

PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE

MINUTES OF PEB MEETING held at the American Law Institute 4025 Chestnut St., Philadelphia on November 12, 2004

Lance Liebman, Chair of the PEB, called the meeting to order on November 12, 2004 at 2:05 p.m. (Eastern). In addition to Professor Liebman, the following PEB members attended: Boris Auerbach, Gerald Bepko, William Henning, Donald Rapson, Curtis Reitz, Carlyle Ring, Linda Rusch, Steven Weise, and James White. Also attending were ex officio members Frederick Miller and Michael Traynor; ABA Liaison Edwin Smith; ALI Deputy Director Elena Cappella and Associate Deputy Director Deanne Dissinger; NCCUSL's Executive Committee Chair Howard Swibel and Legislative Director John McCabe; and PEB Research Director Neil Cohen.

Agenda Item 2 – Approval of Minutes of PEB's Last Meeting: The minutes of the PEB's teleconference held on April 8, 2004, were approved. (Those minutes are attached as Annex A.)

Agenda Item 3 – Status of UCC Enactments: Professor Henning presented a report on the current status of enactment of new, amended, and revised Articles of the Uniform Commercial Code. (The written report is attached as Annex B.) It was noted in the discussion of Revised Article 1 that none of the seven enacting states have adopted the Official Text with respect to the conflict of laws issues addressed in Section 1-301 (although the U.S. Virgin Islands did adopt the Official Text), and that in some states the former definition of "good faith" was retained. Issues with respect to remaining state enactments of Articles 3, 4, 5, and 6 were also discussed.

Agenda Item 4 – Enactment Plans for Revised or Amended Articles 1, 2, 2A, 3, 4, and 7: Professors Miller and Henning reported on plans for these Articles, as more particularly described in Annex B. The discussion centered on the enactment plan for the Article 2 and 2A amendments, with Professor Miller and Mr. McCabe explaining how the four initial target states were chosen.

Agenda Item 5 – Article 2 and the New ALI Project on Software Contracting: Professors Henning and Miller and Messrs. Auerbach and Swibel expressed concerns about the potential impact of ALI's new project, tentatively entitled "Principles of the Law of Software Contracts," on the enactment process of the Articles 2 and 2A amendments. Mr. Traynor and Professor Liebman explained the purpose of the new project, and also noted that it is expected to continue for a number of years.

Agenda Item 15 – Financial Report Ms. Cappella distributed the PEB financial report (attached to these minutes as Annex G). She indicated that the unrestricted fund balance should be sufficient, in light of the PEB's modest financial needs for the remainder of the fiscal year, to permit the transfer after January 1, 2005, should Professors Liebman and Henning so authorize, of an additional \$50,000 to each of the cosponsoring organizations. The additional transfer was previously authorized conditionally by the PEB and the Executive Committees of ALI and NCCUSL.

Agenda Item 6 – PEB Report on Effect of Non-Uniform Scope Provisions in Revised Article 9 of the UCC: This Report was approved by the PEB in April, subject to incorporation of minor modifications to resolve editorial issues raised by Professors Boss and Miller. Professor Cohen reported that these modifications have now been incorporated (and have been reviewed and approved by Professors Boss and Miller). (In addition, a few non-substantive stylistic changes suggested by Mr. Smith after the meeting have also now been incorporated.) Distribution of the Report will be via the usual channels and efforts will be made to have it publicized in various legal publications; it will also be posted on the ALI and NCCUSL websites.

Agenda Item 7 – Article 9 Issues on which PEB Input is Requested by the International Association of Commercial Administrators (IACA): IACA raises three issues, more particularly described in the attached Annexes C and D. With respect to the issues of bogus filings and correction statements, PEB members expressed support for what IACA is trying to accomplish, but also concern about the drafting of IACA's proposals. Mr. Weise volunteered to coordinate the preparation of an "annotated edit" of the proposals, which would not only make suggestions for changes but also explain the suggestions; Professor Cohen will assist in this endeavor. Finally, PEB members saw the issue of the "sunset" provision for financing statements filed under former Article 9 primarily as an educational issue. The idea of including it in the proposed omnibus commentary about Article 9 (see agenda item 8) was discussed briefly but was not adopted.

Agenda Item 8 – Proposed Omnibus PEB Commentary on Revised Article 9: Mr. Weise reported briefly on the plans for this commentary, which will address various issues that have arisen under Revised Article 9 since its promulgation.

Agenda Item 9 – Proposed Amendments to Official Text of Amendments to Articles 2 and 2A from the UCC Committee of the California State Bar Association Business Law Section: PEB members indicated that there is merit in most of the proposed amendments (attached as Annex E), which they regard as primarily technical in nature. It was agreed that (a) the proposals will be forwarded to the Reporter for the Articles 2 and 2A amendments, Professor Henry Gabriel; (b) his draft incorporating appropriate changes will be submitted to the Articles 2 and 2A Standby Committee for review; and (c) the finished product will be communicated to the PEB for its approval and then to the sponsoring organizations. Professor Miller said that, because the proposals are technical, NCCUSL will be able to give its final approval on an expedited basis.

Agenda Item 10 – Effect of Federal Reserve Board's Final "Check 21" Regulations: Professor White presented a memorandum, prepared by Professor Sarah Jane Hughes at the request of Professor Liebman, discussing possible changes to UCC Articles 3 and 4 that might be considered in light of the final regulations. (The memorandum is attached as Annex F.) Several members of the PEB expressed the view that any action at this time would be premature; accordingly, the PEB will take a "wait-and-see" approach in order to see what, if any, problems actually result from the regulations.

Agenda Item 11 – Proposal for PEB Commentary on *Pioneer Commercial Funding Corp.* Case: Based on discussions Professor Miller had with other PEB members prior to the meeting, he concluded that it is unlikely that there would be consensus on the PEB on a Commentary. Accordingly, he withdrew the proposal.

Agenda Item 12 – Project to Assemble a Definitive Official Text of the UCC: Mr. Weise and Professor Cohen reported that, although ALI and NCCUSL sponsor the UCC, neither organization has a definitive version of the entire Code as amended or revised, relying instead on texts assembled by commercial publishers of the UCC (in particular, West). It was agreed that the sponsoring organizations should possess, maintain, and control, the “Official Text” (including the Official Comments). Mr. Weise and Professor Cohen have already embarked on the task of creating this document. It was suggested and agreed that funds for an assistant – perhaps a student research assistant – be made available by the PEB to aid in the assembly of the text.

Agenda Item 13 – Should the PEB Have Its Own Website? The question was asked but not answered at the meeting. The matter will be kept under consideration.

Agenda Item 14 – International Developments: Professor Reitz reported briefly on the current status of the Cape Town Convention on Mobile Goods, the United Nations Convention on the Assignment of Receivables in International Trade, the Hague Convention on the Law Applicable to International Interests in Securities, UNCITRAL’s electronic commerce convention, and Unidroit’s new project concerning the substantive law of indirectly-held securities.

Agenda Item 16 – Reappointment of PEB Research Director for a Three-Year Term: Professor Cohen’s current term expires this fall. Professor Liebman, as PEB Chair, has the authority, in consultation with NCCUSL’s designee and with the concurrence of the PEB, to appoint or reappoint the Research Director. Such consultation and concurrence occurred at the meeting, and Professor Cohen was reappointed for a new term to expire in the fall of 2007.

Agenda Item 17 – Policy on Amicus Briefs: Professor Liebman reported that the ALI would not likely agree, as a cosponsor of the PEB, to participate in PEB efforts to influence court decisions by preparing or signing on to amicus briefs. No further action was taken with respect to a formal policy.

Agenda Item 18 – Next Meeting: Scheduling the next meeting, including whether it should be in person or by telephone conference, was deferred until a later date.

Agenda Item 19 – Other Business: The recent death of Professor William Hawkland, a former member of the PEB and a distinguished commercial law scholar, was noted. Professor Miller read a list of some of Professor Hawkland’s notable accomplishments in his long career.

Agenda Item 20 – Adjournment: The meeting was adjourned at about 4:20 p.m. EST.

These minutes were prepared by Neil Cohen (assisted by Elena Cappella and Deanne Dissinger), and were reviewed and approved for distribution by Lance Liebman. The Annexes are attached to the minutes maintained on file in the offices of ALI and NCCUSL.

Dec. 2, 2004