the belief that this approach is the best method of resolving what has been a difficult and closely debated issue. *The question for the Council is whether this approach is appropriate.*

3. Assent and Contract Formation.

At the most recent ALI Annual Meeting, the membership passed a sense of the house motion by a closely divided vote that the Drafting Committee reconsider its provisions on assent to contract. In response, the Committee has undertaken that review and made two significant changes.

The "assent" provisions are in Section 2B-111 (manifesting assent), 2B-112 (opportunity to review), and the 200's series of sections, most particularly 2B-207 (adopting the terms of a record) and 2B-208 (mass-market licenses).

The Committee approved a proposal by the Chair and the Reporter to rewrite Section 2B-111 to more clearly indicate that assent entails a voluntary act taken with reason to know that the act will indicate assent to the other party. The core of the new language substantively corresponds to Restatement (Second) 19. The section, however, retains the additional requirement that the act must follow an "opportunity to review" the record. It adds a provision encouraging the use of "double click" expressions of assent if appropriate.

Secondly, the Committee adopted a proposal by the Chair and the Reporter to revise Section 2B-207 and 2B-208. Both sections recognize that in some cases terms of a contract may be adopted after the initial obligation arises or performance occurs. The revision makes it clear that this can occur only if, at the time of the initial agreement between the parties, they have reason to know that terms will subsequently be provided for agreement. Under this formulation, subsequent terms may become part of a contract in any of three ways:

- The terms may become part of the contract if the agreement itself gives one party the right to subsequently specify terms of performance. This rule comes from original Article 2 and is found in Section 2B-305. No additional assent to the term is required because the initial agreement gave the other party the right to specify terms.
- The terms may become part of the first contract if they are an effective modification of that contract by virtue of an agreement to the modification. Section 2B-303. This is essentially a case where the original agreement was intended to be full agreement of the parties and a change is now sought. The recipient of the proposal may agree to, or reject the proposal. If it does not agree, the contract remains as originally agreed.
- The terms may become part of the contract if the parties had reason to know that additional terms would be proposed at the time of their original agreement. Section 2B-207; 2B-208. If the terms are rejected, the person who does so can "return" the subject matter of the contract for a refund of any amounts paid. In the case of a mass market transaction, the refund is "cost free" and the other party has liability for correcting any changes in the computer of the other party made in reviewing the license.

A question for the Council is whether these "assent" provisions are appropriate.

4. Warranties

Article 2B warranty rules involve several choices that reflect the subject matter of the project which includes computer programs and computerized information content. The warranty rules are as follows:

- *Infringement warranty* (2B-401): parallels original Article 2, but provides additional protection for licensee's regarding the "hold harmless" rule. Also deals with title issues in reference to exclusive licenses.
- *Express warranty* (2B-402): follows original Article 2 basis of the bargain test. Adds reference confirming that advertising can create an express warranty. Provides that, with respect to published informational content (e.g., digital books, on-line newspapers), this article does not alter existing law on the creation of express contract obligations.
- *Implied warranty: merchantability* (2B-403): applies a warranty of merchantability to computer programs. At the November meeting, the Committee adopted revised language on merchantability which had been jointly proposed by a consumer advocate and a lawyer representing a major software publisher. The new language seeks to create a warranty relevant to this subject matter, but one that might not lead to recurrent disclaimer because of its uncertainty.
- *Implied warranty: informational content* (2B-404): follows the Restatement (Second) of Torts 552 and related cases. Creates liability for error in data only if caused by a failure to exercise reasonable care and if the information was provided in a relationship of special reliance. "Informational content" is a defined term. As agreed with an ALI representative, comments make clear that this does not alter development of liability under other tort law, if appropriate.
- *Implied warranty: fitness* (2B-405): follows original Article 2 for transactions resembling transactions in goods, but follows common law for transactions more like services contracts. Adds a new "system integration" warranty.

A question for the Council is whether this warranty structure is appropriate.

5. Electronic Self-help

At the November meeting, the Committee by a close vote agreed to make a further effort to adopt a provision dealing with the right of a licensor to use electronic devices to disable software in the event of cancellation for breach of contract. The provision outlined in Section 2B-716 relies on a requirement that the licensee must have previously agreed to the self-help opportunity and on a requirement of 15 day notice before the electronic disabling is implemented.

This issue has been controversial with sharp and strongly held opinions on both sides. Previous proposals based on notice and prior agreement did not produce consensus between representatives of small licensors and representatives of large licensees. The alternative to the effort to make a compromise is to provide that Article 2B takes no position, authorizing or precluding electronic self-help. Revised Article 9 contains no treatment of this form of self-help, apparently authorizing it without restraints other than the traditional "breach of the peace" language. Revisions of Article 2A contain no position on this issue.

A question for the Council is whether proposed 2B-716 is appropriate?

6. Electronic Contract Rules.

Within the UCC revision projects, Article 2B for several years has been designated as the context in which electronic commerce rules were to be developed. As a consequence, representatives of many companies involved in this type of commerce have actively participated in the 2B project. The result is a set of rules dealing with and facilitating electronic commerce. Because uniform acts are adopted ad hoc by state legislatures in irregular order, the intent is that the completed set of rules will be adopted by Article 2 and Article 2A and Article 2B. Subsequently, the Article 1 committee may decide whether all or part of these rules should be moved to Article 1 and made applicable throughout the U.C.C.

An issue of the Council is whether this approach within the UCC is appropriate.

After Article 2B began, NCCUSL opened a project for the development of electronic contract rules applicable to transactions outside the UCC. This project (developing a Uniform Electronic Transactions Act (ETA)) has moved toward a purely procedural statute, not dealing with substantive contract law questions. Several meetings have been held between ETA and Article 2B chairs and reporters, maintaining an effort toward full coordination. The projected goal is that the provisions of the two projects be consistent although, because of the differences in scope and substantive goals, the level of generality adopted by the two projects may vary.

7. Surprising Terms: unconscionability.

Article 2B includes the expanded concept of "mass market" providing protection to a broader group that consumers. Article 2 at its recent meeting adopted a policy not to change existing Section 2-302 (unconscionability), but to include a possible new provision which points to a commercially reasonable standard of fair dealing in contract formation. When this Article 2 proposed provision is fully developed, the harmonization effort will result in Article 2B considering the proposal as it may be applicable to computer information transactions.