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Introduction to Symposium on Proposed Revised Article 2

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INTRODUCTION TO SYMPOSIUM ON PROPOSED REVISED ARTICLE 2

*Richard E. Speidel**

IT is an honor to introduce this Symposium on the revision of Article 2, Sales of the Uniform Commercial Code. I was involved in the revision process for twelve years, first as chair of the Permanent Editorial Board of the Uniform Commercial Code's (PEB) Article 2 Study Group (1987-1991) and then as reporter to the National Conference of Commissioners on Uniform State Law's (NCCUSL) drafting committee to revise Article 2. I resigned in July 1999. Since then I have followed the continuing effort to revise Article 2 with great interest.¹

The contributors to this Symposium are members of the American Bar Association's Task Force on Article 2. Their positive suggestions and constructive criticism throughout the drafting process have improved the overall quality of the not-yet-final draft. These articles reflect their judgment on the process and different segments of the latest draft and, in a real sense, represent their "last shot" at the project. Compared to other observers and commentators retained to represent various partisan interests, the members of the Task Force consistently exemplified the highest standards of professionalism and objectivity.

I. A BRIEF HISTORY OF ARTICLE 2, SALES

A. THE UNIFORM SALES ACT

The English common law of sales was codified by Parliament in the British Sale of Goods Act of 1893.² Professor Samuel Williston used this legislation as a model for his draft of the American Uniform Sales Act (USA), which was approved by NCCUSL in 1906. Thirty-four states enacted the USA, with the last enactment occurring in 1941. Professor Grant Gilmore described the USA as a "scholarly reconstruction of 19th Century Law" which, in 1906, "failed to move the law much closer to us

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1. See Richard E. Speidel, *Revising UCC Article 2: A View From the Trenches*, 52 HASTINGS L.J. 607 (2001).

2. This brief legislative history is adapted from material I prepared for the Preliminary Report of the Uniform Commercial Code Article 2 Study Group. See A.B.A. TASK FORCE *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 986-998 (1991) [hereinafter *Preliminary Report*].

than 1850."³ Karl N. Llewellyn and other so-called "realists" were even more critical of the USA. Llewellyn, for example, called the USA "obscure," "uncertain," "misleading," "too technical," and full of "traps" for the ordinary businessman acting in good faith.⁴

B. SALES LAW IN THE UNIFORM COMMERCIAL CODE

In 1937, an effort to federalize the law of sales was made in the Federal Sales Bill (The Chandler Bill). Based upon the USA, the Chandler Bill was introduced in Congress but never enacted.

The first drafts of a revised USA were completed in 1940. This early effort culminated in 1944 with a proposed Uniform Revised Sales Act. This draft was the product of a newly formed partnership between the American Law Institute (ALI) and NCCUSL. Karl N. Llewellyn served as the reporter and Soia Mentschikoff as associate reporter for this draft and for much of the work that followed.

By 1949, there was a first draft of a proposed Uniform Commercial Code with comments. In this draft, the latest version of the Uniform Revised Sales Act appeared as Article 2, Sales. In April 1953, Pennsylvania promulgated and enacted an Official Text of the UCC with comments, which became effective on July 1, 1954. The period from 1949 to 1953, an Editorial Board for the UCC (EB) was created and further revisions of Article 2 were made.

The New York Law Revision Commission held extensive hearings on the UCC in 1954 and issued a detailed, critical report with analysis and conclusions in 1955.⁵ The law revision report, which included Article 2,⁶ prompted the EB (which became the Permanent Editorial Board (PEB) of the UCC in 1961) to review the 1953 Official Text of the UCC and to recommend further revisions. These recommendations led to the promulgation of the 1958 Official Text with comments and, ultimately, the enactment of the complete UCC by every state except Louisiana. Between 1958 and the present, the official text of Article 2 has remained fundamentally the same. There have been no significant changes of substance.

C. THE REVISION OF UCC ARTICLE 2

The project to revise Article 2 commenced in 1986 when Geoffrey Hazard, the Director of the American Law Institute and then Chair of the

3. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1341-42 (1948).

4. Karl N. Llewellyn, *A Brief Opening Statement in Favor of the Article*, N.Y. Law Rev. Commission, Study of the Uniform Commercial Code 5 (1954).

5. See New York Law Revision Report for 1955, Study of the Uniform Commercial Code (1955).

6. See Report of the Law Revision Commission to the Legislature Relating to the Uniform Commercial Code 40-46, Leg. Doc. 65A, 57-8 (1956).

PEB,⁷ invited Professor Charles W. Mooney⁸ and me to prepare a memorandum on whether Article 2, Sales should be revised. Our memo, completed in March 1987, concluded that revisions were needed.

In March 1988, the PEB appointed a Study Group. I served as chair to study more carefully what revisions were required.⁹ The Study Group submitted a Preliminary Report in the Fall of 1990,¹⁰ and, after soliciting comments, I prepared an Executive Summary for the PEB in the Spring of 1991 in which the Study Group recommended the appointment by NCCUSL of a drafting committee to revise Article 2.¹¹ The drafting committee, to which I served as reporter, was appointed in the Fall of 1991, and the first meeting was held in late 1991.¹²

After nearly three years of work, the drafting committee submitted a discussion draft of Revised Article 2 which was read for comment at the July 1994 Annual Meeting of NCCUSL.

The July 1995 draft, however, combined Article 2 and the fledgling project to codify licenses of software into a single, hub-and-spoke configura-

7. This move was stimulated by some suggestive scholarship. See Fairfax Leary, Jr. & David Frisch, *Is Revision Due for Article 2?*, 31 VILL. L. REV. 399 (1986).

8. Mooney is professor of law at the University of Pennsylvania School of Law. He was a member of the Article 2 Study Group and subsequently served with Professor Steven L. Harris as co-reporter to the Article 9 drafting committee. Professor Harris was also a member of the Article 2 Study Group.

9. There were nine members of the Study Group: Mr. Glen Arendsen, Associate Counsel, Ford Motor Company; Mr. Robert W. Weeks, General Counsel, John Deere; Professor Amelia Boss of Temple Law School; Professor Frederick Miller of the University of Oklahoma School of Law; Professor Charles W. Mooney of the University of Pennsylvania School of Law; Professor Steven L. Harris, then of the University of Illinois School of Law; President John E. Murray, Jr. of Duquesne University; Professor James J. White of the University of Michigan School of Law; and Professor Richard E. Speidel of Northwestern University School of Law. Subsequently, Professor Amelia Boss was named an ALI representative on the Article 2 drafting committee, and she is now a member of the PEB and the Council of the American Law Institute. Professor Miller served as Executive Director of NCCUSL during the Article 2 drafting process. Professors Mooney and Harris served with great distinction as co-reporters to the Article 9 drafting committee. John Murray is still president of Duquesne University. Professor White served as reporter to the Article 5 drafting committee, and he is now a commissioner from Michigan and a member of the PEB. Professor Speidel served as reporter to the Article 2 drafting committee until resigning in July 1999. He is a member of the ALI but is not and never will be a commissioner. Mr. Arendsen has since retired from Ford, and Mr. Weeks passed away shortly after the report was completed.

10. See *Preliminary Report*, *supra* note 2, at 981.

11. See *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 Bus. Lawyer 1869 (1991) [hereinafter *Executive Summary*].

12. The Preliminary Report was commissioned by and submitted to the PEB. Pursuant to an agreement between the ALI, NCCUSL, and the PEB, the PEB consists of six members designated by NCCUSL and six members designated by the ALI. NCCUSL designees can be members of the ALI and ALI designees can be commissioners. One of the members is the Chair. The Article 2 drafting committee was appointed by NCCUSL, but two members were ALI designees with voice and vote. The drafting committee meetings were open to all, but only the drafting committee members (not the reporters) could vote. In the ALI process, drafts were discussed by an Article 2 Consultative Group and screened by the Council of the ALI before submission to the ALI membership for a vote. In the NCCUSL process, drafts were reviewed by various committees for style and substance before submission to the membership for a final vote. A proposed draft is final when approved by the ALI and NCCUSL memberships at an annual meeting.

tion. The goal of the "hub and spoke" draft was to state in the "hub" the principles that were common to sales and licenses and to state in the spokes the principles special or unique to each transaction. The "hub and spoke" experiment was abandoned by NCCUSL later that year and a separate drafting committee was appointed for the licenses project. The final product of the business project was at that time to be Article 2B of the UCC.¹³

Revised Article 2 was then redrafted to focus on sales. In 1996¹⁴ and 1997, drafts were read at the annual meetings of NCCUSL, and a discussion draft was presented at the 1997 meeting of the ALI.¹⁵ After a twelve-month hiatus in the Article 2 process, the drafting committee resumed meetings to consider a further revised draft in the Fall of 1998. Following a period of intense effort,¹⁶ a proposed final draft was approved by the ALI in May 1999. During a planned final reading of the ALI approved revision at NCCUSL'S July 1999 annual meeting, however, NCCUSL leadership pulled the draft from the agenda and passed it over until July 2000. Linda J. Rusch,¹⁷ the associate reporter, and I resigned in protest.

13. Article 2B ultimately became a freestanding code called the Uniform Computer Information Transactions Acts (UCITA). UCITA was approved by NCCUSL in July 2000 and has been enacted by two states. The chair of the UCITA drafting committee was Carlyle C. Ring, Jr., and the reporter was Professor Raymond Nimmer of the University of Houston School of Law.

14. In November 1996, the Article 2 drafting committee consisted of 13 members. Those with commercial law expertise include: Lawrence Bugge, chair of the drafting committee and a commissioner; Boris Auerbach, a commissioner who now serves as chair of the Article 1 drafting committee; Chancellor Gerald L. Bepko of the University of Indiana at Indianapolis and a member of the PEB; Professor Amelia Boss, an ALI representative; Professor Patricia Fry of the University of North Dakota School of Law, a commissioner and subsequently chair of the Uniform Electronic Transactions Act drafting committee; Professor Henry D. Gabriel of Loyola University (New Orleans) School of Law and a commissioner; Professor William H. Henning of the University of Missouri (Columbia) School of Law and a commissioner; Professor Curtis R. Reitz of the University of Pennsylvania School of Law, a commissioner and a member of the PEB; Senator Byron D. Sher, Professor of law at Stanford University School of Law, a commissioner and a state senator from California; and Professor John A. Spanogle of George Washington University School of Law, an ALI representative. I was still reporter at this time.

15. Before that time, drafts were prepared for review by the Council of the ALI in 1995 and 1996.

16. This was not the only period of intense effort. Between May 1, 1996 and February 1, 1997, the following occurred: (1) the May 1996 draft was presented for discussion at the ALI Annual Meeting in May 1996, and read for discussion at the annual meeting of NCCUSL in July; (2) there were three meetings of the drafting committee in September and November 1996 and in late January 1997; (3) there was a meeting with the NCCUSL Style Committee in early November 1996; (4) there was a meeting with the ALI Consultative Group in late November 1996 and a meeting with the Council of the ALI in December 1996. New drafts and memos were prepared for each of these meetings.

17. Professor Linda J. Rusch of Hamline University School of Law was originally a member of the ABA Task Force. She was named associate reporter in the Fall of 1996 and is now a member of the PEB. For Professor Rusch's analysis, see Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683 (1999).

Thereafter, a new reporter and chair of the drafting committee¹⁸ were named, and several new members of the drafting committee were appointed.¹⁹ The May 1999 draft was then substantially revised,²⁰ but it was not presented for final approval at either the May 2000 annual meeting of the ALI or the July 2000 annual meeting of NCCUSL. At this writing, a final version of Revised Article 2 has not been approved by the partnership of the ALI and NCCUSL. Whether final approval will be obtained in 2001 remains an open question.

II. WHAT HAPPENED HERE?

From my perspective, several reasons help to explain why a final revision of Article 2 has not yet been (and may not be) approved. Here is a tentative assessment.

First, there was no sizeable group of commercial sellers or buyers who were pushing for the revision of Article 2. Although all agreed that some revisions were warranted, there was disagreement over scope and content. Most commercial sellers and buyers were content with existing Article 2 because they had adjusted to it. There was no ground swell for extensive revision. No one tried to capture the process. Rather, they were content to stand pat and to be persuaded that each and every change was justified. Article 2, put differently, was perceived by some as “not broke,” and proponents of the status quo resisted efforts to “fix it.”²¹

Second, the move to the “hub and spoke” draft and then back to Article 2 expanded the planned scope of the revision. The Study Group had been directed to consider “major problems of practical importance,”²² and this direction had guided the drafting committee until the “hub and spoke” draft. Thereafter, the drafting committee undertook a more expansive approach to the revision. New sections were added, old sections

18. The new reporter was Professor Henry D. Gabriel, and the chair of the drafting committee was Professor William H. Henning. Both are commissioners, and both had been members of the previous drafting committee.

19. In addition to Henning, the new leaner and meaner drafting committee consisted of eight members. A notable addition was Professor James J. White of the University of Michigan School of Law, a member of the original PEB Study Group, and now a commissioner and a member of the PEB. Professor White was an outspoken critic of the July 1999 draft. Gone were Bugge, Bepko, Fry, Reitz, Spanogle, and the prior reporters Speidel and Rusch.

20. For a comparison of the July 2000 revision of the July 1999 draft and the 1990 Official Text of Article 2, see Mark E. Roszkowski, *Revised Article 2 of the Uniform Commercial Code—Section-by-Section Analysis*, 54 SMU L. REV. 927 (2001).

21. According to Karl Llewellyn, lawyers may have supported the original UCC because it was designed to break up the uniform acts, to modernize them, to put them in a coherent and accessible form, and to add material that clarifies disputes over interpretation. See Karl N. Llewellyn, *Why A Commercial Code?*, 22 TENN. L. REV. 779 (1953); see also CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 201-10* (1981) (arguing that a consensus among lawyers must be obtained before any reform of the law and consensus requires a “grievous” situation that demands a remedy).

22. See *Executive Summary*, *supra* note 11, at 1870.

were renumbered, and a thorough rewrite for style and clarity was effected. Although it contained the essence of the original legislation, the July 1999 draft, for example, did not look or feel like the original. This created a sense of unease and provided additional ammunition to opponents of the revision.²³

Third, after the collapse of “hub and spoke,” there was growing tension between the Article 2 and the Article 2B projects (now UCITA), both as to the degree of textual conformity that should exist between them and the line beyond which a sale of goods stopped and a consumer information transaction began. That tension persists to this day.²⁴

Fourth, the July 1999 draft contained more provisions on consumer protection than had been recommended by the PEB Study Group. The Study Group, “for both conceptual and practical reasons,” endorsed Article 2’s neutral position on consumer protection and was content to leave these matters to federal and other state law.²⁵ Others disagreed with this conservative approach,²⁶ and, ultimately, the drafting committee joined in that disagreement. Although the drafting committee never went as far as the able consumer representatives and observers would have preferred,²⁷ it went beyond what the commercial interests were willing to support.²⁸ Thus, there was strong opposition from commercial interests to certain consumer protection provisions,²⁹ fueling opposition to other changes of a less controversial nature.

Finally, commercial interests opposed to Article 2’s revisions did not hesitate to venture outside the normal drafting process to obtain their objectives. They managed to persuade the NCCUSL leadership outside

23. For a statement of this opposition, see Patricia A. Tauchert, *A Survey of Part 5 of Revised Article 2*, 54 SMU L. REV. 971 (2001).

24. See Ann Lousin, *Proposed UCC 2-103 of the 2000 Version of the Revision of Article 2*, 54 SMU L. REV. 913 (2001).

25. See *Executive Summary*, *supra* note 11, at 1876. The stated reasons were that “Article 2 is ‘primarily’ a commercial statute, the fact that the history of consumer protection law reflects local, non-uniform development, and the belief that a more inclusive approach would impair the chances for approval and ultimate adoption of any revised Article 2.” How prophetic those comments were.

26. See for example the comments of the ABA Task force, *Preliminary Report*, *supra* note 2, at 1001.

27. Gail Hillebrand, *Uniform Law Process*, 52 HASTINGS L.J. 631 (2001).

28. For historical reference, the high water mark for consumers was the November 1996 draft prepared for the Council of the American Law Institute. See American Law Institute, *Uniform Commercial Code Revised Article 2, Sales* (Council Draft No. 2, November 1, 1996).

29. The pea under the mattress was a new Section 2-206, drafted to particularize the elements of unconscionability in Section 2-302 for consumer contracts. For example, Section 2-206(b) of the November 1, 1996 Council Draft, *supra* note 28, provided that where a consumer manifests to a “standard form, a term contained in the form which the consumer could not have reasonably expected is not part of contract unless the consumer expressly agrees to it.” In the July 1999 draft, subsection (a) to Section 2-206 provided that “in a consumer contract, a court may refuse to enforce a standard term in a record the inclusion of which was materially inconsistent with reasonable commercial standards of fair dealing in contracts of that type, or . . . conflicts with one or more nonstandard terms to which the parties have agreed.” Commercial interests opposed all versions of new Section 2-206 and insisted that any efforts to particularize UCC 2-302 should be in the comments.

of the process that the July 1999 draft would be difficult to enact and should be pulled from the agenda. Unable or unwilling to capture the process and unable to block approval before the ALI, they resorted to other methods. As a result, the July 1999 draft, already modified to meet continuing objections, was history. Moreover, NCCUSL's response to political pressure outside of the drafting process put the ALI in an uncomfortable spot. If the ALI got it right the first time, why would it want to consider and approve a substantially revised draft necessitated by that political pressure?

Enough has been said to suggest that the Article 2 revision process was compromised by some if not all of these events. At the very least, the NCCUSL leadership should have permitted the membership to consider and vote on the July 1999 Draft. In my opinion, the arbitrary decision to pull the draft before a final vote because of political pressure outside of the drafting process casts a pall over the integrity of private lawmaking and taints the subsequent draft revisions of Article 2.

But enough of this. Read the excellent articles in this Symposium and decide for yourself.

